

Arkansas Department of Transportation

Agreement

On-Call CM-GC Program



Job [XX]

[Project Name]

[XX] County

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EXHIBITS

- A Acronyms, Definitions, and Submittals
- B Preconstruction Services
- C Key Personnel
- D Hourly Rates
- E [Reserved]
- F Form of Performance Bond.
- G Form of Payment Bond
- H Federal Requirements
- I On-the-Job Training (OJT) Program
- J Disadvantaged Business Enterprise (DBE) Program

This Construction Manager - General Contractor Agreement (this “CM-GC Agreement”) is entered into as of the date last signed by any party hereto, by and between the Arkansas State Highway Commission, by and through the Arkansas Department of Transportation (hereinafter, the “Department”), and [*insert name of Contractor*] (hereinafter, “Contractor”), with reference to the definitions contained in Exhibit A hereto and the following:

RECITALS

- A. The Project involves [*insert description of Project*].
- B. The Arkansas State Highway Commission has authorized the Department to procure and administer the Project.
- C. On May 7, 2024, the Department issued to potential Contractors (“Respondents”) a Request for Qualifications (“RFQ”) for the Department’s on-call CM-GC program. On June 25, 2024, the Department received [___] statements of qualifications in response to the RFQ. On August 7, 2024, the Department issued a notice shortlisting [___] Respondents for the on-call CM-GC program.
- C On [●], the Department issued to shortlisted Respondents (“Proposers”) a draft Request for Proposals for the Project, which included a draft of this CM-GC Agreement. The Department subsequently issued a number of addendums to the draft RFP, pursuant to the procedures set out forth therein. On [●], the Department issued the final RFP.
- D. On [●], the Department received [●] proposals in response to the RFP. On [●], the Department issued a notice identifying the Contractor as the successful Proposer to which the Project was awarded.

NOW, THEREFORE, in consideration of the sums to be paid to the Contractor by the Department, the foregoing premises and the covenants and agreements set forth herein, the parties hereto hereby agree as follows.

1 CONTRACT COMPONENTS; INTERPRETATION OF CONTRACT DOCUMENTS

1.1 Certain Definitions

Exhibit A hereto contains the meaning of various terms used in the Contract Documents.

1.2 Order of Precedence

Each of the documents listed below (collectively, the “Contract Documents”) is an essential part of this CM-GC Agreement, and a requirement occurring in one is as binding as though occurring in all. The Contract Documents are intended to be complementary and to describe and provide for a complete CM-GC Agreement. In the event of any conflict among the Contract Documents, the order of precedence shall be as set forth below:

1. Change Orders and amendments to this CM-GC Agreement other than all Construction Package Amendments;
2. The CM-GC Agreement, as executed by the Department and the Contractor, including all exhibits;
3. All Construction Package Amendments; and
4. Applicable Standards.

1.3 Interpretations

In the Contract Documents, where appropriate:

1. The singular includes the plural and vice versa;
2. References to statutes or regulations include all statutory or regulatory provisions consolidating, amending, or replacing the statute or regulation referred to as of the date of execution of this CM-GC Agreement;
3. Words such as “herein,” “hereof,” and “hereunder” refer to the entire document in which they are contained and not to any particular provision or section;
4. Words not otherwise defined that have well-known technical or construction industry meanings are used in accordance with such recognized meanings;
5. References to Persons include their respective permitted successors and assigns and, in the case of Governmental Persons, Persons succeeding to their respective functions and capacities; and
6. Words of any gender used herein include all other genders where appropriate.

Unless otherwise specified, lists contained in the Contract Documents defining the Project or the Work shall not be deemed all-inclusive. The Contractor acknowledges and agrees that it had the opportunity and obligation, prior to submission of its Proposal, to review the Contract Documents and to bring to the Department’s attention any conflicts or ambiguities contained therein. The Contractor further acknowledges and agrees that it has independently reviewed the Contract Documents with legal counsel, and that it has the requisite experience and sophistication to understand, interpret and agree to the particular language of the Contract Documents. Accordingly, in the event of an ambiguity in or dispute regarding the interpretation of the Contract Documents, the Contract Documents shall not be construed against the Person that prepared them, and instead other rules of interpretation shall be used. The Department’s answers to the questions posed during the proposal process for this CM-GC Agreement shall in no event be deemed part of the Contract Documents and shall not be binding in interpreting the Contract Documents.

1.4 Referenced Standards, Codes, or Criteria

Except as otherwise specified in the Contract Documents, or otherwise directed by the Department, references to Legal Requirements, standards, codes, or criteria, or to the

latest version of Legal Requirements, standards, codes, or criteria, shall mean the version in effect or coming into effect during the performance of the Work.

1.5 Standards for Review of, Comment on, and Approval of Submittals

In all cases where approvals, acceptances or consents are required to be provided by the Department or the Contractor hereunder, such approvals, acceptances or consents shall not be withheld unreasonably, except in cases where a different standard is specified. In cases where sole discretion of the Department is specified, the decision is in the sole discretion of the Department and shall not be subject to dispute resolution hereunder.

1.5.1 Approval

When the Contractor is required to submit an item to the Department “for Approval,” the Contractor is required to obtain the Department’s written approval of such item and may not proceed to incorporate that item into the Work or the Project without the Department’s written Approval. If the Department does not respond to such a submittal within any required timeframe set forth in the Contract Documents, the Contractor shall send to the Department a written notice reminding the Department that it is awaiting Approval (which notice shall be a condition precedent to submitting a Request for Change Order for a Relief Event pursuant to Section 12 hereof).

Any time that the Department denies an Approval, it shall provide an explanation, objection or comment to the Contractor. The Contractor shall address the explanation and objections or incorporate the comments in revisions, or shall explain to the Department in detail, to the satisfaction of the Department, why it believes it cannot or should not incorporate such comments. Once all comments and objections have been fully resolved to the reasonable satisfaction of the Department, any revised submittal shall then be resubmitted to the Department for Approval. The Contractor may not proceed to incorporate any item into the Work or the Project that requires Approval without receiving the Department’s Approval.

The Department may, at its sole discretion, conditionally Approve of a submittal, allowing the Contractor to proceed with the Work related to the Submittal subject to the Contractor’s satisfaction of such conditions as may be set forth therein.

1.5.2 Review and Comment

When the Contractor is required to submit an item to the Department “for Review and Comment,” the Department shall have an opportunity to review and comment on such submittal. All comments shall be addressed to the satisfaction of the Department. If the Department does not provide any comments within any required timeframe set forth in the Contract Documents, then the Contractor may assume that the Department does not have any comments and the Contractor may proceed.

1.6 Federal Requirements

The Project will be funded in part with federal funds.

Notwithstanding anything to the contrary contained herein, in the event of any conflict between any Federal Requirement and the other requirements of the Contract Documents, the Federal Requirements shall prevail, take precedence and be in force over and against any such conflicting provisions.

The Contractor acknowledges and agrees that FHWA will have certain approval rights with respect to the Project (including rights to approve certain Change Orders), as well as the right to provide certain oversight and technical services with respect to the Project. The Contractor shall cooperate with FHWA in the reasonable exercise of FHWA's duties and responsibilities in connection with the Project.

[The Contractor acknowledges that the Environmental Approval under NEPA for the Project has not yet been obtained and that no commitments are made to any alternative during the NEPA process. As such, the comparative merits of all alternatives identified and considered during the NEPA process (including the no-build alternative) will be evaluated and considered. To the extent that the Preconstruction Services include an obligation for the Contractor to provide information in respect of the NEPA process, the Department shall have the right to obtain from the Contractor, as needed, technical information pertaining to all alternatives analyzed in the NEPA process.]

2 OBLIGATIONS OF CONTRACTOR

2.1 Performance Requirements

2.1.1 Performance of Work

The Contractor shall complete the Project in accordance with the requirements of the Contract Documents. All materials, services and efforts necessary to complete the Work and achieve Final Acceptance on or before the Final Acceptance Deadline shall be the Contractor's sole responsibility, except as otherwise specifically provided in the Contract Documents.

2.1.2 Performance Standards

The Contractor shall construct the Project in accordance with all applicable Legal Requirements, and shall construct the Project as designed, in a good and workmanlike manner, free from defects and in accordance with Good Industry Practice.

2.2 General Obligations of Contractor

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

1. At all times provide a Project Manager, Approved by the Department, who:
 - (i) will have full responsibility for the prosecution of the Work;
 - (ii) will act as agent and be a single point of contact in all matters on behalf of the Contractor;
 - (iii) will be present at the Site at all times that Work is performed, or be available to appear within a reasonable time period; and
 - (iv) will have authority to bind the Contractor on all matters relating to the Project. If the Project Manager cannot be present at the Site at any time that

Work will be performed, such person shall assign a substitute reasonably acceptable to the Department to be present in such person's absence.

2. Obtain all Governmental Approvals that are agreed to be the responsibility of the Contractor during the Preconstruction Services.
3. Comply with all conditions imposed by and undertake all actions required by and all actions necessary to maintain in full force and effect, all Governmental 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.
4. Provide such assistance as is reasonably requested by the Department in dealing with any Person and/or in prosecuting and defending lawsuits in any and all matters relating to the Work, which may include providing information and reports regarding the Work, executing declarations and attending meetings and hearings, and providing testimony regarding the Work, but which shall in no event be deemed to require the Contractor to provide legal services.
5. Comply with all requirements of all applicable Legal Requirements, including: (i) the Environmental Laws, including all environmental mitigation and monitoring measures required for the Project (including those identified and committed to in the Environmental Approval) and all requirements regarding the handling, generation, treatment, storage, transportation and disposal of Hazardous Materials; (ii) the Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12101 et seq., including any amendments, as well as all applicable regulations and guidelines; and (iii) the Federal Requirements.
6. Cooperate with the Department and Governmental Persons with jurisdiction over the Project in the review and oversight of the Project and other matters relating to the Work.
7. Mitigate delay to the Project and mitigate damages due to delay in all circumstances, to the extent possible, including by re-sequencing, reallocating or redeploying the Contractor's forces to other work, as appropriate.
8. Pay all applicable Federal, State, and local sales, consumer, use, and similar taxes, property taxes and any other taxes, fees, charges, or levies imposed by a Governmental Person, whether direct or indirect, relating to or incurred in connection with the performance of the Work. Notwithstanding the foregoing, the Contractor shall not be treated as the legal or equitable owner of the Site and shall not be liable for property taxes assessed against the Site.
9. Collaborate in good faith with the Department and provide its services in a manner that is in the best interest of the Project.
10. Negotiate all Construction Package Amendments in good faith and in a commercially reasonable manner.

11. Assist the Department, at the Department's request, with the development and execution of Third-Party Agreements.

2.3 Representations, Warranties, and Covenants

The Contractor represents, warrants, and covenants for the benefit of the Department as follows:

2.3.1 Maintenance of Professional Qualifications

The Contractor and its Subcontractor(s) have maintained, and throughout the term of this CM-GC Agreement shall maintain, all required authority, license status, professional ability, skills and capacity to perform the Work, and shall perform the Work in accordance with the requirements of the Contract Documents.

2.3.2 Governmental Approvals

The Contractor has no reason to believe that any Governmental Approval required to be obtained by the Contractor under the Contract Documents 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. Unless the Department informs the Contractor that it will obtain a specific Governmental Approval or the Governmental Approval is the responsibility of the Department pursuant to the Standard Specifications, the Contractor shall be responsible for obtaining and maintaining all Governmental Approvals, including any renewals and replacements needed during the performance of the Work. If any Governmental Approvals required to be obtained by the Contractor must formally be issued in the name of the Department, the Contractor shall undertake all efforts to obtain such approvals, subject to the Department's reasonable cooperation with the Contractor, including execution and delivery of appropriate applications and other documentation in a form approved by the Department. The Contractor shall assist the Department in obtaining any Governmental Approvals, which the Department may be obligated to obtain, including providing information requested by the Department and participating in meetings regarding such Governmental Approvals.

2.3.3 Progression of Work

The Contractor shall at all times schedule and direct its Work (whether the Preconstruction Services or the Construction Work) to provide an orderly progression of such Work to achieve all applicable Completion Deadlines and in accordance with the Preconstruction Schedule and the relevant Construction Package Schedule, including furnishing such employees, materials, facilities and equipment and working such hours (including extra shifts, overtime operations, Sundays and Holidays) as may be necessary to achieve such goals, all at the Contractor's own expense, except as otherwise specifically provided in Sections 12 and 13.

2.3.4 Organization

The Contractor has all requisite power to own its properties and assets and carry on its business as now conducted or proposed to be conducted. The Contractor and each Principal Participant is duly qualified to do business, and is in good standing, in the

State, and will remain in good standing throughout the term of this CM-GC Agreement and for as long thereafter as any obligations remain outstanding under the Contract Documents.

2.3.5 Authorization

The execution, delivery, and performance of this CM-GC Agreement have been duly authorized by all necessary actions of the Contractor, and, if applicable, the 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.

2.3.6 Legal, Valid, and Binding Obligation

This CM-GC Agreement constitutes the legal, valid, and binding obligation of the Contractor and, if applicable, of each member of the Contractor.

2.3.7 False or Fraudulent Statements and Claims

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

3 RESPONSIBILITY FOR PROJECT INFORMATION DOCUMENTS

Except to the extent provided otherwise in Section 12, the Contractor understands and agrees that the Department shall not be responsible or liable in any respect for any loss, damage, injury, liability, cost or cause of action whatsoever suffered by any Contractor-Related Entity by reason of any use of any information contained in the Project Information Documents or any action or forbearance in reliance thereon. The Contractor further acknowledges and agrees that: (i) if and to the extent the Contractor or anyone on the Contractor's behalf uses any of said information in any way, such use is made on the basis that the Contractor, not the Department, has approved and is responsible for said information; and (ii) the Contractor is capable of conducting and obligated hereunder to conduct any and all studies, analyses and investigations as it deems advisable to change, recreate, verify or supplement said information, and that any use of said information is entirely at the Contractor's own risk and at its own discretion.

4 CM-GC APPROACH

4.1 General

4.1.1 Project Phases

The Work shall be performed by the Contractor in two phases: the Preconstruction Phase and, if the Department in its sole discretion decides to authorize the Contractor to perform the Construction Phase, the Construction Phase, as follows:

1. The Preconstruction Phase shall begin upon execution of this CM-GC Agreement and continue until either the Preconstruction Services are complete or this CM-GC Agreement is terminated in accordance with its terms. During the Preconstruction Phase, the Contractor shall perform the Preconstruction Services. During performance of Preconstruction Services, any provisions of the Contract Documents which clearly would not apply to Preconstruction Services shall be deemed to be inapplicable.
2. The Construction Phase shall begin upon execution of the Construction Package Amendment for the first Construction Package and continue until the end of the term of this CM-GC Agreement. During the Construction Phase, the Contractor shall perform all Construction Work. During performance of Construction Work, any provisions of the Contract Documents which clearly would not apply to Construction Work shall be deemed to be inapplicable.

Construction Work may be authorized by the execution of one or more Construction Package Amendments with respect to identifiable components or portions of the Construction Work (each, a “Construction Package”). In addition to other conditions described in the Contract Documents, execution of a Construction Package Amendment shall be a condition precedent to the commencement of any Construction Work for the corresponding Construction Package. Any Construction Package Amendment shall contain all required information identified herein for the Construction Package Amendment with respect to the applicable Construction Package. “Construction Package Amendment” shall be used herein to refer to all Construction Package Amendments.

4.1.2 Risk Register

The Contractor and the Department shall collaborate to develop a risk register during the Preconstruction Phase (the “Risk Register”). The Risk Register will identify the potential preconstruction and construction risk issues (each, a “Risk Register Event”), it will define mitigation strategies to be used with regard to Risk Register Events, and it will identify probable cost and time impacts to the Project. All Risk Register Events shall be assigned a party to bear such risk, and shall be categorized as either a Department risk, a Contractor risk or a provisional risk. All provisional risk items (x) shall designate how the Contractor will be compensated upon the occurrence of such Risk Register Event, which may include payment through unit prices for units included in a Provisional Sum where actual required units exceed those included in Provisional Sums and (y) any required mitigation efforts to be undertaken by the Contractor. The Contractor, the Department and ICE will develop the Risk Register, for approval by

the Department, in accordance with the guidelines and principles described in Exhibit B-1. ICE shall be responsible for maintaining and updating the Risk Register. The Risk Register shall include dates on which the Department gives its written approval of a particular Risk Register Event, and the Risk Register Event shall be deemed as being in effect as of that date. The Contractor shall not commence any portion of Preconstruction Services or Construction Work involving Risk Register Events until relevant Risk Register Events have been approved by the Department. The agreed Risk Register with respect to the applicable Construction Package shall be included with any Construction Package Amendment.

If a Risk Register Event occurs, the Contractor shall give notice to the Department in accordance with Section 12.2.1 and the mitigation strategy identified in the Risk Register will be employed unless the parties agree otherwise in writing based on the particular circumstances. If such a Risk Register Event is a Contractor risk, then the Contractor shall bear the schedule impact and pay all costs associated with the Risk Register Event and the mitigation strategy. If such a risk item is a Department risk or a provisional risk, then the Contractor shall be entitled to seek a Change Order in accordance with Section 12.2.2. If an event occurs which is not identified on the Risk Register, then the Contractor shall bear the schedule impact and pay all costs associated with such event and any appropriate mitigation strategy (unless otherwise expressly provided in this CM-GC Agreement).

4.1.3 Award of Contract for Construction Phase

The execution of this CM-GC Agreement does not obligate the Department to agree, execute or deliver any Construction Package Amendment for the Construction Phase. FHWA concurrence shall be a prerequisite to the execution and delivery of any Construction Package Amendment with respect to any corresponding Construction Package.

4.2 Development of the Construction Package Amendment

4.2.1 Open-Book Negotiations

The development of each Construction Package Amendment shall be on an open-book basis, and the Department and ICE shall have the right to access and copy all records, accounts, and other data used by the Contractor in connection with the preparation of any draft or the final Construction Package Amendment. The Construction Package Price shall be developed in a cooperative manner in accordance with the guidelines and principles described in Exhibit B.

4.2.2 Construction Package Amendment

4.2.2.1 Development of Construction Package Amendment Proposal

As described in Exhibit B-1, throughout the Preconstruction Phase, the Department, ICE and the Contractor shall work together to develop iterative versions of a budget for the Project and OPCC at various milestones. Based on such iterative process, the Contractor shall prepare and submit one or more proposed Construction Package

Amendment (each, a “Construction Package Amendment Proposal”) in a form agreed to by the parties and in accordance with the requirements of this Section 4.2.2.

The Department shall review the Construction Package Amendment Proposal and provide any feedback or direction it elects in its sole discretion including direction to the Contractor to continue to participate in value engineering exercises so that the Contractor can reduce the cost of the Construction Package Amendment Proposal. At the Department’s request, the Contractor shall meet with the Department to review and discuss the Construction Package Amendment Proposal and make adjustments in response to comments from the Department.

4.2.2.2 Calculation of the Construction Package Price and Construction Compensation

The contract price (“Construction Package Price”) for each Construction Package and reflected in the corresponding Construction Package Amendment shall be computed as the sum of the following and any other components agreed by the Department and the Contractor with respect to each such Construction Package:

1. The Contractor’s reasonable, good faith estimate of the cost of the Work for all Construction Work applicable to such Construction Package in a format developed pursuant to the protocols in Exhibit B-1;
2. The Contractor’s fee applicable to such Construction Package, in a format developed pursuant to the protocols in Exhibit B-1; and
3. The cumulative total of Provisional Sums specific to the Work applicable to such Construction Package, including those documented in the Risk Register, including other details relating to relief for each Provisional Risk (e.g., quantities, unit prices).

The aggregate contract price for all aspects of the Construction Phase (the “Construction Compensation”) shall be equal to the sum of all of the Construction Package Prices.

The backup support for the calculation of each Construction Package Price and the Construction Compensation shall be provided to the Department in a manner and in the format developed pursuant to the protocols in Exhibit B-1.

4.2.2.3 Final Construction Package Amendment

If the Department and the Contractor agree upon a Construction Package Price and other items comprising the Construction Package Amendment Proposal, then they shall execute the Construction Package Amendment, each of which shall set forth each of the items below:

1. The Construction Package Price and its component elements set forth in Section 4.2.2.2 in a spreadsheet format;
2. The Construction Package Schedule, which Construction Package Schedule shall include the Substantial Completion Deadline and the Final Acceptance Deadline for the Project and, as applicable, any Substantial Completion

Deadline or Final Acceptance Deadline for the particular Construction Package;

3. The most-current Risk Register with respect to the Construction Package as of the effective date of the Construction Package Amendment updated with all Risk Register Events reasonably expected to be applicable to the Work previously authorized or being authorized to such date;
4. The parties' respective obligations for obtaining any required Governmental Approvals or new Governmental Approvals;
5. A list of any Design Documents, including all addenda thereto, used in preparation of the Construction Package Price, including a list of the clarifications and assumptions made to supplement the information contained in the Design Documents;
6. Description of agreed Liquidated Damages and Daily Road User Costs;
7. Any changes to identified Key Personnel positions or the individuals serving in such positions;
8. The DBE goal; and
9. Any other documentation and information applicable to the Construction Package, as may be required by the Department.

4.3 The Department's Rights

By entering into this CM-GC Agreement, the Department is not obligating itself to authorize the Contractor to perform Construction Work with respect to any Construction Package. If the Department, in its sole discretion, decides not to award a Construction Package to the Contractor or determines that the parties are unable or unwilling to agree upon a corresponding Construction Package Amendment, then the Department may, at its election, take one or more of the following actions:

1. Terminate this CM-GC Agreement by providing the Contractor with notice of termination under Section 15.1.1 hereof;
2. Direct the Contractor to continue to participate in value engineering exercises so that the Contractor can submit another Construction Package Amendment Proposal at a reduced cost (it being understood that, with respect to any such revised Construction Package Amendment Proposal, the Department shall have the same rights to proceed or to terminate as set forth in Section 4.2 and this Section 4.3);
3. Solicit bids for the balance of the Work from other contractors in accordance with applicable law and determine that the Contractor shall not be permitted to submit a bid due to competitive advantage; or
4. At the option of the Department, direct the Contractor to continue to perform all or some of the Preconstruction Services under the then-current compensation arrangement and/or any Construction Work as set forth in any previously-executed Construction Package Amendments.

4.4 Prerequisites for Start of Construction of Any Construction Package

The Contractor shall not start construction (or recommence construction following any suspension) of any portion of any Construction Package until all the following events have been fully satisfied (or waived by the Department in its sole discretion) with respect to the Construction Work proposed to be constructed:

1. The Department and the Contractor have executed the Construction Package Amendment authorizing such Construction Work;
2. All Governmental Approvals necessary for construction of such portion of the applicable Construction Package have been obtained and all conditions of such Governmental Approvals that are a prerequisite to commencement of such construction have been performed;
3. All insurance policies and bonds required to be delivered to the Department hereunder have been submitted to the Department as applicable and remain in full force and effect;
4. All necessary rights of access for such portion of the applicable Construction Package have been obtained;
5. Any additional conditions for construction set forth in the Contract Documents; and
6. Contractor has received Released for Construction Documents for such portion of the applicable Construction Package.

4.5 Completion Deadlines

The Construction Package Schedule included in the Construction Package Amendment shall include the Substantial Completion Deadline, the Final Acceptance Deadline and all other milestone dates directed by the Department. The Contractor shall achieve each milestone by the relevant Completion Deadline.

4.5.1 No Time Extensions

Except as otherwise specifically provided in Sections 12 and 13, the Department shall have no obligation to extend any Completion Deadline and the Contractor shall not be relieved of its obligation to comply with the Project Schedule and the applicable Completion Deadlines for any reason.

5 CONTROL OF WORK

5.1 Control and Coordination of Work; Review of Drawings and Specifications

The Contractor shall be solely responsible for and have control over the construction means, methods, techniques, sequences, procedures, and Site safety, and shall be solely responsible for coordinating all portions of the Work under the Contract Documents, subject, however, to all requirements contained in the Contract Documents.

On an ongoing basis throughout the performance of the Work, the Contractor shall carefully study and compare the various Contract Documents (including Design

Documents in various stages of development) relative to each portion of the Work, take field measurements of any existing conditions related to that portion of the Work, and observe any conditions at the site affecting it. These obligations are for the purpose of facilitating coordination and construction by the Contractor and are not for the purpose of discovering errors, omissions, or inconsistencies in the design contained in the Contract Documents; however, the Contractor shall promptly report to the Department any errors, inconsistencies or omissions discovered by or made known to the Contractor as a request for information. It is recognized that the Contractor's review is made in the Contractor's capacity as a contractor and not as a licensed design professional. The Contractor is not required to ascertain that the Contract Documents are in accordance with applicable laws, statutes, ordinances, codes, rules and regulations, or lawful orders of public authorities, but the Contractor shall promptly report to the Department any nonconformity discovered by or made known to the Contractor as a request for information.

5.2 Safety

The Contractor shall take all reasonable precautions and be solely responsible for the safety of, and shall provide protection to prevent damage, injury, or loss to, all persons on the Site or who would reasonably be expected to be affected by the Work, including individuals performing Work, employees of the Department and its consultants, visitors to the Site and members of the public who may be affected by the Work. The Contractor shall at all times comply with the Safety Plan. The Contractor shall immediately notify the Department if the Contractor believes that any Contract Document requirement creates a safety risk.

5.3 Process to be Followed for Discovery of Differing Site Conditions

5.3.1 Notification to the Department

If the Contractor becomes aware of any Differing Site Conditions, the Contractor shall promptly secure the area and suspend all Work affecting the Differing Site Conditions and shall provide notice to the Department pursuant to Section 12. In such event, the Department will view the location within 10 Business Days of receipt of written notification and will advise the Contractor at that time whether to resume Work affecting the Differing Site Conditions or whether further investigation is required.

5.3.2 Further Investigation

The Contractor shall promptly conduct such further investigations, as the Department deems appropriate. Within five Business Days after its initial written notice to the Department, the Contractor shall advise the Department of any action recommended to be taken regarding the situation. The Department then will either Approve, or require modification of, the Contractor's proposed actions.

5.3.3 Recommence Work

The Department shall have the right to require the Contractor to recommence Work in the area at any time, even though an investigation may still be ongoing (so long as such Work is not in violation of any Legal Requirements or Governmental Approvals). The

Contractor shall promptly recommence Work in the area upon receipt of notification from the Department to do so. On recommencing Work, the Contractor shall follow all applicable procedures contained in the Contract Documents and all other Legal Requirements with respect to such Work, consistent with the Department's determination or preliminary determination regarding the nature of the Differing Site Condition.

5.3.4 Entitlement to Cost and Time Changes

If the Contractor encounters a Differing Site Condition that increases the Contractor's cost or time of performing the Work, the Contractor shall be entitled to seek a Change Order for a Relief Event to the extent provided in Section 12.1.1.3 and all other requirements of Sections 12 and 13.

5.4 Process to be Followed for Discovery of Unknown Archaeological Conditions

5.4.1 Notification to the Department

If the Contractor becomes aware of any Unknown Archaeological Conditions, as a condition precedent to the Contractor's right to a Change Order, the Contractor shall immediately notify the Department thereof by telephone or in person, to be followed by written notification within 24 hours. The Contractor shall immediately stop Work and secure the area. Operations within the area shall be temporarily suspended and shall not be resumed at that location unless and until authorized by the Department. In such event, the Department will view the location within 10 Business Days of receipt of notification and will advise the Contractor at that time whether to resume Work or whether further investigation is required.

5.4.2 Further Investigation

The Contractor shall promptly conduct such further investigations, as the Department deems appropriate. Within five Business Days after its initial notice to the Department, the Contractor shall advise the Department of any action recommended to be taken regarding the situation. The notice shall advise the Department what course of action the Contractor intends to take with respect thereto and whether the location must be fenced off or whether Work can resume. The Department then will either Approve, or require modification of, the Contractor's proposed actions.

5.4.3 Recommence Work

The Department shall have the right to require the Contractor to recommence Work in the area at any time, even though an investigation may still be ongoing (so long as such Work is not in violation of any Legal Requirements or Governmental Approvals). The Contractor shall promptly recommence Work in the area upon receipt of notification from the Department to do so. On recommencing Work, the Contractor shall follow all applicable procedures contained in the Contract Documents and all other Legal Requirements with respect to such Work, consistent with the Department's determination or preliminary determination regarding the nature of the Unknown Archaeological Condition.

5.4.4 Entitlement to Cost and Time Changes

If the Contractor encounters an Unknown Archaeological Condition that increases the Contractor's cost or time of performing the Work, the Contractor shall be entitled to seek a Change Order for a Relief Event to the extent provided in Section 12.1.1.4 and in accordance with all other requirements of Sections 12 and 13.

5.5 Process to be Followed for Discovery of Hazardous Materials

The Contractor shall be responsible for Hazardous Materials at the Site to the extent agreed in the Construction Package Amendment, as provided in the Risk Register and as provided in Section 5.5.5 below. The Contractor shall remediate or render harmless all Hazardous Materials for which it is responsible in accordance with all Legal Requirements and Environmental Laws, subject to Section 6.3.4.

5.5.1 Notification to the Department

If the Contractor becomes aware of any Hazardous Materials that are not disclosed in the Hazardous Materials Report, the Contractor shall immediately notify the Department thereof by telephone or in person, to be followed by written notification within 24 hours. The Contractor shall immediately stop Work and secure the area. Operations within the area shall be temporarily suspended and shall not be resumed at that location unless and until authorized by the Department. In such event, the Department will view the location within 10 Business Days of receipt of notification and will advise the Contractor at that time whether to resume Work or whether further investigation is required.

5.5.2 Further Investigation

The Contractor shall promptly conduct such further investigations as the Department deems appropriate. Within five Business Days after its initial notice to the Department, the Contractor shall advise the Department of any action recommended to be taken regarding the situation. The notice shall advise the Department what course of action the Contractor intends to take with respect thereto and whether the location must be fenced off or whether Work can resume. The Department then will either Approve, or require modification of, the Contractor's proposed actions.

5.5.3 Remediation

The Department will confirm (itself or through experts) whether the discovered condition is in fact a Hazardous Material. If it is, the Department shall take the necessary measures required to ensure that the Hazardous Materials are remediated or rendered harmless or may direct the Contractor to do so through issuance of a Change Order in accordance with Section 13. Such necessary measures shall include retaining experts to prescribe the remedial measures that must be taken to either remove the Hazardous Materials or render the Hazardous Materials harmless.

5.5.4 Recommence Work

The Contractor shall be obligated to resume Work at the affected area of the Project only after the Department has issued a clearance and: (i) the Hazardous Materials have

been removed or rendered harmless; and (ii) all necessary Governmental Approvals have been obtained, as reasonably determined by the Department.

5.5.5 Responsibility for Hazardous Materials Introduced by the Contractor

Notwithstanding the preceding provisions of this Section 5.5, the Department is not responsible for any spill or release or threatened spill or release or exacerbation of Hazardous Materials (i) attributable to the negligence, willful misconduct or breach of contract by any Contractor-Related Entity or (ii) that was brought onto the Site by any Contractor-Related Entity. If the Department reasonably determines that any 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 Environmental Laws shall be performed by the Contractor at its sole cost and expense. Except as to the Contractor's initial response to an emergency, any such remedial action(s) shall require the prior Approval of the Department.

5.5.6 Entitlement to Cost and Time Changes

If the Contractor encounters a Hazardous Material for which it is not responsible in accordance with this Section 5.5 and the Contract Documents and that increases the Contractor's cost or time of performing the Work, the Contractor shall be entitled to seek a Change Order to the extent provided in the Risk Register.

5.6 Obligation to Minimize Impacts

The Contractor shall ensure that all of its activities and the activities of all Contractor-Related Entities are undertaken in a manner that will minimize the effect on surrounding property and the public to the maximum extent practicable.

5.7 Environmental Protection

The Contractor shall comply with all Environmental Laws and all other environmental requirements included in the Construction Package Amendment.

5.8 Quality Management

5.8.1 Contractor Quality Management

The Contractor shall perform the quality management necessary for the Contractor to comply with its obligations under the Contract Documents.

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

All materials and each part or detail of the Work shall also be subject to oversight, audit and testing by the Department and other Persons designated by the Department. When any Third Party, including a Utility Owner, railroad company, unit of government, or political subdivision, is to accept or pay for a portion of the cost of the Work, its respective representatives have the right to oversee, audit, inspect and Test the Work. Such oversight, audit, inspection and/or testing does not make such Person a party to this CM-GC Agreement, nor will it change the rights of the parties hereto. The

Contractor hereby consents to such oversight, inspection and testing by the Department and other Persons. Upon request from the Department, the Contractor shall furnish information to such Persons as are designated in such request and shall permit such Persons access to the Site and all parts of the Work.

5.8.3 Obligation to Uncover Finished Work

If a portion of the Work has been covered contrary to the request of the Department or contrary to the requirements of the Contract Documents, it shall be uncovered at the written request of the Department for its observation and replaced at the Contractor's sole cost and expense, and the Contractor shall not be entitled to any Change Order in connection therewith. If a portion of the Work has been covered which the Department has not specifically requested to observe prior to its being covered or which the Contract Documents do not require to be observed prior to its being covered, the Department may request to see such Work and it shall be uncovered by the Contractor. If such Work is in accordance with the Contract Documents and the uncovering and restoring of such Work causes an increase in the cost or time of performing the Work, the Contractor shall be entitled to seek a Change Order for a Relief Event in accordance with Sections 12 and 13. If the Work exposed or examined is Nonconforming Work, then the cost of uncovering, removing and restoring the Nonconforming Work or making good the parts removed and recovery of any delay to the performance of the Work occasioned thereby shall be at the Contractor's expense.

5.9 Effect of Oversight, Spot Checks, Audits, Tests, Acceptances, and Approvals

5.9.1 Oversight and Acceptance

The Contractor shall not be relieved of its obligation to perform the Work in accordance with the Contract Documents, or any of its other obligations under the Contract Documents, by oversight, spot checks, audits, reviews, tests, inspections, acceptances, Approvals, or approvals by any Persons, or by any failure of any Person to take such action. The oversight, spot checks, audits, reviews, tests, inspections, acceptances, Approvals, and approvals by any Person do not constitute Final Acceptance of the particular material or Work, or waiver of any legal or equitable right with respect thereto. The Department may reject or require the Contractor to remedy any Nonconforming Work and/or identify additional Work which must be done to bring the Project into compliance with Contract Document requirements at any time prior to Final Acceptance, whether or not previous oversight, spot checks, audits, reviews, tests, inspections, acceptances, approvals or Approvals were conducted by any Person.

5.9.2 No Estoppel

The Department shall not be precluded or estopped, by any measurement, estimate, or certificate made either before or after Final Acceptance and payment therefore, from showing that any such measurement, estimate or certificate is incorrectly made or untrue, or from showing the true amount and character of the work performed and materials furnished by the Contractor, or from showing that the work or materials do not conform in fact to the requirements of the Contract Documents. Notwithstanding any such measurement, estimate or certificate, or payment made in accordance

therewith, the Department shall not be precluded or estopped from recovering from the Contractor and its Surety(ies) such damages as the Department may sustain by reason of the Contractor's failure to comply or to have complied with the terms of the Contract Documents.

5.10 Nonconforming Work

5.10.1 Replacement of Nonconforming Work

The Contractor shall correct any Nonconforming Work in the manner and within the time frames required by the Contract Documents.

5.10.2 Nonconforming Work Pay Adjustment

The Department may, in its sole discretion, accept any Nonconforming Work without requiring it to be fully corrected, and shall be entitled to a pay adjustment (or reimbursement of a portion of the Construction Compensation, if applicable). In such event, the Department shall be entitled to reimbursement of a portion of the Construction Compensation in an amount determined by the Department. In general, the pay adjustment (or reimbursement) shall equal, at the Department's election: (i) the amount allocated to such Work as shown in the Construction Package Amendment; (ii) the Contractor's cost savings associated with its failure to perform the Work in accordance with the Contract Document requirements; or (iii) the amount deemed appropriate by the Department to provide compensation for impacts to affected parties such as future maintenance and/or other costs relating to the Nonconforming Work. In certain events, the Department shall be entitled to a pay adjustment (or reimbursement) as expressly set forth elsewhere in the Contract Documents. Such reimbursement shall be deducted from future payments or, if future payments are insufficient to cover the amount owing, shall be payable to the Department within 30 Calendar Days after Contractor's receipt of an invoice, therefore.

6 ACCESS TO SITE, UTILITY WORK AND ENVIRONMENTAL COMPLIANCE

6.1 Right of Way Acquisition and Access

Each of the Contractor's and Department's obligations with respect to ROW acquisition are set forth in Exhibit B and may be further clarified in the Construction Package Amendment.

The Contractor shall not access any ROW parcel prior to receipt of notice from the Department that Contractor has been granted access to such parcel.

6.1.1 Failure to Have Necessary Rights of Access

If the Contractor enters any property in connection with the Project without having all necessary rights of access, the Department may, in its sole discretion, obtain consent from the landowner for the Contractor's access. The Contractor shall be responsible for all costs incurred by the Department as a result thereof and any schedule impacts as a result thereof. Such reimbursement shall be deducted from future payments or, if future

payments are insufficient to cover the amount owing, shall be payable to the Department within 30 Calendar Days after Contractor's receipt of an invoice, therefore.

6.1.2 Use of State Lands

The Contractor may use State-owned land for which the Contractor does not otherwise have all necessary rights of access only at the Department's sole discretion and with its prior written consent, and as specified in the conditions for such use. After the use of any such State-owned land, the Contractor shall return it to its previous condition, free of any Hazardous Materials or other harmful material brought to the land by any Contractor-Related Entity.

6.2 Utility Work

The Contractor's obligations with respect to Utility relocations are set forth in Exhibit B and may be further clarified in the Construction Package Amendment.

In constructing the Project, the Contractor shall take all reasonable steps to minimize costs to the Utility Owners and the Department in connection with Utilities to the extent practicable. If the Contractor damages any Utilities, it must immediately notify the affected Utility Owner and the Department and comply with its obligations under the Contract Documents.

6.3 Environmental Compliance

In performance of the Work, the Contractor shall comply with all requirements of the Hazardous Materials Report and all applicable Environmental Laws and Governmental Approvals issued thereunder. The Contractor acknowledges and agrees that it will be responsible for all fines and penalties that may be assessed in connection with any failure by the Contractor to comply with such requirements.

6.3.1 New Environmental Approvals to be Obtained by the Department

The Department will be responsible for obtaining any New Environmental Approvals necessitated by a Relief Event. The Contractor shall provide support services to the Department with respect to obtaining any such New Environmental Approval.

6.3.2 New Environmental Approvals to be Obtained by Contractor

If a New Environmental Approval becomes necessary for any reason other than a Relief Event, the Contractor shall be fully responsible for the cost of obtaining the New Environmental Approval, and for all resulting requirements, as well as for any litigation arising in connection therewith and any schedule impact related thereto. All required information for a New Environmental Approval shall be prepared and submitted to the Department to obtain the New Environmental Approval. The Contractor shall not contact any agencies or Persons regarding the New Environmental Approval without the prior consent and participation of the Department.

6.3.3 Pre-Existing Site Contamination

It is recognized that the Department may assert that certain third persons or parties may rightfully bear the ultimate legal responsibility for any and all Hazardous Materials that are present on the Site. It is further recognized that certain state and federal statutes provide that individuals and firms may be held liable for damages and claims related to Hazardous Materials under such doctrines as joint and several liability and/or strict liability.

6.3.4 EPA Generator Number for Hazardous Materials Remediation

Hazardous Materials encountered 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 to which Hazardous Materials, other than Hazardous Materials for which the Contractor is responsible under Section 18.1.1.6, will be transported, and the Department shall comply with the applicable standards for generators including those found in 40 CFR Part 262, including the responsibility to sign manifests for the transport of hazardous wastes.

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

1. As between Contractor and the Department, the Department shall be considered the generator and assume generator responsibility for hazardous materials other than those Hazardous Materials for which the Contractor is responsible under Section 18.1.1.6.
2. The foregoing shall not preclude or limit any rights, remedies, or defenses that the Department or the Contractor may have against any Governmental Entity or other Third Party, including prior owners, lessees, licensees, and occupants of any parcel of land that is or becomes part of the ROW.
3. As between the Contractor and the Department, the Contractor shall be considered the generator and assume generator responsibility for those Hazardous Materials for which the Contractor is responsible under Section 18.1.1.6.

7 EQUAL EMPLOYMENT OPPORTUNITY; SUBCONTRACTS; LABOR AND KEY PERSONNEL

7.1 Equal Employment Opportunity

7.1.1 Equal Employment Opportunity Policy

The Contractor confirms that it has an equal employment opportunity policy ensuring equal employment opportunity without regard to race, color, national origin, sex, age, religion, sexual orientation, gender identity, disability or genetic information; and that it maintains no employee facilities segregated on the basis of race, color, religion or

national origin. The Contractor shall comply with the Department's Equal Employment Opportunity Policy, the OJT Requirements, and the Federal Requirements.

7.1.2 Non-Discrimination

The Contractor shall comply with all applicable Legal Requirements that enumerate unlawful employment practices including discrimination because of race, color, national origin, sex, age, religion, sexual orientation, gender identity, disability or genetic information, and that define actions required for affirmative action and minority/disadvantaged business programs. The Contractor shall not discriminate against any employee or applicant for employment because of race, color, national origin, sex, age, religion, sexual orientation, gender identity, disability or genetic information. The Contractor shall take affirmative action to ensure that applicants are employed, and that employees are treated during employment without regard to their race, color, national origin, sex, age, religion, sexual orientation, gender identity, disability or genetic information. Such action shall include the following: employment, upgrading, demotion or transfer; recruitment or recruitment advertising; layoff or termination; rates of pay or other forms of compensation; and selection for training, including apprenticeship. The Contractor agrees to post in conspicuous places, available to employees and applicants for employment, notices to be provided setting forth the provisions of this nondiscrimination clause.

7.1.3 Inclusion in Subcontracts

The Contractor shall include Sections 7.1.1 and 7.1.2 and the Federal Requirements in all Subcontracts (including purchase orders) on the Project, so that such provisions will be binding upon each Subcontractor working on the Project.

7.2 Disadvantaged Business Enterprises (DBE)

The Contractor shall comply with the requirements of Exhibit J and the Contractor's Disadvantaged Business Enterprise Program included in Exhibit J, which require that DBEs have a full and equal opportunity to compete fairly in the performance of contracts administered by the Department. The Contractor shall either meet the DBE goal for the Project established by the Department during the Preconstruction Phase or shall make a good faith effort to meet the DBE goal. The DBE goal shall be set forth in the Construction Package Amendment.

7.3 Limitation on Subcontracted Work

The Contractor and Principal Participants shall self-perform at least 30% of the construction Work. The percentage of construction Work subcontracted shall be determined by dividing the total dollar value of the Subcontracts for construction Work, excluding any Subcontracts with Principal Participants, but including any Subcontracts under and through Principal Participants, by the total dollar value of the construction Work as a whole.

7.4 Subcontracting Requirements

The Contractor shall comply with all applicable requirements of the Contract Documents relating to Subcontracts and shall ensure that all Subcontractors performing Work on the Project comply with all applicable requirements of the Contract Documents relating to subcontracting. The Contractor shall not add, delete, or change the role of, any Principal Participant without the prior written Approval of the Department.

7.4.1 Subcontracts for Preconstruction Services

Engagement and selection of Subcontractors performing Preconstruction Services shall be coordinated with and Approved by the Department.

Subject to the Department's Approval and the requirements of Sections 7.5 and 7.6, the Contractor may negotiate the most favorable price and terms of each such Subcontract; provided that hourly rates of Subcontractors performing such Work will be subject to a review by the Department for reasonableness.

To account for escalation of hourly rates for Preconstruction Services, hourly rates will be subject to annual review and adjustment.

7.4.2 Notice and Award of Subcontracts for Construction Work

All Subcontractors performing Construction Work shall be selected in accordance with the terms and conditions of Section 108.01 of the Department's Standard Specifications.

7.4.3 Substitution of Subcontractors

The Contractor shall not, without the Approval of the Department, (a) substitute any party as Subcontractor in place of a Subcontractor Approved by the Department or (b) allow the subcontracted Work to be performed by anyone other than the original Subcontractor. Consent for substitution shall only be given if:

1. The Approved Subcontractor, after having reasonable opportunity to do so, fails or refuses to execute a written Subcontract that is based upon the requirements of the Contract Documents and upon the terms of such Subcontractor's written bid or proposal, if applicable;
2. The Subcontractor fails or refuses to perform the Subcontract;
3. The Subcontractor is substantially delaying or disrupting the progress of the Work;
4. The Subcontractor fails or refuses to meet the insurance or bonding requirements set forth in this CM-GC Agreement;
5. Work performed by the Subcontractor is unsatisfactory and not in substantial accordance with the Contract Documents;
6. The Subcontractor is not a responsible contractor in the Department's reasonable determination;

7. The Subcontractor is not licensed pursuant to Legal Requirements; or
8. The Subcontractor becomes bankrupt or insolvent.

In the event the Contractor requests a substitution, the Contractor shall notify the Department of its desire and reasoning to substitute a Subcontractor and shall provide the Department at least 10 Business Days to respond.

7.5 Assignment of Subcontract Rights

Each Subcontract shall provide that, pursuant to terms in form and substance satisfactory to the Department: (i) 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; and (ii) all guarantees and warranties, express and implied, shall inure to the benefit of the Department as well as the Contractor. Any acceptance of assignment of a Subcontract from the Department, its successor(s), or assign(s) shall not operate to make the assignee(s) responsible or liable for any breach of the Subcontract by the Contractor or for any amounts due and owing under the Subcontract included in an invoice paid by the Department.

7.6 Subcontract Terms

Each Subcontract, excluding materials purchase orders and any other contracts 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:

1. Each such Subcontract shall include terms substantially similar to the terms in this CM-GC Agreement to the extent that such terms are relevant to such Subcontract, including an agreement by the Subcontractor to be joined in any dispute resolution proceeding pursuant to Section 19 if such joinder is reasonably necessary to resolve a Dispute.
2. Each such Subcontract must be submitted to the Department for Review and Comment before execution. The Department shall have the right to require changes to Subcontracts to the extent they are not in compliance with Legal Requirements or the requirements of the Contract Documents.
3. Each such first-tier Subcontract shall include terms requiring the Subcontractor to self-perform at least 30% of the subcontracted Work. Each lower-tier Subcontract shall include terms prohibiting the Subcontractor from subcontracting any portion of the subcontracted Work.
4. Each such Construction Phase Subcontract of any tier shall (i) prohibit retainage in excess of 10% of the amount of payment under the Subcontract, (ii) provide that amounts withheld as retainage from Subcontractors must be returned within 30 Calendar Days after the Work required under the Subcontract is satisfactorily completed, (iii) provide that delay or postponement of payment under the Subcontract may only be effected after,

as applicable, the Contractor or higher-tier Subcontractor has established good cause and that the delay or postponement is in accordance with, as applicable, the Contractor's or higher-tier Subcontractor's rights under the Subcontract, and (iv) provide that amounts due under a Subcontract may be withheld from payment to a Subcontractor for the reasons provided in Section 11.4.1.2.

5. Each such Subcontract of any tier shall include payment and other terms in compliance with applicable Legal Requirements.
6. Each such Subcontract of any tier shall include language acknowledging the timing of payments from the Department to the Contractor hereunder and the process set forth herein for the submission and review of invoices or Request for Progress Payment applications, as applicable, including the methodology for the calculation of payments.

7.7 Subcontract Data

The Contractor shall allow the Department access to all Subcontracts and records regarding Subcontracts, in accordance with Section 22.1.2.

7.8 Responsibility for Work by Subcontractors

Notwithstanding any Subcontract or agreement with any Subcontractor, the Contractor shall be fully responsible for all of the Work. The Department shall not be bound by any Subcontract, and no Subcontract shall include a provision purporting to bind the Department.

7.9 Employee Performance Requirements and Key Personnel

7.9.1 Employee Performance Requirements

All employees shall have the skill and 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 Contractor or by any Subcontractor is not performing the Work properly and skillfully, then, at the written request of the Department, the 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 Contractor or the Subcontractor fails to remove such Person(s) 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 Contractor. Such suspension shall in no way relieve the Contractor of any obligation contained in the Contract Documents or entitle the Contractor to a Change Order. Once compliance is achieved, the Contractor shall be entitled to and shall promptly resume the Work.

7.9.2 Key Personnel

Exhibit C hereto identifies certain key positions for the Project. The Department shall have the right to review the qualifications of each individual to be assigned to a key

position (including personnel employed by Subcontractors) and to Approve or disapprove use of such key person in such key position prior to the commencement of any Work by such individual or during the prosecution of the Work. The Contractor shall notify the Department in writing of any proposed changes in any Key Personnel and shall demonstrate to the Department's satisfaction that the replacement Key Personnel is equal to or better than the individual being replaced. The Contractor shall not change any Key Personnel without the prior written Approval of the Department.

7.9.3 Representations Regarding Key Personnel

The Contractor acknowledges and agrees that the award of this CM-GC Agreement by the Department to the Contractor was based, in large part, on the qualifications and experience of the personnel listed in the Proposal, and the Contractor's commitment that such individuals would be available to undertake and perform the Work. The 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 agreed to in the Contract Documents. The Contractor shall document such commitment to the Department's satisfaction upon the Department's request.

8 SURETY BONDS

The Contractor shall provide to the Department and maintain at all times during the term of this CM-GC Agreement security for faithful performance and completion of the Work as described below (or other assurance satisfactory to the Department in its sole discretion). Each bond required hereunder shall list the Department as obligee and shall be provided by a Surety or Sureties licensed as surety and qualified to do business in the State and having an A.M. Best rating of A-, VII or better. The Surety or Sureties shall be listed in the current United States Department of the Treasury, Fiscal Service, Department Circular 570, *Companies Holding Certificates of Authority as Acceptable Sureties on Federal Bonds and as Acceptable Reinsuring Companies*. The bonds may not be in excess of the cumulative underwriting limitation listed in the circular of the underwriting capacities of the Contractor's surety companies.

8.1 Performance Bond

Prior to beginning any Construction Work, the Contractor shall furnish and deliver a Performance Bond in the form of Exhibit F in the amount of 100% of the Construction Package Price corresponding to each Construction Package.

The Performance Bond shall be released at Project Release.

8.2 Payment Bond

Prior to beginning any Construction Work, the Contractor shall furnish and deliver a Payment Bond in the form of Exhibit G in the amount of 100% of the Construction Package Price corresponding to each Construction Package.

The Payment Bond shall be released at Project Release.

8.3 No Relief of Liability

Notwithstanding any other requirements of the Contract Documents, performance by a Surety of any of the obligations of the Contractor shall not relieve the Contractor of any of its obligations hereunder.

9 INSURANCE

9.1 General Insurance Requirements

The Contractor shall procure and keep in effect, or cause to be procured and kept in effect with the Contractor as a named insured, as appropriate, the insurance policies outlined herein in accordance with the further requirements of this Section 9. The Contractor's insurance shall cover all of the Work under this CM-GC Agreement, whether the Work is performed by the Contractor or its Subcontractors. The Contractor's insurance shall cover the entire Project within the Project limits as negotiated by the Department and the Contractor, regardless of whether the Contractor is performing Work on a structure within the Project limits (with the exception of Builder's Risk Insurance). If the insurance required by this Section 9 becomes no longer commercially available, the Department will work with the Contractor to find commercially reasonable alternatives to the required coverages that are acceptable to the Department.

9.1.1 Qualified Insurers

All insurance companies providing policies obtained to satisfy the insurance requirements herein must be authorized to conduct business in the State and have a current policyholder's management and financial size category rating of not less than "A-, VII" according to A.M. Best's Insurance Reports Key Rating Guide.

9.1.2 Verification of Coverage

Each time the Contractor is required to initially obtain insurance coverage and at each annual renewal, the Contractors shall provide the Department with evidence of insurance in the form of a certificate of insurance. No Work shall start until proof of insurance acceptable to the Department has been submitted and approved.

Such certificate of insurance shall provide for 10 Calendar Days' written notice of cancellation to the Department for nonpayment of premiums, or 30 Calendar Days' written notice of cancellation to the Department if cancelled by the insurer for any other reason, including non-renewal. The Contractor shall delete the phrase "will endeavor to" preceding all references to provisions of notice by the insurance company in the evidence of insurance. A certificate of insurance indicating certain specified amendments and attachments shall be acceptable, but the Department reserves the right to request a complete certified copy of the policy, at the Department's sole discretion.

9.1.3 Full Force and Effect

The Commercial General Liability, Excess (Umbrella) Liability, Contractor's Pollution Liability and Professional Liability Insurance coverage requirements will remain in full force and effect until Final Acceptance at which time the Contractor shall maintain

Completed Operations Insurance throughout the term of all warranties or as otherwise required by the Contract Documents, whichever is greater.

9.1.4 No Recourse

There shall be no recourse against the Department for payment of premiums or payment of deductibles or self-insured retentions or other amounts with respect to the insurance provided by the Contractor. This provision does not affect any rights the Contractor is entitled to pursuant to Section 13.

9.1.5 Indemnification

The insurance coverage provided hereunder shall support, but shall not limit, the Contractor's indemnification obligations under Section 18.

9.2 Contractor Provided Insurance

9.2.1 Compliance with Standard Specifications

The Contractor shall procure and maintain the insurance policies required by the Standard Specifications.

9.2.2 Additional Insureds

Each policy of Commercial General Liability, Commercial Auto Liability, Excess Liability (Umbrella), and Contractor's Pollution Liability Insurance shall name the State, the Department and the Department's members, agents and employees as additional insureds. Each of such policies shall also contain a separation of insureds condition. The insurance afforded to the additional insureds by the Contractor shall be primary and non-contributory insurance. This Section 9.2.2 shall also apply to insurance policies required of Subcontractors as listed in Section 9.3.

9.2.3 Waiver of Subrogation

Contractor agrees to waive all rights against the Department and the other parties listed in Section 9.2.2 above for any claims to the extent covered by insurance required herein. 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 as listed in Section 9.3.

9.3 Subcontractor Insurance Requirements

At all times during the performance of the Work, the Contractor shall cause each Subcontractor that performs Work at the Site to provide:

1. Commercial General Liability Insurance with limits of at least \$500,000 per occurrence and \$1.0 million in the aggregate, with the general aggregate limit to be applicable on a per project basis.
2. Automobile Liability Insurance with limits of at least \$500,000 combined single limit.

3. Workers Compensation and Employer's Liability Insurance with statutory coverage for workers compensation and minimum limits of \$100,000 for employer's liability on a per accident or disease basis. Such coverage shall, if the subcontractor's work is over or adjacent to navigable waters, include extensions for U.S. Longshore and Harbor Workers Compensation Act and Jones Act claims.

The Commercial General Liability and Automobile Liability Insurance policies shall include the Department and the other parties listed in Section 9.2.2 as Additional Insureds on a primary and non-contributory basis. Such policies, and the workers compensation/employer's liability, shall contain a waiver of subrogation in favor of the additional insureds.

10 RISK OF LOSS

10.1 Site Security

The Contractor shall provide appropriate security for the Site during the performance of the Construction Work, including securing any buildings from entry, and shall take all reasonable precautions and provide protection to prevent damage, injury or loss to the Work and materials and equipment to be incorporated therein, as well as all other property at the Site, whether owned by the Contractor, the Department, or any other Person. The Contractor's obligation to provide security for the Site shall, at any given time, only extend to those parts of the Site to which the Contractor has been provided access pursuant to Section 6.1.

10.2 Maintenance and Repair of Work and On-Site Property

10.2.1 Responsibility of Contractor

During the performance of the Construction Work, the Contractor shall maintain, rebuild, repair, restore, or replace all temporary and permanent Work (including materials, equipment, supplies, and maintenance equipment that are purchased for permanent installation in, or for use during construction of, the Project, regardless of whether the Department has title thereto under the Contract Documents) that is injured or damaged prior to the date of Substantial Completion.

During the performance of the Construction Work, the Contractor shall also have full responsibility prior to the date of Final Acceptance for rebuilding, repairing and restoring all property damaged at the Site, whether owned by the Contractor, the Department or any other Person. If such damage was caused by the Department or any other Person (other than any Contractor-Related Entity), then the Contractor's obligation to pay for rebuilding, repairing, and restoring such damage shall be limited to the amount covered by the Builder's Risk Insurance required to be carried by the Contractor, including the Contractor's obligation to pay any deductibles or self-insured retentions. The Department shall pay to the Contractor the costs of rebuilding, repairing, and restoring the damage in excess of such amount by appropriate Change Order.

If the Contractor fails to satisfy its obligations to maintain, rebuild, repair or restore any Work or other property at the Site, the Department shall provide notice of such

failure to the Contractor. If the Contractor does not commence and diligently continue to remedy such failure within five Calendar Days following notice, the Department shall have the right to take all steps it deems necessary to satisfy such obligations. The Contractor shall reimburse the Department for any costs related to such activities. The Department may deduct such amounts from payments otherwise owing hereunder or may invoice the Contractor. The Contractor shall reimburse the Department for any such amounts paid by the Department within 30 Calendar Days after receipt of an invoice from the Department, therefore.

The Contractor shall at all times keep the Site in a neat and clean condition, including sweeping roadways to prevent excessive accumulation of dirt/mud, performing litter removal, removal of graffiti, and weed control.

10.2.2 Relief from Liability for Maintenance

The Project shall be considered accepted for maintenance purposes as of the date on which Final Acceptance occurs. Notwithstanding the foregoing, all elements of the Work, which will be owned by Persons other than the Department (such as Utility facilities) will be considered accepted for purposes of maintenance responsibility only as of the date of acceptance of maintenance responsibilities by such Persons.

10.3 Damage to Off-Site Property

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

10.4 Third-Party Agreements and Department-Obtained Permits

The Contractor shall comply with all provisions in the Third-Party Agreements that are applicable to the performance of the Work. The Contractor shall also comply with all provisions in the Department-obtained permits.

10.5 Title

The Contractor warrants that it owns, or will own, and has, or will have, good and marketable title to all materials, equipment, tools and supplies furnished, or to be furnished, by it and its Subcontractors that become part of the Project or are purchased for the Department for the operation, maintenance, or repair thereof, free and clear of all Liens. Title to all of such materials, equipment, tools and supplies which shall have been delivered to the Site shall pass to the Department, free and clear of all Liens, upon the sooner of: (i) incorporation into the Project; or (ii) payment by the Department to the Contractor of invoiced amounts pertaining thereto. Notwithstanding any such passage of title, and subject to Section 10.1, the Contractor shall retain sole care, custody, control, and risk of loss of such materials, equipment, tools and supplies, and shall exercise due care with respect thereto as part of the Work until Final Acceptance or until the Contractor is removed from the Project.

11 COMPENSATION AND PAYMENT

11.1 Preconstruction Phase Compensation

The Contractor's compensation for Preconstruction Services performed during the Preconstruction Phase shall be an amount ("Preconstruction Phase Compensation") equal to (a) the hourly rates set forth in Exhibit D for the personnel performing the Preconstruction Services multiplied by number of hours worked by such personnel on the Preconstruction Services, plus (b) actual and documented out-of-pocket reimbursable expenses incurred in performing Preconstruction Services.

The parties have agreed on certain task budgets for projected costs associated with the various phases of the Preconstruction Services. Such budgets are included in Exhibit D. The Contractor shall keep the Department apprised of actual expenditures as compared to budgets and the parties may agree to modify budgets and/or add additional budgets by mutual agreement from time to time.

Payment of Preconstruction Phase Compensation shall be made by the Department in accordance with Section 11.1.1

11.1.1 Payment of Preconstruction Phase Compensation

No later than the second Business Day of each calendar month during the Preconstruction Phase, the Contractor shall invoice the Department for payment of Preconstruction Phase Compensation earned in the prior month in a form approved by the Department.

Each invoice shall be supported by such information substantiating the Contractor's right to payment as the Department shall reasonably require, including (a) such information regarding the cost of labor and the progress of the Preconstruction Services as the Department may reasonably request, including timesheets; (b) as applicable, duly executed conditional waivers of liens from the Contractor and all Subcontractors, in a form approved by the Department, establishing payment or satisfaction of the payment requested by the Contractor in the previous invoice; and (c) an analysis of requested payment amounts as compared to the budgeted amounts set forth in Exhibit D.

Provided that an invoice consistent with the requirements of this CM-GC Agreement is received by the Department not later than the second Business Day of each calendar month, and the Department approves such invoice (which approval shall not be unreasonably withheld), the Department shall make payment in the amount due to the Contractor not later than 14 days after the Department's approval of the invoice. The Contractor understands and agrees that approval of the invoice by the Department (which approval shall not be unreasonably withheld) is required prior to payment.

If an invoice is received after the date for such invoice set forth in this Section 11.1.1, then payment shall be made by the Department as part of the subsequent payment, provided that the invoice is consistent with the requirements of this CM-GC Agreement and the Department approves such invoice (which approval shall not be unreasonably withheld).

11.2 Construction Compensation

The Contractor shall only be entitled to compensation for Construction Work to the extent such Construction Work has been authorized pursuant to the Construction Package Amendment. Construction Compensation for such authorized Construction Work shall be as described in the Construction Package Amendments. Invoicing and payment with respect to all Construction Work shall be processed in accordance with the terms and conditions of Section 109 of the Department's Standard Specifications (excluding Section 109.04 of such Standard Specifications).

12 RELIEF EVENTS

12.1 Relief Events

12.1.1 Relief Event Defined

The occurrence of any of the following events in respect to a Construction Package shall constitute a "Relief Event" for which the Contractor shall be entitled to seek adjustments to the Construction Package Schedule and the applicable Construction Package Price pursuant to this Section 12 and Section 13:

1. A Department-Directed Change;
2. Unavoidable delays, arising from a suspension order pursuant to Section 14.1;
3. The discovery of a Differing Site Condition;
4. The discovery of an Unknown Archaeological Condition;
5. The discovery of Hazardous Materials;
6. Uncovering, removing, and restoring Work, to the extent additional costs or time are provided for in Section 5.8.3;
7. Damage to the Work is caused by the Department or any other Person (other than any Contractor-Related Entity) to the extent provided in Section 10.2.1;
8. The occurrence of a Force Majeure Event; or
9. The occurrence of a Risk Register Event that is identified as a Department risk or a provisional risk on the Risk Register.

12.1.2 Limitations on Relief Events

12.1.2.1 None of the foregoing events described in Section 12.1.1 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, including the fault or negligence of the Contractor, its Subcontractors or any other Contractor-Related Entity for which the Contractor is not entitled to relief.

12.1.2.2 Notwithstanding anything to the contrary herein, if a Risk Register Event occurs that is designated as a Contractor Risk pursuant to the Risk Register, then the Contractor shall give notice to the Department in accordance with this Section 12.2.1, but the Contractor shall not be entitled to seek a Change Order and the Contractor shall bear

the schedule impact and pay all costs associated with such event and the agreed mitigation strategy. If an event occurs that impacts cost or schedule and is not identified as a Relief Event or a Risk Register Event, then Contractor shall not be entitled to seek a Change Order and the Contractor shall bear the schedule impact and pay all costs associated with such event and the agreed mitigation strategy.

12.2 Relief Event Claims

12.2.1 Relief Event Notice

The Contractor shall provide notice to the Department within 15 Calendar Days after the date on which the Contractor first became aware (or should have been aware, using all reasonable diligence) of a Relief Event (the “**Relief Event Notice**”). The Relief Event Notice shall include a reasonably detailed description of the circumstances and an initial estimate of the approximate number of Calendar Days the Contractor expects to be delayed as a result of the event and the approximate additional costs the Contractor will incur as a result of the event. The Relief Event Notice shall also describe the efforts of the Contractor that have been (or are going to be) undertaken by the Contractor to overcome or remove the Relief Event and minimize the potential adverse effect on the cost for performance of the Work resulting from such Relief Event.

If the Contractor fails to deliver the Relief Event Notice within 15 Calendar Days after the date on which the Contractor first became aware (or should have been aware, using all reasonable diligence) of the Relief Event, the 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.

12.2.2 Request for Change Order

The Contractor shall submit to the Department a Request for Change Order (RCO) within 30 Calendar Days after submitting the Relief Event Notice. The RCO shall include (i) a detailed description of the Relief Event, including its nature, the date of its occurrence, and its likely duration; (ii) the effect of the Relief Event on the Contractor’s ability to perform any of its obligations under this CM-GC Agreement, including the specific effect on each affected obligation and the likely duration of that effect and an analysis of the effect to the Critical Path; (iii) the specific relief requested by the Contractor; and (iv) if the relief requested includes compensation, the Contractor’s analysis and estimate of the amount of such compensation. The RCO shall comply with the requirements of Section 13.2 to the extent applicable.

If the Contractor fails to deliver the RCO within 30 Calendar Days after the applicable deadline set forth in the preceding paragraph, the Contractor shall have irrevocably and forever waived and released any Claim or right to relief for the adverse effect attributable to the Relief Event, unless, prior to such deadline, the Department agrees to extend the deadline at its sole discretion.

12.2.3 Adjustments in Construction Package Schedule

An extension of any relevant Completion Deadline for any Construction Package shall only be granted under the following circumstances: (i) a delay occurs in the Critical

Path as a result of a Relief Event, (ii) the delay was not reasonably avoidable by the Contractor, including by resequencing, reallocating or redeploying its forces to other portions of the Work, and was not caused by the fault or negligence, or act or failure to act of any Contractor-Related Entity; and (iii) the Contractor has complied with its obligations under Sections 12.1 and 12.2. The Department and the Contractor will use good faith efforts to agree on the extent to which the Critical Path has been delayed on account of any such Relief Event. Once the parties have mutually agreed as to the extent of such delay, they shall enter into a Change Order reflecting their agreement as to the adjustment in the relevant Completion Deadline(s) pursuant to Section 13.

12.2.4 Adjustments in Construction Package Price

An increase in the applicable Construction Package Price shall only be granted for a Relief Event to the extent: (i) the increased cost was not reasonably avoidable by the Contractor or caused by the Contractor or any Contractor-Related Entity; and (ii) the Contractor has complied with its obligations under Sections 12.1 and 12.2.

The Department and the Contractor will use good faith efforts to agree on the extent to which the Contractor is entitled to cost relief as a result of any such Relief Event. Whenever actual costs for a Provisional Sum item are more than the applicable Provisional Sum, the Construction Package Price will be adjusted by the difference between actual costs and the Provisional Sum amount set forth in the Construction Package Amendment. Where unit prices are specified in a Provisional Sum, such unit pricing shall be used to calculate the amount of any Change Order. Once the parties have mutually agreed as to the Contractor's entitlement to cost relief, they shall enter into a Change Order reflecting their agreement as to the adjustment in the applicable Construction Package Price pursuant to Section 13. Any relief provided pursuant to this Section 12.2.4 shall be subject to the limitations in Section 13.6. For certainty, the Contractor shall not be entitled to an increase in the Construction Package Price for any costs covered by insurance required to be carried pursuant to this CM-GC Agreement (regardless of whether the Contractor has actually obtained such insurance).

12.3 Waiver

The rights and remedies set forth in this Section 12 shall be the Contractor's sole and exclusive rights and remedies in the event of an occurrence of a Relief Event, and the Contractor hereby waives all other rights and remedies at law and/or in equity that it might otherwise have against the Department on account of a Relief Event. In confirmation and furtherance of the terms and provisions of this Section 12 the Contractor acknowledges and agrees that the applicable Construction Package Price and the applicable Completion Deadlines may only be adjusted in accordance with, and to the extent permitted by, the terms and provisions of this Section 12 and Section 13.

13 CHANGES IN THE WORK

This Section 13 sets forth the requirements for obtaining all Change Orders under this CM-GC Agreement, including Change Orders relating to Relief Events and changes in the scope of the Work. The Contractor hereby acknowledges and agrees that the applicable Construction Package Price constitutes full compensation for performance

of all of the Construction Work for each such Construction Package, subject only to those exceptions specified in Section 12 and this Section 13, and that the Department is subject to constraints which limit its ability to increase the applicable Construction Package Price or extend the applicable Completion Deadlines.

13.1 Change Orders

The term “Change Order” shall mean a written amendment to the terms and conditions of the Contract Documents issued in accordance with this Section 13. A Change Order shall not be effective for any purpose unless executed by the Department. Change Orders may be issued for the following purposes (or combination thereof):

1. To modify the Work;
2. To revise a Completion Deadline;
3. To revise a Construction Package Price; and
4. To revise other terms and conditions of the Contract Documents.

Upon the Department’s Approval of the Change Order form, the Department will execute the Change Order form indicating Approval thereof.

The Department may reject a claim by the Contractor for a Change Order at any point in the process. Once a complete RCO is provided, the Department’s failure to respond thereto within 14 Calendar Days of delivery of the request shall be deemed a rejection of such request for a Change Order.

13.2 Contents of Change Orders (excluding No-Cost Change Orders)

Each Change Order form and RCO submitted by the Contractor pursuant to Section 12 shall meet all applicable requirements of this Section 13 and shall include a cost analysis to be prepared in a form reasonably acceptable to the Department.

The Contractor shall prepare a scope of work, cost estimate, time impact analysis, if any and other information as required by this Section 13 for each Change Order form and RCO.

Scope of Work: The scope of work shall describe in detail satisfactory to the Department all activities associated with the Change Order, including a description of additions, deletions and modifications to the existing Contract Document requirements.

Cost Estimate: The cost estimate shall set out the estimated costs in such a way that a fair evaluation can be made and is acceptable to the Department, consistent with the protocols described in Exhibit B-1.

Time Impact Analysis: If the Contractor claims that such event, situation or change affects the Critical Path affecting a Completion Deadline, it shall provide a time impact analysis indicating all activities represented or affected by the change, with activity numbers, durations, predecessor and successor activities, resources and cost, and with a narrative report, in form satisfactory to the Department, which compares the proposed

new schedule to the then-current applicable Construction Package Schedule, as appropriate. Except as otherwise provided in this Section 13, the time impact analysis shall only modify the activities, which have been impacted by the event which justifies the extension. The Contractor may reschedule activities not otherwise affected by the event, in order to take advantage of additional float available as a result of the requested time extension. Any such rescheduling shall be reflected in the time impact analysis.

Other Supporting Documentation: The Contractor shall provide such other supporting documentation as may be required by the Department.

13.2.1 Justification

Each RCO shall include a justification therefore, detailing all causes of the proposed change, making specific reference to the applicable provisions of this Section 13 which permit a Change Order to be issued, and describing the data and documents which establish the necessity of such proposed change.

13.2.2 Incomplete Request for Change Orders

Each RCO shall meet all requirements set forth in this Section 13.2; provided that if any such requirements cannot be met due to the nature of the occurrence, the Contractor shall provide an incomplete RCO, which shall:

1. Comply with all requirements capable of being met;
2. Include a list of requirements, which are not fulfilled, together with an explanation reasonably satisfactory to the Department stating why such requirements cannot be met;
3. Provide such information regarding projected impact on the Critical Path affecting a Completion Deadline as is requested by the Department; and
4. In all events include sufficient detail to ascertain the basis for the proposed Change Order and for any price increase associated therewith, to the extent such amount is then ascertainable.

The Contractor shall furnish, when requested by the Department, such further information and details as may be required to determine the facts or contentions involved. The Contractor agrees that it shall give the Department access to any and all of the Contractor's books, records, and other materials relating to the Work, and shall cause its Subcontractors to do the same, so that the Department can investigate the basis for such proposed Change Order. The Contractor shall provide the Department with a monthly update to all outstanding incomplete RCOs, describing the status of all previously unfulfilled requirements and stating any changes in projections previously delivered to the Department, time expenditures to date and time anticipated for completion of the activities for which the time extension is claimed. The Department may reject the Contractor's claim at any point in the process. Once a complete RCO is provided, the Department's failure to respond thereto within 14 Calendar Days of delivery of the request shall be deemed a rejection of such request. Although the Department intends to review incomplete Change Orders for the purposes of timely

delivery described in this Section 13.2.3, the Department shall have no obligation to review the supporting documentation associated with any RCO until a complete RCO is provided.

13.2.3 Performance of Changed or Extra Work

As a condition precedent to the Contractor's right to receive additional payment beyond the amount of any Provisional Sum or an extension of a Completion Deadline for changed or extra work, the Contractor and the Department must execute a Change Order. To the extent that the Contractor undertakes any such work without receiving a Change Order executed by the Department, the Contractor shall be deemed to have performed such work voluntarily and shall not be entitled to a Change Order in connection therewith. In addition, the Contractor may be required to remove or otherwise undo any such work, at its sole cost.

13.2.4 Procedure for Department Initiated Change Orders

If the Department desires to evaluate whether to initiate a Change Order, the Department may, at its sole discretion, issue a Request for Change Proposal (RCP).

Within seven Calendar Days after the Contractor's receipt of an RCP, the Department and the Contractor shall consult to define the proposed scope of the change. Within seven Calendar Days after the initial consultation, the Department and the Contractor shall consult concerning an estimated rough order of magnitude ("ROM") cost and time impacts, if any. The Contractor shall prepare the ROM at its cost. The Contractor shall provide data regarding such matters as requested by the Department.

Within seven Calendar Days after the ROM consultation meeting and provision of any data requested by the Department, the Department shall notify the Contractor whether the Department:

1. Wishes to request the Contractor to prepare a Change Order form as discussed at the meeting; or
2. No longer wishes to issue a Change Order.

The Department may at any time, in its sole discretion, require the Contractor to provide two alternative Change Order forms, one of which shall provide for a time extension if applicable and any additional costs permitted hereunder, and the other of which shall show all costs associated with meeting the original Completion Deadlines, as well as any additional costs permitted hereunder.

If requested by the Department, the Contractor shall, within 21 Calendar Days after receipt of the notification, prepare and submit to the Department for Approval a Change Order form for the requested change, complying with all applicable requirements of Section 13.4, and incorporating all requests made by the Department. The Contractor shall bear the cost of developing the Change Order form, including any modifications thereto requested by the Department.

If the Department and the 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 the applicable Construction Package Price or a Completion Deadline, the Department may, in its sole discretion, order the Contractor to proceed with the performance of the Work in question notwithstanding such disagreement.

13.2.5 Procedures for Contractor-Initiated Lump Sum Change Orders

Except with respect to a request for a No-Cost Change Order pursuant to Section 13.5, the Contractor may only initiate Change Orders for any Relief Event in accordance with Section 12.

13.3 Certain Limitations for all Change Orders (excluding No-Cost Changes)

13.3.1 Limitation on Construction Package Price Increases

Any increase in any Construction Package Price pursuant to Sections 12 and 13 shall exclude:

1. Costs caused by a breach of contract or fault or negligence, or act or failure to act of any Contractor-Related Entity;
2. Costs, which could reasonably have been avoided by the Contractor, including by resequencing, reallocating, or redeploying its forces to other portions of the Work or to other activities unrelated to the Work (including any additional costs reasonably incurred in connection with such reallocation or redeployment); and
3. Costs for any rejected Work which failed to meet the requirements of the Contract Documents and any necessary remedial Work.

13.3.2 Limitation on Time Extensions

Any extension of a Completion Deadline pursuant to Sections 12 and 13 shall exclude any delay to the extent that it:

1. Did not impact the Critical Path affecting a Completion Deadline;
2. Was due to the fault or negligence, or act or failure to act of any Contractor-Related Entity; or
3. Could reasonably have been avoided by the Contractor, including by resequencing, reallocating or redeploying its forces to other portions of the Work (provided that if the request for extension involves a Department caused delay, the Department shall have agreed, if requested to do so, to reimburse the Contractor for its Actual Costs incurred, if any, in resequencing, reallocating, or redeploying its forces).

The Contractor shall be required to demonstrate to the Department's satisfaction that the change in the Work or other event or situation which is the subject of the Change Order request seeking a change in a Completion Deadline has caused or will result in

an identifiable and measurable disruption of the Work which has impacted the Critical Path activity affecting a Completion Deadline.

13.4 Pricing of Change Orders (excluding No-Cost Changes)

The Department and the Contractor (on its own behalf and on behalf of its Subcontractors) shall endeavor to negotiate, in good faith, a reasonable cost for each Change Order. If the Department and the Contractor cannot agree on the terms of pricing of a Change Order, pricing will be determined in accordance with the Department's Standard Specifications, including provisions for force account change orders.

13.5 No-Cost Change Orders

The Contractor may request the Department's Approval of a Change Order for minor no-cost deviations to the Contract Document requirements. The Department may Approve, in its sole discretion, in whole or in part, a Change Order request for such deviations in a form reasonably acceptable to the Department. If Approved as provided in this Section 13.5, the changes may be implemented without any sharing of the Contractor's cost savings (and without any additional cost to the Department).

A No-Cost Change Order is an Approved proposal developed and documented by the Contractor, which would modify or require a change in any of the Contract Documents in order to be implemented that is a minor deviation to the underlying requirement. No-Cost Change Orders cannot change a Completion Deadline.

13.5.1 Required Information

At a minimum the following information shall be submitted by the Contractor with each No-Cost Change Order proposal:

1. A redline of the changes proposed to the Contract Documents, which are involved in the proposed change;
2. A description of the rationale for the proposed change and its impact on the quality of the Project (with the understanding that the Department generally will not accept changes that will decrease quality); and
3. A description of any previous use or tests of the proposal and the conditions and results if requested by the Department.

The Contractor shall provide any additional information requested by the Department in a timely manner.

13.5.2 Department Review and Approval or Rejection

Upon receipt of a No-Cost Change Order proposal, the Department will review it, but shall not be liable for any delay in acting upon any proposal submitted pursuant to this Section 13.5. The Contractor may withdraw all or part of any No-Cost Change Order proposal at any time prior to Approval by the Department. The Department may Approve, in its sole discretion, in whole or in part, any No-Cost Change Order proposal

submitted. Until a No-Cost Change Order proposal is Approved by the Department, the Contractor shall remain obligated to perform in accordance with the Contract Documents. The decision of the Department as to rejection or Approval of any No-Cost Change Order proposal shall be at the sole discretion of the Department, and shall be final and not subject to partnering, Dispute resolution or appeal. No-Cost Change Order proposals that require excessive time or costs for review, evaluation or investigations, or that are not consistent with the Department's design policies and basic design criteria may be rejected. The Contractor shall have no claim for any additional costs or delays resulting from the rejection of a No-Cost Change Order proposal, including development costs, loss of anticipated profits, or increased material or labor costs. The Department will consider only proven features that have been employed under similar conditions or projects acceptable to the Department.

13.6 Waiver

THE CONTRACTOR HEREBY EXPRESSLY WAIVES ALL RIGHTS TO ASSERT ANY AND ALL CLAIMS BASED ON ANY CHANGE IN THE WORK, DELAY OR ACCELERATION (INCLUDING ANY CHANGE, DELAY, SUSPENSION OR ACCELERATION WHICH, BUT FOR THE EXPRESS TERMS OF THE CONTRACT DOCUMENTS, COULD BE INFERRED OR IMPLIED AT LAW) FOR WHICH THE CONTRACTOR FAILED TO PROVIDE PROPER AND TIMELY NOTICE OR FAILED TO PROVIDE A TIMELY RCO, AND AGREES THAT THE CONTRACTOR SHALL BE ENTITLED TO NO COMPENSATION OR DAMAGES WHATSOEVER IN CONNECTION WITH THE WORK EXCEPT TO THE EXTENT THAT THE CONTRACT DOCUMENTS EXPRESSLY SPECIFY THAT THE CONTRACTOR IS ENTITLED TO A CHANGE ORDER OR OTHER COMPENSATION OR DAMAGES.

13.7 Disputes

If the Department and the Contractor agree that a request to increase any Construction Package Price and/or extend any Completion Deadline by the Contractor has merit, but are unable to agree as to the amount of such price increase and/or time extension, the Department agrees to mark up the Change Order request or Change Order form, as applicable, provided by the Contractor to reduce the amount of the price increase and/or time extension in accordance with the Department's Standard Specifications. In such event, the Department will execute and deliver the marked-up Change Order to the Contractor within a reasonable period, and thereafter will make payment and/or grant a time extension based on such marked-up Change Order. The failure of the Department and the Contractor to agree to any Change Order under this Section 13 (including agreement as to the amount of compensation allowed under a force account Change Order and the disputed amount of the increase in the applicable Construction Package Price and/or extension of a Completion Deadline in connection with a Change Order as described above) shall be a Dispute to be resolved pursuant to Section 19. Except as otherwise specified in the Change Order, execution of a Change Order by both parties shall be deemed accord and satisfaction of all claims by the Contractor of any nature arising from or relating to the Work covered by the Change Order. The Contractor's Claim and any award by the resolver of the Dispute shall be limited to the

incremental costs incurred by the Contractor with respect to the disputed matter (crediting the Department for any corresponding reduction in the Contractor's other costs) and shall in no event exceed the amounts allowed by this Section 13 with respect thereto.

The Contractor shall provide notice to the Department of its intention to dispute a rejected Change Order within seven Calendar Days. The Contractor's failure to provide such notice shall result in a waiver by Contractor of the right to raise such Claim in the future.

13.8 No Release or Waiver

13.8.1 Extension of Time for Performance

No extension of time granted hereunder shall release the Contractor's Surety from its obligations. The Department shall not be deemed to have waived any rights under this CM-GC Agreement (including its right to abrogate this CM-GC Agreement for abandonment or for failure to complete within the time specified, or to impose and deduct damages as may be provided herein) as the result of any grant of an extension of any Completion Deadline, any acceptance of performance of any part of the Work after a Completion Deadline, or the making of any payments to the Contractor after such date.

13.8.2 No Change Order Based on Course of Conduct or Order by Unauthorized Person

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

14 SUSPENSION OF WORK

14.1 Suspension for Convenience

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

14.2 Suspension for Cause

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

1. Correct conditions unsafe for the Project personnel or general public;
2. Comply with any Governmental Approval, Legal Requirement, or otherwise carry out the requirements of this CM-GC Agreement;
3. Carry out directives or orders of the Department;
4. Comply with environmental requirements or requirements contained in the Construction Package Amendment and applicable Legal Requirements; or
5. Remove an employee whom the Department has requested be removed pursuant to Section 7.9.1.

The Contractor shall promptly comply with any such written suspension order. The Contractor shall promptly recommence the Work upon receipt of written notice from the Department directing the Contractor to resume Work.

14.3 Contractor Responsibilities during Suspension

During periods that Work is suspended, the Contractor shall continue to be responsible for the Work and shall prevent damage or injury to the Project and other facilities in the Project vicinity, provide for drainage, obtain and maintain compliance with all Governmental Approvals, maintain all Contractor-provided insurance and bonds and erect necessary Temporary Structures, signs or other facilities required to maintain the Project and other facilities in the Project vicinity. During any suspension period, unless otherwise directed by the Department, the Contractor shall continue to be responsible for maintenance of traffic and maintenance during construction in accordance with requirements of the Contract Documents. If the suspension is for the Department's convenience, the additional work performed by the Contractor during the suspension period shall be considered a Department-Directed Change.

15 TERMINATION FOR CONVENIENCE

15.1 Notice of Termination

15.1.1 Notice of Termination Issued by the Department

The Department may terminate this CM-GC Agreement and the performance of the Work by the Contractor in whole or, from time to time, in part, if the Department determines, in its sole discretion that a termination is in the best public, State or national interest to do so. The Department shall notify the Contractor of its decision to terminate by delivering to the Contractor a written Notice of Termination specifying the extent of termination and its effective date. Termination (or partial termination) of this CM-GC Agreement shall not relieve any Surety of its obligation for any claims arising out of the Work performed.

15.1.2 Notice of Termination Issued by the Contractor

The Contractor may terminate this CM-GC Agreement for convenience if (i) the Approved budget for the Preconstruction Services has been exhausted and not extended within 60 Calendar Days of the exhaustion of such budget or (ii) the Department has suspended the Work (including a deemed suspension pursuant to Section 16.3) for more than 180 consecutive Calendar Days. The Contractor shall notify the Department of its

decision to terminate by delivering to the Department a written Notice of Termination specifying the effective date (which may be no sooner than 30 Calendar Days after delivery of the Notice of Termination). Termination of this CM-GC Agreement shall not relieve any Surety of its obligation for any claims arising out of the Work performed. If the parties mutually agree upon the terms of a Change Order to compensate the Contractor for any ongoing suspension, the Contractor shall withdraw its Notice of Termination in connection with execution of such Change Order. If the Contractor withdraws a Notice of Termination, the Contractor will not be permitted to issue another Notice of Termination pursuant to this Section 15 at a later time in response to the same event(s) that resulted in the issuance of the initial Notice of Termination.

15.2 Contractor Responsibilities Upon Termination

After issuance or receipt of a Notice of Termination, and except as otherwise directed by the Department, the Contractor shall immediately proceed as follows, regardless of any delay in determining or adjusting any amounts due under this Section 15.

1. Stop Work as specified in the notice;
2. Communicate such notice to all affected Subcontractors that their Subcontracts are not to be further performed unless otherwise authorized in writing by the Department;
3. 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;
4. Terminate all Subcontracts to the extent that they relate to the Work terminated;
5. Assign to the Department in the manner, at the times, and to the extent directed by the Department, all of the right, title and interest of the 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;
6. 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;
7. 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: (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;

8. Complete performance in accordance with the Contract Documents of all Work not terminated;
9. Take all action that may be 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 of the Contractor and in which the Department has or may acquire an interest;
10. 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 Section 15.2.7; provided, however, that the 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;
11. 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 Contractor and any Subcontractor in the performance of the Work as the Department may direct; and
12. Take other actions directed by the Department.

15.3 Responsibility After Notice of Termination

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

1. The Contractor's responsibility for damage to materials for which partial payment has been made as provided herein shall terminate when the Department certifies that those materials have been stored in the manner and at the locations directed by the Department; and
2. The Contractor's responsibility for damage to materials purchased by the Department subsequent to the issuance of the notice that this CM-GC Agreement is to be terminated shall terminate when title and delivery of those materials has been taken by the Department.

Immediately after the Department determines that the Contractor has completed the Work directed to be completed prior to termination and such other work as may have been ordered to secure the Project for termination, the Contractor will not be required to provide for continuing safety, Security and maintenance at the Site.

15.4 Payment on Termination Under Section 15.1

15.4.1 Payment During the Preconstruction Phase

If this CM-GC Agreement is terminated under Section 15.1 during the Preconstruction Phase, then the Department shall pay to the Contractor an amount equal to (a) all earned but unpaid Preconstruction Phase Compensation plus (b) any actual, documented and reasonable cancellation charges due to approved Subcontractors pursuant to the terms of their Subcontracts.

The compensation described in this Section 15.4.1 is the Contractor's sole and exclusive remedy hereunder in the event of termination during the Preconstruction Phase.

15.4.2 Payment After the Start of Construction Work

If this CM-GC Agreement is terminated under Section 15.1 after the start of the Construction Phase, then the Department shall pay to the Contractor for Work properly completed in accordance with the applicable Construction Package Amendment plus any actual, documented and reasonable cancellation charges due to approved Subcontractors pursuant to the terms of their Subcontracts by reason of the termination of this CM-GC Agreement. In addition, if the Preconstruction Phase has not yet completed by the time of such termination, then the Contractor shall also be entitled to termination compensation for Preconstruction Services as provided in Section 15.4.1. The compensation described in this Section 15.4.2 is the Contractor's sole and exclusive remedy hereunder in the event of termination during the Construction Phase.

Reimbursement for demobilization of the Site will be considered, the intent being that an equitable settlement will be made with the Contractor. In no event shall the Contractor receive payment, including any portion of the Contractor's fee, with respect to Work or other services not performed as of the time of termination.

Notwithstanding the foregoing, in no event shall the termination payment under this Section 15.4.2 exceed the then-current Construction Compensation.

15.4.3 Payment of Termination Amount

Upon determination of the amount of the termination payment, a Change Order will be executed to reflect the agreed termination payment, and the Contractor shall be paid the agreed amount.

15.4.4 Partial Termination

If a termination hereunder is partial, the Construction Compensation for the remainder of the Work shall be adjusted as appropriate to account for the change in the overall scope of the Project.

15.4.5 Reduction in Amount of Claim

The amount otherwise due the Contractor under this Section 15 shall be reduced by: (i) all unliquidated advance or other payments made to or on behalf of the Contractor

applicable to the terminated portion of this CM-GC Agreement, including any costs for which the Contractor has already been compensated pursuant to a Change Order arising out of a Relief Event; (ii) the amount of any claim which the Department may have against any Contractor-Related Entity in connection with this CM-GC Agreement; (iii) the agreed price for, or the proceeds of the sale of, any property, materials, supplies or other things acquired by the Contractor or sold, pursuant to the provisions of this Section 15, and not otherwise recovered by or credited to the Department; (iv) amounts that the Department deems advisable, in its sole discretion, to retain to cover any existing or threatened claims, Liens and stop notices relating to the Project, including claims by Utility Owners; (v) the cost of repairing any Nonconforming Work, and (vi) any amounts due or payable by the Contractor to the Department.

15.4.6 Partial Payments

The Department may, from time to time, under such terms and conditions as it may prescribe and in its sole discretion, make partial payments on account against costs incurred by the Contractor in connection with the terminated portion of this CM-GC Agreement, whenever in the opinion of the Department the aggregate of such payments shall be within the amount to which the Contractor will be entitled under this Section 15. If the total of such payments is in excess of the amount due to the Contractor under this Section 15, such excess shall be payable by the Contractor to the Department upon demand together with interest at a rate equal to the average rate at the time being received from the investment of state funds, as determined by the State Treasurer, for the period from the date such excess payment is received by Contractor to the date on which such excess is repaid to the Department. However, no interest will be charged with respect to any such excess payment attributable to a reduction in Contractor's claim by reason of retention or other disposition of termination inventory until 10 Calendar Days after the date of such retention or disposition, or such later date as determined by the Department by reason of the circumstances.

15.4.7 Inclusion in Subcontracts

The Contractor shall insert in all Subcontracts a requirement that the Subcontractor shall stop Work on the date and to the extent specified in a Notice of Termination in accordance with this Section 15 and shall require Subcontractors to insert the same provision in each Subcontract at all tiers.

15.4.8 Limitation on Payments to Subcontractor

For the purposes of this Section 15.4, the Contractor will not be entitled to reimbursement for that portion of the termination settlement with any such Subcontractor which constitutes anticipatory or unearned profit on Work not performed, or which constitutes consequential damages on account of the termination or partial termination.

15.4.9 No Unearned Profits or Consequential Damages

Under no circumstances shall the Contractor be entitled to anticipatory or unearned profits or consequential or other damages as a result of a termination or partial

termination under this Section 15. The payment to the Contractor determined in accordance with this Section 15 constitutes the Contractor's sole and exclusive remedy for a termination under this Section 15.

15.5 No Waiver

Anything contained in this CM-GC Agreement to the contrary notwithstanding, a termination under this Section 15 shall not waive any right or claim to damages, which the Department may have, and the Department may pursue any cause of action, which it may have at law or in equity or under this CM-GC Agreement.

15.6 Dispute Resolution

The failure of the parties to agree on amounts due under this Section 15 shall be a Dispute to be resolved in accordance with Section 19.

16 DEFAULT

16.1 Default by Contractor

16.1.1 Events of Default

The Contractor shall be deemed to be in breach under this CM-GC Agreement upon the occurrence of any one or more of the following events or conditions:

1. The Contractor fails to promptly begin (i) the Preconstruction Services under the Contract Documents following execution of the CM-GC Agreement or (ii) the Construction Work under the Contract Documents following execution of the Construction Package Amendment.
2. The Contractor fails to perform the Work with sufficient resources to ensure the prompt completion thereof and fails to execute remedial action in accordance with Contract Documents;
3. The Contractor fails to perform the Work in accordance with the Contract Documents, refuses to remove and replace rejected materials or Nonconforming or unacceptable Work, or fails to remove and replace workers as directed by the Department under Section 7.9.1;
4. The Contractor discontinues or suspends the prosecution of the Work (exclusive of Work stoppage due to: (i) suspension or termination by the Department; (ii) an excusable delay pursuant to a Relief Event or Force Majeure Event; or (iii) nonpayment by the Department not related to a breach by the Contractor);
5. The Contractor fails to resume performance of Work, which has been suspended or stopped, within a reasonable time after receipt of notice from the Department to do so or (if applicable) after cessation of the event preventing performance;
6. The Contractor breaches any other material agreement, representation or warranty contained in the Contract Documents, or the Contractor fails to

perform any other material obligation under the Contract Documents, including EEO and DBE requirements;

7. The Contractor fails to provide and maintain the required insurance and Payment and Performance Bonds;
8. The Contractor assigns or transfers the Contract Documents or any right or interest therein, except as expressly permitted under Section 25.4.2;
9. The Contractor fails, absent a valid Dispute, to make payment when due for labor, equipment or materials in accordance with its agreements with Subcontractors and applicable law; fails to comply with any Legal Requirement or Governmental Approval; or fails reasonably to comply with the instructions of the Department consistent with the Contract Documents;
10. The Contractor or any Principal Participant, partner, joint venture member or other member of the Contractor shall have become 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;
11. Insolvency, receivership, reorganization or bankruptcy proceedings shall have been commenced by or against the Contractor or any Principal Participant, partner, joint venture member or other member of the Contractor and not dismissed within 60 Calendar Days;
12. Any material representation or warranty made by the Contractor in the Proposal or 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;
13. The Contractor or a Principal Participant is a party to fraud;
14. The Contractor meets the cap set forth in the Construction Package Amendment, if any, for cumulative Liquidated Damages and Daily Road User Costs;
15. The Contractor removes or replaces one or more Key Personnel without the prior Approval of the Department;
16. The Contractor fails to appropriately cooperate with the Department, the public, or others associated with the Work or to provide proper supervision of the Work; or
17. During the performance of the Preconstruction Services, the Contractor fails to engage in good faith negotiations related to the development of the Construction Package Amendment.

16.1.2 Right to Cure

The Department agrees to allow the Contractor and Surety 14 Calendar Days' notice and opportunity to cure any breach before declaring an Event of Default, provided that no such notice and opportunity to cure is required for any breach, which by its nature cannot be cured. If a breach is curable but by its nature cannot be cured within 14 Calendar Days, as determined in the Department's reasonable discretion, the

Department agrees not to declare an Event of Default provided that the Contractor commences such cure within such 14-Calendar Day period and thereafter diligently prosecutes such cure to completion; provided, however, that in no event will such cure period exceed 30 Calendar Days in total. The Contractor hereby acknowledges and agrees that the events described in Subsections 16.1.1.12 and 16.1.1.13 are not curable. 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, without notice and without awaiting lapse of any cure period, rectify the condition at the Contractor's cost, and so long as the Department undertakes such action in good faith, even if under a mistaken belief in the occurrence of such default, such action shall not expose the Department to liability to the Contractor and shall not entitle the 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 Site. 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.

16.2 Remedies

16.2.1 Rights of the Department

If an Event of Default occurs, then, in addition to all other rights and remedies provided by law or equity or available under this CM-GC Agreement or otherwise, including the rights to recover Delay Charges and to seek recourse against the Payment Bond and the Performance Bond, 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 Contractor from any obligations:

1. The Department may order the Contractor to suspend or discontinue the Work or any portion of the Work;
2. The Department may terminate this CM-GC Agreement or a portion thereof, in which case, the provisions of Sections 15.2 and 15.3 shall apply;
3. If and as directed by the Department, the 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 Contractor-Related Entity in the performance of the Work;
4. The Contractor shall deliver to the Department possession of any or all facilities of the Contractor located on the Site as well as all Design Documents;
5. The Contractor shall confirm the assignment to the Department of the Subcontracts requested by the Department, and the Contractor shall terminate, at its cost, all other Subcontracts;
6. The Department may deduct from any amounts payable by the Department to the Contractor such amounts payable by the Contractor to the Department, including Delay Charges or other damages payable to the Department under the Contract Documents;

7. The Department, without incurring any liability to the Contractor, shall have the rights to: (i) take the performance of all or a portion of the Work from the Contractor (either with or without the use of the Contractor's materials, equipment, tools and instruments) and enter into an agreement with another Person for the completion of such Work; or (ii) use such other methods, as in the opinion of the Department, will be required for the completion of the Project; and
8. If the Department exercises any right to perform any obligations of the Contractor, in the exercise of such right the Department may, but is not obligated to, among other things: (i) perform or attempt to perform, or cause to be performed, such Work; (ii) spend such sums as the Department deems necessary and reasonable to employ and pay such architects, engineers, consultants and contractors and obtain materials and equipment as may be required for the purpose of completing such Work; (iii) execute all applications, certificates and other documents as may be required for completing the Work; (iv) modify or terminate any contractual arrangements; (v) take any and all other actions which it may in its sole discretion consider necessary to complete the Work; and (vi) prosecute and defend any action or proceeding incident to the Work.

16.2.2 Liability of Contractor

If an Event of Default has occurred, the Contractor and Surety shall be jointly and severally liable to the Department (in addition to any other damages under the Contract Documents other than those costs intended to be covered by Delay Charges payable hereunder) for all costs reasonably incurred by the Department or any party acting on the Department's behalf in completing the Work or having the Work completed by another Person (including any re-procurement costs, throw away costs for unused portions of the completed Work and increased financing costs). Upon the occurrence of an Event of Default, the Department shall be entitled to withhold all or any portion of further payments to the Contractor until such time as the Department is able to determine how much (if any) remains owing to the Contractor. Promptly upon such determination, the Department shall notify the Contractor in writing of the amount, if any, that the Contractor shall pay the Department or that the Department shall pay the Contractor with respect thereto. All costs and charges incurred by the Department, including attorneys', accountants' and expert witness fees and costs, together with the cost of completing the Work under the Contract Documents, will be deducted from any moneys due or which may become due to the Contractor. If such expense exceeds the sum which would have been payable under this CM-GC Agreement, then the Contractor and its Surety(ies) shall be liable and shall pay to the Department the amount of such excess.

It is recognized that if a default under Section 16.1.1.10 or 16.1.1.11 occurs, such event could impair or frustrate the Contractor's performance of the Work. Accordingly, it is agreed that upon the occurrence of any such event, the Department shall be entitled to request of the Contractor, or its successor in interest, adequate assurance of future performance in accordance with the terms and conditions hereof. Failure to comply

with such request within ten Calendar Days of delivery of the request shall entitle the Department to terminate this CM-GC Agreement and to the accompanying rights set forth above. Pending receipt of adequate assurance of performance and actual performance in accordance therewith, the Department shall be entitled to proceed with the Work with its own forces or with other contractors on a time and material or other appropriate basis, the cost of which will be credited against and deducted from the Department's payment obligations hereunder. The foregoing shall be in addition to all other rights and remedies provided by law or equity and such rights and remedies as are otherwise available under this CM-GC Agreement and the Payment and Performance Bonds.

In lieu of the provisions of this Section 16.2 for terminating this CM-GC Agreement and completing the Work, the Department may pay the Contractor for the parts already done according to the provisions of the Contract Documents and may treat the parts remaining undone as if they had never been included or contemplated by this CM-GC Agreement. No claim under this provision will be allowed the Contractor for prospective profits on, or any other compensation relating to, Work uncompleted by the Contractor.

If this CM-GC Agreement is terminated for grounds, which are later determined not to justify a termination for default, such termination shall be deemed to constitute a termination for convenience pursuant to Section 15.

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

The exercise or beginning of the exercise by the Department of any one or more rights or remedies under this Section 16.2 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.

The Contractor and Surety shall not be relieved of liability for continuing Delay Charges on account of a default by the Contractor hereunder or by the Department's declaration of an Event of Default, or by actions taken by the Department under this Section 16.2.

16.3 Right to Stop Work if Undisputed Payment is Not Made

The Contractor shall have the right to stop Work if the Department fails to make an undisputed payment due hereunder within 30 Calendar Days after receipt of notice of nonpayment. Any such Work stoppage shall be deemed a suspension for purposes of Sections 14.1 and 15.1.2. The Contractor shall not have the right to terminate this CM-GC Agreement for default as the result of any failure by the Department to make an undisputed payment due hereunder, but the Contractor shall have the right to issue a Notice of Termination under Section 15 upon meeting the requirements of Section

15.1.2. In such event, the Contractor's sole and exclusive remedy shall be to receive termination compensation as set forth in Section 15.

17 DAMAGES

17.1 Liquidated Damages and Daily Road User Costs

17.1.1 Failure to Meet Contract Requirements

The Contractor understands and agrees that if the Contractor fails to complete the Work in accordance with the Contract Documents, the Department will suffer substantial losses and damages. The cost to the Department of the administration of the contract, including engineering, inspection and supervisions, will be increased as the time occupied in the Work is lengthened. Loss will also accrue to the public due to delays in access to the Project. The Contractor agrees that it shall be liable for all such losses and damages.

17.1.2 Liquidated Damages

The Contractor and the Department have agreed to stipulate the amount payable by the Contractor in the event of its failure to achieve Substantial Completion by the Substantial Completion Deadline or to achieve Final Acceptance by the Final Acceptance Deadline. The Contractor acknowledges and agrees that the Department's right to seek Liquidated Damages is the Department's sole and exclusive remedy for the Contractor's failure to achieve Substantial Completion by the Substantial Completion Deadline or to Achieve Final Acceptance by the Final Acceptance Deadline. Payment of Liquidated Damages shall not excuse the Contractor from liability from any other breach of Contract Document requirements, including any failure of the Work to conform to applicable requirements, or from the obligation to pay Daily Road User Costs in accordance with Section 17.1.3.

If the Contractor fails to achieve Substantial Completion by the Substantial Completion Deadline or to achieve Final Acceptance by the Final Acceptance Deadline, the Contractor shall pay to the Department Liquidated Damages in the amounts agreed to in the Construction Package Amendment.

17.1.3 Daily Road User Costs

In addition to Liquidated Damages, the Contractor shall also be responsible for any stipulated lane use charges, lane site use charges, and contract site use charges (collectively, "Daily Road User Costs") as agreed to and set forth in the Construction Package Amendment.

The Contractor acknowledges and agrees that Daily Road User Costs are intended to compensate the Department solely for the Contractor's failure to meet these Contract Document requirements and shall not excuse the Contractor from liability from any other breach of Contract Document requirements, including any failure of the Work to conform to applicable requirements.

17.1.4 Maximum Liquidated Damages and Daily Road User Costs

Cumulative Liquidated Damages and Daily Road Use Costs under this Section 17.1 shall not exceed 100% of the Construction Compensation as the same may be adjusted by Change Order.

17.1.5 Multiple Assessments of Liquidated Damages and Daily Road User Costs

Liquidated Damages and Daily Road User Costs may be assessed simultaneously under more than one subsection of this Section 17.1.

17.1.6 Reasonableness of Delay Charge Amounts

The Contractor acknowledges and agrees that the Liquidated Damages and the Daily Road User Costs, if any, shall be set based on an evaluation by the Department of damages, which it will incur in each of the above events, including administrative costs. The Contractor and the Department agree that the parties have agreed or shall agree to such charges in order to fix the Contractor's costs and to avoid later disputes over which items are properly chargeable to the Contractor. The Contractor understands and agrees that any Liquidated Damages or Daily Road User Costs payable in accordance with this Section 17.1 are not a penalty and that such sums are reasonable under the circumstances existing as of the date of execution and delivery of this CM-GC Agreement. The Contractor further acknowledges and agrees that Liquidated Damages and Daily Road User Costs may be owing even though no Event of Default has occurred.

17.2 Offset; Waiver

17.2.1 Offset

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

17.2.2 No Waiver

Permitting or requiring the Contractor to continue and finish the Work or any part thereof after a Completion Deadline shall not act as a waiver of the Department's right to receive Delay Charges hereunder or any rights or remedies otherwise available to the Department.

17.3 Payment of Delay Charges

To the extent Delay Charges are not deducted from any amount owed to the Department by the Contractor, the Department may send Contractor an invoice and the Delay Charges shall be payable by the Contractor to the Department within 10 Calendar Days after the Contractor's receipt of the invoice, therefore.

18 INDEMNIFICATION

18.1 Indemnifications by Contractor

18.1.1 General Indemnities

Subject to Section 18.1.2, the Contractor shall release, defend, indemnify and hold harmless the Department and its agents, consultants, and their respective successors and assigns and their respective shareholders, officers, directors, agents and employees (collectively referred to as the “Indemnified Parties”) from and against any and all third party claims, causes of action, suits, judgments, investigations, legal or administrative proceedings, penalties, fines, damages, losses, liabilities, costs and expenses, including any injury to or death of persons or damage to or loss of property (including damage to utility facilities), and including attorneys’, accountants’ and expert witness fees and costs, arising out of, relating to or resulting from:

1. The failure by any Contractor-Related Entity to comply with any applicable Environmental Laws or other Legal Requirements (including Legal Requirements regarding handling, generation, treatment, storage, transportation and disposal of Hazardous Materials) or Governmental Approvals in performing the Work;
2. Any patent or copyright infringement or other improper appropriation or use of trade secrets, patents, proprietary information, know-how, copyright rights or inventions in performance of the Work, or arising out of any use in connection with the Project of methods, processes, designs, information or other items furnished or communicated to the Department or another Indemnified Party pursuant to this CM-GC Agreement; provided that this indemnity shall not apply to any infringement resulting from the Department’s failure to comply with specific written instructions regarding use provided to the Department by the Contractor;
3. The negligent act or omission or willful misconduct of any Contractor-Related Entity;
4. Any and all claims by any governmental or taxing authority claiming taxes based on gross receipts, purchases or sales, or the use of any property or income of the Contractor or any of its Subcontractors or any of their respective agents, officers or employees with respect to any payment for the Work made to or earned by any Contractor-Related Entity;
5. Any and all stop notices and/or Liens filed in connection with the Work, including all expenses and attorneys’, accountants’ and expert witness fees and costs incurred in discharging any stop notice or Lien, provided that the Department is not in default in payments owing to the Contractor with respect to such Work;
6. Any spill or release or threatened spill or release or exacerbation of Hazardous Materials: (i) attributable to the negligence, willful misconduct or breach of contract by any Contractor-Related Entity; or (ii) that was brought onto the Site by any Contractor-Related Entity; and

7. The claim or assertion by any contractor of inconvenience, disruption, delay or loss caused by interference by any Contractor-Related Entity with or hindering the progress or completion of work being performed by other contractors as described in Section 24.1, or failure of any Contractor-Related Entity to cooperate reasonably with other contractors in accordance therewith.

18.1.2 Losses Caused by Indemnified Parties

The Contractor's indemnity obligation under Sections 18.1.1 shall not extend to any loss, damage or cost to the extent that such loss, damage or cost was caused by the negligence, fault, gross negligence or willful misconduct of such Indemnified Party or its agents, servants or independent contractors who are directly responsible to such Indemnified Party.

18.1.3 Claims by Employees

In claims by an employee of the Contractor, a Subcontractor, anyone directly or indirectly employed by them or anyone for whose acts they may be liable, the indemnification obligation under this Section 18.1 shall not be limited by any limitation on the amount or type of damages, compensation or benefits payable by or for the Contractor or a Subcontractor under workers' compensation, disability benefit or other employee benefits laws.

18.1.4 Reliance on Contractor's Performance

The Contractor hereby acknowledges and agrees that it is the Contractor's obligation to construct the Project in accordance with the Contract Documents and that the Indemnified Parties are fully entitled to rely on the Contractor's performance of such obligation. The Contractor further agrees that any review, acceptance and/or Approval by the Department and/or others hereunder shall not relieve the Contractor of any of its obligations under the Contract Documents or in any way diminish its liability for performance of such obligations or its obligations to provide indemnities hereunder.

18.1.5 Indemnities in Connection with Third-Party Agreements

18.1.5.1 The Contractor is advised that certain Third-Party Agreements contain provisions for the Contractor to indemnify, save and hold harmless the counterparties, their employees and agents with respect to certain matters. The Contractor hereby agrees to and shall perform and comply with such provisions of the Third-Party Agreements for the benefit of the counterparties, their employees and agents.

18.1.5.2 The Contractor is also advised that certain Third-Party Agreements may include agreements by the Department to indemnify, defend and hold harmless the counterparties with respect to certain matters. The Contractor's obligation under this Section 18.1 shall automatically apply to require it to release, indemnify, defend and

hold harmless the counterparties, in addition to the Indemnified Parties, with respect to all such matters.

18.2 No Effect on Other Rights

The foregoing obligations shall not be construed to negate, abridge or reduce other rights or obligations, which would otherwise exist in favor of a party hereunder.

18.3 Comprehensive Environmental Response, Compensation, and Liability Act Agreement

Without limiting their generality, the indemnities set forth in Section 18.1.1.6 are intended to operate as agreements pursuant to Section 107(e) of the Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. § 9607(e), to insure, protect, hold harmless and indemnify the parties indemnified in said Section 18.1.1.6.

19 PARTNERING, CLAIMS FOR ADJUSTMENT AND DISPUTES

19.1 Partnering

The Department intends to encourage the use of an extensive partnering program among the Department, the Contractor, its Subcontractors and other stakeholders, where appropriate. The partnering relationship will be structured to draw on the strengths of each organization to identify and achieve reciprocal goals. The objectives include effective and efficient Project performance and completion on schedule, within budget and in accordance with the Contract Documents.

The Department anticipates a partnering effort involving the executive management, Project management, Project staff and others. The Contractor shall pay all costs associated with effectuating the partnership.

It is the intent of the parties that the dispute resolution provisions contained in this Section 19 shall apply only in the event that the normal Department-Contractor issue resolution efforts through partnering are not successful. The dispute resolution provisions set forth in Section 19.2 shall apply to all Disputes arising out of the Work that are not resolved by the parties through the partnering process, except as expressly provided to the contrary in the Contract Documents.

19.2 Dispute Resolution

19.2.1 General Provisions

All Disputes between the Contractor and the Department that are not resolved by the parties through the partnering process shall be resolved as provided by this Section 19.

Participation in and completion of this dispute resolution process is a condition precedent to an action or claim before the Arkansas State Claims Commission pursuant to A.C.A. §§ 19-10-200, et seq.

If a dispute arises relating to a Utility Agreement or the Utility Work thereunder, and the Utility Owner is a necessary or appropriate party to such dispute, then such dispute shall be resolved in the manner set forth in the applicable Utility Agreement, and the Contractor shall participate in such dispute resolution process as appropriate to resolve such dispute.

19.2.2 Continuation of Work

At all times during this Dispute resolution process or any subsequent administrative or court proceeding, and at all times during the pendency of any Dispute with any other project contractor, the Contractor and all Subcontractors shall proceed with the Work diligently, without delay, in accordance with all provisions of the Contract Documents.

19.2.3 Records Related to Dispute

Throughout the course of any work that is the subject of any Dispute, the Contractor shall keep complete records of the extra costs and time incurred related to the Dispute. The Contractor shall permit the Department access to these and all other records needed for evaluating the disputed issue(s) as determined by the Department. These records shall be retained for a period of not less than six years from the date of resolution of the Dispute.

19.2.4 Submission of Claim to Department Alternative Project Delivery Administrator

If the parties have been unable to resolve a Dispute through the partnering process, and the Contractor wishes to seek additional relief, the Contractor shall comply with the following procedures:

1. Within 14 Calendar Days (or as mutually agreed by the Department and the Contractor) after the date on which the Contractor and the Department first agree that the Dispute cannot be resolved through the partnering efforts of the parties, the Contractor shall submit a Claim to the Department, which shall be accompanied by all information required to be submitted with respect to an RCO as described in Section 13.2. Such information shall explain in detail, with supporting back-up documentation, the nature of the Claim and the claimed cost and schedule impacts as required by Section 13.2.
2. Concurrent with the submission of its Claim pursuant to Section 19.2.4.1, the Contractor also shall submit a sworn certification in a form acceptable to the Department, executed by an authorized representative with authority to bind the Contractor and with direct knowledge of the Dispute, certifying that: (i) the Claim is made in good faith and in accordance with the terms of the Contract Documents; (ii) the amount claimed accurately reflects the appropriate adjustments in the Construction Compensation and/or extension in the Completion Deadlines, and includes all delay claims and direct and indirect costs sought by the Contractor to the extent reasonably known at the time; (iii) the supporting cost and pricing data are accurate, current and complete to the extent reasonably known at the time; (iv) the factual basis

for the Claim is not falsely represented; and (v) except as expressly noted and justified by citation to legal authority, the amount claimed includes no attorneys' fees, interest or other generally non-compensable costs.

3. In the event any such Claim or protest package, supporting statement and the required certification is not filed within the time period set forth above and within the timing requirements of Section 13.2, the Contractor shall be deemed to have waived the right to pursue the Claim.

19.2.5 Decision by the Department Alternative Project Delivery Administrator

Within 60 Calendar Days after the Contractor's Claim, the Department Alternative Project Delivery Administrator shall provide a decision to both parties setting forth such person's conclusions regarding the Dispute. The Department Alternative Project Delivery Administrator shall base such person's findings and conclusions on the terms of the Contract Documents, established principles of law, statutes and regulations deemed by the Department Alternative Project Delivery Administrator to be applicable, and the facts and circumstances of the Dispute as found by the Department Alternative Project Delivery Administrator, and the information provided by the parties. The Department Alternative Project Delivery Administrator's decision shall include a statement of findings and conclusions upon all the material issues of fact, law, or sole discretion presented by the record, and the appropriate order, sanction, relief or demand of the Department Alternative Project Delivery Administrator.

The Department Alternative Project Delivery Administrator may, at its sole discretion, hold an informal hearing prior to issuing such person's decision. If the Department Alternative Project Delivery Administrator holds an informal meeting, the Contractor shall be given the opportunity to make a presentation, and the Department Alternative Project Delivery Administrator shall consider such presentation when reaching its decision.

19.2.6 Submission of Claim to the Department Assistant Chief Engineer – Program Delivery

Within 30 Calendar Days after issuance of the Department Alternative Project Delivery Administrator's decision, the Contractor may file an appeal of the decision with the Department Assistant Chief Engineer – Program Delivery. The Department Alternative Project Delivery Administrator shall provide the Department Assistant Chief Engineer - Program Delivery with, and the Department Assistant Chief Engineer - Program Delivery shall review and consider, all records and information considered by the Department Alternative Project Delivery Administrator in making such person's decision. The Department Assistant Chief Engineer - Program Delivery shall base such person's findings and conclusions on the terms of the Contract Documents, established principles of law, statutes and regulations deemed by the Department Assistant Chief Engineer - Program Delivery to be applicable, and the facts and circumstances of the

Dispute as found by the Department Assistant Chief Engineer - Program Delivery, and the information provided by the parties.

The Department Assistant Chief Engineer - Program Delivery may, at its sole discretion, hold an informal hearing prior to issuing such person's decision. If the Department Assistant Chief Engineer - Program Delivery holds an informal meeting, the Contractor shall be given the opportunity to make a presentation, and the Department Assistant Chief Engineer - Program Delivery shall consider such presentation when reaching its decision.

19.2.7 Decision by the Department Assistant Chief Engineer – Program Delivery

The Assistant Department Chief Engineer – Program Delivery will render a decision within 60 Calendar Days after the appeal has been filed. The Assistant Department Chief Engineer – Program Delivery's decision shall include a statement of findings and conclusions upon all the material issues of fact, law, or sole discretion presented by the record, and the appropriate order, sanction, relief or demand of the Assistant Department Chief Engineer – Program Delivery.

19.2.8 Submission of Claim to the Department Chief Engineer - Preconstruction

Within 30 Calendar Days after issuance of the Department Assistant Chief Engineer – Program Delivery's decision, the Contractor may file an appeal of the decision with the Department Chief Engineer - Preconstruction. The Department Assistant Chief Engineer - Program Delivery shall provide the Department Chief Engineer - Preconstruction with, and the Department Chief Engineer - Preconstruction shall review and consider, all records and information considered by the Department Assistant Chief Engineer – Program Delivery in making such person's decision. The Department Chief Engineer - Preconstruction shall base such person's findings and conclusions on the terms of the Contract Documents, established principles of law, statutes and regulations deemed by the Department Chief Engineer - Preconstruction to be applicable, and the facts and circumstances of the Dispute as found by the Department Chief Engineer - Preconstruction, and the information provided by the parties.

The Department Chief Engineer - Preconstruction may, at its sole discretion, hold an informal hearing prior to issuing such person's decision. If the Department Chief Engineer - Preconstruction holds an informal meeting, the Contractor shall be given the opportunity to make a presentation, and the Department Chief Engineer - Preconstruction shall consider such presentation when reaching its decision.

19.2.9 Decision by the Department Chief Engineer - Preconstruction

The Department Chief Engineer - Preconstruction will render a decision within 60 Calendar Days after the appeal has been filed. The Department Chief Engineer - Preconstruction's decision shall include a statement of findings and conclusions upon all the material issues of fact, law, or sole discretion presented by the record, and the appropriate order, sanction, relief or demand of the Department Chief Engineer - Preconstruction.

19.2.10 Appeal to the Arkansas Claims Commission

The decision of the Department Chief Engineer - Preconstruction shall constitute the Department's final decision, which may be appealed to the Arkansas Claims Commission within 60 Calendar Days of the issuance of the decision of the Department Chief Engineer - Preconstruction, in accordance with A.C.A. §§ 19-10-200, et seq.

20 ACCEPTANCE OF PROJECT

20.1 Substantial Completion

As a pre-requisite to Substantial Completion, the Contractor shall provide written notice to the Department representing that the following have occurred with respect to the Project, or, at the Department's sole election, with respect to a particular Construction Package:

1. The Department and the Contractor have agreed upon a Punch List of items to be completed for Final Acceptance;
2. The Contractor has completed all applicable Work (except for Punch List items, final cleanup and other items only included in the requirements for Final Acceptance);
3. The Contractor represents that the applicable Work in connection with Substantial Completion has been performed in accordance with the requirements of the Contract Documents;
4. The Contractor represents that the Project (or Construction Package, as applicable) may be operated safely without injury to any Person or damage to the Project (or portion thereof, as applicable) or any other property on or off the Site;
5. The Contractor represents that the Project (or portion thereof, as applicable) is ready to be opened for traffic and pedestrians, as applicable, and that no further work is required which would involve any lane or shoulder closure;
6. The Contractor has received all applicable Governmental Approvals required for the Project (or portion thereof, as applicable);
7. The Contractor has furnished to the Department certifications from the Project Manager, in form and substance satisfactory to the Department, certifying that the construction meets the requirements of the Contract Documents and that there are no outstanding Nonconforming Work or Punch List items, identified by the Contractor or the Department, as prerequisites to Substantial Completion; and
8. The Contractor has obtained all applicable Third-Party approvals relating to the Work (including Utility Owners as required under any applicable Utility Agreements), and all Third Parties have completed all work that involves obligations by the Contractor (including Utility Owners under any applicable Utility Agreements).

20.2 Notice of Substantial Completion

Within 10 Business Days following receipt of the Contractor's notice under Section 20.1, the Department will either (i) issue a Notice of Substantial Completion (which shall be backdated to the date the Contractor achieved Substantial Completion) or (ii) notify the Contractor of the Nonconforming Work or other prerequisites to Substantial Completion that have yet to be corrected or satisfied. If the Department provides notice to the Contractor pursuant to clause (ii), the Contractor shall provide written notification to the Department after it has corrected such Nonconforming Work and satisfied all such prerequisites, and the Department will verify that all prerequisites to Substantial Completion have been met and will issue a Notice of Substantial Completion.

20.3 Affidavit of Final Completion

Once the following have occurred, the Contractor shall provide the Department with an affidavit containing the statement and certifications described below (the "Affidavit of Final Completion"):

1. All Punch List items have been completed;
2. The Department has received all deliverables required under the Contract Documents for the Project (or portion thereof, as applicable);
3. All of the Contractor's and Subcontractors' personnel, supplies, equipment, waste materials, rubbish, and temporary facilities not incorporated into the Work have been removed from the Site, the 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;
4. The Contractor has furnished to the Department certifications from the Project Manager, in form and substance reasonably satisfactory to the Department, certifying that there are no outstanding Nonconforming Work or Punch List items; and
5. All of the Contractor's other obligations under the Contract Documents (other than obligations which by their nature are required to be performed after Final Acceptance as determined by the Department) have been satisfied in full or waived in writing by the Department.

The Affidavit of Final Completion shall include the following statement:

To the best of the Contractor's knowledge and belief, the Work under the CM-GC Agreement has been completed in accordance with the Contract Documents; no lawful debts for labor or materials are outstanding; all requests for funds for undisputed work under the CM-GC Agreement, including changes in the Work, and under all billings of whatsoever nature are accurate, complete and final and no additional compensation over and above the final payment will be requested or is due under the CM-GC Agreement or under any adjustment issued thereunder for said undisputed work; there are no outstanding claims, Liens or stop notices relating to the

Project, including claims by Utility Owners; there is no existing default by the Contractor under any Utility Agreement, and no event has occurred which, with the passing of time or giving of notice or both, would lead to a claim relating to the Work or event of default under any Utility Agreement; and upon receipt of final payment, the Contractor and Subcontractors acknowledge that the Department and any and all employees of the Department and their authorized representatives will thereby be released, discharged and acquitted from any and all claims or liability for additional sums on account of undisputed work performed under the CM-GC Agreement.

The Affidavit of Final Completion shall certify to the following:

1. All Work has been performed in accordance with the requirements of the Contract Documents;
1. The Contractor has resolved any claims made by Subcontractors, Suppliers, Utility Owners, laborers, and others against the Contractor, the Department, or the Project, except for those claims for which the Subcontractor has executed a release against the Department, the Project, and the Payment Bond;
2. The Contractor has provided complete lien releases from all Subcontractors and Suppliers in a form and with language Approved by the Department;
3. The Contractor has no reason to believe that any Person has a valid claim against the Contractor, the Department, or the Project which has not been communicated in writing by the Contractor to the Department as of the date of the certificate; and
4. All guarantees, warranties, the Payment Bond and the Performance Bond are in full force and effect.

If the Contractor is unable to provide the affidavit in the above form, the affidavit shall certify that all such outstanding matters are set forth in an attached list which shall describe the outstanding matters in such detail as may be requested by the Department. Such a list shall describe any actions being taken by the Contractor to contest any such matters by appropriate legal proceedings and shall provide a status report regarding the same including an estimate of the maximum payable with respect to each such matter. The Department shall be under no obligation to issue a Notice of Final Acceptance if there are any such outstanding matters.

20.4 Notice of Final Acceptance

Within 15 Business Days following receipt of the Affidavit of Final Completion, the Department will either (i) issue a Notice of Final Acceptance (which shall be backdated to the date the Contractor achieved Final Acceptance); or (ii) notify the Contractor of the Nonconforming Work, Punch List items or other prerequisites to Final Acceptance (other than obligations which by their nature are required to be performed after Final Acceptance as determined by the Department) that have yet to be corrected or

completed. If the Department provides notice to the Contractor pursuant to clause (ii), the Contractor shall provide written notification to the Department after it has corrected such Nonconforming Work and satisfied such Punch List items and other outstanding prerequisites to Final Acceptance, and the Department will verify that all prerequisites to Final Acceptance have been met and will issue a Notice of Final Acceptance.

20.5 Overpayments; No Relief from Continuing Obligations

Final Acceptance will not prevent the Department from correcting any measurement, estimate or certificate made before or after completion of the Work, or from recovering from the Contractor, the Surety(ies) or both, the amount of any overpayment sustained due to failure of the Contractor to fulfill the obligations under this CM-GC Agreement. A waiver on the part of the Department of any breach by the Contractor shall not be held to be a waiver of any other or subsequent breach. Final Acceptance shall not relieve the Contractor from any of its continuing obligations hereunder or constitute any assumption of liability by the Department.

20.6 Opening of Sections of Project to Traffic

20.6.1 No Waiver

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

20.7 Assignment of Causes of Action

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

21 WARRANTIES

21.1 Warranties by Contractor

21.1.1 Project Warranties

The Contractor warrants until Project Release that:

1. The construction Work shall be free of defects and shall be performed in a good and workmanlike manner in accordance with Good Industry Practice;
2. Materials and equipment furnished under the Contract Documents shall be of good quality and shall be new; and
3. The Work shall meet all of the requirements of the Contract Documents (collectively, the “Contractor’s Warranties”).

21.1.2 Corrective Work

Within seven Calendar Days of receipt by the Contractor of notice from the Department specifying a failure of any of the Work to satisfy the Contractor's Warranties, or of any Subcontractor representation, warranty, guarantee, or obligation which the Contractor is responsible to enforce, the Contractor and the Department shall mutually agree when and how the Contractor shall remedy such violation; provided, however, that in case of an emergency as indicated by the Department in its notice requiring immediate curative action, the Contractor and the Department shall agree on a remedy immediately upon notice by the Department of such emergency. If the Contractor does not use its best efforts to proceed to effectuate such remedy within the agreed time, or if the Contractor and the Department fail to reach such an agreement within such seven Calendar Day period (or immediately, in the case of emergency conditions), then the Department, after notice to the Contractor, shall have the right, but not the obligation, to perform or have performed by Third Parties the necessary remedy, and the costs thereof shall be borne by the Contractor. The Department may agree to accept Nonconforming Work in accordance with Section 5.10.2.

21.1.3 Costs of Correction of Work

The Contractor will bear all costs of correcting such rejected Work, including additional testing and inspections and other costs of the Department. The Contractor shall reimburse the Department and pay the Department's expenses made necessary thereby within 10 Calendar Days after the Contractor's receipt of invoice, therefore.

21.2 Subcontractor Warranties

21.2.1 Assignment

Without in any way derogating the Contractor's own representations and warranties (including the Warranties) and other obligations with respect to all of the Work, the Contractor shall obtain from all Subcontractors and cause to be extended to the Department, appropriate representations, warranties, guarantees and obligations with respect to the materials, workmanship, equipment, tools and supplies furnished by such Subcontractors, including all such representations, warranties, guarantees, and obligations required to be furnished by Subcontractors pursuant to the Contract Documents. All representations, warranties, guarantees, and obligations of Subcontractors shall: (i) be written so as to survive all the Department and the Contractor inspections, tests, and approvals; and (ii) run directly to and be enforceable by the Contractor and/or the Department and their respective successors and assigns. The Contractor hereby assigns to the Department all of the Contractor's rights and interest in all extended warranties.

21.3 No Limitation of Liability

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

21.4 Warranty Beneficiaries

In addition to benefiting the Department and its successors and assigns, the Warranties and Subcontractor warranties provided under this Section 21 shall inure to the benefit of, and shall be directly enforceable by, any local agencies and Utility Owners with respect to those portions of the Work owned or controlled by each such Person.

21.5 Remedies for Breach of Warranty

In addition to the Department's other rights and remedies hereunder, at law or in equity, the Contractor shall be liable for actual damages resulting from any breach of an express or implied warranty or any defect in the Work.

21.6 Disputes

Any disagreement between the Department and the Contractor relating to this Section 21 shall be subject to the Dispute resolution provisions contained in Section 19, provided that the Contractor shall proceed as directed by the Department pending resolution of the Dispute.

22 DOCUMENTS AND RECORDS

22.1 Project Records

22.1.1 Maintenance of Records

The Contractor shall maintain at the Project Manager's office in the State a complete set of all books, records and documents prepared or employed by the Contractor with respect to the Project.

22.1.2 Audit and Inspection Rights

The Department, FHWA, and the U.S. Comptroller General and their respective authorized representatives shall be afforded access to, and shall be permitted to audit and copy, the Contractor's and its Subcontractors' records, books, correspondence, instructions, drawings, receipts, subcontracts, purchase orders, vouchers, memoranda and other data relating to any Work on the Project for which the Contractor is being compensated on a time and materials basis, including Work charged based on unit prices and Provisional Sums. The Contractor and its Subcontractors shall preserve these records for a period of three years after final payment is made by FHWA to the Department for the Project, or for such longer period as may be required by applicable Legal Requirements. Such parties shall have the right to perform, or cause to be performed, an audit of the Contractor's accounting records during the term of this CM-GC Agreement or during the aforesaid three-year period (as may be extended by applicable Legal Requirements). The Contractor shall include a provision substantially similar to this Section 22.1.2 in its Subcontracts.

22.1.3 Claims Audits

All Claims filed against the Department shall be subject to audit at any time following the filing of the Claim. The audit may be performed by employees of the Department or by an auditor under contract with the Department. No notice is required before

commencing any audit before 60 Calendar Days after Final Acceptance. Thereafter, the Department shall provide 20 Calendar Days' notice to the Contractor, any Subcontractors or their respective agents before commencing an audit. The Contractor, Subcontractors or their agents shall provide adequate facilities, acceptable to the Department, for the audit during normal business hours. The Contractor, Subcontractors, and their agents shall cooperate with the auditors. Failure of the Contractor, Subcontractors, or their agents to maintain and retain sufficient records to allow the auditors to verify all or a portion of the Claim or to permit the auditors access to the books and records of the Contractor, Subcontractors, or their agents shall constitute a waiver of the claim and shall bar any recovery thereunder. At a minimum, the auditors shall have available to them the following documents:

1. Daily time sheets and supervisor's daily reports;
2. Union agreements;
3. Insurance, welfare, and benefits records;
4. Payroll registers;
5. Earnings records;
6. Payroll tax forms;
7. Material invoices and requisitions;
8. Material cost distribution worksheet;
9. Equipment records (list of company equipment, rates, etc.);
10. Subcontractors' (including Suppliers) and agents' invoices;
11. Subcontractors' and agents' payment certificates;
12. Canceled checks (payroll and Suppliers);
13. Job cost report;
14. Job payroll ledger;
15. General ledger;
16. Cash disbursements journal;
17. E-mail, letters, and correspondence;
18. Network servers, data storage devices, backup media;
19. All documents that relate to each and every Claim together with all documents that support the amount of damages as to each Claim; and
20. Work sheets used to prepare the Claim establishing the cost components for items of the Claim including labor, benefits and insurance, materials, equipment, Subcontractors, all documents that establish the time periods, individuals involved, the hours for the individuals and the rates for the individuals.

Full compliance by the Contractor with the provisions of this Section 22.1.4 is a contractual condition precedent to the Contractor's right to seek relief under Section 19. The Contractor represents and warrants the completeness and accuracy of all information it or its agents provides in connection with this Section 22.1.

The Contractor or a Subcontractor, as applicable, may request that any auditors or other Persons performing an audit or inspection pursuant to this Section 22.1 execute a reasonable non-disclosure agreement prior to conducting an audit or inspection of any documents, books, or records reasonably determined by, as applicable, the Contractor or Subcontractor to be confidential or proprietary.

22.2 Retention of Records Regarding Claims

All records which relate to Claims being processed or actions brought under the dispute resolution provisions hereof shall be retained and made available until such actions and Claims have been finally resolved. Records to be retained include all books and other evidence bearing on the Contractor's costs and expenses under the Contract Documents. The Contractor shall make these records and documents available for audit and inspection to the Department, at the Contractor's office, at all reasonable times, without charge, and shall allow such Persons to make copies of such documents (at no expense to the Contractor).

22.3 Arkansas Freedom of Information Act

22.3.1 Applicability of Law

The Contractor acknowledges and agrees that all records, documents, drawings, plans, specifications, and other materials in the Contractor's or the Department's possession directly related to the Project, including materials submitted to the Department by the Contractor, are subject to the provisions of the Arkansas Freedom of Information Act. If any of the materials submitted by the Contractor to the Department are clearly and prominently labeled trade secret, privileged information, or confidential commercial, financial, geological, or geophysical data by the Contractor, the Department shall provide notice to the Contractor of any request for the disclosure of such materials prior to making any such disclosure and give the Contractor an opportunity to assert, in writing and at its sole expense, a claimed exception under the Arkansas Freedom of Information Act or other applicable Legal Requirement within the time period specified in the notice issued by the Department and allowed under the Arkansas Freedom of Information Act.

22.3.2 Confidential Materials

Under no circumstances will the Department be responsible or liable to the Contractor or any other Person for the disclosure of any such labeled materials, whether the disclosure is required by law, by court order or occurs through inadvertence, mistake or negligence on the part of the Department.

22.3.3 Contractor to Defend Against Disclosure Request

In the event of litigation concerning the disclosure of any material submitted by the Contractor to the Department, the Department's sole involvement will be as a stakeholder retaining the material until otherwise ordered by a court, and the Contractor shall be fully responsible for otherwise prosecuting or defending any action concerning the materials at its sole expense and risk.

22.3.4 Cooperation with the Department Regarding Arkansas Freedom of Information Act Requests

In the event the Department receives an Arkansas Freedom of Information Act request for documents that are in the custody and control of the Contractor, the Contractor shall cooperate with the Department in responding to the request in a timely manner under the Arkansas Freedom of Information Act.

23 OWNERSHIP OF DOCUMENTS

23.1 Ownership

The copies and other tangible embodiments of the Design Documents and all related intellectual property rights are and shall remain the exclusive property of the Department. The Contractor shall use its best efforts to ensure all copies of the Design Documents are delivered or returned to the Department or suitably accounted for upon the Department's request or upon final payment, whichever is earlier. The Contractor may not use or allow the use of the Design Documents for any other purpose except for construction of the Project as outlined herein.

24 COORDINATION WITH OTHERS

24.1 Coordination with Other Contractors of the Department

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

If the Department exercises its right under Section 4.3 to contract with other contractors to perform outstanding Work on the Project, the Contractor shall coordinate with such other contractors in good faith to facilitate completion of the Project in a timely and effective manner.

24.2 Interference by Other Contractors of the Department

If the Contractor asserts that any of the Department's other contractors have hindered or interfered with the progress or completion of the Work, then the Contractor's sole

remedy shall be to seek recourse against such other contractors. The Contractor shall have the right to ask the Department Project Manager to resolve such dispute, provided the other contractor and its sureties have agreed to submit the dispute to the Department Project Manager, and provided that such proceeding shall be conducted at no cost to the Department.

25 MISCELLANEOUS PROVISIONS

25.1 Amendments

This CM-GC Agreement may be amended only by a written instrument duly executed by the parties or their respective successors or assigns. For clarity, such requirement applies to the Construction Package Amendment.

25.2 Waiver

25.2.1 No Waiver of Subsequent Rights

Either party's waiver of any breach or failure to enforce any of the terms, covenants, conditions, or other provisions of the Contract Documents at any time shall not in any way limit or waive that party's right thereafter to enforce or compel strict compliance with every term, covenant, condition, or other provision, any course of dealing or custom of the trade notwithstanding. Furthermore, if the parties make and implement any interpretation of the Contract Documents without documenting such interpretation by an instrument in writing signed by both parties, such interpretation and implementation thereof will not be binding in the event of any future Disputes. The consent by one party to any act by the other party requiring such consent shall not be deemed to render unnecessary the obtaining of consent to any subsequent act for which consent is required, regardless of whether similar to the act for which consent is given.

25.2.2 Custom Does not Constitute Waiver

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

25.2.3 Waivers Must be in Writing

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

25.3 Independent Contractor

The Contractor is an independent contractor, and nothing contained in the Contract Documents shall be construed as constituting any relationship with the Department other than that of Project owner and independent contractor. In no event shall the relationship between the Department and the Contractor be construed as creating any

relationship whatsoever between the Department and any of the Contractor's employees. Neither the Contractor nor any of its employees is or shall be deemed to be an employee of the Department. Except as otherwise specified in the Contract Documents, the Contractor has sole authority and responsibility to employ, discharge and otherwise control its employees and has complete and sole responsibility as a principal for its agents, for all Subcontractors and for all other Persons that the Contractor or any Subcontractor hires or engages to perform or assist in performing the Work.

25.4 Successors and Assigns

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

25.4.1 Assignment by the Department

The Department may assign all or part of its right, title, and interest in and to this CM-GC Agreement, including rights with respect to the surety bonds required hereunder and any other performance security provided, to any Person with the prior written approval of the Contractor.

25.4.2 Assignment by the Contractor

The Contractor may assign its rights to receive payment under the Contract Documents and in compliance with the requirements of the Contract Documents. The Contractor shall not otherwise sublet, transfer, assign, or dispose of any portion of this CM-GC Agreement, or delegate any of its duties hereunder, except with the Department's prior written approval, which approval shall be at the Department's sole discretion. The Contractor's assignment or delegation of any of its Work under the Contract Documents shall be ineffective to relieve the Contractor of its responsibility for the Work assigned or delegated, unless the Department, in its sole discretion, has Approved such relief from responsibility.

25.5 Designation of, and Cooperation with Representatives

25.5.1 Designation of Representatives

Identified below are representatives of the Department and the 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 25.11. 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 Contractor.

The Department's representative is the Alternative Project Delivery Administrator.

The Contractor's representative is [●].

25.5.2 The Department's Representative to Execute Change Orders

Notwithstanding Section 25.5.1, the Alternative Project Delivery Administrator is the only person who can execute Change Orders and other amendments to this CM-GC Agreement, including the Construction Package Amendment, on behalf of the Department. Such designation may be changed by a subsequent written notice delivered by the Department to the Contractor in accordance with Section 25.11.

25.5.3 Cooperation

The Contractor shall cooperate with the Department and all representatives of the Department.

25.6 Gratuities and Conflicts of Interest

Neither the Contractor nor any of its employees, agents and representatives shall offer or give to an officer, official, or employee of the Department or the State gifts, entertainment, payments, loans, or gratuities. The Contractor represents and warrants that it has not previously offered or given any gifts, entertainment, payments, loans, or gratuities in violation of such prohibitions.

25.7 Survival

The dispute resolution provisions contained in Section 19, the indemnification provisions contained in Section 18, the warranty provisions contained in Section 21, and all other provisions, which by their inherent character should survive termination of this CM-GC Agreement, shall survive the termination of this CM-GC Agreement.

25.8 Restrictions on Employment of Present and Former Department Employees

The Contractor shall not be permitted to employ or make an offer of employment, for regular or part-time work related to any Department projects during the term of this CM-GC Agreement, to any person who:

1. Is a present employee of the Department;
2. Is a former employee of the Department and at any time during the person's employment with the Department, the person participated personally and substantially through decision, approval, disapproval, recommendation, rendering of advice, investigation, or otherwise while an employee, on any particular matter pertaining to this CM-GC Agreement;
3. Is a former employee of the Department and within 12 months of employment cessation, and under this CM-GC Agreement, will knowingly act as a principal or as an agent in matters that were within this person's official responsibility;
4. Is a former employee of the Department and within 12 months of employment cessation will engage in selling or attempting to sell commodities or services, including technical or professional services, to the Department, unless the former employee's last annual salary with the Department did not exceed \$10,500; or

5. Is a former employee of the Department and at any time was terminated with cause or allowed to resign/retire in lieu of termination with cause.

Any individual or entity acting as a principal or agent on behalf of any person disqualified pursuant to the terms of this Section 25.8 shall not be permitted to perform any work related to any Department project for the Contractor during the term of this CM-GC Agreement.

This Section 25.8 is not intended to preclude a former employee from accepting employment with the Contractor solely because the Contractor has entered into this CM-GC Agreement.

25.9 Limitation on Third-Party Beneficiaries

It is not intended by any of the provisions of the Contract Documents to create any third-party beneficiary hereunder, or to authorize anyone not a party hereto to maintain a suit for personal injury or property damage pursuant to the terms or provisions hereof, except to the extent that specific provisions (such as the warranty and indemnity provisions) identify third parties and state that they are entitled to benefits hereunder. The duties, obligations, and responsibilities of the parties to the Contract Documents with respect to such third parties shall remain as imposed by law. 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 Contractor.

25.10 No Personal Liability

The Department's representatives are acting solely as agents and representatives of the Department when carrying out the provisions of or exercising the power or authority granted to them under the Contract Documents. They shall not be liable either personally or as employees of the Department for actions in their ordinary course of employment.

25.11 Notices and Communications

Notices and all other communications under the Contract Documents shall be in writing and shall be delivered through the Project's e-Builder website and other forms of written notice shall not be considered official notice. A notice shall be considered delivered and received when it is properly submitted to e-Builder.

25.12 Further Assurances

The Contractor shall promptly execute and deliver to the Department all such instruments and other documents and assurances as are reasonably requested by the Department to further evidence the obligations of the Contractor hereunder, including assurances regarding assignments of Subcontractors contained herein.

25.13 Severability

If any clause, provision, Section or part of this CM-GC Agreement is ruled invalid under Section 19 or otherwise by a court of competent jurisdiction, then the parties shall: (i) promptly meet and negotiate a substitute for such clause, provision, Section

or part, which shall, to the greatest extent legally permissible, effect the original intent of the parties, including an equitable adjustment to the Construction Compensation and Completion Deadline(s) to account for any change in the Work resulting from such invalidated portion; and (ii) if necessary or desirable, apply to the court or other decision maker (as applicable) which declared such invalidity for an interpretation of the invalidated portion to guide the negotiations. The invalidity or unenforceability of any such clause, provision, Section or part shall not affect the validity or enforceability of the balance of this CM-GC Agreement, which shall be construed and enforced as if this CM-GC Agreement did not contain such invalid or unenforceable clause, provision, Section or part.

25.14 Headings

The captions of the sections of the Contract Documents are for convenience only and shall not be deemed part of this CM-GC Agreement or considered in construing this CM-GC Agreement.

25.15 Governing Law

The Contract Documents shall be governed by and construed in accordance with the law of the State of Arkansas.

25.16 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.

25.17 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.

IN WITNESS WHEREOF, the parties have executed this CM-GC Agreement as of the date and year first set forth above.

[INSERT CONTRACTOR]

ARKANSAS STATE HIGHWAY
COMMISSION

By: _____
Signature

By: _____
Director of Highways and Transportation

Typed or Printed Name

Date

Date

EXHIBIT A

ACRONYMS, DEFINITIONS, AND SUBMITTALS

As used in the CM-GC Agreement to which this Exhibit is attached, and in the other Contract Documents (unless otherwise specified therein), the following acronyms shall have the meanings set forth below.

ACRONYMS	
Abbreviation	Title or Description
CFR	Code of Federal Regulations
DBE	Disadvantaged Business Enterprise
EEO	Equal Employment Opportunity
EPA	(U.S.) Environmental Protection Agency
FAR	Federal Acquisition Regulation
FEMA	Federal Emergency Management Agency
FHWA	Federal Highway Administration
ICE	Independent cost estimator retained by the Department
ISO	International Organization for Standards
NEPA	National Environmental Policy Act (42 U.S.C. §§ 4321 et seq.)
OPCC	Opinion of Probable Construction Cost
OSHA	United States Occupational Safety and Health Administration
RCO	Request for Change Order
RCP	Request for Change Proposal
RFC	Released for Construction
RFP	Request for Proposals
ROW	Right of Way
USACE	United States Army Corps of Engineers
U.S.C.	United States Code
USDOT	United States Department of Transportation

As used in the CM-GC Agreement to which this Exhibit is attached, and in the other Contract Documents (unless otherwise specified therein), the following terms shall have the meanings set forth below.

DEFINITIONS	
Term	Meaning
Actual Cost	The Contractor's direct cost to provide labor, material, equipment (owned or invoiced rental), and administrative overhead necessary for the Work; excludes profit.
Affidavit of Final Completion	The meaning set forth in Section 20.3.
Affiliate	<p>(1) Any Person that directly or indirectly through one or more intermediaries controls, or is controlled by, or is under common control with the: (i) Contractor or (ii) any Principal Participant; and</p> <p>(2) Any Person for which 10% or more of the equity interest in such Person is held directly or indirectly, beneficially, or of record by the: (i) Contractor, (ii) any Principal Participant, or (iii) any Affiliate of the Contractor under Part (1) of this definition.</p> <p>For purposes of this definition, the term "control" means the possession, directly or indirectly, of the power to cause the direction of the management of a Person, whether through voting securities, by contract, family relationship, or otherwise.</p>
Applicable Standards	All standards, guidelines, manuals, policies, and other Department-published requirements that govern the planning, design, and construction of projects delivered by the Department, subject to exceptions, deviations, or variances included in the Agreement or the Construction Package Amendment. Applicable Standards shall not be used as a basis of payment or the assessment of damages and do not include Division 100 of the Arkansas State Highway and Transportation Department's 2014 Standard Specifications for Highway Construction, unless specifically identified in the Contract Documents.
Application for Final Payment	The application described in Section 11.6.
Approve or Approval	The meaning set forth in Section 1.5.1.
Arkansas State Highway and Transportation Department	The Department.
Business Day	A day that the Department is open for business.
Calendar Day	Each and every day shown on the calendar, including Saturdays and Sundays, beginning and ending at midnight.
Change Order	The meaning set forth in Sections 12 and 13.
Claim	A request by the Contractor for: (i) a time extension which is disputed by the Department, or (ii) payment of money or damages arising from work done by or on behalf of the Contractor in connection with the CM-GC Agreement which is disputed by the Department. A claim will cease to be a Claim upon resolution thereof, including resolution by delivery of a Change Order or CM-GC Agreement amendment signed by all parties.
CM-GC Agreement	The CM-GC Agreement executed by the Department and the Contractor (to which this Exhibit A is attached), and any and all amendments thereto.
Completion Deadline	The Substantial Completion Deadline, the Final Acceptance Deadline, and any other milestone deadlines agreed to by the Department and the Contractor in the Construction Package Amendment.
Construction Compensation	The meaning set forth in Section 4.2.2.2.
Construction Package	The meaning set forth in Section 4.1.1.

Construction Package Amendment	An amendment establishing the Construction Package Price for all or a portion of the Construction Phase, which will serve as a notice-to-proceed for the applicable portion of the Construction Phase, and satisfying the requirements set forth in Section 4.2.2.3.
Construction Package Amendment Proposal	The meaning set forth in Section 4.2.2.1.
Construction Package Price	The meaning set forth in Section 4.2.2.2.
Construction Package Schedule	The initial schedule with respect to any Construction Package in the corresponding Construction Package Amendment, and any subsequent modified schedule Approved by the Department.
Construction Phase	The Project phase beginning and ending as set forth in Section 4.1.1 during which all Construction Work will be completed.
Construction Work	All Work other than the Preconstruction Services.
Contract Documents	The meaning set forth in Section 1.2.
Contractor	The meaning set forth in the first page of the CM-GC Agreement.
Contractor-Related Entities	Contractor, Principal Participants, Subcontractors, their employees, agents and officers and all other Persons for whom Contractor may be legally or contractually responsible.
Critical Path	The longest path of activities, in terms of time, of logically connected activities on a relevant Construction Package Schedule ending with Final Acceptance. Any delay along a Critical Path will impact the timing of Substantial Completion or Final Acceptance.
Daily Road User Costs	The meaning set forth in Section 17.1.3.
day	A Calendar Day.
DBE Performance Plan	The plan provided by the Contractor and Approved by the Department as described in Exhibit J.
Delay Charges	Means Liquidated Damages and Daily Road User Costs.
Department	The Arkansas Department of Transportation (formerly known as the Arkansas State Highway and Transportation Department), acting directly or through a representative authorized in writing, who is responsible for administrative supervision of the Project, whichever the context requires.
Department Alternative Project Delivery Administrator	Tom Fisher.
Department Assistant Chief Engineer – Program Delivery	Keli Wylie.
Department Chief Engineer – Preconstruction	Jared Wiley.
Department Project Manager	Colton Cowles.
Department-Directed Changes	Any changes in the Work (including changes in the standards applicable to the Work) that the Department has directed the Contractor to perform as described in Section 13.
Design Documents	All drawings (including plans, elevations, sections, details, and diagrams), specifications, 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 shop drawings, the Released for Construction Documents and the Final Design.
Differing Site Conditions	A condition that (i) is a subsurface or latent condition encountered at the exact boring holes identified in the geotechnical reports produced as part of the Preconstruction Services, and (ii) differs materially from those conditions indicated in in any of the reports or documents provided to the Contractor by the Department. The foregoing definition specifically excludes (w) Utility facilities,

	(x) Hazardous Materials, (y) non-contaminated water and (z) any other conditions that would otherwise constitute a Relief Event.
Disadvantaged Business Enterprise or DBE	A contracting firm certified to participate in the U.S. Department of Transportation financial assistance programs as a DBE by the Department pursuant to the “Arkansas Unified Disadvantaged Business Enterprise Certification Program.”
Dispute	Any written request for relief in any form arising out of or relating to the Contract Documents or the Project, including all contract claims, statutory claims, equitable claims, claims for extension of time, disagreements resulting from a change, a delay, a Change Order, any other written orders, or oral orders from the Department, including any direction, instruction, interpretation, or determination by the Department, but excluding claims that are not actionable against the Department by the Contractor on its own behalf or on behalf of any of its Subcontractors, claims arising in tort, claims relating to the scope or applicability of indemnities provided under the Contract Documents, claims relating to decisions within the sole discretion of the Department, claims for injunctive relief, and claims against insurance companies.
Effective Date	The date of execution of the CM-GC Agreement by the Department.
Engineer	A professional engineer registered with the Arkansas State Board of Licensure for Professional Engineers and Professional Surveyors who is responsible for engineering and administrative supervision of the Project on behalf of the Contractor, who is either an employee of the Contractor or a Contractor-Related Entity.
Engineer of Record	An engineer licensed in the State responsible for the final design of an element of the Work for the Contractor. The Engineer of Record is responsible to seal and sign the design plans in accordance with the requirements of the State Board.
Environmental Approval	All Governmental Approvals arising from or required by any Environmental Law in connection with the Project, including the NEPA environmental documents and environmental decision documents.
Environmental Laws	All Legal Requirements now or hereafter in effect relating to the environment or to emissions, discharges, releases, or threatened releases of Hazardous Materials into the environment, including into the air, surface water or groundwater, or onto land, or relating to the manufacture, processing, distribution, use, treatment, storage, disposal, transport, or handling of Hazardous Materials or otherwise relating to the protection of public health, public welfare, or the natural environment (including protection of nonhuman forms of life, land, surface water, groundwater, and air), including the statutes listed in the definition of Hazardous Materials; the National Environmental Policy Act, 42 U.S.C. §§ 4321 et seq.; the Occupational Safety and Health Act, as amended, 29 U.S.C. §§ 651 et seq.; and the Hazardous Materials Transportation Act, 49 U.S.C. §§ 5101 et seq.; the Endangered Species Act, 16 U.S.C. §§ 1531 et seq.; the Clean Water Act, 33 U.S.C. §§ 1251 et seq.; the Safe Drinking Water Act, 42 U.S.C. §§ 300f et seq.; the Migratory Bird Treaty Act, 16 U.S.C. §§ 703 et seq.; and the Eagle Protection Act, 16 U.S.C. § 668, each as amended.
Error	An error, omission or other defect.
Event of Default	A default as described in Section 16.1.1, following notice and opportunity to cure to the extent permitted by Section 16.1.2 and issuance by the Department of notice that an Event of Default has occurred.
Federal Acquisition Regulation	The Federal Acquisition Regulation contained in 48 CFR § 1.101 et seq. and all related regulations that implement or supplement the FAR.
Federal Requirements	All Legal Requirements applicable to work financed with federal funds and the provisions required to be included in FHWA-assisted contracts, including the provisions set forth in Exhibit H.
Final Acceptance	Acceptance of the Project as described in Section 20.4.

Final Acceptance Deadline	The date specified as such in the relevant Construction Package Schedule, as the same may be updated with the Approval of the Department.
Final Design	Depending on the context: (i) the final complete version of the construction drawings prepared by the Contractor, (ii) the design concepts set forth in the Design Documents, which shall be substantially consistent with the Contract Documents or (iii) the process of development of the Design Documents which includes Preliminary Design Submittals, Final Design Submittals and Released for Construction Documents.
Force Majeure Event	Any of the following acts, events, conditions or occurrences to the extent that the same are beyond the Contractor's reasonable control, which could not have been either foreseen or avoided by the exercise of due diligence, and which has an adverse effect on the Contractor's ability to perform its obligations hereunder: <ol style="list-style-type: none"> 1. Fire; 2. Hurricane or tornado; 3. Any epidemic or quarantine restrictions occurring within the vicinity of the Project and unknown as of the date of this CM-GC Agreement; 4. A blockade or freight embargos; 5. War, whether foreign or domestic; and 6. Acts of the public enemy.
Good Industry Practice	The exercise of the degree of skill, prudence and foresight which would reasonably and ordinarily be expected from a skilled and experienced contractor seeking in good faith to comply with its contractual obligations engaged in the same type of undertaking under circumstances and conditions similar to those within the same geographic area as the Project and which complies with applicable Legal Requirements. Good Industry Practice includes, without limitation, taking reasonable steps to assure sufficient personnel are employed and available to perform the work and such personnel are adequately skilled, experienced and trained to complete the Work.
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 construct the Project.
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 of Arkansas and agencies and subdivisions thereof, other than the Department.

Hazardous Materials	<p>Any of the following:</p> <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 the Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. §§ 9601 et seq.; the Hazardous Materials Transportation Act, 49 U.S.C. §§ 5101 et seq.; the Resource Conservation and Recovery Act, 42 U.S.C. §§ 6901 et seq. (“RCRA”); the Toxic Substances Control Act, 15 U.S.C. §§ 2601 et seq.; the Clean Water Act, 33 U.S.C. §§ 1251 et seq.; the Clean Air Act, 42 U.S.C. §§ 7401 et seq.; all as amended, or any other federal, state or local statute, law, ordinance, resolution, code, rule, regulation, order or decree regulating, relating to, or imposing liability or standards of conduct concerning, any hazardous, toxic or dangerous waste, substance or material, as now or at any time hereafter in effect; 2. Any substance, product, waste or other material of any nature whatsoever which may give rise to liability under any of the above statutes or under any statutory or common law theory based on negligence, trespass, intentional tort, nuisance or strict liability or under any reported decisions of a state or federal court; 3. Petroleum or crude oil excluding de minimis amounts and excluding petroleum and petroleum products contained within regularly operated motor vehicles; and 4. Asbestos or asbestos-containing materials in structures and or other improvements on or in the Site (other than mineral asbestos naturally occurring in the ground).
Hazardous Materials Report	Any hazardous materials report included with any Construction Package Amendment.
Holidays	Any day the Department is closed for a holiday.
ICE	The independent cost estimator retained by the Department.
Including, or including, includes, included	All references in the Contract Documents to “Including”, “includes” or “included” shall mean “including, but not limited to”.
Indemnified Parties	The meaning set forth in Section 18.1.
Intellectual Property Rights	All patents, copyrights, trademarks, service marks, trade secrets and all similar and related intellectual property rights protected under any Legal Requirement.
Key Personnel	The persons identified on Exhibit C as key personnel, subject to revision in accordance with the Contract Documents.
Legal Requirements	All applicable federal, state and local laws, codes, ordinances, rules, regulations, judgments, decrees, directives, guidelines, policy requirements, orders and decrees of any Governmental Person having jurisdiction over the Project or Site, the practices involved in the Project or Site, any Work, or any Utility Work being performed by a Utility Owner. Legal Requirements also includes Applicable Standards.
Lien	Any pledge, lien, security interest, mortgage, deed of trust or other charge or encumbrance or attempt to make such an encumbrance of any kind, or any other type of preferential arrangement (including any agreement to give any of the foregoing, any conditional sale or other title retention agreement, any lease in the nature of a security instrument, and the filing of or agreement to file any financing statement or other instrument intended to perfect a security interest).
Liquidated Damages	The charges described in Section 17.1.2.
Materials	All components required for use in the construction of the Project.

New Environmental Approval	Any of the following: 1. A new Environmental Approval; and 2. A renewal, revision, modification or amendment to one or more of the Environmental Approvals.
Nonconforming Work	Work performed that does not meet the requirements of the Contract Documents.
No-Cost Change Order	The meaning set forth in Section 13.8.
Notice of Final Acceptance	The notice delivered to the Contractor under Section 20.4 stating that final Department acceptance of the Project has occurred.
Notice of Substantial Completion	The notice delivered to the Contractor under Section 20.2 stating that Substantial Completion of the Project has occurred.
Notice of Termination	A notice issued by the Department or the Contractor to terminate the CM-GC Agreement pursuant to Section 15.
OJT Requirements	The on-the-job training program requirements set forth in Exhibit I.
Payment Bond	The payment bond described in Section 8.2.
Performance Bond	The performance bond described in Section 8.1.
Person	Any individual, corporation, company, voluntary association, partnership, trust, unincorporated organization, or Governmental Person, including the Department.
Preconstruction Phase	The Project phase beginning and ending as set forth in Section 4.1.1 during which Preconstruction Services will be performed.
Preconstruction Phase Compensation	The meaning set forth in Section 11.1.
Preconstruction Schedule	The schedule with respect to the Preconstruction Services included in Exhibit B, and any subsequent modified schedule Approved by the Department.
Preconstruction Services	All work described in Exhibit B and any other work necessary in connection with the preparation and finalization of the Construction Package Amendment.
Preliminary Design Submittal	All non-final Design Documents.
Principal Participant	<i>[If Contractor is a team, list both team members; otherwise, insert "None".]</i>
Project	The [insert Project name], as described by the Contract Documents.
Project Information Documents	Any Project studies or other related information prepared by the Contractor and/or the Department as part of the Preconstruction Services.
Project Release	The point at which Final Acceptance has been achieved and the Department has undertaken its final audit, accounting and reconciliation of all Project costs and has determined that the Project is accepted and released.
Project Schedule	The Preconstruction Schedule, the applicable Construction Package Schedule, or both the Preconstruction Schedule and the Construction Package Schedule, as the context may require.
Project Team	The meaning set forth in Exhibit B-1.
Provisional Sum	A fixed sum for a specific line item of Work that is included as an allowance amount in the Construction Package Price upon agreement by the 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 the Construction Package Price. Where appropriate, Provisional Sums may include a designation of unit pricing and the estimated number of units making up the Provisional Sums. The Contractor and the Department shall agree on all Provisional Sums as part of the Construction Package Amendment. Whenever actual costs for a Provisional Sum item are more or less than the applicable Provisional Sum, the Construction Package Price will be adjusted accordingly by Change Order. The amount of the Change Order shall reflect the difference between actual costs and the Provisional Sum amount set forth in the Construction Package Amendment. Where unit prices are specified in a Provisional Sum, such unit pricing shall be used to calculate the amount of any additive or deductive Change Order, as appropriate.

Proposal or Proposal Documents	Those documents constituting the Contractor's proposal in response to the RFP, including any supplements to proposals as may have been requested by the Department.
Proposer	The meaning set forth in Recital C.
Punch List	The list of Work items with respect to the Project which remain to be completed after achievement of Substantial Completion, 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.
Quality Control	The activities performed by the Contractor, producer or manufacturer to ensure and document that a product meets the requirements of the Contract Documents. Activities may include checking, materials handling and construction procedures, calibrations and maintenance of equipment, shop drawing review, document control, production process control, and any sampling, testing, and inspection done for these purposes.
Record Drawings	Documents that depict the final completed Project, including all changes from RFC Documents and data showing all items such as the electrical systems, drainage systems, lighting systems, underground utilities, traffic controls, intelligent transportation system, signing placement, highway alignment and grade revisions, bridge detail changes, bridge settlement reference elevations and joint seal measurements, typical sections, cross sections, and all other relevant data, including any operations and maintenance manuals for mechanical and electrical systems.
Released for Construction Documents	All drawings, specifications, revisions thereto, and any other items necessary to construct the Work, signed and sealed by the Engineer of Record.
Relief Event	The meaning set forth in Sections 12.1.1.
Relief Event Notice	The meaning set forth in Section 12.2.1.
Relocation or Relocate	As related to Utilities, each Removal, transfer of location, Abandonment and/or Protection of Existing Utilities as necessary to ensure their continued safe operation and structural integrity (including provision of temporary services as necessary) of any and all Utilities that is necessary or advisable in order to accommodate or permit construction of the Project.
Removal	Work necessary to remove any Utilities for which leaving the Utilities in-place is not feasible or not permitted, or which the Contractor otherwise proposes to be removed in order to accommodate or permit construction of the Project, regardless of whether or not replacements for such Utilities are being installed in other locations.
Request for Change Order	A Contractor initiated request for a change order made pursuant to Sections 12 and 13.
Request for Change Proposal	A proposal issued by the Department under Section 13.
Request for Progress Payment	A request made by Contractor for payment pursuant to Section 11.4.1.
Request for Proposals	The Request for Proposals for the Project issued by the Department on September 28, 2018, including all addenda thereto.
Review and Comment	The meaning set forth in Section 1.7.2.
Right of Way	The land use rights already owned or to be acquired by the Department to make up the Site.
Risk Register	The meaning set forth in Section 4.1.2.1.
Safety Plan	The Contractor's safety plan for the Project, which shall comply with all applicable Legal Requirements.
Site	The parcels of ROW upon which any active Construction Work for all applicable Construction Packages are to be constructed and installed as well as all other areas in the vicinity used by the Contractor for Construction Work.

Standard Specifications	The 2014 edition of the Standard Specifications for Highway Construction for the Arkansas State Highway and Transportation Department, now Arkansas Department of Transportation.
State	The State of Arkansas, acting by and through the Department.
State Board	The Arkansas Board of Licensure for Professional Engineers that has the responsibility to regulate, license, and monitor the practices of Professional Engineers in the State.
Structures	Bridges, culverts, catch basins, drop inlets, retaining walls, cribbing, manholes, endwalls, buildings, storm drains, service pipes, underdrains, foundation drains, fences, guardrail, signs, end sections, traffic signals, light standards, and other features that may be encountered in the Work and not otherwise classified.
Subcontract	Any subcontract to perform any part of the Work or provide any materials, equipment or supplies for any part of the Work between the Contractor and a Subcontractor, or between any Subcontractor and its lower tier Subcontractor, at any tier.
Subcontractor or Subconsultant	Any Person with whom the Contractor has entered into any Subcontract, and any other Person with whom any Subcontractor has further subcontracted any part of the Work, at any tier.
Substantial Completion	Achievement of all Work necessary to meet the Substantial Completion Deadline as described in Section 20.1.
Substantial Completion Deadline	The date specified as such in the relevant Construction Package Schedule, as the same may be updated with the Approval of the Department.
Substructure	That part of a bridge structure below the bearings of simple and continuous spans; all buttresses and piers below the skewbacks of arches; all parts of rigid frames, or integral bents below tops of footings or tops of caissons; and also, all parts of the abutments, backwalls and wingwalls, except handrails and handrail posts.
Superstructure	All parts of a bridge structure not defined as Substructure.
Supplier	Any Person other than employees of the Contractor not performing work at the Site that supplies machinery, equipment, materials or systems to the Contractor or any Subcontractor in connection with the performance of the Work; Persons who merely transport, pick up, deliver, or carry materials, personnel, parts, or equipment or any other items or persons to or from the Site shall not be deemed to be performing Work at the Site.
Surety	A corporate body duly authorized to do business in the State of Arkansas, and which has issued one or more of the Payment and Performance Bonds.
Test	The procedure and method of acquiring and recording physical data and comparing it to set standards and submitting a statement to such conditions or operations as will lead to its acceptance or rejection (deficiency, defect, Nonconforming Work) of the item.
Third Party	Any Governmental Person, railroad, property owner or other third party having regulatory jurisdiction or property rights over or in any aspect of the Project, Work or the Right of Way.
Third-Party Agreement	An agreement between the Department and any Third Party related to the Project.
Threatened or Endangered Species	Any species listed by the United States Fish and Wildlife Service as threatened or endangered pursuant to the Endangered Species Act, as amended, 16 U.S.C. §§ 1531 et seq.

United States Department of Transportation (USDOT)	United States Department of Transportation or any executive department or agency thereof, or as the context may require, the USDOT Secretary or other person who may at the time be acting in the capacity of Secretary, or an authorized representative or any other person otherwise authorized to perform the functions to be performed hereunder by USDOT.
Unknown Archaeological Conditions	Any human remains, artifacts, and/or other items of historical, archaeological or geological significance within the Right of Way to the extent that the existence of such item was not disclosed in any of the reports or documents provided to the Contractor by the Department.
Utility or utility	A privately, publicly, or cooperatively owned line, facility and/or system for producing, transmitting or distributing communications, power, cable television, electricity, light, heat, gas, oil, crude products, water, steam, waste, and other products that directly or indirectly serve the public. The necessary appurtenances to each utility facility shall be considered part of such utility. Without limitation, any service line connecting directly to a utility shall be considered an appurtenance to that utility, regardless of the ownership of such service line. The term "Utility" shall specifically exclude privately owned irrigation facilities, existing storm water facilities, traffic signals and street lights, without regard to whether or not such items are included in the definition of "Utility" in the Utility Agreements.
Utility Agreement	An agreement with a Utility Owner that impacts the Project.
Utility Owner	The owner or operator of any Utility.
Work	Depending upon the placement and context of its use, Work shall mean one or more of the Preconstruction Services, Construction Work or all of the Work. In general, Work shall include, in totality and in each respective Phase, as applicable, all duties and services to be furnished and provided by Contractor as required by the Contract Documents, including the administrative, quality control, quality assurance, Relocation, procurement, legal, professional, manufacturing, supply, installation, construction, supervision, management, testing, verification, labor, Materials, equipment, documentation and other efforts necessary or appropriate to achieve Final Acceptance except for those efforts which the Contract Documents specify will be performed by the Department or other Persons. In certain cases, the term is also used to mean the products of the Work.

EXHIBIT B

PRECONSTRUCTION SERVICES

GENERAL PRECONSTRUCTION SERVICES

[Note to Draft: Services identified in brackets below are optional and at the sole discretion of the Department. If the Department elects to include any or all of these services as part of the CM-GC Agreement, the relevant sections may be included with appropriate adjustments for the project.]

[PRECONSTRUCTION PHASE UTILITY SERVICES]

[PRECONSTRUCTION PHASE RIGHT OF WAY SERVICES]

SECTION 1. GENERAL PRECONSTRUCTION SERVICES

I. INFORMATION AND SERVICES TO BE PROVIDED BY THE CONTRACTOR

The Contractor shall collaborate with the Department and others contracted by the Department for the Project during the Preconstruction Phase. The Contractor shall perform the services generally described in the following table.

DESIGN RELATED	ADMINISTRATION RELATED
Validate design	Coordinate with 3rd party stakeholders
Provide input on design	Attend public meetings
Perform constructability reviews	Perform subcontractor bid packaging
Perform operability reviews	Prequalify subcontractors
Perform regulatory reviews	Assist in right-of-way acquisition
Conduct market surveys related to design decisions	Assist and advise with permitting actions
Verify/take-off quantities	Study labor availability/conditions
Assist in shaping scope of work	Prepare sustainability certification application
COST RELATED	SCHEDULE RELATED
Validate consultant estimates	Validate existing project schedules
Prepare project estimates	Prepare and manage project schedules
Perform cost engineering reviews	Develop sequence of design work
Identify long-lead bid packages that may impact schedule	Develop construction phasing
Perform life cycle cost analysis	Provide schedule risk analysis/control
Participate in value engineering analysis	PRECONSTRUCTION RELATED FIELD WORK
Perform material cost forecasting	Advise and coordinate utility relocation
Provide cost risk analysis	Perform subsurface utility exploration, including potholing
Provide cash flow projections/cost control	Perform right of way demolition
Advise on project affordability/budget and potential scope refinements to mitigate	Perform preliminary surveying

The table below lists the subcontractors for the project and their anticipated scopes of work:

Subcontractor	Scope of Work

The Contractor shall:

1. Provide Key Personnel and associated staff to consult with, advise, assist, and provide recommendations to the Department and the design team on all aspects of the planning, design, and proposed construction, as requested by the Department.
2. Participate in various meetings and workshops as further described in Exhibit B-1:
 - a) Initial Project workshop;
 - b) Initial approach to cost meeting;
 - c) Risk and opportunity workshop; and
 - d) OPCC Meetings.
3. Participate in recurring design coordination meetings with the Department and others contracted by the Department for the Project. Design coordination meetings are anticipated to be held bi-weekly but may be held more frequently at the Department's preference.
4. Provide written comments and recommendations to the Department through the use of oversight and constructability reviews related to various elements of the Project, including:
 - a) input on staging, sequencing, equipment storage, detour routes, traffic control, storm water management, permitting, sustainability, accelerated bridge construction techniques, evaluation of bridge and retaining wall types, and materials that may be cost-effectively recycled during construction;
 - b) identification of any long lead items (e.g., equipment, materials, etc.) that may cause delay;
 - c) identification of conflicts and deficiencies in the available design information (e.g., conceptual drawings) being prepared by the Department and others contracted by the Department.
5. Participate in constructability, material, equipment and labor availability reviews with the Department and others contracted with the Department for the Project. These reviews will focus on identifying revisions to improve clarity for bidding, identifying potential design revisions that would reduce construction costs, and identifying elements to potentially create a more efficient schedule and reduce the overall duration of the Project.

6. Provide ongoing professional support during reviews and meetings related to right of way elements of the Project. Examine specific design variables and provide professional guidance intended to reduce investment in design time by providing cost benefit analysis for right of way versus construction cost. Services shall include the following:
 - a) Provide feedback regarding right of way risks, including impacts to cost and schedule)'
 - b) Identify long acquisition lead times that could impact the Project Schedule;
 - c) Identify adverse or unnecessary right of way impacts attributable to available design information (e.g., conceptual drawings);
 - d) Identify and document right of way cost savings and schedule impacts attributable to design innovations within the innovation log; and
 - e) Attend public involvement meetings to support right of way related issues.
7. Provide ongoing professional opinions and support during reviews and meetings relating to utility costs, risk identification, risk mitigation strategies, and schedule impacts during the Preconstruction Phase which include:
 - a) Providing support to the Project Team regarding subsurface utility locations;
 - b) Coordinating the limits of final utility location services to be performed; and
 - c) Providing general technical support regarding management, coordination and execution of utility relocations.
8. Support the development and maintenance of the Risk Register, including:
 - a) Participation in risk workshops, including the Risk and Opportunity Workshop described in Exhibit B-1, with the Department, relevant third parties, and others contracted by the Department for the Project to develop and maintain the Risk Register;
 - b) Identification of potential risks and assessment of the probable impact to cost and schedule related to those risks; and
 - c) Development of mitigation strategies related to Risk Register Events.
9. Develop a cost model using an open book format consistent with discussions during the "initial approach to cost meeting" set forth in Exhibit B-1. The Contractor shall allow the Department to examine the cost model. The cost model shall include:
 - a) Unit prices and quantity take-offs;
 - b) Material costs, equipment costs, labor costs, hourly labor rates, crew sizes, shifts per day, hours per shifts (labor rates shall include employee benefits, payroll taxes and other payroll burdens);
 - c) Risk assumptions and assignment of risks;

- d) Production rates, transportation, and other facilities and services necessary for the proper execution of the work;
 - e) Copies of quotations from subcontractors and suppliers; and
 - f) Field indirect costs, bonds, taxes and insurance.
10. Provide the Department with a written narrative regarding the cost model that identifies the means, methods, assumptions, and risks that were used to price the work.
11. Participate in design milestone review meetings that will take place at milestones determined by the Department. The design milestone review meetings will generally occur at the following approximate design development milestones: 30%, 60% and 90%.
- a) For the initial design milestone review meeting, the Contractor shall provide the Department with the initial version of the Opinion of Probable Construction Cost (OPCC) estimate (prepared as described in Exhibit B-1), the cost model, cost model narrative, Project Schedule and recommendations related to the current Risk Register.
 - b) For subsequent design milestone review meetings, the Contractor shall refine the OPCC (prepared as described in Exhibit B-1), the cost model, cost model narrative, Project Schedule and recommendations related to the current Risk Register.
12. Participate in OPCC price reconciliation meetings as described in Exhibit B-1 to reconcile components of the price that deviate from the estimate prepared by the ICE by more than a stipulated amount. During OPCC price reconciliation meetings, the Department may request that the Contractor share the cost model in an over-the-shoulder environment to more fully understand how the proposed pricing was derived and to help reconcile differences. The Contractor is responsible for preparing and updating the cost model in accordance with the Department's requests at these meetings in a manner consistent with this Exhibit.
13. Develop, propose, and track innovations identified by the Contractor to be incorporated during the Construction Phase. The Contractor shall document and track cost savings and schedule impacts associated with innovations in a written report ("innovation log") to be submitted to the Department.
14. Prepare and submit a Project Schedule in accordance with the guidance provided by the Department. The Contractor shall:
- a) Develop a preliminary baseline version of the Project Schedule [within 90 days after Notice to Proceed].
 - b) Update the Project Schedule for each design milestone review. With each Project Schedule update, the Contractor shall identify schedule savings that result from innovations identified in the innovation log and the Contractor shall include a comparison of the current Project Schedule with the previous version of the Project Schedule.

- c) Prepare an updated Project Schedule prior to the development of the Construction Package Price to serve as the Construction Package Schedule, which identifies all activities during the Construction Phase in accordance with the requirements to be provided by the Department. In addition to the Project Schedule, the Contractor shall submit a finalized budget and schedule control management plan to ensure completion of construction within budget and in accordance with the Construction Package Schedule.
15. Develop and submit to the Department a Basis of Construction plan prior to the development of the Construction Package Price to describe the approach to achieve construction milestones that include:
- a) A subcontracting plan to integrate subcontractors as needed to accomplish all construction work. The Contractor shall identify the proposed plan to meet DBE contract goals for the overall Project;
 - b) A brief narrative with documentation describing:
 - i) the applicable construction standards and specifications;
 - ii) any CM-GC proposed changes to standards and specifications; and
 - iii) the approach to implementing design reports, design plans, and other design related documentation within each phase of construction;
 - c) Overall description of the how the Contractor will approach and sequence each phase of the construction. The description shall illustrate the Contractor’s approach to constructing the Work, including a description of work areas, sequence of Work to be performed during each phase of construction, and the overall order, sequence, and linkages between each phase of construction;
 - d) Procedures and processes for installing and maintaining safe ingress and egress of construction vehicles in the work zone;
 - e) A description of the anticipated laydown, staging, disposal, and maintenance locations to be used during construction;
 - f) A description of all existing roadways and structures to be closed, demolished, left as is, or incorporated into the Project; and
 - g) A listing of submittals anticipated during the Construction Phase.

II. SUBMITTALS

Submittal	Review Type
Innovation log	Review and comment
Oversight and constructability reviews	Review and comment
Cost model	Review and comment
Cost model narrative	Review and comment
OPCC estimate @ design milestones	Review and comment

Submittal	Review Type
Project Schedule – Preliminary baseline	Approval
Project Schedule – Design Development Milestones	Approval
Construction Package Schedule (Construction Package Price)	Approval
Basis of Construction	Approval
Construction Package Price	Approval

SECTION 2. PRECONSTRUCTION PHASE UTILITY SERVICES

[Note to Draft: Services identified in this Section are optional and at the sole discretion of the Department. If the Department elects to include any or all of these services as part of the CM-GC Agreement, the relevant sections may be included with appropriate adjustments for the project.]

I. INFORMATION AND SERVICES TO BE PROVIDED BY THE CONTRACTOR

Timely subsurface utility engineering services are needed for the Project in order to proceed with construction. Utility services by the Contractor shall support the Department’s utility location, coordination, and relocation efforts.

A. UTILITY – LOCATION AND MAPPING

The Contractor shall perform utility potholing, Subsurface Utility Engineering (SUE) and associated work. The Contractor shall identify the location of in-place aerial and underground utilities located within the Project limits, with the exception of storm sewer systems. The Contractor shall prepare a written utility location work plan to identify the location of in-place aerial and underground utilities located within the Project limits, with the exception of storm sewer systems. The utility location work plan will be jointly reviewed by the Department and the Contractor prior to determining locations to be potholed. Following the joint review of the utility location work plan, the Contractor and Department shall agree on specific locations to be potholed. The Contractor shall reference the below table regarding the various quality levels of SUE.

Quality Level	Description
QL-D	QL-D is the most basic level of information for utility locations. It involves collecting data from existing utility records. Records may include as-built drawings, distribution and service maps, existing geographic information systems databases, construction plans, and utility line locates. QL-D is limited in terms of comprehensiveness and accuracy and used primarily for project planning and route selection.
QL-C	QL-C is commonly used level and involves surveying visible utility facilities such as manholes and valve boxes and correlating this information with existing utility records (QL-D information).
QL-B	QL-B, also known as designating, involves the application of appropriate surface geophysical methods to determine the existence and horizontal position of virtually all utilities within the project limits. The information obtained in this manner is surveyed to project control. It addresses problems caused by inaccurate utility records, abandoned or unrecorded facilities, and lost references.
QL-A	QL-A, also known as locating, is the highest level of accuracy presently available and involves the full use of SUE. It provides information for the precise plan and profile mapping of underground utilities through the nondestructive (potholing or open-cut trenching) exposure of underground utilities. QL-A also provides the type, size, condition, material, and other characteristics of underground features.

The Contractor shall perform SUE in accordance with the appropriate quality level as follows:

1. QL-B—field designate all non-gravity utilities
2. QL-B—aerial utilities and gravity sanitary sewers
3. QL-A—as directed by the Department
4. The Contractor shall collect and document the following details for gravity sanitary sewer mains and services:
 - a) Invert elevations
 - b) Number, size, and material type of pipes
5. The Contractor shall collect and document the following details for aerial utility systems:
 - a) Number of utility attachments on pole
 - b) Number of cables per attachment
 - c) Utility company ownership per attachment
 - d) Bottom attachment sag height at all road crossings
 - e) Utility pole size, height, material type, ownership, and condition
6. Provide traffic control including shoulder closures, lane closures, rolling lane closures, and worker protection including attenuator trucks, traffic drums, and signage. All lane closures requests shall be approved in advance by the Department. The Contractor shall submit to the Department request for lane and shoulder closures five (5) business days prior to the beginning the work.
7. Pothole to identify utility locations at locations approved by the Department in accordance with the following:
 - a) Excavate areas where utilities are marked using soft-excavation techniques including vacuum truck excavation or hand digging to locate the underground utilities to sufficiently view and identify line and grade. If rock is encountered prior to location or depth is too great to be exposed through conventional pothole methods, the bottom of the hole will be surveyed at a depth, backfilled, and an electronic depth obtained and documented.
 - b) Utilities will generally be potholed along the length of the utility at intervals of 25' on-center. Field adjustments may be made due to risk, alignment changes, tie-ins, elbows, or junctions.
 - c) Utilize a surveyor and appropriate survey equipment to determine the line and grade of the utility within each pothole.
 - d) Upon completion, backfill potholes with on-site spoils, aggregates, material determined to be acceptable by the Department. Potholes within driving lanes shall be backfilled with flowable select material and capped with high performance asphalt patch material. Open-cut trenches within limits of existing roadways shall be backfilled with flowable select material and

capped with and approved hot mix asphalt concrete matching the existing surface.

- e) When feasible PVC or similar markers will be installed within the backfilled hole above the utility.
- f) Spoils from vacuum excavation shall be transported to and permanently stored on Department right of way as directed by the Department. All waste areas shall be approved by the Department. If re-handling and hauling spoils from the project limits is required, a unit price rate will be agreed to and established for that work. Best Management Practices (BMPs) shall be used for erosion and sediment control and final stabilization of the area.
- g) All survey data collected in the field shall be incorporated into a master as-built utility file and provided to the Department and be under the direction and supervision of a Professional Surveyor.
- h) Prior to field work starting, the Department and the Contractor shall agree on a public outreach effort to inform local stakeholders of the upcoming work and any temporary access or egress changes needed to facilitate the work.
- i) The Contractor shall agree in advance to changes in unit price compensation when conditions require open-cut trenching.

B. UTILITY – RELOCATION COORDINATION

The Contractor shall provide the following services:

1. Utility Easements: Coordinate review of existing easements, joint-use agreements, reimbursable utilities, and right of way design requirements, including phased construction requirements. Assist in determining easement locations.
2. Utility Relocations: Provide design reviews, cost estimates, and permit reviews. Assist with inspection of utility relocation to ensure compatibility with the proposed Project design.
3. Field Management: Coordinate with utility relocation contractors and subcontractors in connection with utility relocation work.

SECTION 3. PRECONSTRUCTION PHASE RIGHT OF WAY SERVICES

[Note to Draft: Services identified in this Section are optional and at the sole discretion of the Department. If the Department elects to include any or all of these services as part of the CM-GC Agreement, the relevant sections may be included with appropriate adjustments for the project.]

I. INFORMATION AND SERVICES TO BE PROVIDED BY THE CONTRACTOR

A. RIGHT OF WAY COORDINATION DURING PROJECT DESIGN

The Contractor shall perform the following services in accordance with Department Right of Way policies and procedures using a subcontractor approved by the Department:

1. Provide right of way cost estimates for 30%, 60% and 90% design development milestones; and
2. Perform title research to determine if overlaps and gaps exist prior to 90% right of way plan submittal.

B. RIGHT OF WAY ACQUISITION

The Contractor shall perform professional right of way services for the acquisition of properties and property management for the Project in accordance with Public Law 91-646, the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, as amended (Uniform Act), Federal and State laws and regulations, and Department Right of Way policies and procedures. CM-GC shall perform acquisition and property management services with a subcontractor approved by the Department.

C. UTILITY RELOCATION EASEMENTS

The Contractor shall provide the following services in accordance with Department Right of Way policies and procedures using a subcontractor approved by the Department:

1. Utility Easement Services
 - a) Coordinate between utility owner's engineering/design departments, the Department's Utilities Program, and others contracted by the Department for the Project to meet the requirements for utility easements beyond the limits of the new right of way;
 - b) Determine need for easement acquisition;
 - c) Establish legal descriptions;
 - d) Verify non-conflicts, gaps, and errors; and
 - e) Resolve conflicts in legal descriptions.
2. Utility Easement Acquisition
 - a) See Section 3.I.B (Right of Way Acquisition).

EXHIBIT B-1

FAIR PRICING APPROACH

The Contractor shall work collaboratively with the Department to maximize the scope, value, and quality of the Project during the performance of the Preconstruction Services. Such efforts shall include the following:

1. Development of a collaborative team environment that fosters communication, accountability, and trust;
2. Collaboration with the Department and its representatives, including but not limited to the ICE.
3. Participation in workshops and recurring meetings with the Department to discuss risk and identify opportunities and innovations;
4. Participation in the interactive design process to incorporate risk mitigation strategies and innovations into the design;
5. Performance of plan and specification reviews and quantity reconciliation meetings at major milestones as determined by the parties;
6. Preparation of OPCC at various milestones. This includes the obligation to share information with the Department and to maintain confidentiality among various Department representatives as requested by the Department to ensure the independence of the Department's cost estimate.
7. Participation in price reconciliation meetings to review differences in the assumptions of those items; and

Section 1. Initial Approach to Cost Meetings

Before any pricing of the Work begins in development of the Construction Package Amendment, the Contractor shall meet with the Department, and to discuss and agree on the pricing strategy for the Construction Package Amendment. The following issues will be discussed:

1. Definition of fair market price;
2. Acceptable percentage of price difference between the Contractor and the Department, which may use an estimate prepared by the ICE;
3. Expectation of CM-GC cost versus low bid;
4. Overhead and profit margins (includes management labor above project manager level, audited home office overhead rate, and profit margin);
5. Labor and equipment rates;

6. Subcontractor quotes and self-performed work; and
7. Number of OPCCs and bid submittals.

Section 2. Risk and Opportunity Workshop, Constructability Review, and Quantity Reconciliation Meeting

The Contractor shall participate in one or more risk and opportunity workshops to identify and prioritize risks, discuss possible risk mitigation strategies, and explore risk sharing concepts. Each workshop shall seek to quantify risks and predict probabilities of occurrence in an effort to predict a total Project contingency figure. The meeting shall focus on risk mitigation and how risks would affect bid items. For the priority risks, associated bid items will be identified and the affected pricing components (production rates, labor, materials cost, etc.) summarized for each.

During the risk and opportunity workshop, the attendees will also discuss constructability review comments and issues related to quantities. The Contractor shall review plans to ensure that the risk mitigation strategies and opportunities stemming from the risk and opportunity workshop have been incorporated. This review shall also include quantity takeoffs, verification, and reconciliation to ensure all bidding parties have agreed to bid quantities.

Section 3. OPCCs

After the risk and opportunity workshop, the Contractor shall prepare a production-based OPCC based on a pre-formatted Excel spreadsheet with the bidding schedule provided by the Department. The Department or its designated representative will also prepare its own version of the OPCC. The Contractor and the Department will each use their own construction schedule in development of their respective estimate. The Contractor shall separately account for indirect items, profit, and risk in the estimate. Once the OPCC estimates are complete, the Contractor shall submit its spreadsheet to the Department. The Department or its designated representative will compare the costs for each item in the Contractor's OPCC and highlight any items that vary from the Department's estimate by more than the divergence percentage identified by the Department. The total cost of each OPCC will also be compared by the Department to ensure that the OPCCs are within the Project budget. The Department will then return the spreadsheet to the Contractor and other involved parties.

Section 4. OPCC Price Reconciliation Meeting

- a) The Contractor shall meet with the Department to discuss the assumptions for items which have a discrepancy greater than the divergence factor defined by the Department. Costs will not be discussed. Rather, the factors that contribute to the costs are shared and discussed. The goal of these meetings is to clarify and resolve differences where possible between estimators. The goal is that the total project cost be at fair-market value at the time the Construction Package Price is determined with respect to the Construction Package Amendment.

EXHIBIT C
KEY PERSONNEL

Project Manager – PM	[●]
Construction Manager – CM	[●]
Lead Cost Estimator – LCE	[●]
Lead Scheduler – LS	[●]
<i>Add any Additional Key Personnel</i>	[●]

Indicates Required Key Personnel

Indicates Additional Key Personnel

EXHIBIT D

HOURLY RATES; UNIT PRICES; AND PRECONSTRUCTION BUDGET(S)

Project Manager – PM	\$[●]
Construction Manager – DM	\$[●]
Lead Cost Estimator – LCE	\$[●]
Lead Scheduler – LS	\$[●]
<i>Add any Additional Key Personnel</i>	\$[●]

Indicates Required Key Personnel

Indicates Additional Key Personnel

Indicates Other Personnel

EXHIBIT E
[RESERVED]

EXHIBIT F

FORM OF PERFORMANCE BOND

Applicable to the Construction Phase

KNOW ALL MEN BY THESE PRESENTS:

That we, **[NAME AND LEGAL STATUS OF CONTRACTOR]** as Principal, and **[NAME AND LEGAL STATUS OF SURETY]** authorized to do business in the State of Arkansas, as Surety, are held and firmly bound unto the State of Arkansas for the use and benefit of the Arkansas State Highway Commission, and its successors and assigns for one hundred percent of the contract amount in the sum of:

[INSERT AMOUNT]

(\$[●]), lawful money of the United States of America to be paid to said Arkansas State Highway Commission, to which payment, well and truly to be made, we bind ourselves, our heirs, executors, administrators, successors or assigns, jointly and severally, firmly by these presents.

Signed, sealed and delivered this date _____

THE CONDITION OF THIS BOND is as follows: That, whereas the Principal, has entered into a CM-GC Agreement with the Arkansas State Highway Commission, by and through the Arkansas Department of Transportation, for the construction of that certain project in Pulaski County Arkansas, designated as

Job [●] FEDERAL AID PROJECT

Job Name: [Insert Project name]

also known as the *[insert Project name]* Project, *[insert description of Project]*, more specifically described in the CM-GC Agreement, such work to be performed in strict accordance with the terms and conditions of the CM-GC Agreement.

NOW, THEREFORE, if the Principal shall in all things stand and abide by and well and truly observe, do keep and perform all and singular, the terms, covenants, guarantees and agreements in the CM-GC Agreement to be observed, kept, done and performed, and each of them, at the time and in the manner and form therein specified, and shall do and perform all the labor and work as specified in the CM-GC Agreement and in strict accordance with the terms of the CM-GC Agreement, along with any and all modifications thereof, and shall be bound to the Arkansas State Highway Commission for all overpayments made to the Contractor in accordance with Section 20.5 of the CM-GC Agreement, and shall complete said work within the time specified in said CM-GC Agreement, then this obligation shall be null and void; otherwise to remain in full force and effect.

PERFORMANCE BOND (Continued)

The Surety hereon further agrees that lack of knowledge by the Surety of any delay in the progress of the work by the Principal shall not operate as a defense by the Surety to any claim or suit on this bond, it being understood that the Surety shall receive reasonable notice of all steps looking to the cancellation of the Principal, and, or, the reletting of the work.

If the CM-GC Agreement is placed in default or terminated in accordance with Section 16 of the CM-GC Agreement, a suspension order will be issued effective on the date that the Arkansas State Highway Commission gives notice of default or termination. A resumption order will be issued sixty (60) days after the date of the suspension order or when work is actually resumed if prior to sixty (60) days. If the Arkansas State Highway Commission determines that special circumstances or project complexity justify, this sixty-day period may be modified. If the responsible Surety fails to actively respond to the resumption order within thirty (30) days and to secure immediate completion/closing of the project, then no future bonds will be accepted from the Surety until the matter is resolved to the Department's satisfaction.

WITNESS OUR HANDS, this date _____

Surety

Principal

Surety

By: _____
Licensed Agent, State of Arkansas

By: _____

PRINTED NAME: _____
(Must Be Legible)

Filed with the Arkansas State Highway Commission for approval this date _____.

EXHIBIT G

FORM OF PAYMENT BOND

Applicable to the Construction Phase

KNOW ALL MEN BY THESE PRESENTS:

That we, **[NAME AND LEGAL STATUS OF CONTRACTOR]** as Principal, and **[NAME AND LEGAL STATUS OF SURETY]** authorized to do business in the State of Arkansas, as Surety, are held and firmly bound unto the State of Arkansas for the use and benefit of the Arkansas State Highway Commission, and its successors and assigns for eighty percent of the contract amount in the sum of:

[INSERT AMOUNT]

(\$[●]), lawful money of the United States of America to be paid to said Arkansas State Highway Commission, to which payment, well and truly to be made, we bind ourselves, our heirs, executors, administrators, successors or assigns, jointly and severally, firmly by these presents

Signed, sealed and delivered this date _____.

THE CONDITION OF THIS BOND is as follows: That, whereas the Principal, has entered into a CM-GC Agreement with the Arkansas State Highway Commission, by and through the Arkansas Department of Transportation, for the construction of that certain project in Pulaski County Arkansas, designated as

Job [●] FEDERAL AID PROJECT

Job Name: *[Insert Project name]*

also known as the *[insert Project name]* Project, *[insert Project description]*, more specifically described in the CM-GC Agreement, such work to be performed in strict accordance with the terms and conditions of the CM-GC Agreement.

NOW, THEREFORE, if the Principal shall pay all bills and claims for all materials, labor and supplies entered into contingent or incident to the construction of said work, or used in the course of performance of the work, then this obligation shall be null and void; otherwise to remain in full force and effect.

The Surety hereon further agrees that lack of knowledge by the Surety of any delay in the progress of the work by the Principal shall not operate as a defense by the Surety to any claim or suit on this bond, it being understood that the Surety shall receive notice of all steps looking to the cancellation of the CM-GC Agreement, and, or, the reletting of the work.

The Surety Company hereon agrees to pay all unpaid claims for all materials, labor and supplies entered into contingent or incident to the construction of said work or used in the course of said work including but not limited to materials, labor and supplies described in and provided

for in Act Nos. 65 and 368 of 1929, Act No. 82 of 1935, and Acts amendatory thereof. Unpaid claims for materials, labor and supplies entered into contingent or incident to construction of said work or used in the performance of said work shall have a right of action on this bond in accordance with the provisions of Ark. Code Ann. § 22-9-403 and Ark. Code Ann. § 18-44-503. However, no suit, action or proceeding shall be brought on this bond outside the State of Arkansas.

WITNESS OUR HANDS, this date _____

Surety

Principal

Surety

By: _____
Licensed Agent, State of Arkansas

By: _____

PRINTED NAME: _____
(Must Be Legible)

Filed with the Arkansas State Highway Commission for approval this date _____.

EXHIBIT H

FEDERAL REQUIREMENTS

Applicable to the Construction Phase

[To be updated to insert then-current FHWA-1273]

EXHIBIT I

ON-THE-JOB TRAINING PROGRAM

Applicable to the Construction Phase

1. **Training Requirement.** The Contractor shall provide on-the-job training (“OJT”) aimed at developing full journeymen in the type of trades and job classifications required for the Work. The Contractor shall seek to provide at least the minimum number of training slots (consisting of 520 to 1040 hours each) determined by the Department during the Preconstruction Phase to be the goal for the Project. Where feasible, 25 percent of apprentices or trainees in each occupation shall be in their first year of apprenticeship or training. The goals for minority and female participation established in accordance with the Federal Requirements apply to all training performed by the Contractor in the covered area.
2. **Training Objective.** The primary object of the training program shall be the training and upgrading of minorities, women, and disadvantaged individuals toward journey-level status. For purposes of this Exhibit I, a “disadvantaged individual” is an individual that falls under the poverty threshold established by the U.S. Department of Health and Human Services Poverty Guidelines. Training in classifications such as clerk-typist, secretary, bookkeeper, fire fighter, office engineer, estimator, timekeeper, laborer, or flag person shall not be considered toward the training goals required under this Exhibit I.
3. **Training Requirements and Subcontractors.** The Contractor may not assign any portion of the training requirements established herein to a Subcontractor without the prior Approval of the Department and the written approval of the Subcontractor.
4. **Required Submittals.** The Contractor shall submit the following to the Department for Approval:
 - (a) A completed Form 1 (“Training Commitment Form” or “TCF”) specifying the training program, number of trainees, training classification, estimated starting date and training hours required per training classification to be used to fulfill the training requirement; and
 - (b) A completed Form 2 for each trainee, which shall include the following information:
 - (i) Name;
 - (ii) Last Four Digits of Social Security Number;
 - (iii) Address;
 - (iv) Telephone Number;
 - (v) Race/Ethnic Origin;

- (vi) Gender;
- (vii) Training Classification;
- (viii) Training Starting Date; and
- (ix) Classification(s) previously trained and date training was completed (if applicable).

5. **Acceptable Training Programs.** Only training programs approved by the Department with FHWA concurrence, the U.S. Department of Labor, its agencies, or by a state Apprenticeship Agency or Council recognized by the U.S. Department of Labor may be used to fulfill training requirements hereunder.
6. **Monthly Reports.** The Contractor shall provide OJT progress reports to the Department simultaneously with each Request for Progress Payment. The reports shall include the following:
 - (a) The number of training hours accumulated by each trainee during the prior month submitted on Form 3;
 - (b) The names of any new trainees not previously provided to the Department, along with the information described in Section 4(b) for such new trainees submitted on Form 2 (any new trainees shall be subject to the Department's Approval); and
 - (c) A trainee termination form submitted on Form 4 for any trainee that completed such person's training during the prior month or otherwise ended such person's participation in the training program.
7. **Information Provided to Trainees.** The Contractor, prior to the start of training, shall provide written notice to each individual to be trained under the Contractor's training program of that individual's designation as a trainee, the training program and classification under which training will be provided, the length of the training program, and the hourly wage rate to be paid to the trainee. Each month, while enrolled in the training program, the Contractor shall inform the trainees of the number of hours they have accumulated in the training program. Upon graduation, each trainee shall be issued a permanent certification designating the bearer as a graduate journey person of the appropriate training program.
8. **Limitations on Trainee Participation.** No employee shall be employed as a trainee in any classification in which the employee has successfully completed a training course leading to journey-level status or in which the employee has been employed at the journey level. Individuals may be trained a maximum of three times as long as the training is for the purpose of upgrading that individual. If the trainee is enrolled more than once on the Project, the trainee will only count as one trainee for purposes of satisfying the number of trainees required to be enrolled pursuant to the requirements of this Exhibit I. The Contractor shall satisfy this requirement by including appropriate

questions in the employee application or by other suitable means. The Contractor's findings in each case shall be documented.

9. **Payment to the Contractor for Training.** The Department shall pay the Contractor \$2.00 per hour of training provided to individuals under an Approved training program. Such \$2.00 per hour payment will be made regardless of whether the Contractor receives additional training program funds from other sources, provided that such other sources do not prohibit the Contractor from receiving payment from the Department for the training. Payment for off-Site training may be made only if the Approved training program includes provision for off-Site training, the trainees are concurrently employed on the Project and the Contractor contributes to the cost of the training, provides the training instruction, or pays the trainees' wages during the off-Site training.
10. **Timing of Training.** It is expected that each trainee will begin training on the Project as soon as feasible following the start of Work requiring the skill on which such trainee will be trained and remain on the Project until either the trainee has completed the training program or training opportunities no longer exist in the relevant work classification. It is desired that all trainees be on board for the entire length of the Project. The Contractor will not earn any credit toward the OJT goal for any trainee that is terminated or leaves the Project prior to completing the training program (although the Contractor will get paid for the work done by any such trainee pursuant to Section 9).
11. **Trainee Pay.** The Contractor shall pay each trainee no less than 60 percent of the prevailing rates of wages, as provided in the statutes and regulations applicable to public work contracts, including the Davis-Bacon Act, and as provided in the Federal Requirements for the first half of the trainee's training period, 75 percent of such rates for the third quarter of the trainee's training period, and 90 percent of such rates for the last quarter of the trainee's training period. Notwithstanding the forgoing, if a trainee on this Project is already in an approved existing program, then the appropriate rates approved by the U.S. Departments of Labor or Transportation in connection with such existing program shall apply to all trainees being trained for the same classification as such trainee on this Project.

EXHIBIT I FORM 1

TRAINING COMMITMENT FORM

The Contractor will provide training in the following crafts and in the amount of hours indicated below.

Training Program _____

Number of Trainees	Training Classification	Estimated Starting Date	Minimum Number of Training Hours Required Per Trainee

EXHIBIT I FORM 2
REGISTRATION FOR OJT PROGRAM

NAME _____ SS# (last four) _____

ADDRESS _____
STREET

_____ CITY STATE ZIP CODE

TELEPHONE _____ SEX _____ RACE _____

CONTRACTOR _____

ADDRESS _____
STREET

_____ CITY STATE ZIP CODE

TRAINING CLASSIFICATION _____

DATE TRAINING STARTED _____

CLASSIFICATIONS PREVIOUSLY TRAINED _____

JOB NUMBER _____ JOB SITE _____

SIGNATURE - APPLICANT

SIGNATURE – CONTRACTOR

SUPERVISOR _____

CONTACT NUMBER _____

THIS IS AN EQUAL OPPORTUNITY PROGRAM

EXHIBIT I FORM 3
ON-THE-JOB TRAINING
MONTHLY CERTIFIED TRAINING HOURS

Job Number _____

Contractor _____

Trainee Name _____

Job Classification _____

Month _____

Total of Monthly Hours _____

Total Accumulated Training Hours _____

EXHIBIT I FORM 4
TRAINEE TERMINATION FORM

Contractor _____ Job Number _____
FAP Number _____

1. Name of Trainee _____

2. Classification _____

3. Social Security Number (last four) _____

4. Total Hours Trained _____

5. Hourly Wage at Time of Termination _____

6. Date of Termination _____

7. Reason for Termination (Check Appropriate Item)

- _____ a. Program completed - retained as journeyman
- _____ b. Program completed - not retained by the Contractor
- _____ c. Illness
- _____ d. Laid-off; construction phase or road completed
- _____ e. Fired (Explain below)
- _____ f. Relocated
- _____ g. Death
- _____ h. Strike, work stoppage, did not return
- _____ i. Quit to work for another contractor or company
- _____ j. Did not return from seasonal layoff
- _____ k. Military
- _____ l. Personal or health problems (Explain)
- _____ m. Lack of transportation and/or travel distance
- _____ n. Reason unknown

8. Comments on Trainee Performance (Use reverse if required)

EXHIBIT J

DISADVANTAGED BUSINESS ENTERPRISE (DBE) PROGRAM

Applicable to the Construction Phase

1. **Purpose.** The purpose of this Exhibit J is to carry out and implement the Department's and the U.S. Department of Transportation's ("DOT") policies and regulations to ensure nondiscrimination in the award and administration of DOT-assisted contracts and to create a level playing field on which DBEs can compete fairly for DOT-assisted contracts.
2. **Policy.** It is the policy of the Department to ensure nondiscrimination on the basis of race, color, age, disability, national origin, and sex in the award and administration of contracts in the Department's highway and transit programs. In support of this policy, the Department encourages and assists those businesses owned and controlled by socially and economically disadvantaged individuals as determined in accordance with CFR 49 Part 26.

"Disadvantaged Business Enterprise" or "DBE" means a contracting firm certified to participate in the U.S. Department of Transportation financial assistance programs as a DBE by the Department pursuant to the "Arkansas Unified Disadvantaged Business Enterprise Certification Program."

3. **Contractor Assurances.**
 - (a) Neither the Contractor nor any Subcontractor shall discriminate on the basis of race, color, age, disability, national origin, or sex in the performance of the CM-GC Agreement. The Contractor shall carry out applicable requirements of 49 CFR Part 26 in the award, administration and performance of its Subcontracts. Failure by the Contractor to carry out these requirements is a material breach of the CM-GC Agreement, which may result in termination of the CM-GC Agreement or such other remedy as the Department deems appropriate.
 - (b) The Contractor agrees to ensure that DBEs have a full and equal opportunity to participate in the performance of Subcontracts on this Project financed in whole or in part with Federal funds. In this regard the Contractor shall take all necessary and reasonable steps in accordance with this Exhibit J to ensure that DBEs have an equal opportunity to compete for and perform Work on contracts.
4. **CM-GC Agreement DBE Goal.** The Department shall determine the DBE participation goal for the Project during the Preconstruction Phase. The Contractor shall establish individual contract DBE goals as appropriate for each Subcontractor

to ensure that the DBE goal is met or exceeded. The Department will monitor the Contractor's activities to determine if they are conducted in a manner consistent with the requirements of 49 CFR Part 26, the CM-GC Agreement requirements and the Contractor's DBE Performance Plan.

5. **Submittal of Documents.** The following documents have been or shall be submitted:
 - (a) **DBE Goal Certification** was submitted as part of the Contractor's Proposal.
 - (b) **DBE Performance Plan** shall be submitted prior to issuance of the Construction Package Amendment. The DBE Performance Plan shall include completed copies of Forms 1, 2, and 3.
 - (c) **Monthly Reports** shall be submitted monthly with each Request for Progress Payment.
6. **DBE Performance Plan.** The Contractor shall submit the DBE Performance Plan for the Department's Approval prior to issuance of the Construction Package Amendment.

The DBE Performance Plan shall set forth Contractor's plan to meet the DBE participation goal, and shall provide for an effective method of achieving those goals, and reporting to the Department regarding DBE participation. The DBE Performance Plan shall also set forth a proactive outreach program for DBE firms. The minimum requirements are as follows:

- (a) **DBE Goals.** The DBE Performance Plan shall set forth the Contractor's plan to meet the Project goal for DBE participation, with meaningful construction representation, throughout the term of the CM-GC Agreement. It shall include the following information, which shall be set forth in the form attached hereto as Form 1:
 - (i) The estimated dollar amount of DBE subcontracts to be awarded and paid for construction; and
 - (ii) The areas and types of anticipated Work to be subcontracted to DBE firms and the anticipated timing of such Work.

DBE Subcontracts shall be distributed among work classifications on the basis of the Contractor's needs and the availability of DBE firms in the various classifications.

- (b) **Description of Approach to Good Faith Efforts.** The DBE Performance Plan shall describe the good faith efforts the Contractor will take to ensure

that DBEs have maximum opportunity to successfully bid and perform on the CM-GC Agreement, and that the Contractor meets its DBE goal. These efforts shall include but not be limited to the following:

- (i) Soliciting through all reasonable and available means the interest of all certified DBEs who have the capability to perform the Work.
- (ii) Selecting portions of the Work to be performed by DBEs to increase the likelihood of meeting the DBE participation goal for the Project (including, where appropriate, breaking out contract work items into economically feasible units to facilitate DBE participation).
- (iii) Providing interested DBEs with adequate information about plans, specifications, and requirements of the CM-GC Agreement in a timely manner to assist them in responding to a solicitation;
- (iv) Negotiating in good faith to secure Subcontracts with DBEs whether or not committed to prior to CM-GC Agreement award;
- (v) Not rejecting DBEs as being unqualified without sound reasons based on a thorough investigation of their capabilities.
- (vi) Making efforts to assist interested DBEs in obtaining necessary equipment, supplies, materials, or related assistance or services.
- (vii) Effectively using the services of available minority/women community organizations; minority/women contractors' groups; local, state, and federal minority/women business assistance offices; and other organizations as allowed on a case-by-case basis to provide assistance in the recruitment and placement of DBEs.
- (viii) Continuing to provide assistance to DBE Subcontractors in obtaining bonding, lines of credit, etc., if required by the applicable Subcontract;
- (ix) Notifying a DBE in writing of any potential problem and attempting to resolve the problem prior to formally requesting the Department's approval to substitute the DBE;
- (x) Timely payment of all monies due and owing to DBE contractors, subcontractors, consultants, sub-consultants, suppliers and service providers, in accordance with the requirements of Sections 7.6.4 and 11.5 of the CM-GC Agreement;

- (xi) Timely submittal of complete and accurate DBE payment reports in accordance with the reporting requirements specified herein.
 - (xii) Timely submittal of “good faith efforts” information and documentation to the Department throughout the term of the CM-GC Agreement, as Subcontracts are entered into and new Subcontractors are selected;
 - (xiii) Informing the Department in writing in a timely manner of any problems anticipated in attaining the DBE participation goal for the Project; and
 - (xiv) If the Contractor or any Subcontractor requests a substitution of a DBE firm, the Contractor or the applicable Subcontractor must exert good faith efforts to replace the DBE firm with another DBE firm, and must include all documentation to substantiate its good faith efforts, subject to the Department’s approval.
- (c) **Good Faith Efforts Forms.** The Contractor shall submit the following documentation of its good faith efforts with its DBE Performance Plan:
- (i) Form 2 – Bidder’s List, providing information on all DBE and non-DBE firms that submitted a bid/proposal for the Project, including:
 - (1) The firm’s name;
 - (2) The firm’s address;
 - (3) The firm’s status as a DBE or non-DBE; and
 - (4) The type of work/work category the firm proposed to perform.
 - (ii) Form 3 – Good Faith Efforts showing the good faith efforts that the Contractor has made to provide equal opportunities to DBE firms, and including a certification on behalf of the Contractor and its Subcontractors that the Contractor has made a good faith effort to ensure that DBEs have an equal opportunity to compete for and perform on the CM-GC Agreement.

The information and documentation required by Form 3 includes the following, which must be provided:

- (1) The names and dates of advertisement of each newspaper, trade paper and minority-focus paper in which the

Contractor placed requests for DBE participation (the actual advertisement and the number of times it was run shall be included);

- (2) The names and dates of written notices to certified DBEs solicited by direct mail or other means for this Project, and the methods used to follow up on these solicitations;
 - (3) Items of work for which the Contractor requested bids, proposals or materials to be supplied by DBEs and the information furnished to DBEs, for example plans, specifications and requirements for the work and any break downs of work into economically feasible units to facilitate DBE participation;
 - (4) The names of DBEs that submitted bids or proposals for any of the work indicated above, which were not accepted by the Contractor; a summary the Contractor's discussions and/or negotiations with them; the name of the contractor, subcontractor, consultant, sub-consultant, supplier or service provider that was selected for the work and the reasons therefore. If the reason for the DBE rejection is price, state the rejected DBE's price bid/proposal and that of the selected contractor, subcontractor, consultant, sub-consultant, supplier or service provider.
 - (5) A description of the assistance the Contractor extended to rejected DBEs identified above to remedy the bid deficiencies;
 - (6) Efforts to assist DBEs on obtaining bonding, lines of credit, insurance;
 - (7) Effective use of services of available minority/women community organizations, contractor groups and local/state/Federal minority/women business assistance offices.
- (iii) Any additional documentation that demonstrates the Contractor made good faith efforts, including but not limited to the Contractor's efforts to encourage its Subcontractors to solicit DBE participation in their Subcontracts.
- (d) **DBE Coordinator.** The initial DBE Coordinator shall be identified during the Preconstruction Phase and shall be subject to the Department's

reasonable approval. The DBE Coordinator may be replaced by the Contractor with the Department's reasonable approval. The initial DBE Coordinator, and any replacement DBE Coordinator, must be a direct, full-time employee of a firm that is responsible for performing more than 20 percent of the construction of the Project, and must possess a minimum of three years of experience in DBE outreach or mentorship for complex construction projects. The responsibilities of the DBE Coordinator shall include managing and implementing the DBE Performance Plan, and ensuring compliance with 49 CFR Part 26, the DBE Performance Plan, the Federal Requirements and the OJT Requirements. The DBE Coordinator shall be 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 disseminating information on available business and subcontracting opportunities so that DBEs are provided an equitable opportunity to compete and perform the Work on behalf of the Contractor. The DBE Coordinator shall work with the Department DBE specialist assigned to the Project to ensure that all rules and regulations are carried out in accordance with the Department's DBE requirements and the federal regulations. All DBE participation will be reviewed and Approved by the Department prior to being counted towards the Project DBE goal.

- (e) **DBE Outreach Program.** The DBE Performance Plan shall describe in detail the processes Contractor will use to achieve the following:
- (i) Develop a proactive outreach program for DBEs;
 - (ii) Assist DBEs in identifying subcontracting opportunities on the Project, and assist subcontractors in identifying concerns for their specific subcontracting needs;
 - (iii) Provide for training for DBEs, and coordinate with the Department's Equal Employment Opportunity / Disadvantaged Business Enterprise Section;
 - (iv) Provide technical business assistance for DBEs, including coordination with the Department's DBE Supportive Services; and
 - (v) Work cooperatively with the Department, including the obligation to forward to the Department any complaints received regarding the Contractor's efforts to be in compliance with the DBE requirements described herein.
- (f) **Record Keeping for Monthly DBE Progress Reports.** The DBE Performance Plan shall describe in detail the processes Contractor will use

to keep records regarding the progress of DBE participation sufficient to provide the information required in the monthly DBE progress reports as described in Section 7.

(g) **DBE Subcontracts.** The DBE Performance Plan shall ensure that whenever a DBE Subcontract is signed the Contractor shall promptly provide the Department with the following information regarding the Subcontract:

- (i) The name and business address of the Subcontractors.
- (ii) The total dollar amount of the Subcontract.
- (iii) The specific work items covered by the Subcontract.
- (iv) The amount of the Subcontract to be credited to construction.
- (v) The estimated quantities of each work item.

No Work shall be performed by a DBE under a Subcontract until the Review and Comment process for such Subcontract required under Section 7.4.2 of the CM-GC Agreement is completed.

7. **Monthly DBE Progress Reports.** The Contractor shall provide DBE participation progress reports to the Department simultaneously with each Request for Progress Payment. The reports shall include the following information for each DBE Subcontract under which Work was performed during the applicable payment period:

- (a) The name of the relevant DBE Subcontractor.
- (b) Dollar amount of the Subcontract.
- (c) Quantities (or other measure of performance) completed as of the month just ended, reported using the same units of measurement used in the relevant Subcontract.
- (d) Dollar amount paid under the Subcontract as of the end of the month (separately stating the amount paid during the month in question with a

cumulative total for the month and all prior periods, including the dates of all payments).

- (e) Dollar amount of outstanding invoices and of uncompleted work remaining on the Subcontract.
- (f) Dollar amount and percentage amount of retainage, if any.
- (g) Expected completion date of the Subcontract.

The information described above shall be provided using the form attached hereto as Form 4.

The report shall also include a narrative summary stating whether the Contractor is on target with respect to its DBE goals, whether it has exceeded its goals (and stating the amount of the excess), or whether it is behind (and stating the amount of the deficit).

The Contractor shall submit with its final DBE monthly report a final certificate of payment to all DBE Subcontractors using the form attached hereto as Form 5.

8. **Consequences of Failure to Achieve DBE Participation**

If a monthly report shows that the Contractor is not on track to achieve the DBE participation rate set forth in the last Form 1 submitted by the Contractor, the Contractor shall submit the following to the Department with its next monthly report:

- (a) **Updated DBE Participation Form.** The Contractor shall submit an updated Form 1. Any revision to the amount of participation by a DBE on the Project or the removal of a DBE from the Project shall be accompanied by a letter from the affected DBE acknowledging the change and describing the reason for the change.
- (b) **Updated Good Faith Efforts Form.** The Contractor shall submit an updated Form 3 describing the Contractor's good faith efforts undertaken since the last Form 3 submitted by the Contractor.

If the Department determines that the Contractor has not made good faith efforts to achieve the DBE goal for the Project, payment made to the Contractor shall be reduced by an amount equal to dollar value of the unmet portion of the DBE goal for the Project. The Parties agree that such deduction is not a penalty, but is a good faith and reasonable estimate of the damages and loss the Owner would suffer in the event of Contractor's failure to achieve the DBE goal for the Project.

9. **Counting DBE Participation Toward Goals.**

- (a) **Certification Requirement.** The Department will recognize and grant DBE credit only for the value of the Work actually performed by a DBE Subcontractor for which it is certified.
- (b) **Work Performed by DBE Subcontractor.** The entire amount of that portion of a DBE Subcontract that is performed by the DBE Subcontractor's own forces for which it is certified shall be counted toward the CM-GC Agreement DBE goal. The cost of supplies and materials obtained by the DBE Subcontractor for the work of that portion of the Subcontract, including supplies purchased or equipment leased by the DBE Subcontractor (except supplies and equipment the DBE Subcontractor purchases or leases from the Contractor or its affiliates), is included.
- (c) **Second Tier Subcontractors.** When a DBE Subcontractor subcontracts part of the work of its Subcontract to another firm, the value of the subcontracted work may be counted toward the CM-GC Agreement DBE goal only if the DBE Subcontractor's Subcontractor is a DBE and is certified for the types of work being subcontracted. Work that a DBE Subcontractor subcontracts to a non-DBE firm does not count toward the CM-GC Agreement DBE goals.
- (d) **Contrived Arrangements.** No credit will be given toward the CM-GC Agreement DBE goal for any subcontracting arrangement that is contrived to artificially inflate or obtain the appearance of DBE Subcontractor participation, including any arrangement that uses DBE middlemen or passive conduits that are inconsistent with standard industry practices or which serve no commercially useful function, and arrangements in which a DBE Subcontractor is acting essentially as a broker (e.g., DBE second-tier Subcontracts between DBE Subcontractors who are fulfilling Project goals, and non-DBE Subcontractors with Subcontracts acknowledged by the Department on the same project). Regardless of whether an arrangement between the Contractor and a DBE Subcontractor represents standard industry practice, where such an arrangement erodes the ownership, control, or independence of the DBE or does not meet the commercially useful function requirement, the Contractor shall receive no credit toward the CM-GC Agreement DBE goal.
- (e) **Bona Fide Services.** The entire amount of fees or commissions charged by a DBE Subcontractor for providing a bona fide service, such as professional, technical, consultant, or managerial services, or for providing bonds or insurance specifically required for the performance of a contract, may be counted toward the CM-GC Agreement DBE goal, provided the fee is

determined to be reasonable and not excessive as compared with fees customarily allowed for similar services.

- (f) **Joint Ventures.** When a DBE performs as a participant in a joint venture Subcontractor, the portion of the total dollar value of the Subcontract equal to the clearly defined portion of the work that the DBE performs with its own forces may be counted toward the CM-GC Agreement DBE goal.
- (g) **Commercially Useful Function.** Only expenditures to DBE Subcontractors that perform a commercially useful function count toward the CM-GC Agreement DBE goal. A DBE Subcontractor performs a commercially useful function when it is responsible for execution of a distinct element of the Work and carrying out its responsibilities by actually performing, managing, and supervising the work involved. To determine whether a DBE Subcontractor is performing a commercially useful function, the Department shall evaluate the amount of Work subcontracted, industry practices, whether the amount the DBE Subcontractor is to be paid under the Subcontract is commensurate with the work it is actually performing and the DBE credit claimed for its performance of the work, and other relevant factors.

A commercially useful function is performed when:

- (i) All employees are under direct supervision of the DBE Subcontractor and on the DBE Subcontractor's payroll. Use by a DBE Subcontractor of personnel from the Contractor or any other Subcontractor will not be permitted without prior Approval by the Department.
- (ii) The DBE Subcontractor is responsible for obtaining all equipment necessary to perform the Subcontract work. The DBE Subcontractor shall negotiate and enter into equipment lease or purchase order agreements directly with the equipment source. Such lease or purchase order agreements must receive prior Approval by the Department.
- (iii) The DBE Subcontractor is responsible, with respect to materials and supplies, for negotiating price, determining quality and quantity, ordering the material, and installing (where applicable) and paying for the material itself.

If the Contractor chooses to assist a DBE Subcontractor by assuring payment for materials to be placed in the DBE Subcontractor's work or equipment leased by the DBE Subcontractor and wants to receive

credit toward the CM-GC Agreement DBE goal for the cost, the following procedures may be used:

- (1) the material supplier or lessor may invoice the DBE Subcontractor and be paid by remittance from the DBE Subcontractor; or
- (2) the supplier or lessor may invoice the Contractor and DBE Subcontractor jointly and be paid by the Contractor and DBE Subcontractor firm utilizing a joint check from the Contractor. Such a joint checking arrangement must be in writing, either in the subcontract or a separate agreement, and Approved by the Department prior to the supplies or equipment being utilized and payment being made.

No credit will be given toward the CM-GC Agreement DBE goal for the cost of the DBE Subcontractor's required materials or equipment that the Contractor pays directly to the material supplier or lessor.

- (iv) A DBE Subcontractor will be deemed to have performed a commercially useful function and the Contractor will be allowed DBE goal credit when a DBE Subcontractor performs at least 30% of its Subcontract. This work shall be performed by the DBE Subcontractor's normal work force.

The following factors will be used in determining whether a DBE Subcontractor trucking firm or owner/operator is performing a commercially useful function:

- (i) The DBE Subcontractor must be responsible for the management and supervision of the entire trucking operation for the items on its Subcontract or purchase order, including scheduling, providing sufficient trucks to accomplish the haul, and coordinating the work with the Contractor. There cannot be a contrived arrangement for the purpose of meeting DBE goals.
- (ii) The DBE Subcontractor must own and operate at least one fully licensed, insured, and operational truck used on the Subcontract when work is in progress.
- (iii) The DBE Subcontractor receives credit for the total value of the transportation services it provides on the Subcontract using trucks it owns, insures, and operates using drivers it employs. The DBE Subcontractor will also receive credit for the total dollar value of the

transportation services attributable to no more than twice the number of trucks owned by the DBE Subcontractor and leased from another DBE firm. Long-term lease arrangements are an acceptable form of “ownership.”

(iv) There are two types of lease arrangements that can be utilized by DBE Subcontractor firms: long-term leases and short-term leases.

(1) Long-term lease arrangements. The DBE Subcontractor may lease trucks under a long-term lease arrangement from independent equipment leasing companies. To be an independent equipment leasing company, the company must lease equipment to the public. A long term lease is defined as a 12 month or longer lease period. The drivers, fuel, minor maintenance responsibility, and full control of the leased trucks must rest solely with the DBE Subcontractor as stipulated in the lease agreement. Drivers must be employees of the DBE Subcontractor, subject to withholding, worker’s compensation requirements, unemployment, etc. Leased trucks must display the name and identification number of the DBE Subcontractor. The DBE Subcontractor will receive full credit for the full value of the transportation services provided by trucks leased and operated in this manner. A DBE supplier (regular dealer) must utilize this type of lease to supplement distribution equipment owned by the firm to receive credit for transportation services.

(2) Short-term lease arrangements.

a. The DBE Subcontractor may lease trucks from another DBE firm, including an owner-operator who is certified as a DBE. The DBE Subcontractor who leases trucks from another DBE receives credit for the total value of the transportation services the lessee DBE Subcontractor provides on the contract.

b. The DBE Subcontractor may also lease trucks from a non-DBE firm, or owner-operator. Credit for the total value of the non-DBE firm or owner-operator trucks transportation services will be credited to the DBE Subcontractor so long as the number of non-DBE firm or owner operator trucks does not exceed the number of trucks owned by the DBE Subcontractor or leased from other DBE firms. For trucks leased by the DBE Subcontractor in excess of

the total number of owned or leased DBE Subcontractor trucks, the DBE Subcontractor is entitled to receive credit only for the fee or commission it receives as a result of the lease arrangements for the excess trucks.

All lease agreements must indicate that the DBE Subcontractor has exclusive use of and control over the truck. This does not preclude the leased truck from working for others during the term of the lease with the consent of the DBE Subcontractor, so long as the lease gives the DBE Subcontractor absolute priority for use of the leased truck. A copy of each lease agreement must be provided to and Approved by the Department before the truck begins hauling. The agreement must reflect the name of the lessor, cab card registration numbers of all leased trucks, the description of the truck(s), the amount and terms of the lease and method of payment (hour, ton, cubic yard, or number of loads hauled), and, if owner-operator, his/her Social Security Number.

The DBE Subcontractor must certify on each applicable Request for Progress Payment the amounts paid to: (1) other DBE truckers, (2) non-DBE truckers, and (3) for hauls made with trucks owned by the DBE Subcontractor. This certification must be made on a form Approved by the Department.

- (h) **Right to Rebut Finding of Not to Be Performing Commercially Useful Function.** When a DBE Subcontractor is found not to be performing a commercially useful function, the DBE Subcontractor may present evidence to rebut the finding. Such evidence will be reviewed by the Department and a determination made. Decisions on commercially useful function matters are subject to review by the Federal Highway Administration.
- (i) **Materials and Supplies.** The Contractor may count toward the CM-GC Agreement DBE goal 60% of expenditures for materials and supplies required under the CM-GC Agreement and obtained from a DBE regular dealer, and 100% of such expenditures to a DBE manufacturer.
 - (i) For purposes of this Section, a manufacturer is a firm that operates or maintains a factory or establishment that produces on the premises the materials, supplies, articles or equipment required under the CM-GC Agreement for incorporation into the Work.
 - (ii) For purposes of this Section, a supplier or regular dealer is a firm that owns, operates, or maintains a store, warehouse, or other

establishment in which the materials, supplies, articles or equipment required under the CM-GC Agreement for incorporation into the Work are bought, kept in stock, and regularly sold or leased to the public in the usual course of business. To be a supplier, the firm must be an established, regular business that engages in, as its principal business and under its own name, the purchase and sale or lease of the products in question. A trucking firm or owner/operator will not be considered a supplier, nor will a supplier be considered a trucking firm.

A regular dealer in such bulk items as steel, cement, gravel, or stone, must own or lease, and operate, a pit, quarry, concrete plant, or other such facility that sells materials to the public. A person may be a regular dealer in petroleum products or asphalt binder without owning, operating, or maintaining a place of business, where these items are bought, kept in stock, and regularly sold to the public, if the person both owns and operates distribution equipment for the products. Any supplementing of regular dealers' own distribution equipment shall be by a long-term lease agreement and not on an ad hoc or contract-by-contract basis.

- (iii) Expenditures for lease of a particular piece or pieces of equipment from DBEs for exclusive use on the Project may be counted 60% toward the CM-GC Agreement DBE goal, provided the DBE dealer actually has ownership or control of the equipment and is considered a regular dealer.
- (iv) Capital expenditures for tools, equipment, vehicles, field office furniture, and similar property items, even though such items are used on the project and purchased from DBEs, do not count toward the CM-GC Agreement DBE goal.
- (v) Expenditures for materials and supplies obtained from DBE suppliers and manufacturers for use in the Contractor's general operations that are not incorporated into the work are not creditable in whole or part toward CM-GC Agreement DBE goal, even though a portion of such items may be used in the administration and/or execution of the Project.
- (j) **Dealers.** Brokers, manufacturer's representatives, packagers, or other persons who arrange or expedite transactions are not regular dealers within the meaning of this Section.

With respect to materials or supplies purchased from a DBE which is neither a manufacturer nor regular dealer, the entire amount of fees or commissions

charged for assistance in the procurement of the materials and supplies, or fees or transportation charges for the delivery of materials or supplies required on a job site, counts toward the CM-GC Agreement DBE goal, provided the fees are determined to be reasonable and not excessive as compared with fees customarily allowed for similar services. None of the cost of the materials and supplies themselves will count toward CM-GC Agreement DBE goal.

- (k) **Pipe Suppliers.** In order for a firm to qualify as a DBE supplier of metal and/or concrete pipe, the firm must fabricate the pipe.
- (l) **Purchased Material.** If material is purchased from a DBE supplier, credit will be allowed at 60% of the total cost of the material obtained from the DBE facility and the cost of delivery if the supplier is transporting the material using equipment it owns or leases on a long-term basis. Credit for 100% of transportation services provided by the DBE truckers will be allowed.

A valid purchase order for the material must be executed by the Contractor and DBE and approved by the Department prior to the material being hauled from the facility.

- 10. **Changes and Substitutions.** Any change in previously identified DBE Subcontractors, or any reduction in the scope of work to be performed by a DBE Subcontractor, or any change in or variance from the approved DBE Performance Plan, will require the Department's prior Approval.

The Contractor may propose a substitution of a DBE Subcontractor who is unable to perform successfully. However, substitutions of any DBE Subcontractor(s), reductions in scope for DBE Subcontracts, substitution of work item(s), or decreases of total dollar amount(s) committed to DBE Subcontracts will not be allowed without prior submission of written justification to the Department and Approval of the Department.

The Contractor shall make good faith efforts to replace any DBE Subcontractor who fails to perform its obligations with another DBE.

Unauthorized substitutions and/or under-runs in total dollar amounts may result in a withholding of part or all of progress payments as described below in Section 11.

- 11. **CM-GC Agreement Sanctions.** Noncompliance with the DBE Performance Plan or with the requirements of this Exhibit J shall result in one or more of the following remedies:

- (a) If the Contractor fails to provide documentation required by this Exhibit J, the Department shall have the sole discretion to withhold all or part of the monthly progress payments until such time that the Contractor provides the required documentation. The amount withheld shall be within the sole discretion of the Department.

- (b) If the Contractor fails to comply with its DBE Performance Plan or with the requirements of this Exhibit J in any other manner, the Department shall have the sole discretion to withhold all or part of the monthly progress payments until such time that the Contractor comes into compliance. The amount withheld shall be within the sole discretion of the Department.

EXHIBIT J FORM 1
DBE COMMITMENTS

Contractor:

The Contractor has executed contracts with the following DBE Subcontractors:

NAME & ADDRESS	ITEM DESCRIPTION	AMOUNT
		\$

If any firm listed above is a regular dealer of materials and supplies, but not a manufacturer, the total amount of the agreement and the amount to be credited (60%) should be recorded on this form.

Total for DBEs - \$ _____ or
_____ % of Construction Package Price.

(Contractor)

By:

Title:

The named DBE subcontractors confirm their participation in the contract as provided in the commitment.

DBE Firm:

DBE Owner or Authorized Representative's Signature:

- | | | |
|----|--|--|
| 1. | | |
| 2. | | |
| 3. | | |
| 4. | | |

EXHIBIT J FORM 3

GOOD FAITH EFFORTS

The Contractor shall submit the following information to demonstrate that a good faith effort has been made to provide opportunities for DBE firms, including contractors, subcontractors, consultants, subconsultants, regular dealers, and service providers, etc. on the Project.

1. List the names and dates of advertisement of each newspaper, trade paper, and minority-focus paper in which a request for DBE participation for this Project was place by the Contractor:

Publication	Date of Advertisement

2. List the names and dates of written notices of all certified DBEs solicited by direct mail or other means for this Project and the dates and methods used for following up initial solicitations to determine with certainty whether the DBEs were interested:

DBE Firms Solicited	Dates of Solicitations	Follow-up Methods and Dates

3. List the items of work for which the Contractor requested bids, proposals or materials to be supplied by DBEs, if any; the information furnished to interested DBEs in way of plans, specifications and requirements for the Work, and any breakdown of items of Work into economically feasible units to facilitate DBE participation. Where there are DBEs available for doing portions of the Work normally performed by the Contractor with its own forces, the Contractor will be expected to make portions of such work available for DBEs to bid on.

- a. Items of Work: [Describe]
- b. Information Furnished: [Describe]
- c. Breakdown of Items: [Describe]

4. List the names of DBEs selected to work on the Project; names of DBEs that submitted bids or proposals for any of the Work indicated above which were not accepted, a summary of the Contractor's discussions and/or negotiations with them, the name of the subcontractor, consultant, subconsultant, regular dealer, or service provider who was selected for that portion of the work, and the reasons for the Contractor's choice. If the reason for rejecting a DBE bid was price, give the bid price or proposal by the rejected DBE and the bid price by the selected subcontractor, subconsultant, regular dealer, or service provider. Since the utilization of available DBEs is expected, only significant price differences will be considered as cause for rejecting such DBE bids.
 - a. Proposed DBEs to be utilized on the Project: [List]
 - b. Rejected DBEs: [List]
 - c. Summary of discussions and negotiations: [Describe]
 - d. Selected Non-DBEs and reasons for that choice: [Describe]
5. List any assistance that the Contractor extended to the rejected DBEs identified above to remedy the deficiencies in their bids:
[List]
6. List all efforts Contractor made to assist interested DBEs on obtaining required bonding, lines of credit, or insurance:
[List]
7. List all efforts to assist interested DBEs in obtaining necessary equipment, supplies, materials or related assistance or services:
[List]
8. List the Contractor's effective use of services available from minority/women community organizations, contractor groups and local/state/Federal minority/women business assistance offices and other organizations to assist in recruitment and placements of DBEs:
[List]
9. List any additional data to support a demonstration of good faith efforts, such as contacts with DBE assistance agencies:
[List]

NOTES:

- 1) This form provides for a minimum of good faith efforts requirements, see Federal Register, Vol. 64, No. 21, Tuesday, February 2, 1999/Rules and Regulations, Appendix A to Part 26 – Guidance Concerning Good Faith Efforts for additional good faith effort considerations.
- 2) Appropriate documentation such as copies of newspaper ads, letters soliciting bids, and telephone logs should accompany this form.

GOOD FAITH EFFORTS AFFIDAVIT:

The undersigned, being first duly sworn, deposes and says that (he/she) is the [Title] of [Company Name] _____, which entity is a [shareholder, partner, joint venture member or other] _____ of [Contractor's Name] _____, a [corporation, partnership, limited liability company, joint venture, or other] _____, and he/she affirms that the Contractor has made good faith efforts to achieve the DBE goals identified in the CM-GC Agreement.

[Contractor's Name]

By: _____

Signature

Typed or Printed Name

Title

STATE OF _____ S.S

COUNTY OF _____

Subscribed and sworn to before me this _____ day of, _____, 20__.

Signature

Printed Name of Notary Public in and for
said County and State

My commission expires

EXHIBIT J FORM 4

DBE SUBCONTRACTOR PAYMENT LOG

Project _____ Contractor _____

DBE Subcontract Amount _____ DBE Subcontractor _____

Expected Completion Date _____ Date Payment Made to DBE _____

Item Description	Subcontract Unit Price	2 nd Tier Unit Price	Quantity	Value Earned By Subcontractor
Total This Estimate				
Retainage Withheld this Estimate				
Net Total this Estimate				
___ % Retainage	Previous Total			
Total to Date				

The Contractor certifies that the payment listed has been made to the DBE Subcontractor and that the documentation of this payment is available for inspection upon request.

Authorized Signature _____ Title _____

Typed or Printed Name _____ Date _____

