



**S A F E &
S O U N D**

**REQUEST FOR PROPOSALS
For The Bridge Improvement Project**

**BOOK 1 — DESIGN BUILD,
CONTRACT**

November 29, 2008
Project Number J5B0800
Missouri Department of Transportation
1320 Creek Trail Drive
Jefferson City, MO 65109





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EXHIBITS

- A Acronyms and Definitions
- B Completion Deadlines
- C Federal Requirements
- D Disadvantaged Business Enterprise (DBE) Program
- E Key Personnel
- F Performance Bond
- G Payment Bond
- H Settlement of Claims (Form C-242)
- I Letter of Vested Interest
- J Cost Analysis for Request for Change Order
- K Dispute Resolution Board Agreement



This Design-Build Contract is entered into as of _____, 2009, by and between the Missouri Highways and Transportation Commission (hereinafter, "Commission") and _____, a _____ (hereinafter, "Contractor"), with reference to the definitions contained in Exhibit A hereto and the following facts:

RECITALS

WHEREAS, the Commission is embarking on an innovative approach to address its bridge needs. The Safe and Sound Bridge Improvement Project is a large-scale system improvement. In order to keep costs under control, The Commission expects and encourages route closures for most of these bridges and innovative methods to keep the duration of closure to a minimum. The Contractor is challenged with obtaining maximum public acceptance of the Project and delivering quality projects on a large scale in a short time;

WHEREAS, the improvements include actions to reconstruct over 550 bridges currently in poor or serious condition located on major and minor highways throughout the State. The Commission believes that innovative design and construction methods or approaches identified through the private sector will reduce costs for the Project. These methods or approaches could include, but are not limited to, elimination of bridges entirely, as defined by 23 CFR, replacement with innovative structure types and/or standardization;

WHEREAS, the bridge improvement projects are classified by FHWA as categorical exclusions. The Contractor shall be required to complete and submit the required documentation to obtain the necessary environmental approvals for each project.

WHEREAS, the Commission issued the Request for Qualifications on October 27, 2008 and addendums [], as subsequently amended, the "RFQ". The Commission issued these and all subsequent procurement documents for the Project pursuant to RSMo 227.107, which grants the Commission the authority to solicit Proposals from and enter into agreements with private entities, or consortia thereof, for the design and construction of transportation facilities such as the Project; and

WHEREAS, on [December 16, 2008], pursuant to the procurement process outlined in the RFQ, The Commission selected [] short-listed Proposers based on their respective qualifications as detailed in the Statements of Qualifications. The Commission then issued a Request for Proposals to these short-listed Proposers, which included various RFP Documents and addenda thereto, as subsequently amended; and

WHEREAS, on [date], the Commission selected the Contractor as the best value Proposer to continue with negotiations. The Commission's decision was based on its overall evaluation of the Proposals and the Commission's conclusion that the selected Contractor has offered the best value Proposal, based on the Contractor's Contract Price, together with its approach to project management, design and construction of the Project.

WHEREAS, on [,2009], the Commission executed this Contract.

- a) The parties intend for the Contract to be a lump-sum design build contract obligating the Contractor to perform all Work necessary to complete the

Project by the deadlines specified herein, for the Contract Price, subject only to certain specified limited exceptions. To allow the Commission to budget for the Project and to reduce the risk of cost overruns, the Contract includes restrictions affecting the Contractor's ability to make claims for an increase to the Contract Price or an extension of the Completion Deadlines. The Contractor has agreed in the Contract to assume such responsibilities and risks and has reflected the assumption of such responsibilities and risks in the Contract Price.

- b) If the Contractor fails to complete the Project within the time limitations set forth in the Contract Documents, then the Commission will suffer substantial losses and damages. The Contract Documents therefore provide that the Contractor shall pay the Commission substantial Liquidated Damages if such completion is delayed.
- c) The Commission has provided Informational Documents to the Contractor. The Contractor has no right to rely on the Informational Documents. The Commission and the Contractor both intend for the Contractor to assume full responsibility and liability with respect to the design of the Project, and the Commission and the Contractor both intend for the Contractor to indemnify and hold harmless the Commission and others with respect to any defects in the Project.

NOW, THEREFORE, in consideration of the sums to be paid to the Contractor by the Commission, 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 Contract Documents

The term "Contract Documents" shall mean the documents listed in Section 1.3, including all exhibits thereto.

1.3 Order of Precedence

Each of the Contract Documents is an essential part of the Contract, 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 Contract. In the event of any conflict among the Contract Documents, the order of precedence shall be as set forth below:

- a) Book 1, as executed by the Commission and the Contractor, including all exhibits (Design-Build Contract).
- b) Book 2, including all Appendices and Exhibits (Performance Requirements).

- c) Book 3 Applicable Standards, including Additional Applicable Standards proposed by the Contractor and accepted by the Commission. The Applicable Standards, including Additional Applicable Standards are the final Applicable Standards included as Book 3 after final Contract negotiations.
- d) Book 4 Contract Drawings, Data, and Reports.
- e) The Proposal Documents and the Proposal Appendix, to the extent that they meet or exceed the requirements of the other Contract Documents. In other words, if the Proposal Documents or Proposal Appendix include statements that can reasonably be interpreted as offers to provide higher quality items than otherwise required by the Contract Documents, or to perform services in addition to those otherwise required or otherwise contain terms which are more advantageous to the Commission than the requirements of the other Contract Documents, the Contractor's obligations hereunder shall include compliance with all such statements, offers, and terms.

Notwithstanding the foregoing, in the event of conflicting requirements involving any requirement within a Book or a reference contained within a Book of the Contract Documents, the Commission shall have the right to determine, in its sole discretion, which requirement(s) apply. The Contractor shall request the Commission's determination respecting the order of precedence among conflicting provisions promptly upon becoming aware of any such conflict.

1.4 Informational Documents (Book 5)

The documents included in Book 5 – Informational Documents are for information only and are not Contract Documents to be relied upon by the Contractor. Cross-references in the Contract Documents to the Informational Documents do not incorporate the Informational Documents or portions of the Informational Documents as Contract Documents or requirements.

1.5 Interpretations

In the Contract Documents, where appropriate:

- a) The singular includes the plural and vice versa;
- b) References to statutes or regulations include all statutory or regulatory provisions consolidating, amending, or replacing the statute or regulation referred to as of the Proposal Due Date;
- c) 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;
- d) Words not otherwise defined that have well-known technical or construction industry meanings are used in accordance with such recognized meanings;
- e) 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
- f) Words of any gender used herein include each other gender 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 Commission'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 Commission's final answers to the questions posed during the proposal process for the Contract shall in no event be deemed part of the Contract Documents and shall not be relevant in interpreting the Contract Documents except as they may clarify provisions otherwise considered ambiguous.

1.6 Referenced Standards, Codes, or Criteria

Except as otherwise specified in the Contract Documents, or otherwise directed by the Commission, references to *Bridge Inspection Rating Manual* (link provided in Book 3), standards, codes, or criteria, or to the latest version of standards, codes, or criteria, shall mean the latest version in effect on the Final Proposal Due Date, except that the applicable version date of the Additional Applicable Standards shall be the date found acceptable by the Commission.

1.7 Omission of Details; Clarification by the Commission

The Contractor shall not take advantage of any apparent Error in the Contract. Should it appear that the Work to be done or any matter relative thereto is not sufficiently detailed or explained in the Contract Documents, the Contractor shall apply to the Commission in writing for such further written explanations as may be necessary and shall conform to the explanation provided. The Contractor shall promptly notify the Commission of all Errors that it may discover in the Contract Documents, and shall obtain specific instructions in writing regarding any such Error before proceeding with the Work affected thereby.

1.8 Computation of Periods

References to "days" or "Days" contained in the Contract Documents shall mean Calendar Days unless specified otherwise. If the date to perform any act or give any notice specified in the Contract Documents (including the last date for performance or provision of notice "within" a specified time period) falls on a non-Business Day, such act or notice may be timely performed on the next succeeding day that is a Business Day. Notwithstanding the foregoing, requirements contained in the Contract Documents relating to actions to be taken in the event of an emergency, requirements contained in Section 5.3 and any other requirements for which it is clear that performance is intended to occur on a non-Business Day, shall be required to be performed as specified, even though the date in question may fall on a non-Business Day.

1.9 Standard for Approvals

In all cases where Approvals, acceptances or consents are required to be provided by the Commission or approvals, acceptances or consents are required to be provided by the Contractor hereunder, such Approvals, acceptances, approvals or consents shall not be withheld unreasonably except in cases where a different standard (such as sole discretion) is specified, and shall not be unreasonably delayed if no response time is specified. In cases where sole discretion is specified, the decision shall not be subject to dispute resolution hereunder.

1.10 Federal Requirements

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.

1.11 Completion Deadlines

The Contractor shall complete all Work per the Final Acceptance date stated in their Proposal, and in any case no later than October 31, 2014.

1.12 Project Scope

The database, "Bridges Improvement Program Bridge Listing", provided in Book 4 lists the required minimum width and MOT requirements for each Project Bridge. The Contractor shall replace all Project Bridges.

1.13 Revisions to Additional Applicable Standards

The Additional Applicable Standards, as defined by the Contractor, shall be modified as follows and incorporated into Book 3:

- a) All references to any DOT, Commission, or MoDOT personnel shall mean the Engineer, as defined in Exhibit A.
- b) Except as otherwise provided in Book 2, all references to information, recommendations, or services provided by any DOT shall be disregarded.
- c) The Contractor shall maintain each submittal referenced in the Additional Applicable Standards but is not required to submit the documents to any DOT unless requested.
- d) All references to payment provisions related to pay items, measurement for payment, basis of payment, adjustment of unit prices, quantities, method of measurement, extra work, or similar phrases shall be disregarded.
- e) All Additional Applicable Standards that are not Missouri standards or that are Missouri standards that have been modified by the Contractor shall be signed and sealed by a Missouri licensed professional engineer.
- f) Any standards, manuals, specifications, and technical requirements necessary for performance of the Work that have not been specified by the Contractor as Additional Applicable Standards shall be the MoDOT standards that were effective on the Proposal Due Date, and such standards shall apply to the Project at no additional cost to MoDOT.

- g) For any Standard Specifications for Highway Construction used, Division 100 shall be disregarded.
- h) All Additional Applicable Standard details that include references to other state divisions, requirements, or personnel must be Approved by MoDOT prior to construction.
- i) MoDOT conditions of Approval of Additional Applicable Standards are included as part of the Additional Applicable Standards.
- j) Any proposed design exceptions that have been submitted but have not been Approved by MoDOT and FHWA are not Approved and must be Approved prior to construction.

2 OBLIGATIONS OF CONTRACTOR

2.1 Performance Requirements

2.1.1 Performance of Work

All materials, services and efforts necessary to achieve Final Acceptance on or before the Final Acceptance Deadline as shown in Section 4.3 shall be the Contractor's sole responsibility, except as otherwise specifically provided in the Contract Documents. Subject to the terms of Section 13, the costs of all such materials, services and efforts are included in the Contract Price.

2.1.2 Performance Standards

The Contractor shall furnish the design of the Project in accordance with all professional engineering principles and generally accepted standards of the industry (but at least meeting the terms, conditions and requirements of the Contract Documents), and in accordance with the terms and conditions set forth in the Contract Documents; and shall construct the Project as designed, in a good and workmanlike manner, free from defects, and in accordance with the terms and conditions of the Contract Documents.

2.1.3 Performance as Directed

At all times during the term hereof, including during the course of and notwithstanding the existence of any dispute, the Contractor shall perform as directed by the Commission in a diligent manner and without delay, shall abide by the Commission's decision or order, and shall comply with all applicable provisions of the Contract Documents. If a dispute arises regarding such performance or direction, the dispute shall be resolved in accordance with Section 19.

2.2 General Obligations of Contractor

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

- a) Furnish all design and other services, provide all materials and labor and undertake all efforts necessary or appropriate (excluding only those services, materials and efforts which the Contract Documents specify will be undertaken by other Persons):



- i. to construct the Project and maintain it during construction in accordance with the requirements of the Contract Documents, including the Contract Schedule, all Legal Requirements, all Governmental Approvals, the Quality Manual, the Maintenance of Traffic Plan, Contractors Public Relations integration plan, environmental, licensing and other requirements, taking into account the Right of Way (ROW) Drawings and other constraints affecting the Project, so as to achieve Acceptance of Structure and Final Acceptance by the applicable Completion Deadlines; and
 - ii. otherwise to do everything required by and in accordance with the Contract Documents.
 - b) At all times provide a Contractor Project Manager, Approved by the Commission, who will:
 - i. have full responsibility for the prosecution of the Work;
 - ii. act as agent and be a single point of contact in all matters on behalf of the Contractor;
 - iii. be present (or his Approved designee will be present) at the Site at all times that Work is performed; and
 - iv. have authority to bind the Contractor on all matters relating to the Project.
 - c) Obtain all Governmental Approvals (other than the Environmental Approvals and certain New Environmental Approvals caused by actions of the Commission as provided in Section 6.3.2).
 - d) 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.
 - e) Provide such assistance as is reasonably requested by the Commission in dealing with any Person and/or in prosecuting and defending lawsuits in any and all matters relating to the Project, which may include providing information and reports regarding the Project, executing declarations and attending meetings and hearings, but which shall in no event be deemed to require the Contractor to provide legal services. If the amount of time required to provide assistance becomes unreasonable, the Commission may request such assistance at its cost.
 - f) 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 set forth in Book 2, Section 5, and requirements regarding the handling, generation, treatment, storage, transportation and disposal of Hazardous Substances;

- ii. the Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. § 12101 et seq., including any amendments, as well as all applicable regulations and guidelines; and
- iii. the Federal Requirements.
- g) Comply with all Applicable Standards, including Additional Applicable Standards accepted by the Commission, as revised to ensure their enforceability.
- h) Cooperate with the Commission and Governmental Persons with jurisdiction over the Project in the review and oversight of the Project and other matters relating to the Work.
- i) Supervise and be responsible to the Commission for acts and omissions of all Contractor-Related Entities, as though the Contractor directly employed all such Persons.
- j) 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.
- k) 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.

2.3 Representations, Warranties, and Covenants

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

2.3.1 Maintenance of Professional Qualifications

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

2.3.2 Evaluation of Constraints

The Contractor has evaluated the constraints affecting delivery of the Project, including the ROW Drawings and the conditions of the Environmental Approvals, and has reasonable grounds for believing and does believe that the Project can be delivered within such constraints.

2.3.3 Feasibility of Performance

The Contractor has evaluated the feasibility of performing the Work within the time specified herein and for the Contract Price, and has reasonable grounds for believing and does believe that such performance including achievement of Completion Deadlines, for the Contract Price is feasible and practicable.

2.3.4 Review of Site Information

The Contractor has, prior to submitting its Proposal, in accordance with prudent and generally accepted engineering and construction practices, reviewed the existing bridge plans and related informational documents provided by the Commission in Book 5, inspected and examined all Project Bridge locations, and undertaken other appropriate activities sufficient to familiarize itself with surface conditions and subsurface conditions affecting the Project, to the extent the Contractor deemed necessary or advisable for submittal of a Proposal. As a result of such review, inspection, examination and other activities, the Contractor is familiar with and accepts the physical requirements of the Work. The Contractor acknowledges and agrees that changes in conditions at the Site may occur after the Proposal Due Date, and that the Contractor shall not be entitled to any Change Order in connection therewith except as specifically permitted under Sections 12 and 13. Before commencing any Work on a particular aspect of the Project, the Contractor shall verify all governing dimensions and conditions at the Site and shall examine all adjoining work, which may have an impact on such Work. The Contractor shall be responsible for ensuring that the Design Documents and Construction Documents accurately depict all governing and adjoining dimensions and conditions.

2.3.5 Governmental Approvals

The Contractor has no reason to believe that any Governmental Approval required to be obtained by the Contractor will not be granted in due course and thereafter remain in effect so as to enable the Work to proceed in accordance with the Contract Documents. If any Governmental Approvals required to be obtained by the Contractor must formally be issued in the name of the Commission, the Contractor shall undertake all efforts to obtain such approvals, subject to the Commission's reasonable cooperation with the Contractor, including execution and delivery of appropriate applications and other documentation in a form approved by the Commission. The Contractor shall assist the Commission in obtaining any Governmental Approvals, which the Commission may be obligated to obtain, including providing information requested by the Commission and participating in meetings regarding such approvals.

2.3.6 Progression of Work

The Contractor shall at all times schedule and direct its Work to provide an orderly progression of the Work to achieve the Completion Deadlines in accordance with the Contract 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 Section 4.4, Section 12 or Section 13.

2.3.7 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 Commission determines in its sole 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 Commission, 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 Commission. 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 Commission 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.

2.3.8 Design and Engineering Personnel

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

2.3.9 Organization

The Contractor, [Contractor's name], is a [joint venture, LLC., etc.], duly organized and validly existing under the laws of the State, with 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 its joint venture members are duly qualified to do business, and are in good standing, in the State, and will remain in good standing throughout the term of the Contract and for as long thereafter as any obligations remain outstanding under the Contract Documents.

2.3.10 Authorization

The execution, delivery, and performance of the Contract 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.

2.3.11 Legal, Valid, and Binding Obligation

The Contract constitutes the legal, valid, and binding obligation of the Contractor and, if applicable, of each member of the Contractor.

2.3.12 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 its actions hereunder. Accordingly, by signing the Contract, the Contractor certifies or affirms the truthfulness and accuracy of any statement it has made, it makes, or it may make pertaining to the Contract. 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 INFORMATION SUPPLIED TO CONTRACTOR; RESPONSIBILITY FOR DESIGN; DISCLAIMER

3.1 Information Supplied

The Commission has made available to the Contractor information, which is described in the Contract Documents and certain Informational Documents regarding the Project, and has allowed the Contractor access to the Site for purposes of inspection and testing.

3.2 Responsibility for Design

The Contractor agrees that it has full responsibility for the design of the Project and that the Contractor shall furnish the design of the Project. The Contractor specifically acknowledges and agrees that:

- a) The Contractor is not entitled to rely on and has not relied on:
 - i. the Informational Documents, except as specifically permitted for Existing Right of Way Plans; or
 - ii. any other documents or information provided by the Commission, unless specifically permitted in the Contract Documents.
- b) The Contractor's Warranties and indemnities hereunder cover any Errors in the Project even though they may be related to Errors in the Informational Documents.

3.3 Disclaimer

3.3.1 No Liability Regarding Informational Documents

The Contractor understands and agrees that the Commission 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 Informational Documents or any action or forbearance in reliance thereon. The Contractor further acknowledges and agrees that:

- a) 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 Commission, has approved and is responsible for said information; and
- b) 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.

3.3.2 No Representation or Warranty Regarding Informational Documents

THE COMMISSION DOES NOT REPRESENT OR WARRANT THAT THE INFORMATION CONTAINED IN THE INFORMATIONAL DOCUMENTS IS EITHER COMPLETE OR ACCURATE OR THAT SUCH INFORMATION CONFORMS TO THE REQUIREMENTS OF THE CONTRACT DOCUMENTS.

3.4 Professional Licensing Laws

The Commission does not intend to contract for, pay for, or receive any design services that are in violation of any professional licensing laws, and by execution of the Contract, the Contractor acknowledges that the Commission has no such intent. It is the intent of the parties that the Contractor is fully responsible for furnishing the design of the Project, although the fully licensed design firm(s) or individuals designated herein will perform the design services required by the Contract Documents. Any references in the Contract Documents to the Contractor's responsibilities or obligations to "perform" the design portions of the Work shall be deemed to mean that the Contractor shall "furnish" the design for the Project. The terms and provisions of this Section 3.4 shall control and supersede every other provision of the Contract Documents.

4 TIME WITHIN WHICH PROJECT SHALL BE COMPLETED; SCHEDULING

4.1 Time of Essence

Time is of the essence of the Contract.

4.2 Notices to Proceed

4.2.1 Issuance of Notice-to-Proceed 1

The Contractor shall begin performance of certain limited Work as directed and described in Notice-to-Proceed 1 (NTP1) issued by the Commission. NTP1 Work that may be performed includes all Work other than construction. NTP1 will be issued within 5 Business Days of execution of the Contract by the Commission, provided that the Commission has received Contractor's Performance and Payment Bonds and insurance certificates. The Contractor shall not receive its first monthly progress payment until it has submitted a Preliminary Baseline Schedule that is acceptable to MoDOT. The amount to be paid to the Contractor for Work performed pursuant to NTP1 shall not exceed the NTP1 Payment Cap, except that the Contractor shall also be entitled to receive reimbursement of insurance premiums and bond premiums in accordance with Section 9, and the first mobilization payment in accordance with Section 11.4. If the Commission issues NTP1 more than 5 Business Days after Contract execution through no fault, negligence, act or failure to act of Contractor, Contractor shall be entitled to an extension of the Completion Deadlines to the extent of the delay between 5 Business Days after Contract execution and the date the Commission issues NTP1.

4.2.2 Issuance of Notice-to-Proceed 2

The Contractor shall begin performance of the remainder of the Work as directed and described in Notice-to-Proceed 2 (NTP2) issued by the Commission. The Commission shall issue NTP2 upon Approval of the Original Baseline Schedule in accordance with Book 2, Section 2, and Approval of the Quality Manual in accordance with Book 2, Section 3. MoDOT will provide comments on the Original Baseline Schedule and the Quality Manual within 30 days of receipt of each and will issue NTP2 immediately upon satisfactory incorporation by Contractor of MoDOT's comments on both documents.

4.3 Completion Deadlines

4.3.1 Final Acceptance Deadline

The Contractor shall achieve Final Acceptance no later than the Final Acceptance Date as set forth in the Contractor's Proposal, and in any case no later than October 31, 2014. Said deadline for Project Completion, as it may be extended hereunder, is referred to as the "Final Acceptance Deadline."

4.3.2 Acceptance of Structure Deadlines

The Contractor shall achieve Acceptance of Structure for all Project Bridges within the Construction Duration or Total Closure Day Limit, as set forth in the Contractor's Proposal, and as may be modified hereunder. Achievement of Acceptance of Structure within these timeframes shall enable the Contractor to receive incentives, while achievement of Acceptance of Structure in excess of these timeframes shall result in liquidated damages, as described in Section 17.

4.3.3 No Time Extensions

Except as otherwise specifically provided in Section 12, the Commission shall have no obligation to extend any Completion Deadline and the Contractor shall not be relieved of its obligation to comply with any Completion Deadlines for any reason.

4.4 Contract Schedules

The Contractor shall deliver the Work in accordance with the Contract Schedules, as described in Book 2, Section 2, as modified in accordance with the Contract Documents. Such schedules shall also be the basis for determining the amount of monthly progress payments to be made to the Contractor. External impacts such as Third Party Agreements, Utility Relocations, Hazardous Substances or ROW acquisition, including but not limited to those constituting Relief Events, may impact the Contract Schedule, in which case the Contractor shall be entitled to revise and update the Contract Schedule in accordance with Book 2, Section 2; provided that no such impact, revision or update shall have any effect on the Contractor's liability for Liquidated Damages, except to the extent the Contractor is entitled to relief from such impact, revision or update under Section 12. In the event any such impact constitutes a Relief Event, the Contractor shall be entitled to request a Change Order pursuant to Section 12 and Section 13, which Change Order may include a negotiated Change Order to remove or substitute specific Project Bridges in accordance with Section 13. The Contract Schedules for each Project Bridge shall become binding 30 days prior to the proposed mobilization for such Project Bridge,

except that the Contract Schedule for Project Bridges listed on Form T shall become binding three months prior to proposed mobilization to such Project Bridges.

4.5 Prerequisites for Start of Construction

The Contractor shall not start construction (or recommence construction following any suspension) of any Project Bridge until all the following events have been fully satisfied with respect to the Work proposed to be constructed.

- a) The Commission has issued NTP1 and NTP2.
- b) All Governmental Approvals necessary for construction of such portion of the Project Bridge have been obtained and all conditions of such Governmental Approvals that are a prerequisite to commencement of such construction have been performed.
- c) All insurance policies and bonds required to be delivered to the Commission hereunder have been submitted to the Commission as applicable and remain in full force and effect.
- d) All necessary rights of access for the construction proposed to be undertaken on such Project Bridge have been obtained.
- e) Any additional conditions for construction on such Project Bridge set forth in Book 2, Sections 12.7 and 16.3 have been satisfied.

5 CONTROL OF WORK

5.1 Control and Coordination of Work

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.

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 Commission 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 its safety program. The Contractor shall immediately notify the Commission if the Contractor believes that any Contract requirement creates a safety risk.

5.3 Process to be Followed for Discovery of Certain Site Conditions

5.3.1 Notification

If during the Term, either the Contractor or the Commission becomes aware of:

- a) any on-Site material that it believes may contain Hazardous Substances,

other than lead paint or asbestos-containing materials, on any Project Bridge in an amount, type, quality or location that would require taking any preventive or remedial action; or reporting or notification to any Governmental Person or other Person and in each case under applicable Legal Requirements, Governmental Approvals or any applicable provision of the Contract Documents; or

- b) any on-site human remains, artifacts, fossils or other items of historical, archaeological, cultural, paleontological, biological or geological significance, each a Reportable Site Condition; then it shall promptly notify the other party of such Reportable Site Condition by telephone or in person, to be followed by written notification as soon as practicable. In the case where a Reportable Site Condition is discovered by the Contractor, delivery of such notice to the Commission shall be a condition precedent to the Contractor's right to a Change Order pursuant to Section 13 with respect to any Work delayed or affected by such Reportable Site Condition. Promptly following the giving or receipt of such notice, as the case may be, the Contractor shall temporarily suspend further Work in and secure the area and operations within 50 feet (15 m) of the affected location, or such smaller area as may be reasonable under the circumstances, and shall not resume the suspended Work at that location unless and until authorized by the Commission. In such event, the Commission will view the location within two Business Days of receipt of notification, and will advise the Contractor at that time whether to resume Work or whether further investigation is required. Any delay resulting from the Commission viewing the location for more than two Business Days shall constitute a Relief Event.

5.3.2 Further Investigation

Following discovery of a Reportable Site Condition, the Contractor shall promptly conduct such further investigations, as the Commission may reasonably request. Within ten Business Days after the Commission determines further investigation is required, the Contractor shall advise the Commission of any action it recommends to be taken regarding the situation. If Hazardous Substances are involved, the notice shall describe the type of Remediation Work, if any, that the Contractor proposes to undertake with respect thereto. If human remains, artifacts, fossils, paleontological, historical, geological, cultural, archaeological or biological significance are present, the notice shall advise the Commission 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 Commission then will determine whether the Contractor's findings and proposed actions are acceptable and either approve, or require modification thereof. The Contractor's proposed actions will be documented pursuant to a Change Order issued pursuant to Section 13.

5.3.3 Recommence Work

In the event of any suspension of Work pursuant to Section 5.3.1, the Commission 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 Requirement or Governmental Approvals. Subject to the Contractor's rights to a Change Order pursuant to Section 13, the Contractor shall promptly recommence Work in the area upon receipt of notification from the

Commission 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 Commission's determination or preliminary determination regarding the nature of the material, resources, species or condition.

5.3.4 Special Provisions Related to Lead Paint and Asbestos-Containing Materials

The Contractor is responsible for all abatement of lead based paint and asbestos containing materials on any Project Bridge. The Contractor shall perform all such abatement Work in accordance with the Applicable Standards.

The Commission has provided to the Contractor identification testing of lead based paint and asbestos containing materials. Asbestos and lead test results are provided in Book 4. The Commission will provide labels for shipping containers and manifest information for lead paint residue. The Contractor shall be entitled to a Change Order pursuant to Section 13 with respect to any costs incurred by the Contractor in connection with the abatement of any lead based paint or asbestos contamination not included in Book 4.

5.4 Obligation to Minimize Impacts

The Contractor shall undertake and cause each Contractor-Related Entity to undertake workmanlike and commercially reasonable measures to minimize any significant negative effects that its activities may have on property and public in the vicinity of each.

In addition to the requirements set forth in Book 2, Section 5, the Contractor shall comply with all Environmental Laws. Pollution of streams, lakes, ponds and reservoirs with fuels, oils, bitumens, chemicals or other harmful material and pollution of the atmosphere from particulate and gaseous matter shall be avoided to the extent required by Environmental Law.

Fording of streams and fill for temporary Work shall not be permitted unless a plan for such operation is authorized by the U.S. Army Corps of Engineers, complies with the current MoDOT *Storm Water Pollution Prevention Plan* and results in minimum siltation to the stream. Temporary stream crossings shall not be constructed unless specifically designated as a condition of the U.S. Army Corps of Engineers Section 404 permit or a permit is obtained and the temporary stream crossing is in accordance with Book 2, Section 5. Temporary measures shall be used to correct sediment and erosion conditions that develop during construction and prior to placement of permanent features. Streams or other bodies of water shall be promptly cleared of all falsework, piling, debris or other obstructions placed therein or caused by construction operations. When Work areas or pits are located in or adjacent to streams, the areas shall be separated from the main stream by a dike or barrier to keep sediment from entering the stream. Care shall be taken during the construction and removal of such barriers to minimize siltation of the stream to the extent required by applicable Environmental Laws.

Disposal of Portland cement concrete residue and wash water, water from aggregate washing or other operations resulting in sediment shall be treated by filtration, settling basins or other means sufficient to reduce the sediment concentration to

applicable limits established by the MoDNR.

5.5 Quality Management

5.5.1 Contractor Quality Management

The Contractor shall perform the quality management necessary for the Contractor to comply with its obligations under the Contract Documents. The Commission will perform quality control inspection and testing of construction work.

5.5.2 Oversight, Audit, Inspection, and Testing by the Commission and Others

All materials and each part or detail of the Work shall also be subject to oversight, audit, inspection and testing by the Commission and other Persons designated by the Commission. 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 the Contract nor will it change the rights of the parties hereto. The Contractor hereby consents to such oversight, inspection and testing by the Commission and other Persons. Upon request from the Commission, 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.

5.5.3 Obligation to Uncover Finished Work

At all times before Final Acceptance, the Contractor shall remove or uncover such portions of the finished construction Work as directed by the Commission. After examination by the Commission, the Contractor shall restore the Work to the standard required by the Contract Documents. If the Work exposed or examined is not in conformance with the requirements of the Contract Documents, then the cost of uncovering, removing and restoring the Work or making good the parts removed and recovery of any delay shall be at the Contractor's expense. If Work exposed or examined under this Section 5.5.3 is in conformance with the requirements of the Contract Documents, then the cost of uncovering, removing and restoring the Work shall be at the Commission's expense and any delay in the Critical Path from uncovering, removing and restoring Work shall be the Commission's responsibility. Refer to Section 5.7 for provisions regarding payments owing by the Contractor to the Commission, if the Commission agrees (in its sole discretion) to accept certain Nonconforming Work.

5.6 Effect of Oversight, Spot Checks, Assessment, Tests, Acceptances, and Approvals

5.6.1 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, assessments, 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, assessments, 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 Commission 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 requirements at any time prior to Final Acceptance, whether or not previous oversight, spot checks, assessments, reviews, tests, inspections, acceptances, approvals or Approvals were conducted by any Person.

5.6.2 No Estoppel

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

5.7 Nonconforming Work

5.7.1 Rejection, Removal, and Replacement of Work

Subject to the Commission's right, in its sole discretion, to accept or reject Nonconforming Work, the Contractor shall remove and replace rejected Nonconforming Work so as to conform with the requirements of the Contract Documents, at the Contractor's expense and without any time extension; and the Contractor shall promptly take all action necessary to prevent similar deficiencies from occurring in the future. The fact that the Commission may not have discovered the Nonconforming Work shall not constitute an acceptance of such Nonconforming Work. If the Contractor fails to correct any Nonconforming Work within five days of receipt of notice from the Commission requesting correction (or, for Nonconforming Work which cannot be corrected within five days, if the Contractor fails to provide to the Commission a schedule for correcting any such Nonconforming Work Approved by the Commission within such five-day period, begin correction within such five-day period and thereafter diligently prosecute such correction in accordance with such Approved schedule to completion), then the Commission may cause the Nonconforming Work to be remedied or removed and replaced, and may deduct the cost of doing so from any moneys due or to become due the Contractor and/or obtain reimbursement from the Contractor for such cost.

5.7.2 Nonconforming Work Pay Adjustment

The Commission 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 Contract Price, if applicable). In such event, the Commission shall be entitled to reimbursement of a portion of the Contract Price in an amount determined by the Commission. In general, the pay adjustment (or reimbursement) shall equal, at the Commission's election:



- a) the Contractor's cost savings associated with its failure to perform the Work in accordance with the Contract requirements; or
- b) the amount deemed appropriate by the Commission 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 Commission 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 Commission within 30 days after Contractor's receipt of an invoice therefor.

6 ACCESS TO SITE, UTILITY RELOCATIONS, AND ENVIRONMENTAL COMPLIANCE

6.1 Access to Right of Way Identified on Right of Way Drawings

6.1.1 Obligation to Provide Access to Right of Way

The Commission will make available to the Contractor throughout the Term timely access to the Site of each Project Bridge and any related Existing ROW, in each case when and as required in order to permit the Contractor to carry out the Work in accordance with the terms and conditions of the Contract Documents, in each case subject to:

- a) rights of public passage or access existing over any part of the Site from time to time; and
- b) the right of the Commission, any other Governmental Person or any Utility Owner under any Legal Requirement to have access to the Site, but subject to Section 23.

6.1.2 Additional Right of Way

The Commission has identified Existing ROW to be used for permanent improvements included in the Project, which are depicted in Book 4 Existing ROW Plans. The Contractor shall identify any ROW in addition to the Existing ROW that it determines is necessary to complete the Project, Additional ROW, in its Additional ROW Plans. To the extent requested by the Contractor, the Commission shall provide access to each Additional ROW identified on the Contractor's Additional ROW Plans as soon as reasonably practicable and in any event within one year from receipt of the Contractor's Additional ROW Plans so long as such costs are not due to an error or omission by the Contractor.

The Contractor shall include this period when developing the Contract Schedule. The Contractor shall prepare all documents described in Book 2, Section 8 and shall deliver them to the Commission in sufficient time to allow review and execution of any required Commission action prior to the date the transfer is scheduled to occur.

6.1.3 Delay in Providing Access

If the Commission at any time determines it will be unable to provide access to a

particular parcel on any Site or as shown on the Existing ROW Plans or is unable to provide access within the requirements of Book 2, Section 8 for Additional ROW, the Commission shall notify the Contractor regarding the revised projected date for delivery of access. The Contractor shall take appropriate action to minimize any cost and time impact and shall work around such parcel until access can be provided, including rescheduling and resequencing Work so as to avoid any delay to the Project. Subject to Section 6.1.4, to the extent that a delay cannot be avoided due to not providing access to a parcel(s) in accordance with Book 2, Section 8, the Contractor shall be entitled to additional compensation, time, bridge removal or bridge substitution in accordance with Sections 12 and 13.

6.1.4 Payment for Additional Right of Way

The Commission shall provide up to [\$10 million], the ROW Reserve Account, to be applied to the cost of property use or ownership interests acquired as part of the Additional ROW. The Contractor shall be responsible for all costs of property use or ownership interests acquired for Additional ROW which exceed this amount. If the total cost of acquisition of property use or ownership interests for all Additional ROW are less than this amount, the savings shall be shared equally between the Commission and the Contractor. The Commission will be responsible for all recording fees, title insurance, closing costs, staff-related costs, vehicle costs, appraisals and payments for legal services related to such Additional ROW obtained by the Commission. The Contractor shall be responsible for all costs related to temporary rights, such as staging areas and borrow operations, associated with the Contractor's design and construction operations.

6.1.5 Contractor's Right to Obtain Additional Right of Way

At its election, the Contractor shall have the right to obtain Additional ROW in accordance with the procedures set forth in Book 2 Section 8.3, including compliance with the Uniform Relocation Act. In such case, the Contractor shall be acting in its capacity for the Commission, not on its own behalf.

6.1.6 Railroad Flagger Costs

Railroad flaggers are required whenever working on railroad ROW. The Contractor shall be responsible for negotiating the terms and conditions for the provision of railroad flagging with the relevant railroads pursuant to Book 2, Section 6.3. Railroad flagger costs will be paid by the Contractor, in accordance with the specific railroad requirements.

6.2 Utility Relocations

The Commission will be responsible for all Utility coordination. The Commission will be responsible for costs and expenses incurred in connection with the initial relocation of any Utility Relocation with respect to the Existing ROW and any Additional ROW. The Contractor shall be entitled to receive a Change Order for additional costs and delays associated with the Utility Work only as permitted by this Section, Section 12 or Section 13.

6.2.1 Changes in Utility Work

The Commission has provided information concerning locations of Utilities or Service Lines in Book 4 and Book 5 for approximately 480 Project Bridges. The Commission

shall not be responsible for any additional costs resulting from Utility Delays or for work efforts associated with any other Utility interference or Relocation of Utilities except for time extensions and compensation as allowed in this Section, Section 12 or Section 13.

The Commission shall not be responsible for any costs or delays associated with performance of Incidental Utility Work by the Contractor described in Section 7 of Book 2.

6.2.2 Betterments

Utility Betterments shall not be included in this Contract.

6.2.3 Utility Delays

Pursuant to Section 12 the Contractor shall be entitled to an increase in the Construction Day Allowance for a Project Bridge due to any Utility Delay provided that each of the following conditions are satisfied for such Project Bridge:

- a) if the Contractor elects to be responsible for the Relocation, the Contractor has provided a reasonable Relocation Plan to the Utility Owner and the Contractor has obtained, or is in a position to timely obtain, all Governmental Approvals, in order to design and construct such Relocations;
- b) the Contractor has previously provided necessary submittals within the timeframes outlined in Section 7, Book 2, including the 12-month written advance notification for Utility Relocation, and an additional 12-month advanced notification if Additional ROW is required; and

If the Contractor meets all of the foregoing conditions with respect to any Utility Delay, then the Contractor will be entitled to a Change Order pursuant to Section 13.4.3 increasing the applicable Construction Day Allowance by a number of days equal to the number of days that the Construction Duration was increased due to such Utility Delay, in addition to a Change Order pursuant to Section 13.4.2 increasing the Contract Price in order to compensate for the Remobilization and/or Relocation costs resulting from such Utility Delay.

6.2.4 Certain Obligations of Contractor; Utility-Related Right of Way Costs

The Contractor shall, at minimum have the following obligations with respect to Utilities:

- a) endeavor to avoid multiple Relocations of the same Utility, whether by the Utility Owner or by the Contractor; after a Utility has been Relocated once in order to accommodate a Project Bridge based on the Contractor's Design Documents, the Contractor shall be responsible for all costs incurred by either the Contractor or the Utility Owner in order to subsequently Relocate such Utility to accommodate the same Project Bridge; if the Utility Owner performs such subsequent Relocation the Contractor shall be responsible for all amounts paid to such Utility Owner in reimbursement for such subsequent Relocation; if the Contractor performs such subsequent Relocation, then the Contractor shall not receive any time extension or increase in the Contract Price on account of the performance of such subsequent Relocation;

- b) take all commercially reasonable steps to minimize costs to the Utility Owners and the Commission to the extent practicable.

The Commission will be responsible for the cost paid for any property ownership interest in connection with the acquisition of any necessary replacements with respect to all Utility Easements for which the Utility Owners are entitled to replacement or other compensation pursuant to the applicable Utility Agreement(s) provided to the Contractor prior to the Proposal Due Date and which are located within the ROW depicted on the Existing ROW Plans or shown on the provided SUE utility location plans.

6.2.5 Additional Restrictions on Change Orders

The Contractor shall bear the burden of proving that the Relocation cannot reasonably be avoided. To require Utility Relocation, the reasonable estimate of any additional construction cost required absent such Utility Relocation must exceed the reasonable estimate of the total cost to the Utility Owner, Commission and Contractor of the Utility Relocation; otherwise, the Utility shall not be relocated and the additional construction shall be considered included in the Contract Price.

The Contractor shall not be entitled to an increase in the Contract Price for any costs of coordinating with Utility Owners or for assisting the Commission in coordinating with Utility Owners.

If the Contractor elects to make payments to Utility Owners or to undertake any other efforts that are not required by the terms of the Contract Documents, the Contractor shall not be entitled to a Change Order in connection therewith. The Contractor shall promptly notify the Commission of the terms of any such arrangements.

6.3 Environmental Compliance

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

6.3.1 Mitigation Requirements

The Contractor shall perform all environmental mitigation measures identified prior to the Proposal submittal, except those which may be provided by the Commission as described in Section 5.9, Book 2 for the Project Bridges. The Contract Price includes compensation for the Contractor's performance of all such identified mitigation measures. The Contractor may be required by Change Order to perform additional mitigation measures arising from new or additional Environmental Approvals not identified prior to the Proposal submittal.

6.3.2 New Environmental Approvals to be Obtained by the Commission

The Commission will be responsible for obtaining any New Environmental Approvals necessitated by a relief or compensation event as described in Section 12 or 13. The Contractor shall provide support services to the Commission with respect to obtaining any such New Environmental Approval.

6.3.3 New Environmental Approvals to be Obtained by Contractor

If a New Environmental Approval becomes necessary for any reason other than those specified in Section 6.3.2, such as temporary staging or Contractor-furnished borrow facilities, the Contractor shall be fully responsible for obtaining the New Environmental Approval and any other environmental approvals that may be necessary, and for all resulting requirements, as well as for any litigation arising in connection therewith. The Commission will reasonably assist the Contractor in obtaining any New Environmental Approvals. If the New Environmental Approval is associated with a Technical Change order, the costs of obtaining and complying with the terms of the New Environmental Approval shall be considered in determining the Contract Price adjustment under Section 13.

7 EQUAL EMPLOYMENT OPPORTUNITY; SUB-CONTRACTS; LABOR

7.1 Equal Employment Opportunity

7.1.1 Equal Employment Opportunity Policy

The Contractor confirms that it has an EEO policy ensuring equal employment opportunity without regard to race, color, national origin, sex, age, religion or disability, and that it maintains no employee facilities segregated on the basis of race, color, religion or national origin. The Contractor shall comply with the:

- a) Commission's Equal Employment Opportunity Policy;
- b) on the Job Training requirements in this Section;
- c) FHWA special provision 1273 (Exhibit B); and
- d) all applicable Federal Requirements.

7.1.2 Non-Discrimination

The Contractor shall comply with all Legal Requirements that enumerate unlawful employment practices including discrimination because of race, religion, color, gender, age, disability or national origin, 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, religion, sex, age or disability. 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, religion, gender, age or disability. 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 shall 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 in all contracts and

Subcontracts over ten thousand dollars (\$10,000), including purchase orders, so that such provisions will be binding upon each Subcontractor working on the Project.

7.2 Disadvantaged Business Enterprises (DBE)

7.2.1 Disadvantaged Business Enterprises Policy

The Contractor shall comply with the Commission's DBE Policy ensuring that DBE's shall have the equal opportunity to compete fairly in the performance of contracts financed in whole or in part with Federal funds. The Contractor shall comply with the requirements set forth in Exhibit B and the approved DBE performance plan required pursuant to this Section. The Contractor shall either meet the DBE goals established for the Project, which is 7% of costs associated with design and construction, or shall make a good faith effort, as determined by the MoDOT's Civil Rights Office, in accordance with 23 CFR Sec. 26.53, to meet the DBE goal. If it is determined that a good faith effort was not made and the goal of 7% was not met, a Liquidated Damage will be assessed in accordance with Section 17.1.1. For avoidance of doubt, costs associated with payments made to landowners/tenants for Right of Way or utility owners for utility relocation are not considered to be costs associated with design and construction.

7.2.2 Inclusion in Subcontracts

The Contractor shall include Section 7.2.1 in every contract and Subcontract involving construction and design work over ten thousand dollars (\$10,000), including purchase orders, so that such provisions will be binding upon each Subcontractor that is working on the Project.

7.3 ON-THE JOB TRAINING

7.3.1 Purpose:

The intent of the on the job training program is to recruit entry-level individuals, when feasible, and provide them with meaningful training intended to lead to journey-men level employment. The Contractor shall make every reasonable effort to enroll minority, disadvantaged persons and women trainees to the extent such persons are available within a reasonable recruitment area. This training provision is not intended and shall not be used to discriminate against any applicant for training.

The Contractor is hereby advised that it is no excuse for a union, with which the Contractor has a collective bargaining agreement providing for exclusive referral, to fail to refer minority and female employees (23 CFR 230.411). Contractors are here by made aware that if union referral practices prevent the Contractor from meeting the EEO requirements, the Contractor should make written notification to MoDOT's external civil rights office (ECR) immediately. Furthermore, the FHWA's Form FHWA-1273 EEO bid conditions are the Contractor's affirmative action plan (AAP). The EEO bid conditions specifically state, In the event the union is unable to provide the Contractor with a reasonable flow of minority and women referrals within the time limit set forth in the collective bargaining agreement, the Contractor will, through independent recruitment efforts, fill the employment vacancies. Unions are not allowed to discriminate based on race, color, national origin or sex, union membership or non-membership or domicile.

Contractors can sometimes demonstrate that they referred minorities and women to

the unions for referral back to them or the Contractors can demonstrate efforts made to request minorities and women from the union when they see their work force is deficient in certain construction trades. These efforts should be documented and will be verified by the Commission.

7.3.2 Program Administration

The goal for this Project has been set at 25 slots of 1000 hours each. The intent of the training is to develop trainees into full journeymen-level.

No apprentice/trainee can be assigned less than 500 hours. Providing less than 500 hours is not considered to be beneficial training nor helping to achieve journey-level status. Therefore, a trainee/apprentice, regardless of craft, must have worked on the Project for at least 500 hours to be eligible for meeting this requirement. However, the Contractor may transfer the trainee, with MoDOT's approval, from another MoDOT highway construction project. Upon reaching the 500 hours, the trainee slot will be considered complete. The same documentation as required in Section 7.3.8 and Section 7.3.10 will be a required submittal in order to determine if hours will be approved. MoDOT will only approve training programs meeting the requirements of this Section. A program will be approved if it is reasonably calculated to meet the equal employment opportunity obligations of the Contractor and to qualify the average trainee for journeyman status in the classification concerned by the end of the training period. Furthermore, apprenticeship programs registered with the U.S. Department of Labor, Bureau of Apprenticeship and Training, or with a State of Missouri apprenticeship agency recognized by the Bureau and training programs approved but not necessarily sponsored by the Department of Labor, Manpower Administration, Bureau of Apprenticeship and Training will also be considered acceptable provided it is being administered in a manner consistent with the equal employment obligations of Federal-aid highway construction contracts determined at the discretion of the MoDOT's External Civil Rights office.

No individual shall be employed as a trainee in any classification in which they have successfully completed a training course leading to journeyman status or in which the individual has been employed as a journeyman. The Contractor shall satisfy this requirement by including appropriate questions in the employee application or by other suitable means. It is the Contractor's responsibility to verify that the individual has not been trained or worked at the journeyman level and their records shall document the findings. Training should only be directed toward those trades where underutilization or under representation exists. Flagging and traffic control programs are not considered as meeting the intent. However, other programs that include flagging training will be approved if the flagging portion is limited.

7.3.3 Approval Process General

The intended training plan must be submitted 30 Calendar Days prior to work commencing. Failure to submit the plan will not allow hours to be counted toward the Contract goal. A written explanation outlining why the delay occurred may be submitted to MoDOT's External Civil Rights Office for consideration. A revised training plan must be resubmitted when modifications to the plan occur. The program must contain the trades proposed in which to accomplish the training, the number of trainees and hours assigned to the trade and the estimated beginning work date for the trainee/apprentice. Acceptable training programs include:

- a) BAT programs – Apprenticeship programs approved by the U.S. Department of Labor, Bureau of Apprenticeship and Training; and
- b) any other program, such as the Missouri Manpower Programs, which have been approved by FHWA and MoDOT on an annual basis.

7.3.4 Apprentice/Trainee Approval Forms

Submittal of the CAT TRAINEE NOTIFICATION/APPROVAL/UPGRADE – After the training plan has been approved, the trainee approval form should be submitted prior to the trainee commencing work on the Project. It is the intention that training is to be provided in the construction crafts rather than clerk-typists or secretarial type positions. Training is permissible in lower level management positions such as office engineers, estimators, timekeepers, etc., where the training is oriented toward construction applications. Training in the laborer classification will be permitted only with the approval of the MoDOT External Civil Rights Office. Some offsite training is permissible as long as the training is an integral part of an approved training program and does not comprise a significant part of the overall training. Credit applied towards meeting this requirement to be made when the Contractor:

- a) contributes to the cost of the training; or
- b) provides the instruction to the trainee; or
- c) pays the trainee's wages during the offsite training period; and
- d) the trainees are concurrently employed on Federal aid projects:

7.3.5 Ethnicity Verification

When there is a questionable ethnic claim concerning an individual submitted for participation in the OJT program, further documentation of that claim may be necessary to ensure eligibility. Acceptable documentation for ethnicity verification includes, in order of preference:

- a) Birth certificate;
- b) Naturalization papers;
- c) Native American Indian Tribal roll, tribal voter registration certificate, or other official document;
- d) History of individual having held himself to be a member of the minority group or community (driver's license, school, medical and service records);
- e) Recognition of applicant in a particular minority community as a minority through sworn and notarized statements from bona fide members of the community who are clearly disinterested parties; or
- f) Proof of membership and interaction in recognized minority organizations

If requested, the Contractor will be required to obtain this information from the employee claiming the minority status. If an individual requesting minority status cannot provide acceptable documentation and does not manifest the visual characteristics of the ethnic group claimed, the individual can not claim minority status for the purpose of the OJT program. If a person manifests the visual characteristics of an acceptable ethnic minority group, the Contractor may consider

the person to be a member of that group.

7.3.6 Beneficial Training

Training shall be consistent with the trainee/apprentice program. Training tasks will be consistent with the approved trade classification for this contract. The Contractor shall furnish the trainee a copy of the program the Contractor will follow in providing the training. The Contractor shall provide each trainee and Project Director documentations showing the type and length of training that will be completed including classroom and on-the-job hours.

7.3.7 Training Cost

The goal established in this Section shall be considered completely paid for and included in the Contract Price. At the end of the Initial Construction Period all required training hours are to be completed and approved. If all required training hours are not completed and approved at the end of the Initial Construction Period and it is determined that a good faith effort was not made, as determined by the MoDOT's Civil Rights office, then Liquidated Damages will be assessed in accordance with Section 17.1.1.

7.3.8 Monitoring

MoDOT will monitor the Contractor to ensure trainees and apprentices are receiving beneficial training in the type of trade submitted. Training shall be consistent with the training program or those OJT programs MoDOT and the FHWA have approved. It is normally expected that the trainee/apprentice will begin training on the Project as soon as possible, utilizing the skills involved and remaining on the Project as long as training opportunities exist in the work classifications or until the completion of the training program. Onsite Interviews may be performed to determine:

- a) whether the apprentice/trainee is receiving the designated craft experience;
- b) the work place environment;
- c) if the trainee/apprentice is experiencing problems on the jobsite; and
- d) if the apprentice/trainee is being treated fairly.

MoDOT will monitor this Project's training program through onsite visits and annual training reports. These reports are generated by the Contractor and are to be disseminated to the Project Director. The External Civil Rights Office will contact the Contractor to address the deficiencies, if any. If there are deficiencies, the Contractor must provide a corrective action plan addressing the deficiencies.

7.3.9 Wages

Trainees will be paid at the rate set by the training program. The appropriate minimum journeyman's rate paid cannot be less than the amounts set out in the 23CFR subpart A, Appendix B, unless apprentices or trainees in an approved existing program are enrolled as trainees on this project, in which case, the appropriate rates approved by the Department of Labor or Transportation in connection with the existing programs shall apply to all apprentice or trainees being trained for the same classification who are covered by this Contract's training requirements.

7.3.10 Reports

Upon the Commission's request, the Contractor shall provide for the maintenance of records a report documenting the Contractor's compliance with Section 7 including all trainees, approvals, payrolls and cumulative hours worked to date. All trainee(s) shall be approved by the MoDOT External Civil Rights Office prior to their start on the project. If a trainee has been previously approved by MoDOT, the Contractor must still notify MoDOT the name of the individual(s) and proposed craft the trainees will be trained in as well as indicating which Project Bridge(s) the trainees will be working on. The trainee notifications or listing of the proposed trainees must be submitted via fax or mail to the External Civil Rights Office and the Project Director. The Contractors report shall include at least the following information:

- a) the Contractor's name and address;
- b) the period that the report covers;
- c) the bridge numbers of the Project Bridges where trainee will work; and
- d) Information for each employee being trained on the Project including:
 - i. Name;
 - ii. Social Security Number;
 - iii. Trade and craft;
 - iv. Pay percent, based on portion of training complete (if applicable);
 - v. Journeyman's full prevailing wage applicable;
 - vi. Trainee wage; and
 - vii. Total trainee hours for the project.

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. Subcontractors shall be listed on the MoDOT approved list of Contractors or subcontractors. Existing prime contractors located on the MoDOT web site http://www.modot.mo.gov/business/contractor_resources/bid_opening_info/bidGenInfo.shtml are approved and additional Subcontractors may be verified by the Commission at the request of the Contractor. The Contractor shall not add, delete, or change the role of, any Major Participant without the prior written Approval of the Commission.

7.5 Assignment of Subcontract Rights

Each Subcontract shall provide that, pursuant to terms in form and substance satisfactory to the Commission:

- a) the Commission 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
- b) all guarantees and warranties, express and implied, shall inure to the benefit

of the Commission as well as the Contractor.

Any acceptance of assignment of a Subcontract from the Commission, 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 Commission. The Subcontractor specifically acknowledges the terms of this Contract and further agrees in the event of any conflict between this Contract and any Subcontract agreement that the Contract will govern.

7.6 Subcontract Terms

Each Subcontract shall include terms and conditions sufficient to ensure compliance by the Subcontractor with all applicable requirements of the Contract Documents. The Contractor will ensure that the terms of the Contract are submitted to and accepted by all Subcontractors, to the extent of the Subcontractor's obligations. All Subcontracts shall include 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 the dispute.

7.7 Subcontract Data

The Contractor shall notify the Commission, in writing, of the name and address of, and licenses held by each Subcontractor, excluding Suppliers, as soon as the potential Subcontractor has been identified by Contractor; but in no event less than 14 Calendar Days prior to the scheduled initiation of Work by such proposed Subcontractor. The Contractor shall provide the Commission with:

- a) a list of its Subcontractors, including Suppliers, from time to time upon request by the Commission;
- b) access to all Subcontracts and records regarding Subcontracts;
- c) copies of all Subcontracts with major Subcontractors within 10 Calendar Days after execution; and

copies of all other Subcontracts within 10 Calendar Days after receipt of a request from the Commission.

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 Commission shall not be bound by any Subcontract, and no Subcontract shall include a provision purporting to bind the Commission.

7.9 Key Personnel

7.9.1 Key Personnel

Exhibit C hereto identifies certain key positions for the Project. The Commission shall have the right to review the qualifications and character 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 Commission in writing of any proposed changes in any Key Personnel and shall include a resume of proposed Key Personnel. The Contractor shall not change any Key Personnel without the prior written Approval of the Commission. The Key personnel are:

- a) the Project Manager responsible for all aspects of the Project, including but not limited to overall design, construction, quality management, and contract administration; the Project Manager should have at least ten years of recent experience managing the design and construction of large-scale infrastructure projects, must be assigned to the Project full time for the duration of the Project;
- b) the Quality Manager's responsibilities include, but are not limited to, creation and execution of the Contractor's quality program, Quality Assurance activities independent of production, enforcement of quality procedures and documentation of quality records including environmental compliance and DBE/labor compliance; the Quality Manager shall report directly to the Contractor's executive team and should have at least ten years of recent experience developing, implementing and overseeing quality programs;
- c) the Design Manager is responsible for ensuring the project design is completed and all design requirements are met; the Design Manager must be assigned to the Project full time during design activities, and be available during construction activities, should have at least ten years of recent experience managing the design of transportation projects and must be a registered professional engineer in the State of Missouri;
- d) the Construction Manager shall be responsible for the overall structure and roadway construction for the Project; the Construction Manager shall be assigned to the program full time during construction activities, shall have at least seven years of recent experience managing the construction of transportation projects and materials testing;
- e) the Public Relations Coordinator – The Public Relations Coordinator shall be responsible for coordinating public relations activities with MoDOT staff who will implement the program statewide. This individual will publicly represent the Contractor, and will provide support to the MoDOT public involvement implementation effort, as well as coordinate specific commitments by the Contract team in addressing stakeholder concerns. The Public Relations Coordinator shall have at least four years of recent experience in public relations efforts on large transportation projects.

7.9.2 Representations, Warranties, and Covenants

The Contractor acknowledges and agrees that the award of the Contract by the Commission to the Contractor was based, in large part, on the qualifications and experience of the personnel listed in the Statement of Qualifications and 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 Statement of Qualifications and the Proposal in connection with the Work. Unless otherwise agreed to by the Commission in writing, individuals filling Key Personnel roles shall devote a sufficient amount of their time for the applicable

role with respect to the prosecution and performance of the Work and the Contractor shall document such commitment to the Commission's satisfaction upon the Commission's request.

7.10 Character of Workers

All individuals performing the Work shall have the skill and experience and any licenses or certifications required to perform the Work assigned to them. If the Commission determines in its sole discretion that any Person employed by the Contractor or by any Subcontractor is not performing the Work properly and skillfully, or who is intemperate or disorderly, then, at the written request of the Commission, the Contractor or such Subcontractor shall remove such Person and such Person shall not be re-employed on the Project without the prior Approval of the Commission in its sole discretion. 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 Commission 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.

7.11 WAGE LAWS

The Contractor and its Subcontractors shall pay the prevailing hourly rate of wages for each craft or type of worker required to execute the Work as determined by the Department of Labor and Industrial Relations of Missouri and they shall further comply in every respect with the minimum wage laws of Missouri and the United States. Federal wage rates under the Davis-Bacon or other Federal acts apply to and govern this Contract also for such work which is performed at the jobsite, in accord with 29 CFR Part 5. Thus, this Contract is subject to the *Contract Work Hours and Safety Standards Act*, as amended (40 U.S.C. Sections 327, *et seq.*), and its implementing regulations. The Contractor shall take the acts, which may be required to fully inform itself of the terms of, to comply with state and Federal laws.

Wage rates applicable at the time the Final Technical Proposal is submitted shall apply to construction work performed during the first year of the Contract. On the first anniversary of the Award, the rates in effect under the then current *General Wage Order* as published by the *Missouri Department of Labor and Industrial Relations* shall apply. Thereafter, on July 1 of each year, the contractor shall update the wage rates based on the *General Wage Order* then in effect.

8 SURETY BONDS

The Contractor or its Subcontractors (limited to a maximum of one per Project Bridge) shall provide to the Commission and maintain at all times during the period of Contractor Control for each Project Bridge the Contract security for performance of the Work as described below. Any such bond, which is provided by a Subcontractor, shall name the Commission, MoDOT, and its employees as additional obligees. Any such bond, which is provided by the Contractor, shall name the Commission as the obligee. Each bond required hereunder shall be provided by a Surety or Sureties

licensed as surety and qualified to do business in the State. The Surety(ies) 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 Contract 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

The Contractor shall provide a Performance Bond, in the form of Exhibit F, in the amount of the total Proposal price allocated for design and construction of each Project Bridge, as stated on Form O.

8.2 Payment Bond

The Contractor shall provide a Payment Bond, in the form of Exhibit G, in the amount of the total Proposal price allocated for design and construction of each Project Bridge, as stated on Form O. The Payment Bond shall be released one year after the later to occur of Final Acceptance of such Project Bridge, or the Commission's receipt of the Contractor's Affidavit Regarding Settlement of Claims (Form C-242), attached hereto as Exhibit H.

8.3 Utility Work

The Utility Work furnished or performed by the Contractor hereunder will automatically be covered by the Payment and Performance Bonds and any replacement performance bond or other Security to be provided by the Contractor pursuant to Section 20. Utility Owners whose Utilities are being Relocated by the Contractor shall be added as additional obligees to the Payment and Performance Bonds (up to a maximum cost of the Utility Owner's Relocation(s)) , as well as to such replacement performance bond or other security, through the use of a standard Additional Obligee rider to be Approved by the Commission. The Contractor shall provide all information necessary for such coverage to the surety(ies) providing such bonds. All cost estimates required to be provided under the Contract Documents with respect to Utility Work furnished or performed by the Contractor shall include the cost of bond premiums.

8.4 Replacement of Performance Bond

Provided that all conditions to Final Acceptance have occurred, the Contractor shall have the right to replace the Performance Bond with a replacement performance bond in an amount and in a form satisfactory to the Commission in its sole discretion (provided that it shall not be required to exceed 5 percent of the Contract Price) or with such other security as is Approved by the Commission in its sole discretion, guaranteeing due and punctual performance of all obligations of the Contractor under the Contract Documents which survive Final Acceptance.

8.5 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

9.1.1 Evidence of Insurance

The Contractor shall provide evidence of insurance as proof of compliance for all insurance requirements contained in this Section 9. The Contractor will be able to satisfy its insurance requirements by requiring subcontractors, limited to a maximum of one per Project Bridge, to provide the required insurance so long as the Contractor, the Commission and its employees are named as an additional insured. The evidence of insurance shall provide for ten Days written notice of cancellation for nonpayment of premiums, or 45 days written notice of cancellation 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 Commission reserves the right to request a complete certified copy of the policy, at the Commission’s sole discretion. No Work will start until proof of insurance has been submitted to the Commission.

9.1.2 A.M. Best Rating

All insurance companies providing policies obtained to satisfy the insurance requirements must have an A.M. Best rating of A- or better.

9.1.3 Full Force and Effect

The commercial general liability, excess (umbrella) liability, automobile 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 Contractors 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 State for payment of premiums or other amounts with respect to the insurance provided by the Contractor, or for deductibles under these policies. 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 is not intended to limit, the Contractor’s indemnification obligations under Section 18.

9.2 Contractor Provided Insurance

The Contractor shall procure, at its own expense, insurance acceptable to the Commission, as described herein, and shall maintain such insurance, as specified herein, in accordance with the requirements stated in Section 9.1, or as otherwise Approved by the Commission at its sole discretion.

9.2.1 Workers' Compensation and Employer's Liability Coverage

The Contractor shall furnish evidence to the Commission that, with respect to the Work, the Contractor carries workers' compensation insurance, or is qualified to by the Missouri Division of Workers' Compensation as self-insured, and carries insurance for employer's liability sufficient to comply with all obligations under state laws relating to workers' compensation and employer's liability. The Contractor shall require each Subcontractor on the Project to make the same evidence available to the Commission at the Commission's request. This evidence shall be furnished to and Approved by the Commission prior to the time the Contractor or Subcontractor commences Work on the Project.

9.2.2 Commercial General Liability Insurance

The Contractor shall provide commercial general liability broad form coverage for bodily injury, property damage, personal injury and advertising liability written on an occurrence form that shall be no less comprehensive or more restrictive than the coverage provided by Insurance Services Office (ISO) form CG 00 01 10 01.

- a) Limits of liability. General liability:
 - i. \$2.5 million - each occurrence.
 - ii. \$2.5 million - general aggregate (annually). The general aggregate limit shall apply separately to the Project.
 - iii. \$2.5 million - personal injury/advertising liability.
 - iv. \$2.5 million - products/completed operations liability.
- b) the above referenced minimum insurance coverage shall be annually increased to correspond to the sovereign immunity caps contained in Section 537.610 RSMo, which are updated annually in accordance with 537.610.5 RSMo; if a statutory limit of liability for a type of liability specified in this Section is repealed or does not exist, the Commission shall set reasonable limits of that insurance coverage which shall be as specified or adjusted periodically in a written notice from the Commission to the Contractor;
- c) Such insurance shall include, by its terms or appropriate endorsements, bodily injury, property damage, legal liability, personal injury, blanket contractual, independent contractors, premises, operations and products and completed operations. Such insurance shall also include blanket coverage for explosion, collapse, and underground (XCU) hazards.
- d) Products and completed operations coverage shall be continued for a minimum of five years from Final Acceptance of such Project Bridge.
- e) The Commission and its employees shall be an additional insured with respect to liability arising out of acts or omissions of the Contractor or its Subcontractors, whether on or off the Site.

9.2.3 Automobile Liability Insurance

The Contractor shall provide occurrence-based commercial automobile liability insurance covering all owned/leased, non-owned and hired vehicles used in the performance of Work, both on and off the Site, including loading and unloading.



The following limits of liability and other requirements shall apply:

- a) \$2.5 million combined single limit for bodily injury and property damage liability.
- b) Coverage shall be provided on ISO form number CA 00 01 10 01 or equivalent.
- c) The policy shall be endorsed to include Motor Carrier Act endorsement – Hazardous Materials Cleanup (MCS-90), if applicable.

the above referenced minimum insurance coverage shall be annually increased to correspond to the sovereign immunity caps contained in Section 537.610 RSMo, which are updated annually in accordance with 537.610.5 RSMo; if a statutory limit of liability for a type of liability specified in this Section is repealed or does not exist, the Commission shall set reasonable limits of that insurance coverage which shall be as specified or adjusted periodically in a written notice from the Commission to the Contractor.

9.2.4 Excess (Umbrella) Liability Insurance

The Contractor shall provide umbrella or excess liability insurance with limits of not less than \$25 million per occurrence and \$25 million annual aggregate which will provide bodily injury, personal injury and property damage liability at least as broad as the primary coverages set forth above, including employer's liability, commercial general liability and commercial automobile liability, as set forth in this Section.

9.2.5 Contractor's Pollution Legal Liability Coverage

The Contractor shall provide pollution legal liability coverage for the Project. The following limits and conditions shall apply:

- a) The limit of liability per occurrence shall be \$5 million and the total Project aggregate shall be \$10 million.
- b) The Commission, MoDOT, and its employees shall be named as an additional insured (to the extent commercially available as determined by the Commission).
- c) The policy form shall be written on a claims made form. The extended reporting period must be at least 60 months following completion of the Work.

9.2.6 Additional Insureds

Each policy of commercial general liability insurance, commercial auto liability and excess liability (umbrella) insurance shall name the State of Missouri for the benefit of the State of Missouri's Legal Expense Fund, the Commission and the Commission's members, agents and employees as additional insureds. Each of such policies shall also contain a separation of insureds condition. The insurance afforded by the Contractor shall be primary insurance.

9.2.7 Navigable Waters Insurance Protection

Any Work that is performed on or adjacent to the Missouri and/or Kansas rivers, and any other waters classified as "navigable waters of the United States" by the USACE must be covered by Jones Act Insurance, Longshore and Harbor Workers'

Compensation Act Insurance, and maritime law liability insurance as described below. Employees of Contractor or Subcontractors that perform marine construction Work on or near a waterway that is a navigable water of the United States may be subject to maritime law liability for injuries to employees working from vessels in waterways or working from nearby facilities in relation to construction on or over such waterways.

9.2.7.1 Insurance shall be purchased by Contractor or any Subcontractor performing Work on or near the Missouri and/or Mississippi rivers, and any other navigable waters of the United States, for exposures under the Jones Act, 46 USC, with a minimum limit of \$2,000,000 per occurrence and in the aggregate, or as specified by law, whichever amount is higher. Insurance under this Subsection covers any employee deemed by the courts as masters or members of crews or vessels who are entitled to seek recovery as “seamen” for injury or death under the Jones Act, or general maritime law. Such coverage may be provided through appropriate endorsements to the Contractor’s or Subcontractor’s workers’ compensation policy.

9.2.7.2 Insurance shall be purchased by the Contractor or any Subcontractor performing Work on or near the Missouri and/or Mississippi rivers, and any other navigable waters of the United States, for exposures under the US Longshore and Harbor Workers’ Compensation Act, USC, Title 33, with a minimum limit of \$2,000,000 per occurrence, and in the aggregate, or as may be specified by law, whichever amount is higher. Insurance under this Subsection covers any employees who do not qualify as masters or members of a crew of a vessel, but perform Work in loading or unloading vessels or Work from docks, barges or other platforms, and who may be deemed by the courts as entitled to seek compensation for injury or death under the US Longshore and Harbor Workers’ Compensation Act. Such coverage may be provided through appropriate endorsements to the Contractor’s or Subcontractor’s workers’ compensation policy.

9.2.8 Professional Liability Insurance

The Major Participant in the Contractor entity that will perform the design function (“Designer”), shall maintain professional liability insurance appropriate to the consultant’s profession, endorsed to include contractual liability, with provisions at least as follows:

- a) the policy shall protect against any negligent act, error or omission arising out of design or engineering activities of the Designer;
- b) the policy shall have a retroactive date of no later than the date the first design or engineering activities have been conducted by the Designer; and
- c) the policy shall be required to cover up to ten million dollars (\$10,000,000) per claim and an aggregate of ten million dollars (\$10,000,000).
- d) if the policy is written on an occurrence, or claims reported, basis, (that is, the policy covers claims arising out of acts, errors or omissions that occur and are reported during a specific policy period or an extended reporting period), the insured shall provide an extended reporting period covering five (5) years after Final Acceptance;
- e) if the policy is written on a strict claims made basis (that is, the policy covers claims made while the policy is in effect without regard to when the event

giving rise to the claim occurred), the insured shall maintain the policy in force for a period of five (5) years following Final Acceptance.

9.2.9 Railroad Protective Insurance

The Contractor shall obtain Railroad Protective Liability Insurance for any Work that is performed within any railroad ROW. Specific insurance requirements, including limits of liability and additional insured will be noted in specific railroad agreements or negotiated requirements, as required by Book 2, Section 6, Third Party Agreements.

9.2.10 Builder's Risk

The Contractor is not required to purchase and maintain builder's risk Insurance; however the Contractor shall be responsible for all builder's risk claims, except to the extent of the Commission's responsibility for the Project Bridges as set forth herein.

9.2.11 Subcontractor's Coverage

For Work that is subcontracted, each Subcontractor or the Contractor on behalf of the Subcontractor shall obtain the same commercial general liability insurance and commercial auto liability. The commercial general liability insurance shall name the same entities specified in this Section above as additional insureds and shall have the same separation of insureds' conditions.

10 RISK OF LOSS

10.1 Site Security

The Contractor shall provide appropriate security for the Site of each Project Bridge during each period when such Project Bridge is under Contractor Control, including securing any buildings from entry, and shall take all reasonable precautions during such period of Contractor Control, 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 Commission, or any other Person. The Contractor shall at all times during such period of Contractor Control keep the Site in a neat and clean condition, including performing litter removal, removal of graffiti and weed control.

10.2 Maintenance and Repair of Work and On-Site Property

10.2.1 Responsibility of Contractor

The Contractor shall maintain, rebuild, repair, restore or replace all Work, other than as set forth in Section 15 of Book 2 and on any Project Bridge that is damaged during the period of Contractor Control of such Project Bridge. All such Work shall be at no additional cost to the Commission, except for costs for which the Contractor is entitled to a Change Order as provided in Section 13. The Contractor shall also have full responsibility during each period of Contractor Control for rebuilding, repairing and restoring all other property at the Site directly affected by the Work or damaged by the Contractor, whether owned by the Contractor, the Commission or any other Person, except as provided in the previous sentence. The Commission may make temporary repairs, at its own expense, except as otherwise provided in Book 2, Section 15, if necessary for traffic safety at any time when a Project Bridge is

not under Contractor Control. Any such Commission repairs will be for its own account coordinated with the Contractor as provided in Section 23. The Contractor shall be responsible for all site maintenance within the area of construction on each Project Bridge during any period of Contractor Control of such Project Bridge. The Contractor shall be responsible, during Contractor Control, for maintaining the roadway surface within the Work Zone as provided in Book 2, Section 16. Subject to Section 13, and as more particularly described in Book 2, the maintenance required to be undertaken by the Contractor during any period of Contractor Control will include property damage resulting from collisions from vehicles, natural disasters or other acts of God as well as Routine Maintenance. The Contractor shall be responsible for any Errors arising from the Work expressly from the period of Acceptance of Structure of a Project Bridge until 1 year following the Final Completion of such Project Bridge.

10.2.2 Relief from Liability for Maintenance

At all times prior to the commencement of initial Contractor Control of a particular Project Bridge and at all times after Final Completion of such Project Bridge the Commission is responsible for maintenance of all elements of each Project Bridge. Upon Acceptance of Structure with respect to a particular Project Bridge, the Commission will be responsible for the Maintenance of such Project Bridge, other than during any subsequent period of Contractor Control with respect to such Project Bridge. The Commission will be responsible for all property and other damages to all Project Bridges resulting from Force Majeure Events, at all time other than during Contractor Control with respect to a particular Project Bridge. Nothing in the Contract Documents, however, shall be construed to relieve the Contractor of full responsibility for making good any non-latent defect in Work or material found on any section of Work prior to Final Acceptance of the entire Project, to alter in any manner the method of payment prescribed in the Contract Documents, or to constitute a waiver of any claim the Commission may have against the Contractor on the entire Project. Notwithstanding the foregoing, all elements of the Work, which will be owned by Persons other than the Commission (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 Commission-Obtained Permits

10.4.1 Third Party Agreements

The Contractor shall comply with all provisions in the third party agreements and Commission-obtained permits in Book 4. The Contractor shall be responsible for all costs related to Third Party Agreements required to fulfill the scope of this Contract. Railroad agreements will be based on *American Railway Engineering and Maintenance-of-Way Association Manual for Railway Engineering*. The Commission

will negotiate all Third Party Agreements with the reasonable assistance of the Contractor. Third Party Agreements which require additional Work beyond the scope expressly provided in this Contract will be mutually agreed upon by the Commission and the Contractor and will entitle the Contractor to a Change Order pursuant to Section 13. If the Commission negotiates a reduction in scope for a Third Party, at the Contractor's request, savings from such reduction in scope shall be addressed in accordance with Section 13.4.6. In any case, a Third Party requirement to replace a structure in kind is not considered additional Work beyond the scope expressly provided in this Contract.

10.4.2 Environmental Permits and Approvals

For Environmental Approvals to be obtained by the Commission pursuant to Section 6.3 and Book 2, Section 5, upon Contractor's fulfillment of all applicable requirements of Section 13 and subject to the limitations contained therein and Section 12, the Commission shall be responsible for and will issue a Change Order to compensate the Contractor for additional costs and/or delay directly attributable to any additional Work or mitigation measures necessitated by the terms of the finally issued Environmental Approvals to the extent such Work or mitigation measure constitute material changes or additions from the Contract requirements and are the result of any material change occurring after Contract Execution in the terms, interpretation or administration of the relevant Environmental Laws.

The Contractor shall be responsible for proving the Environmental Laws have substantially changed and such change causes an impact to their pricing.

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 Commission 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 of any Project Bridge, shall pass to the Commission, free and clear of all Liens, upon the sooner of:

- a) incorporation into such Project Bridge; or
- b) payment by the Commission 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 and control 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 PAYMENT

11.1 Contract Price

11.1.1 Contract Price

As full compensation for the Work and all other obligations to be performed by the

Contractor under the Contract Documents, the Commission shall pay to the Contractor the Fixed Price of [\$. (Such amount, as it may be adjusted from time to time to account for Change Orders, is referred to herein as the "Contract Price"). The Contract Price may be increased or decreased only by a Change Order issued in accordance with Sections 12 and 13 or by a Contract amendment.

11.1.2 Items Included in Contract Price

The Contractor acknowledges and agrees that, subject only to the Contractor's rights under Sections 12 and 13, the Contract Price includes:

- a) Performance of each and every portion of the Work.
- b) All designs, equipment, materials, labor, insurance and bond premiums, home office, jobsite and other overhead, profit and services relating to the Contractor's performance of its obligations under the Contract Documents (including all Work, Warranties, equipment, materials, labor and services provided by Subcontractors and intellectual property rights necessary to perform the Work).
- c) The cost of obtaining all Governmental Approvals, except for approvals which are the responsibility of the Commission, as specifically provided elsewhere in the Contract Documents.
- d) All costs of compliance with and maintenance of the Governmental Approvals and compliance with Legal Requirements.
- e) Payment of any taxes, duties, and permit and other fees and/or royalties imposed with respect to the Work and any equipment, materials, labor, or services included therein.
- f) All costs of payments made for any property ownership interest for Additional Right of Way, in excess of the ROW Reserve Account.

11.1.3 Delay in Issuance of Notice-to-Proceed 1

The Commission anticipates that it will issue NTP1 within 5 Business Days of execution and delivery of the Contract, subject to the requirements in 4.2.1. If the Commission has not issued NTP1 within 5 Business Days after execution of the Contract by the Commission, the Contractor may seek to negotiate a Change Order including an extension in the time allowed to the Commission for issuance of NTP1 and an increase in the Contract Price mutually acceptable to the Contractor and the Commission. If the Contractor does not wish to seek a Change Order as provided above or the Commission fails to issue a Change Order acceptable to the Contractor, then the Contractor's sole remedy shall be to terminate the Contract by delivery of notice of termination to the Commission, with the right to receive payment as specified in Section 15. The Contractor is not obligated to perform any work that would result in payments exceeding the NTP1 payment cap.

Any price increase under this Section 11.1.3 shall be amortized equally over the next 12 succeeding monthly invoices following the issuance of NTP1, and shall be evidenced by a Change Order.

11.2 Invoices and Payment

Payment of the Contract Price will be made in accordance with the following

schedule, which shall be invoiced on a monthly basis, in addition to the *Mobilization, Bond, and Insurance* payments per Section 11.4. Within thirty days after Approval by the Commission of each final and complete invoice, the Commission shall pay the Contractor the amount of the invoice Approved for payment less any amounts that the Commission is entitled to withhold.

Invoices for specific Project Bridges shall be made on a milestone basis for each Project Bridge, expressed as a percentage of the total cost of each Project Bridge as provided on Form O of the Contractor's Proposal, as follows:

- a) Upon Completion of released for construction design plans– ten percent (10%);
- b) Permanent Materials, upon submission of applicable material invoices and related quality documentation and inspection in accordance with Section 11.3.2 – up to ninety percent (90%);
- c) Upon Acceptance of Structure – the remainder of the ninety percent (90%) not already paid; and
- d) Upon Final Completion of such Project Bridge – the remainder of ninety-nine percent (99%) not already paid. One percent of the total cost of each project Bridge as provided on Form O shall be with held as retainage.

All Force Account amounts or Change Order amounts not included within the milestone percentages as shown above shall be stated separately on all applicable invoices and in accordance with the terms their Change Order.

11.3 Limitations on Payment

In no event shall the Commission have any obligation to pay the Contractor any amount which would result in:

- a) payment for any Project Bridge milestone in excess of the value of the milestone percentage of the total for such Project Bridge; or
- b) aggregate payments hereunder in excess of:
 - i. the overall completion percentage for the Project times the Contract Price; or
 - ii. the payment caps described herein. The Commission does not have the obligation to pay the Contractor for any Nonconforming Work.

The maximum amount of funds available to pay the Contractor prior to issuance of NTP2 is limited to the amount of the Work performed by the Contractor up to the NTP1 Payment Cap, insurance and bond premiums, and the first Mobilization payment of \$2,500,000.00. The Commission has no obligation to make any payment to the Contractor in excess of this amount until such time (if any) as NTP2 is issued. If the Contractor performs any Work in excess of the NTP1 Payment Cap, other than payment of insurance and bond premiums, it does so at its own risk. The NTP1 Payment Cap does not apply to termination costs under Section 15.5.1.

11.3.1 Requirement to Provide Corrected Monthly Update

After Approval of the Original Baseline Schedule, no payment will be processed or owing to the Contractor for Work performed during any period, unless the Monthly

Progress Schedule has been delivered to the Commission (note for definitions – Monthly Progress Schedule will be the cost loaded schedule graph noting actual and forecast percent complete, based on total contract costs, versus time which will be used for informational purposes by MoDOT budget/finance staff.)

11.3.2 Material Allowance

The Commission will pay material allowance for Permanent Materials up to the limit established in Section 11.2 on a per Project Bridge basis. The Commission may in any payment estimate include the value of any material, which has been or will be finally incorporated in the completed work in accordance with the Quality Manual. The material shall be inspected and in conformity with the Contract. The value of any single invoice shall not be less than \$10,000. The material shall be delivered to the project or other location that is approved by the Commission. Any storage area not within the right of way shall be leased at the Contractor's expense with a provision for right of entry by the Commission during the period of storage. Invoices for material payment shall be submitted to the Project Director or designated representative at least four days prior to the estimate date. Receipted invoices for all material payments previously allowed on the estimate shall be submitted to the Project Director or designated representative within 42 days of the date of the estimate on which material allowance was made or such material allowance will be deducted from future payments. The amounts paid for such material shall not exceed the limits established in Section 11.2 and will reduce the amount of payments due upon Acceptance of Structure. .

11.4 Mobilization, Bonds and Insurance Payments

The actual amount of premiums paid by the Contractor for the Payment and Performance Bonds, for insurance required to be provided by the Contractor under Section 8 and 9, monthly progress payments based on the preliminary baseline schedule up to the NTP1 Payment Cap and the first mobilization payment of \$2,500,000.00 may be invoiced at any time after issuance of NTP1. In addition, the Contractor shall be entitled to three additional mobilization payments totaling \$ 7,500,000.00 (that is, the maximum amount payable for mobilization under this Section 11.4 shall be \$10,000,000). The second mobilization payment shall be in the amount of \$2,500,000.00, and may be invoiced at any time after issuance of NTP1. The third payment shall be in the amount of \$2,500,000.00, and may be invoiced at any time after 30 days after issuance of NTP2. The fourth payment shall be in the amount of \$2,500,000.00, and may be invoiced at any time after 60 days after issuance of NTP2.

11.5 Deductions

The Commission may deduct from any amounts otherwise owing to Contractor, including each monthly progress payment and the final payment, the following:

- a) Any accrued losses, liability, Liquidated Damages or other damages for which Contractor is responsible hereunder.
- b) The estimated cost of remedying any Nonconforming Work or otherwise remedying any breach of contract by Contractor.
- c) The amount of any outstanding claim relating to the Work.

- d) The amount for Work that the Contractor is obligated to perform under the Contract, which the Contractor has failed to perform.
- e) Any other sums which the Commission is entitled to recover from the Contractor under the terms of the Contract.

The Commission's failure to deduct from a progress payment any amount, which the Commission is entitled to recover from the Contractor under the Contract, shall not constitute a waiver of the Commission's right to such amounts.

11.6 Final Payment

Final payment will be made in accordance with this Section 11.6.

11.6.1 Application for Final Payment

On or about the date of delivery of its Affidavit of Final Completion, the Contractor shall prepare and submit a proposed Application for Final Payment to the Commission showing the proposed total amount due the Contractor. In addition to meeting all other requirements for invoices hereunder, the Application for Final Payment shall include:

- a) an affidavit, on the form prescribed by the Commission, to the effect that all payments have been made and all claims have been released for all material, labor and other items covered by the Contract bond; or
- b) a list of all existing or threatened claims, Liens and stop notices by Subcontractors, laborers, Utility Owners or other third parties relating to the Project, including any notices filed or to be filed with the Affidavit of Final Completion, stating the amount at issue associated with each such notice;
- c) the written consent by the surety to such payment; and
- d) such other documentation as the Commission may reasonably require. Prior applications and payments shall be subject to correction in the proposed Application for Final Payment.

If a Subcontractor refuses to furnish a release or waiver required by the Commission, the Contractor may furnish a bond satisfactory to the Commission to indemnify the Commission against such Lien. If such Lien remains unsatisfied after payments are made, and is not bonded over as provided in the previous sentence, Contractor shall promptly pay to the Commission all money that the Commission may be compelled to pay in discharging such Lien, including all costs and attorneys' fees.

The Commission will review the Contractor's proposed Application for Final Payment, and changes or corrections will be forwarded to the Contractor for correction. If no changes or corrections are required, the Commission will Approve the Application for Final Payment.

11.6.2 Payment

As a condition to its obligation to make payment to the Contractor based on the Application for Final Payment, the Commission shall have received a completed Form C-242 (Exhibit H) from the Contractor, releasing and waiving any claims against the Indemnified Parties, and otherwise satisfactory in form and content to the Commission.

Exhibit H shall be accompanied by an affidavit from the Contractor certifying:

- a) That it has resolved any claims made by Subcontractors, Utility Owners, and others against the Contractor or the Project.
- b) That it has no reason to believe that any Person has a valid claim against the Contractor or the Project which has not been communicated in writing by the Contractor to the Commission as of the date of the certificate.
- c) That all guarantees and warranties are in full force and effect.

Exhibit H and the affidavit shall survive final payment. The payment amount will be reduced by any amounts deductible under Section 11.5.

All prior partial estimates and payments shall be subject to correction in the final payment.

Contractor's acceptance of final payment shall constitute a waiver of affirmative Claims by Contractor except those previously made in writing and identified as unsettled at the time of final payment.

11.7 Prompt Payment to Subcontractors

The Contractor is responsible to ensure that all Subcontractors and suppliers at every tier are promptly paid in accordance with the Missouri Prompt Pay Act, 34.057 RSMo. The Contractor shall include in all subcontracts a provision that this requirement for prompt payment to the Subcontractors and suppliers must be included in all subcontracts at every tier. If the Contractor fails to comply with this requirement, the Commission may withhold the amount due from any monthly progress payment until the required payment(s) have been made.

11.8 Disputes

Subject to the Commission's right to withhold from progress payments any amounts in dispute, and except as expressly stated otherwise in this Section, any disagreement between the Commission and the Contractor relating to this Section 11 shall be subject to Section 19. Failure by the Commission to pay any amount in dispute shall not alleviate, diminish, or modify in any respect the Contractor's obligation to perform under the Contract Documents, including the Contractor's obligation to achieve Final Acceptance in accordance with the Contract Documents, and the Contractor shall not cease or slow down performance under the Contract Documents on account of any such amount in dispute. The Contractor shall proceed as directed by the Commission pending resolution of the dispute. Upon resolution of such dispute, each party shall promptly pay to the other any amount owing.

12 FORCE MAJEURE AND OTHER RELIEF EVENTS

12.1 Relief from Liability

- a) The Contractor shall be relieved from liability for schedule delays under the Contract, including liability for Liquidated Damages under Section 17, for any delay or failure in performance of the Work to the extent such delay or failure is caused by a Relief Event, provided that it shall have delivered notice of such event to the Commission as soon as reasonably practicable after

becoming aware thereof. The Contractor shall be entitled to a Change Order pursuant to Section 13.4.3 to increase the Construction Day Allowance and/or the Total Closure Date Limit, as appropriate, for any Project Bridge by the number of Calendar Days the delay or failure extends such Construction Duration of increases the number of Closure Days.

- b) Subject to Section 12.2, the Commission shall not have the right to terminate the Contract for a Contractor Default pursuant to Section 16.2.1 c) for the Contractor's failure to achieve any Completion Deadline or failure to satisfy any Construction Day Allowance or the Total Closure Day Limit, to the extent any such failure was caused by a Relief Event. Moreover, as further set forth in Section 17.1.4, the Commission shall not have the right to terminate the Contract for the Contractor's failure to achieve any Completion Deadline or failure to satisfy any Construction Day Allowance or the Total Closure Day Limit, even in the event such failure was not caused by a Relief Event, except to the extent provided in Section 17.1.4.
- c) As further set forth in Section 16.1.1, the Contractor shall be relieved from liability for any such failure to perform any of its obligations under the Contract to the extent such failure was caused by a Relief Event.

12.2 Right to Relief Event for Force Majeure

The Contractor shall be entitled to relief in the event of any Force Majeure event, to the extent of the duration of the Force Majeure event. The Contractor shall deliver written notice to the Commission prior to any such relief, which sets forth in reasonable detail how the:

- a) Force Majeure Event has prevented the Contractor from performing the Work with respect to all or substantially all of the Project; and
- b) written notice sets forth in reasonable detail of the Force Majeure Event, a description of the direct result and its duration and the specific relief sought by the Contractor.

A party may only seek relief for under this Section 12.2 so long as such party is not responsible for the subject Relief Event for which termination is sought.

13 CHANGES IN THE WORK

This Section 13 sets forth the requirements for obtaining all Change Orders. The Contractor hereby waives the right to make any claim for a time extension or for any monetary compensation in addition to the Contract Price and other compensation specified in the Contract, except as set forth in Section 12 or this Section 13.

13.1 Time Frame to Process Change Orders

Change order responses and settlements shall be performed within 20 Business Days of receipt by either party unless mutually agreed by both parties.

13.2 Circumstances Under Which Change Orders May be Issued

13.2.1 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. A Change Order shall not be effective for any purpose unless executed by the Commission and the Contractor. Execution of a Change Order by the Commission shall mean fully executed by the Commission’s duly authorized representatives. Change Orders may be issued for the following purposes, or combination thereof to:

- a) modify the Work; and
- b) revise other terms and conditions of the Contract Documents.

A Change Order may direct the Contractor to proceed with the Work with the amount of any adjustment of the Contract Price to be determined within 45 days of written direction. Any amount in dispute after 45 days shall be resolved in accordance with Section 13.7 or by Force Account, per Section 13.12.1. In addition, the Commission will execute a Change Order form to evidence any compensation or other relief to which the Contractor is entitled pursuant to the Contract.

13.2.2 Performance of Changed or Extra Work

As a condition precedent to the Contractor’s right to receive additional payment for changed or extra work, but without in any way limiting its rights under Section 12 or Section 13.4, a Change Order for such work shall have been executed by the Commission and the Contractor. To the extent that the Contractor undertakes any such work without receiving a Change Order executed by the Commission, unless the Commission directs the Contractor to otherwise proceed with such Work and the Commission and the Contractor have agreed upon the scope of work and the price in respect thereto:

- a) the Contractor shall be deemed to have performed such work at its own risk and may not be entitled to a Change Order in connection therewith, except as otherwise provided herein; and
- b) the Contractor may be required to remove or otherwise undo any such work, at its cost.

13.2.3 Changes in Law

The Contractor shall be entitled to an increase in the Contract Price for any change in a Legal Requirement, change in the judicial interpretation of a Legal Requirement, Legal Requirements in addition to or in lieu of those in effect as of the date of Contract Execution of this Contract or adoption of any new Legal Requirement, which is materially inconsistent with Legal Requirements in effect on the Proposal Due Date, excluding any such change or new Legal Requirement which was passed or adopted but not yet effective as of the Proposal Due Date, and which:

- a) requires a material modification in the Work;
- b) requires the Contractor to obtain an Environmental Approval or other Governmental Approval not previously required for the Project;
- c) eliminates existing Tax exemptions or increases applicable sales Taxes or

increases any other Taxes or introduces any new Taxes applicable to the Project, the Work, the Contract or the Contractor; or

- d) specifically targets, or is principally borne by, the Project or the Contractor or contractors of highway or bridge projects in the State of Missouri.

In the event that any change in Legal Requirements occurring after Contract Execution, reduces the cost of the Work by:

- e) allowing a material modification in the design of the Project resulting in a net cost savings; or
- f) reducing the expense of complying with the requirements of the Environmental Approvals;

then the Commission will realize the savings.

13.3 Procedure for Commission Initiated Change Orders

The Commission may initiate a Change Order at any time; provided however, that the Commission will not have the right to initiate a Change Order that requires any change that:

- a) is not in compliance with applicable Legal Requirements;
- b) would contravene an existing Governmental Approval;
- c) constitutes a fundamental change in the nature or scope of the Project;
- d) is fundamentally incompatible with the Project design;
- e) would not allow the Contractor to achieve the Work in accordance with the Contract Schedule and Completion Deadlines; or
- f) is not technically or commercially feasible to construct.

13.4 Procedure for Contractor Requested Change Orders

13.4.1 Improvements

The Contractor may request the Commission to approve a Change Order that provides equal to or better value than the Contract Document requirements. The Commission may approve, in its sole discretion, in whole or in part, such Change Order in the form attached as Exhibit G.

13.4.2 Compensable Events

The Contractor shall be entitled to reasonable, increased cost, subject to compliance with Section 13.5, to a Change Order to increase the Contract Price for all increased costs incurred in connection with the Work, determined pursuant to Section 13.7.1, attributable to the following “Compensable Events”:

- a) Commission-Caused Delay which is not solely a Relief Event;
- b) any Errors in the Contract Documents, excluding inconsistencies that are resolved by Section 1.3;
- c) any implementation of measures approved by the Commission pursuant to Section 5.3.2 or any recommencement of Work at the direction of the

- Commission pursuant to Section 5.3.3;
- d) any Remobilization or Utility Relocation costs pursuant to Section 6.2.3;
 - e) any Third Party Agreement, to the extent provided in Section 10.4.1;
 - f) any additional Work or mitigation measure necessitated by terms of the finally issued Environmental Approvals, to the extent provided in Section 10.4.2;
 - g) any Change in Law to the extent provided in Section 13.2.3;
 - h) any Hazardous Substances present on the Site and, to the extent provided in Section 13.8 or Section 18.2, and any Remediation Work related thereto;
 - i) any Commission Default or any breach of the Contract by the Commission;
 - j) any failure by the Commission to comply with any Legal Requirement or Governmental Approval;
 - k) a Force Majeure Event that materially effects any Project Bridge which is not covered under Contractor insurance or covered elsewhere in the Contract;
 - l) any of the following events, provided such events are beyond the reasonable control of the Contractor and are not due to a negligent act or omission any Contractor-Related Entity:
 - i. the discovery at, near or on the site of any human remains, artifacts, fossils or and other items of historical, geological, archaeological, cultural, paleontological or biological significance which term shall be deemed to mean any raptors, eagles or any threatened or endangered species, to the extent that the existence of such resources was not disclosed in the RFP Documents;
 - ii. the suspension, termination, interruption, denial, failure to obtain, non-renewal or amendment of any Environmental Approval, including in connection with those Environmental Approvals required to be obtained by the Commission as provided in Section 6.3.3; or
 - iii. any lawsuit seeking to restrain, enjoin, challenge or delay construction of any Project Bridge, except to the extent that the risk of such lawsuit has been assumed by the Contractor under Section 6.3.3 or the lawsuit otherwise arises out of any act, omission or breach of obligation of any Contractor-Related Entity.
 - p) related to assistance from the Contractor required pursuant to Section 2.2 e) and specifically requested by the Commission.

13.4.3 Change Orders Affecting Construction Day Allowance

The Contractor shall be entitled to a Change Order to increase the Construction Day Allowance for a Project Bridge and/or the Total Closure Day Limit if it is entitled to such increase as a result of a Relief Event pursuant to Section 12.1.

For the avoidance of doubt, no Change Order shall be necessary for any time extensions or other changes in the Contract Schedule other than for any increase in the Construction Day Allowance for a Project Bridge and/or the Total Closure Day Limit.

13.4.4 Change Orders Affecting Final Acceptance Deadline

(STILL IN PROGRESS) If any Relief Event causes the Acceptance of Structure for any Project Bridge(s) to be delayed beyond the Initial Construction Completion Deadline (such Project Bridges, the “Affected Project Bridges”) but Acceptance of Structure has occurred or will occur as of such Initial Construction Completion Deadline for all other Project Bridges, the Contractor shall be entitled to a Change Order for payment of incentives for Final Completion by adjusting the Proposed Final Completion Date the same amount as the Relief Event.

13.4.5 Bridge Substitution

The Commission has identified candidate Bridge substitute structures. The Commission and the Contractor shall agree, within 6 months after Contract Execution, on a list of Bridge structures for potential substitution during the initial construction period of the project. This Bridge Substitution list of no more than 50 structures will be developed based on the goals of the Project, including a fixed price and will undergo environmental review by the Commission in order to provide a list of additional Bridges with NEPA classification from the FHWA. The Contractor or the Commission may request a Change Order for Project Bridge removal or substitution if:

- a) the Work relating to any Project Bridge is affected by a Relief Event and:
 - i) the duration of the delay associated with the Relief Event is 2 months or greater; or
 - ii) the delay begins after the date which is 6 months prior to the scheduled Final Completion, and a time adjustment is not agreed upon; or
- b) such removal or substitution is agreed to by the Commission, in its sole discretion; or
- c) the removal or substitution is required by the Commission to control cost increases to remain within the confines of the Contractor's original Cost Proposal.

Should a Bridge substitution be requested, the Commission and the Contractor shall identify a substitute Bridge, based on the list developed by the Commission and the Contractor. If the Commission and the Contractor do not reach mutual consent to substitute a Bridge, then the Commission may elect, in its sole discretion, to remove the Bridge.

In the event a substitute Bridge is added to the Contract, any Closure Duration resulting from Work previously performed on the Project Bridge that is eliminated from the Contract and any Closure Duration resulting from the process of remobilizing for Work on the substituted Bridge, shall be deemed never to have occurred for purposes of calculating Liquidated Damages.

If no appropriate substitute Bridge is agreed in accordance with the terms of this Section, a Project Bridge may be removed and the Contractor will be entitled to payment of costs referred to in the proceeding Section 13.4.5 e).

13.4.6 Technical Change Orders

Subsequent to the Effective Date, the Contractor may identify changes to the original Contract documents resulting in a net cost savings that requires revisions to the Contract, new or revised Additional Applicable Standards and/or Design Exceptions. The Contractor shall submit for approval, documentation of such changes to the Commission. The documentation shall include all relevant revised Proposal items, Additional Applicable Standards and Design Exceptions. Prior to proceeding to determinations of any Compensation Event and/or Relief Event pursuant to Section 13.7, the Commission shall have approved all documentation for the Technical Change Order. Should the Commission approve such Technical Change Order, the Contractor shall provide payment to the Commission in an amount equal to 50% of any net cost savings, in the form of a lump sum payment within 30 days following Completion of Initial Construction; or at the Contractor's election, the Commission may be compensated by adjustment to the Payment Schedule pursuant to the terms of Section 13.7.1. No changes can be made to Applicable Standards and Additional Applicable Standards without a Change Order documenting the mutual consent of the Contractor and the Commission acting reasonably.

13.5 Contents of Change Orders

13.5.1 Scope of Work; Cost Estimate

Either at the Commissions reasonable request or on the Contractor's own volition for each Change Order request, the Contractor shall:

- a) meet all applicable requirements of this Section;
- b) describe the scope of work, additions, substitutions, deletions, delays and modifications to the existing Contract requirements for all activities associated with the Change Order, in detail that is satisfactory to the Commission;
- c) set out the estimated costs in the form of Exhibit G, in such a way that a fair evaluation can be made, including:
 - i. a breakdown for labor, Materials, Equipment, overhead which includes all indirect costs, financing costs, profit and any other costs included in the Compensation Amount; and
 - ii. Subcontractor's quotes for work to be preformed by such Subcontractors with breakdowns showing cost of labor, Materials, Equipment, overhead and profit on the Subcontractor's stationery.

The Contractor's overhead shall be limited to a maximum of five percent of the increase in costs associated with physical work;

- d) provide an impact analysis on the Contract Schedule, if applicable; and
- e) provide such other supporting documentation as may be reasonably requested by the Commission.

13.5.2 Justification

All requests for Change Orders shall include a narrative justification, detailing all causes of the proposed change, making specific reference to the applicable provisions which permit a Change Order to be issued and describing the data and

documents which establish the necessity of such proposed change.

13.5.3 Contractor Representation

Each Change Order shall contain a sworn certification in form acceptable to the Commission by the Contractor that the amount of compensation requested includes all known and anticipated impacts or amounts, direct, indirect and consequential, which may be incurred as a result of the event or matter giving rise to such proposed change and that the Contractor has no reason to believe and does not believe that the factual basis for the Change Order is falsely represented.

13.6 Certain Limitations

Any increase in the Contract Price allowed shall exclude:

- a) costs caused by the breach of contract, fault or negligence, or act or failure to act of any Contractor-Related Entity;
- b) costs, which could reasonably have been avoided by the Contractor, incurred by resequencing, reallocating or redeploying its forces to other portions of the Work or to other activities unrelated to the Work; and
- c) costs for any rejected Work which failed to meet the requirements of the Contract Documents including any necessary remedial Work resulting therefrom.

13.7 Determination of Compensation and Other Relief

13.7.1 Compensation Amount Determination

- a) If the Contractor complies with the notice and information requirements of Section 13.5 related to a requested Change Order for a Compensable Event, then within 15 Calendar Days, the Commission and the Contractor shall commence good faith negotiations to determine the Compensation Amount or Bridge Removal or Substitution, as the case may be.
- b) If the Commission and the Contractor are unable to agree on the relevant Compensation Amount or appropriate Project Bridge substitution within 15 Calendar Days after commencing good faith negotiations, or if the Contractor asserts a claim against the Commission for the Compensation Amount pursuant to this Section, the Commission shall prepare and deliver to the Contractor a good faith estimate of the Compensation Amount and shall pay the full undisputed portion of the Compensation Amount to the Contractor within 30 Calendar Days thereafter, or in accordance with any other arrangement mutually agreed upon within such 15-Day period. Any Dispute related to such Compensation Amount shall be resolved in accordance with Section 19.

13.7.2 Other Relief Event Determinations

- a) If the Contractor complies with the notice and information requirements of Section 13.5 related to a requested Change Order for relief other than payment by the Commission of a Compensation Amount including any relief pursuant to Sections 12, 13.4.3, 13.4.4 or 13.4.5, then within 15 Calendar Days the Commission and the Contractor shall commence good faith negotiations to

determine the relief, if any, to which the Contractor is entitled.

13.7.3 Mitigation

The Contractor shall take reasonable steps to mitigate the consequences of any Relief Event or Compensable Event, including all steps that would generally be taken in accordance with good industry practice.

13.8 Hazardous Substances Management

Except as expressly provided in this Section, the Contract Price includes the cost of all activities to be performed by the Contractor as described in Section 5.0, Book 2.

13.8.1 Price Increase and Time Extension

The Contractor shall be entitled to payment or other relief for Remediation Work, except as set forth in Section 18, through a Change Order priced in accordance with Section 12 or Section 13.

13.8.2 Limitations on Change Orders

All Change Orders authorized with respect to Remediation Work shall be subject to the restrictions, limitations and procedures set forth in this Section. Allowable costs shall be limited to the Incremental Costs associated with any Hazardous Substances not identified prior to the submittal of the Price Allocation. The Contractor shall take all reasonable steps to minimize any such costs. In addition, compensation for Remediation Work under this Section will not be allowed unless the Contractor demonstrates to the Commission's reasonable satisfaction that the Contractor's plan for the Remediation Work represents at least the minimum standards required by applicable law. The Contractor shall provide the Commission with such information, analyses and certificates as available and reasonably requested in order to enable a determination regarding eligibility for payment.

13.9 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 CHANGE REQUEST FOR CHANGE ORDER, 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. FOR PURPOSES OF THIS SECTION, "PROPER AND TIMELY NOTICE" SHALL MEAN, WITH RESPECT TO CONSTRUCTION ACTIVITIES, BEFORE FINAL COMPLETION WITH RESPECT TO THE RELEVANT PROJECT BRIDGE AND, WITH RESPECT TO MAINTENANCE ACTIVITIES, NO LATER THAN THE SECOND PAYMENT INSTALLMENT FOLLOWING THE OCCURRENCE OF THE EVENT GIVING RISE TO THE REQUEST FOR A CHANGE ORDER.

13.10 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 Commission has been unjustly enriched shall be the basis for any claim, request for additional compensation or other relief. 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 Commission may require the Contractor to remove or otherwise undo any such work, at the Contractor's sole cost.

13.11 No Release or Waiver

13.11.1 Extension of Time for Performance

Except as otherwise set forth in Sections 12 and 13, no extension of time granted hereunder shall release the Contractor's Financial Assurance Package provider from its obligations. The Commission shall not be deemed to have waived any rights under the Contract, including its right to abrogate the Contract for abandonment or for failure to complete within the time specified (as such time may be modified pursuant to Sections 12 and 13) or to impose and deduct damages as may be provided herein, as the result of any grant of an extension of time (except as otherwise set forth in Sections 12 and 13) beyond the date fixed for the completion of any part of the Work (as such date may be modified pursuant to Sections 12 and 13), 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.

13.12 Force Account Change Orders

The Commission may at its discretion issue a Force Account Change Order whenever the parties cannot agree to a Lump Sum Change Order or the Commission determines that a Force Account Change Order is advisable. The Force Account Change Order shall instruct the Contractor to perform the Work, indicating expressly the intention to treat the items as changes in the Work, and setting forth the kind, character, and limits of the Work as far as they can be ascertained, the terms under which changes to the Contract Price will be determined and the estimated total change in the Contract Price anticipated thereunder. Upon final determination of the allowable costs, the Commission shall issue a modified Change Order setting forth the final adjustment to the Contract Price. The costs and additional amounts allowed in Section 13.8 (and no others) shall be used for calculating the change in the Contract Price. No direct compensation will be allowed for other miscellaneous costs for which no specific allowance is provided in Section 13.6.

The Commission and the Contractor may agree to negotiate unit prices for a Force Account Change Order. Measurement of any unit-priced quantities will be as specified in the Change Order. Unit prices shall be deemed to include all costs for labor, material, overhead and profit, and shall not be subject to change regardless of any change in the estimated quantities. Upon final determination of the quantities, the Commission will issue a modified Change Order setting forth the final adjustment

to the Contract Price.

13.12.1 Force Account Records

The Contractor shall maintain its records in such a manner as to provide a clear distinction between:

- a) the direct cost of Work for which it is entitled (or for which it believes it is entitled) to an increase in the Contract Price; and
- b) the costs of other operations.

The Contractor shall contemporaneously collect, record in writing, segregate, and preserve:

- c) all data necessary to determine the costs described in this Section 13.5 with respect to all Work which is the subject of a Change Order or a requested Change Order, specifically including costs associated with design Work as well as Utility Relocations, but specifically excluding all negotiated Change Orders (except for Lump Sum Work Orders that are also Change Orders as described in Section 13.4); and
- d) all data necessary to show the actual impact (if any) of the change on the Critical Path affecting a Completion Deadline with respect to all Work which is the subject of a Change Order or a proposed Change Order, if the impact on the Critical Path affecting a Completion Deadline is in dispute. Such data shall be provided pursuant to Section 19, on forms Approved by the Commission. The cost of furnishing such reports is included in the Contractor's predetermined overhead and profit.

The Contractor shall furnish daily, on forms Approved by the Commission, reports of Force Account Change Order Work. The cost of furnishing such reports shall be included in the Contractor's overhead and profit percentages. The reports shall include:

- e) Name, classification, date, daily hours, total hours, rate, and extension for each worker (including both construction and non-construction personnel) and foreman.
- f) Designation, dates, daily hours, total hours, rental rate, and extension for each unit of machinery and equipment.
- g) Quantities of materials, prices and extensions.
- h) Transportation costs of materials, machinery, and equipment.
- i) Invoices for materials used and for transportation charges.

The reports shall also state the total costs to date for the Force Account Change Order Work.

If materials used on the Force Account Change Order Work are not specifically purchased for the Work but are taken from the Contractor's stock, the Contractor shall furnish an affidavit certifying that such materials were taken from the Contractor's stock, that the quantity claimed was actually used, and that the price and transportation costs claimed represent actual costs to the Contractor.

All Force Account Change Order reports shall be signed by the Contractor's Project

Manager. The Commission will compare its records with the Contractor's reports, make the necessary adjustments and compile the costs of Force Account Change Order Work. When such reports are agreed upon and signed by both parties, they will become the basis of payment, but shall not preclude subsequent adjustment based on a later audit. The Contractor's (and each Subcontractor's) cost records pertaining to Work paid for on a Force Account basis shall be open, during all regular business hours, to inspection or audit by representatives of the Commission during the life of the Contract and for a period of not less than seven years after Final acceptance, and the Contractor (and each Subcontractor) shall retain such records for that period. If an audit is to be commenced more than 60 days after Final acceptance, the Contractor will be given a 20-day notice of the time when such audit is to begin.

13.13 Pricing of Change Orders

The Commission 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. Subject to the foregoing exceptions, in general the price of a Change Order shall be negotiated in accordance with this Section 13.8 or shall be based on Force Account records pursuant to Section 13.5.

13.13.1 Scope Development Risk

Risk associated with the Work described in the Change Order, defined as scope development risk, may be included in a Change Order through an additional amount agreed to by the Commission and the Contractor.

13.13.2 Labor Costs

The cost of labor shall be separated into construction-related Work and non-construction-related Work as described below. The use of a labor classification that would increase the extra work cost will not be permitted unless the Contractor establishes the necessity for such additional costs. The cost of labor shall be calculated based on straight time for all hours worked, unless the Contractor obtains the Commission's prior Approval for overtime.

The cost of labor for workers used in the actual and direct performance of construction-related Work, including Lead Workers, whether provided by the Contractor or a Subcontractor, will equal the sum of the following:

- a) actual unburdened wages (i.e. the base wage paid to the employee exclusive of any fringe benefits); plus
- b) the actual costs paid to, or on behalf of, employees for liability and worker's compensation insurance premiums, unemployment insurance contributions and social security taxes, health and welfare benefits, pension fund benefits or other benefits, if such amounts are required by the collective bargaining agreement or employment contract, applicable to the classes of labor employed on the work; plus
- c) 20% (15% overhead and 5% profit) of the sum of the above items.

The cost of labor for non-construction-related Work, whether provided by the Contractor or a Subcontractor, will equal the sum of the following:

- d) Actual wages (i.e. the base wage paid to the employee exclusive of any fringe benefits); plus
- e) an overhead based on the audited Federal Acquisition Regulations (FAR) field rates not to exceed 145%, or if a company has no FAR rate, an overhead of 145%. Contractor will also be paid for profit on non-construction labor of 10% of labor costs plus overhead.

13.13.3 Material Costs

Material costs shall be the cost of all materials to be used in the performance of construction Work including normal wastage allowance as per industry standards, subject to the requirements set forth in this Section 13. The material prices shall be supported by valid quotes and invoices from the Suppliers. The cost shall include applicable sales taxes, freight and delivery charges and any allowable discounts (exclusive of machinery rentals). The Commission reserves the right to Approve materials and sources of supply of materials to be furnished by the Contractor or Subcontractors, and shall have the right to furnish such materials as it deems advisable. The price allowed for materials shall be adjusted as follows:

If the materials are obtained from a supply or source owned in whole or in part by the Contractor or a Subcontractor, the cost of such materials shall not exceed the lesser of the lowest price charged by the Contractor or such Subcontractor (as applicable) for similar materials furnished to other jobs or the current wholesale price for such materials delivered to the Site.

If the cost of such materials is, in the opinion of the Commission, excessive, then the cost of such materials shall be deemed to be the lowest current wholesale price at which such materials were available, in the quantities needed and delivered to the Site.

If the Contractor or any Subcontractor (as applicable) does not furnish satisfactory evidence of the cost of such materials from the actual supplier thereof within 60 days after the date of delivery of the material, the Commission reserves the right to establish the cost of such materials at the lowest current wholesale prices at which such materials were available, in the quantities needed and delivered to the Site.

Contractor will be paid an additional 20% for overhead and profit.

13.13.4 Equipment

Contractor will be paid for the use of equipment owned or rented by Contractor or any Subcontractor for actual use in construction of the Project at an hourly rate derived from the most recently published *Rental Rate Blue Book for Construction Equipment* by Dataquest, Inc., San Jose, California which is in effect at the time of commencement of the changed Work (the "Blue Book").

The total hourly rates derived from the above publication are computed from equipment costs currently in effect. The rates derived do not include costs for operating personnel. The rates require adjustment by a Regional Factor and a Depreciation Factor found in the front of each chapter in the Blue Book.

Equipment use rates fall in the following two categories:

- a) Operating Rate - This rate applies to those hours the equipment is actually in

use, includes ownership and operating costs, and shall equal the Blue Book monthly rate adjusted for year of manufacture divided by 176 times the Regional Factor of 1.06 plus the estimated hourly operating costs from the Blue Book.

- b) The Standby Rate - This rate applies to equipment required to be at the Site but not operating, includes ownership costs only, and shall equal the Blue Book monthly rate adjusted for year of manufacture divided by 176 times the Regional Factor of 1.06 times 0.5. The duration of allowable standby time is to be Approved in writing by the Commission with a maximum of eight hours per day or 40 hours in a normal week.

When the "manufacturer's rated capacity" falls between those shown in the Blue Book, the closest rated capacity will be used, without interpolation. All rates shall be agreed upon in writing before work is begun. Payment will not be made for pickup trucks used solely for transportation.

In cases where the equipment to be used is specialized in nature and is not available in Contractor's inventory and is rented or leased from an outside agency a 10 percent allowance will be added on the first \$5,000 plus 5 percent of the balance in excess of \$5,000 for overhead for all rented or leased equipment paid for by invoices. Where the rate charged by the agency exceeds the rate determined by the Blue Book, the rental or lease agreement shall be submitted to the Commission for Approval. The equipment operating costs from the Blue Book will be paid for rented or leased equipment for each hour the equipment was actually used.

In those cases where the required equipment is in Contractor's or Subcontractor's available inventory but not on the Site, the equipment may be rented from a local source. The Commission may Approve rental rates for equipment obtained from local sources when such rates are within 10 percent of rates in the Blue Book. When the equipment use is of short duration (less than a week) "move-in" and "move-out" costs for equipment owned by Contractor or Subcontractors may be considered when comparing rental costs of equipment obtained from local sources. This option will only be allowed when the cost of locally rented equipment would be less than using owned equipment, including "move-in" and "move-out" charges. Such rentals must be supported by a cost analysis indicating the method used was the least expensive. Should equipment be rented even though it is of a type that is in Contractor's or Subcontractor's inventory and the rental costs exceed that allowed by this paragraph, Contractor will be reimbursed for such equipment based on the rates in the Blue Book.

The rates paid as above provided shall be deemed to include compensation for the cost of fuel, oil, lubricants, supplies, small tools, necessary attachments, repairs and maintenance of all kinds, depreciation, storage, insurance and all incidentals. Individual pieces of equipment or tools not listed in the Blue Book and having an individual replacement value of \$1,000 or less, whether or not consumed by use, shall be considered to be small tools. Equipment rental rates not provided by the Blue Book must be Approved by the Commission before the start of any Change Order Work.

Contractors will be paid an additional 20% for overhead and profit.

Equipment operators will be paid for as stipulated in Section 13.

All equipment shall be in good working condition and suitable for the purpose for which the equipment is to be used.

Unless otherwise specified, manufacturer's ratings and manufacturer-approved modifications shall be used to classify equipment for the determination of applicable rental rates. Equipment, which has no direct power unit, shall be powered by a unit of at least the minimum rating recommended by the manufacturer of that equipment.

The time to be paid for use of equipment on the Site shall be the time the equipment is in operation on the Force Account Change Order Work being performed. The time shall include the reasonable time required to move the equipment to the location of the Force Account Change Order Work and return it to the original location or to another location requiring no more time than that required to return it to its original location. Moving time will not be paid for if the equipment is also used at the Site other than for Force Account Change Order Work. Loading and transporting costs will be allowed, in lieu of moving time, when the equipment is moved by means other than its own power. No payment for loading and transporting will be made if the equipment is also used at the Site other than for Force Account Change Order Work. Time will be computed in half and full hours. In computing the time for use of equipment, less than 30 minutes shall be considered one-half hour.

13.13.5 Permit Fees

The Contractor will be reimbursed for the cost of any additional permit fees payable as the result of a change in the Work requiring additional permit fees. Back-up documentation supporting each cost item for this category shall be provided by the Contractor and Approved by the Commission prior to any payment authorization being granted.

Contractor will be paid an additional 5% for overhead and profit.

13.14.6 Subcontracted Work

For administration and all overhead costs in connection with Subcontract Work, the Contractor will receive an amount equal to five percent of the cost of the Subcontracted Work, notwithstanding the actual number of intervening Subcontractors, provided that the Contractor may allocate all or any part of such administration and overhead costs among intervening Subcontractors. This shall fully compensate the Contractor (and all Subcontractors) for administration, general superintendence, overhead, profit and expenses not otherwise recoverable with respect to subcontracted Work. This shall not apply to:

- a) Subcontracts with Affiliates; or
- b) Subcontracts with Suppliers.

13.14.7 Overhead and Profit

Unless otherwise indicated in this Section 13, the overhead and profit and labor surcharges under this Section 13 are full and complete compensation for all indirect costs of the added or changed Work, as well as for profit thereon. The Contractor's overhead and profit percentages and labor surcharges under this Section 13 shall be considered to include, among other costs, salary and expenses of executive officers, supervising officers or supervising employees, clerical employees, charges for minor equipment, such as small tools, and other miscellaneous supplies and services,

incidental job burdens, bonuses not otherwise covered, field, jobsite and general home office expenses of all types (including timekeepers, bookkeepers, and other general office help), supervisory expenses of all types (excluding only direct supervision of force account work) and all other overhead, general condition and indirect costs and expenses, and profit. With respect to non-construction related labor costs, overhead is included as part of the labor surcharge calculated in accordance with Section 13 and includes accessories such as Computer-Assisted Drafting and Design (CADD) systems, computers, facsimile transmission machines, scanners, plotters, etc.

Payment of Overhead and Profit

The foregoing overhead and profit and labor surcharges will be paid to the Contractor only for Work it performs; in the case of Work that is subcontracted, the additional payment for Subcontract administration will be allowed to the Contractor as described in Section 13 and all other overhead and profit and labor surcharges will be allowed to the Subcontractor who actually performs the Work.

Materials and Equipment

No overhead, profit or other surcharges will be paid to the Contractor for any materials or equipment furnished by the Commission.

Credit Items

Where the Contractor's or any Subcontractor's portion of a change involves credit items, or the proposed change is a net deductive change, the Contractor shall include all Contractor's and Subcontractor's overhead and profit in computing the value of the credit.

Bond and Insurance Premiums

If a change requires additional bond and/or insurance premiums, they will be paid for as a direct payment with no additional amount for overhead or profit.

13.14.8 Compliance with Federal Acquisition Regulations

Reimbursable expenses shall be limited to and comply with the FARs. Expenses excluded by the FARs shall not be reimbursed. If FHWA asserts that any claimed reimbursable expenses are not reimbursable under FARs, the Commission will allow the Contractor the opportunity to respond to the Commission and defend the allowability of the expenses.

14 SUSPENSION OF WORK

14.1 Suspension for Convenience

The Commission 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 Commission deems appropriate for the convenience of the Commission. 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 Commission directing the Contractor to resume Work. Suspensions related to seasonal or climatic conditions, or

compensable events shall not be considered a Commission caused delay.

14.2 Suspension for Cause

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

- a) Correct conditions unsafe for the Project personnel or general public.
- b) Comply with any Governmental Approval, Legal Requirement, or otherwise carry out the requirements of the Contract.
- c) Carry out orders of the Commission.
- d) Comply with environmental requirements or requirements for developing and implementing the Quality Manual.

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 Commission 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 Commission, the Contractor shall continue to be responsible for maintenance of traffic in accordance with Maintenance of Traffic Plan and Section 16 of Book 2 and for maintenance during construction in accordance with Section 18 of Book 2. If the suspension is for the Commission's convenience, the additional work performed by the Contractor during the suspension period shall be considered a Commission-Directed Change. The Contractor shall be entitled to payment, in accordance with Section 34.057, RSMo, for all work performed in accordance with the terms of the order of suspension.

15 TERMINATION FOR CONVENIENCE

15.1 Notice of Termination

The Commission may terminate the Contract and the performance of the Work by the Contractor in whole or, from time to time, in part, if the Commission determines, in its sole discretion that a termination is in the best public, State or national interest to do so. The Commission 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 the Contract shall not relieve any Surety of its obligation for any claims arising out of the Work performed.

15.2 Contractor Responsibilities Upon Termination

After receipt of a Notice of Termination, and except as otherwise directed by the

Commission, the Contractor shall immediately proceed as follows, regardless of any delay in determining or adjusting any amounts due under this Section 15.

- a) Stop Work as specified in the notice.
- b) Communicate such notice to all affected Subcontractors and that their Subcontracts are not to be further performed unless otherwise authorized in writing by the Commission.
- c) Place no further Subcontracts or orders for materials, services or facilities, except as necessary to complete the continued portion of the Work, if any, or for mitigation of damages.
- d) Terminate all Subcontracts to the extent that they relate to the Work terminated.
- e) Assign to the Commission in the manner, at the times, and as and to the extent directed by the Commission, all of the right, title and interest of the Contractor under the Subcontracts so terminated, in which case the Commission will have the right, in its sole discretion, to accept performance, settle or pay any or all claims arising out of the termination of such Subcontracts.
- f) Settle all outstanding liabilities and claims arising out of such termination of Subcontracts, with the Approval or ratification of the Commission, to the extent it may be required, which Approval or ratification shall be final.
- g) Provide the Commission 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 Commission, and such other information as the Commission may request; and transfer title and deliver to the Commission, in the manner, at the times, and as and to the extent, if any, directed by the Commission, the:
 - i. fabricated or unfabricated parts, the Work in process, completed Work, supplies and other material produced or acquired for the Work terminated; and
 - ii. Design Documents, Construction Documents and all other completed or partially completed drawings (including plans, elevations, sections, details and diagrams), specifications, records, samples, information and other property that would have been required to be furnished to the Commission if the Work had been completed.
- h) Complete performance in accordance with the Contract Documents of all Work not terminated.
- i) Take all action that may be reasonably necessary, or that the Commission 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 Commission has or may acquire an interest.
- j) As authorized by the Commission 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 Commission, 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 Commission. The proceeds of any transfer or disposition will be applied to reduce any payments to be made by the Commission under the Contract Documents or paid in any other manner directed by the Commission.
- k) If requested by the Commission, withdraw from the portions of the Site designated by the Commission 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 Commission may direct.
- l) Take other actions directed by the Commission.

15.3 Responsibility After Notice of Termination

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

- a) The Contractor's responsibility for damage to materials for which partial payment has been made as provided herein shall terminate when the Commission certifies that those materials have been stored in the manner and at the locations directed by the Commission.
- b) The Contractor's responsibility for damage to materials purchased by the Commission subsequent to the issuance of the notice that the Contract is to be terminated shall terminate when title and delivery of those materials has been taken by the Commission.

Immediately after the Commission 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. Subsequent to the determination that all materials have been stored in the manner and at the locations directed by the Commission, further handling of such materials shall be the responsibility of the Commission.

15.4 Negotiated Termination Settlement

15.4.1 Settlement Proposal

After receipt of a Notice of Termination, the Contractor shall submit a final termination settlement proposal to the Commission in the form and with the certification prescribed by the Commission. The Contractor shall submit the proposal

promptly, but no later than 60 days from the effective date of termination, unless the Contractor has requested a time extension in writing within such 60-Day period and the Commission has agreed in writing to allow such an extension. The Commission will then review the Contractor's termination settlement proposal and will act upon it, return it with comments or reject it. If the Contractor fails to submit the proposal within the time allowed, the Commission may determine, on the basis of information available to it, the amount, if any, due the Contractor because of the termination and shall pay the Contractor the amount so determined.

15.4.2 Negotiated Settlement Amount

The Contractor and the Commission may agree, as provided in Section 15.4.1, upon the whole or any part of the amount or amounts to be paid to the Contractor by reason of the total or partial termination of Work pursuant to this Section 15. Such negotiated settlement may include a reasonable allowance for profit solely on Work, which has been completed as of the termination date and subsequently accepted by the Commission. Such agreed amount(s), exclusive of settlement costs, shall not exceed the total Contract Price as reduced by the amount of payments otherwise made and as further reduced by the Contract Price of Work not terminated. Upon determination of the settlement amount the Contract will be amended accordingly, and the Contractor will be paid the agreed amount. Nothing in Section 15.5, prescribing the amount to be paid to the Contractor in the event that the Contractor and the Commission fail to agree upon the whole amount to be paid to the Contractor by reason of the termination of Work pursuant to this Section 15, shall be deemed to limit, restrict or otherwise determine or affect the amount(s) which may be agreed upon to be paid to the Contractor pursuant to this Section 15.4. Unless otherwise agreed to by the parties as a part of a negotiated settlement, the Commission's execution and delivery of any settlement agreement shall not affect any of its rights under the Contract Documents with respect to completed Work, relieve the Contractor from its obligations with respect thereto, including Warranties, or affect the Commission's rights under the Payment and Performance Bond and Payment as to such completed or non-terminated Work.

15.5 Determination of Settlement Amount if Negotiations Fail

If the Contractor and the Commission fail to agree, as provided in Section 15.4.2, upon the whole amount to be paid to the Contractor by reason of the termination of Work pursuant to this Section 15, the amount payable (exclusive of interest charges) shall be determined by the Commission in accordance with the following, but without duplication of any amounts agreed upon in accordance with Section 15.4:

15.5.1 Payment Amount

The Commission will pay the Contractor the sum of the following amounts for Work performed prior to the effective date of the Notice of Termination, as such amounts are determined by the Commission:

- a) The Contractor's actual reasonable out-of-pocket cost (without profit, and including equipment costs only to the extent permitted by Section 13) for all Work performed, including mobilization, demobilization and work done to secure the Project for termination, including reasonable overhead and accounting for any refunds payable with respect to insurance premiums,

deposits or similar items, as established to the Commission's satisfaction. In determining the reasonable cost, deductions will be made for the cost of materials to be retained by the Contractor, amounts realized by the sale of materials and for other appropriate credits. Deductions will also be made for the cost of damaged materials. When, in the opinion of the Commission, the cost of an item of Work is excessively high due to costs incurred to remedy or replace defective or rejected Work, the reasonable cost to be allowed will be the estimated reasonable cost of performing that Work in compliance with the requirements of the Contract Documents and the excessive actual cost will be disallowed.

- b) As profit on Clause 1 above, a sum determined by the Commission to be fair and reasonable; provided, however, that if it appears that the Contractor would have sustained a loss on the entire Contract had it been completed, no profit shall be included or allowed under this Section 15.5.1 and an appropriate adjustment shall be made by reducing the amount of the settlement to reflect the indicated rate of loss.
- c) The cost of settling and paying claims arising out of the termination of Work under Subcontracts as provided in Section 15.2(6), exclusive of the amounts paid or payable on account of supplies or materials delivered or services furnished by the Subcontractor prior to the effective date of the Notice of Termination under the Contract, which amounts shall be included in the cost on account of which payment is made under clause 1 above.
- d) The reasonable out-of-pocket cost (including reasonable overhead) of the preservation and protection of property incurred pursuant to Section 15.2(9) and any other reasonable out-of-pocket cost (including overhead) incidental to termination of Work under the Contract, including the reasonable cost to the Contractor of handling material returned to the vendor, delivered to the Commission or otherwise disposed of as directed by the Commission, and including a reasonable allowance for the Contractor's administrative costs in determining the amount due to the Contractor as the result of the termination of Work under the Contract.

15.5.2 Maximum Compensation

The Contractor acknowledges and agrees that it shall not be entitled to any compensation in excess of the value of the Work performed (determined as provided in Section 15.5.1) plus its settlement costs, and that items such as lost or anticipated profit, unabsorbed overhead and opportunity costs shall not be recoverable by it upon termination of the Contract. However, the total amount to be paid to the Contractor, exclusive of costs described in Sections 15.5.1(3) and (4), may not exceed the total Contract Price less the amount of payments previously made and less the Contract Price of any Work not terminated. Furthermore, if any refund is payable with respect to insurance or bond premiums, deposits or similar items which were previously passed through to the Commission by the Contractor, such refund shall be paid directly to the Commission or otherwise credited to the Commission. Notwithstanding anything to the contrary contained herein, if a termination occurs prior to issuance of NTP2, the total amount payable to the Contractor shall in no event exceed the NTP1 Payment Cap (and previously made insurance or bond payments).

15.5.3 Excluded Items

Except for normal spoilage, and except to the extent that the Commission will have otherwise expressly assumed the risk of loss, there will be excluded from the amounts payable to the Contractor under Section 15.5.1, the fair value, as determined by the Commission, of equipment, machinery, materials and property which is destroyed, lost, stolen or damaged so as to become undeliverable to the Commission, or to a buyer pursuant to Section 15.2(10). The amount set forth in the Proposal by the Contractor for the Work terminated shall be a factor to be analyzed in determining the value of the Work terminated.

15.5.4 Payment of Termination Amount

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

15.6 Partial Termination

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

15.7 Reduction in Amount of Claim

The amount otherwise due the Contractor under this Section 15 shall be reduced by:

- a) all unliquidated advance or other payments made to or on behalf of the Contractor applicable to the terminated portion of the Contract;
- b) the amount of any claim which the Commission may have against any Contractor-Related Entity in connection with the Contract;
- c) 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 Commission;
- d) amounts that the Commission 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;
- e) the cost of repairing any Nonconforming Work, and
- f) any amounts due or payable by the Contractor to the Commission.

15.8 Partial Payments

The Commission 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 the Contract, whenever in the opinion of the Commission 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 finally agreed or determined to be due under this Section 15, such excess shall be payable by the Contractor to the Commission 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 Commission. 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 ten days after the date of such retention or disposition, or such later date as determined by the Commission by reason of the circumstances.

15.9 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 from the Commission in accordance with this Section 15, and shall require Subcontractors to insert the same provision in each Subcontract at all tiers.

15.10 Limitation on Payments to Subcontractor

For the purposes of Sections 15.4.2 and 15.5, upon termination under Section 15.2(4) of Work under any Subcontract, 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.

15.11 No Unearned Profit or Consequential Damages

Under no circumstances shall the Contractor be entitled to anticipatory or unearned profit 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.

15.12 No Waiver

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

15.13 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.

15.14 Allowability of Costs

All costs claimed by the Contractor under this Section 15 shall, at a minimum, be allowable, allocable and reasonable in accordance with the cost principles and procedures of 48 CFR Part 31.

15.15 Suspension of Work

In the event of any suspension of Work by the Commission, after issuance of NTP1, for more than 180 consecutive days, the Contractor shall have the right to consider the Contract to have been terminated for convenience under this Section 15. The

Contractor shall notify the Commission of such election by delivering to the Commission a written notice of termination due to such suspension specifying its effective date. Upon delivery by the Contractor to the Commission of a notice of termination due to suspension, the provisions of this Section 15 shall apply.

16 DEFAULT

16.1 Default by Contractor

16.1.1 Events of Default

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

- a) The Contractor fails to promptly begin the Work under the Contract Documents following issuance of NTP1.
- b) The Contractor fails to perform the Work with sufficient resources to ensure the prompt completion thereof; (i.e., the Contractor fails to execute remedial action in accordance with the Quality Manual and Book 2, Section 3).
- c) 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 Commission under Section 7.4.3.
- d) The Contractor discontinues or suspends the prosecution of the Work (exclusive of Work stoppage due to:
 - i. termination by the Commission;
 - ii. an excusable delay pursuant to 13.3.2(g); or
 - iii. nonpayment by the Commission not related to a breach by the Contractor).
- e) The Contractor fails to resume performance of Work, which has been suspended or stopped, within a reasonable time after receipt of notice from the Commission to do so or (if applicable) after cessation of the event preventing performance.
- f) The Contractor breaches any other agreement, representation or warranty contained in the Contract Documents, or the Contractor fails to perform any other obligation under the Contract Documents, including EEO and DBE requirements.
- g) The Contractor fails to provide and maintain the required insurance and payment and performance bond.
- h) The Contractor assigns or transfers the Contract Documents or any right or interest therein, except as expressly permitted under Section 24.4.2.
- i) 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 Commission consistent with the Contract Documents.
- j) The Contractor fails to discharge or obtain a stay within ten days of any final judgment(s) or order for the payment of money against it in excess of \$100,000 in the aggregate arising out of the prosecution of the Work (provided that, for purposes hereof, posting of a bond in the amount of 125 percent of such judgment or order shall be deemed an effective stay).
 - k) 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.
 - l) Insolvency, receivership, reorganization or bankruptcy proceedings shall have been commenced by or against the Contractor and not dismissed within 60 days.
 - m) Any representation or warranty made by the Contractor in the Contract Documents or in any certificate, schedule, instrument or other document delivered pursuant to the Contract Documents shall have been false or materially misleading when made.
 - n) The Contractor is a party to fraud.

16.1.2 Right to Cure

The Commission agrees to allow the Contractor and Surety ten (10) 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 10 days, as determined by the Commission, the Commission agrees not to declare an Event of Default provided that the Contractor commences such cure within such 10-Day period and thereafter diligently prosecutes such cure to completion; provided, however, that in no event will such cure period exceed 60 days in total. The Contractor hereby acknowledges and agrees that the events described in Subsections 16.1.1 m) and n) are not curable. Notwithstanding the foregoing, if the Commission believes a condition affecting the Project poses an immediate and imminent danger to public health or safety, the Commission may, without notice and without awaiting lapse of any cure period, rectify the condition at the Contractor's cost, and so long as the Commission undertakes such action in good faith, even if under a mistaken belief in the occurrence of such default, such action shall not expose the Commission to liability to the Contractor and shall not entitle the Contractor to any other remedy, it being acknowledged that the Commission has a paramount public interest in providing and maintaining safe public use of and access to the Project. The Commission'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 Commission

If an Event of Default occurs, then, in addition to all other rights and remedies provided by law or equity or available under the Contract or otherwise, including the

rights to recover Liquidated Damages and to seek recourse against the surety bonds required hereby and/or other performance Security, the Commission 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, and the Contractor shall have the following obligations (as applicable):

- a) The Commission may order the Contractor to suspend or discontinue the Work or any portion of the Work.
- b) The Commission may terminate the Contract or a portion thereof, in which case, the provisions of Sections 15.2 and 15.3 shall apply.
- c) If and as directed by the Commission, 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.
- d) The Contractor shall deliver to the Commission possession of any or all facilities of the Contractor located on the Site as well as any or all Design Documents, Construction Documents and all other completed or partially completed drawings (including plans, elevations, details and diagrams), specifications, records, information, schedules, samples, Shop Drawings and other documents, that the Commission deems necessary for completion of the Work.
- e) The Contractor shall confirm the assignment to the Commission of the Subcontracts requested by the Commission, and the Contractor shall terminate, at its cost, all other Subcontracts.
- f) The Commission may deduct from any amounts payable by the Commission to the Contractor such amounts payable by the Contractor to the Commission, including Liquidated Damages or other damages payable to the Commission under the Contract Documents.
- g) The Commission, 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 Commission, will be required for the completion of the Project.
- h) If the Commission exercises any right to perform any obligations of the Contractor, in the exercise of such right the Commission 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 Commission 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 Commission (in addition to any other damages under the Contract Documents other than those costs intended to be covered by Liquidated Damages payable hereunder) for all costs reasonably incurred by the Commission or any party acting on the Commission'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 Commission shall be entitled to withhold all or any portion of further payments to the Contractor until such time as the Commission is able to determine how much (if any) remains owing to the Contractor. Promptly upon such determination, the Commission shall notify the Contractor in writing of the amount, if any, that the Contractor shall pay the Commission or that the Commission shall pay the Contractor with respect thereto. All costs and charges incurred by the Commission, 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 the Contract, then the Contractor and its Surety(ies) shall be liable and shall pay to the Commission the amount of such excess.

It is recognized that if a default under Section 16.1.1 k) or l) 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 Commission 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 days of delivery of the request shall entitle the Commission to terminate the Contract and to the accompanying rights set forth above. Pending receipt of adequate assurance of performance and actual performance in accordance therewith, the Commission 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 Commission's payment obligations hereunder. The foregoing shall be in addition to all other rights and remedies provided by law or equity and such rights and remedies as are otherwise available under the Contract and Payment and Performance Bond.

In lieu of the provisions of this Section 16.2 for terminating the Contract and completing the Work, the Commission 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 the Contract. No claim under this provision will be allowed the Contractor for prospective

profit on, or any other compensation relating to, Work uncompleted by the Contractor.

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

The exercise or beginning of the exercise by the Commission of any one or more rights or remedies under this Section 16.2 shall not preclude the simultaneous or later exercise by the Commission 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 Liquidated Damages on account of a default by the Contractor hereunder or by the Commission's declaration of an Event of Default, or by actions taken by the Commission 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 Commission fails to make an undisputed payment due hereunder within seven days after receipt of notice of nonpayment. Any such Work stoppage shall be considered a suspension under Section 14.1. The Contractor shall not have the right to terminate the Contract for default as the result of any failure by the Commission to make an undisputed payment due hereunder, but the Contractor shall have the right to declare a termination for convenience under Section 15 upon meeting the requirements of Section 15.15.

16.4 Notice and Opportunity to Cure Other Types of Commission Breaches

In the event of any breach of the Contract by the Commission other than a failure to make payments to the Contractor, the Contractor shall provide to the Commission a written notice describing the breach and the opportunity to cure such breach. The Commission shall be entitled to 30 days notice and opportunity to cure any such breach; provided that if such breach is capable of cure but by its nature cannot be cured within 30 days, the Commission shall have such additional period of time as may be reasonably necessary to cure the breach so long as the Commission commences such cure within such 30-day period, and thereafter diligently prosecutes such cure to completion. The Contractor shall have no right to exercise any remedies to which it may be entitled at law or in equity until the foregoing notice is delivered and the foregoing cure period lapses without cure of the breach.



17 DAMAGES

17.1 Liquidated Damages

17.1.1 Failure to Meet Contract Requirements

The Contractor understands and agrees that if the Contractor fails to complete the Work as provided herein, the Commission will suffer substantial losses and damages. The Contractor agrees that it shall be liable for all such losses and damages that are expressed as Liquidated Damages. The Contractor acknowledges and agrees that it is impracticable and extremely difficult to ascertain and determine the actual damages which would accrue to the Commission and the public in the event of the Contractor's failure to achieve completion of the Work as provided herein. Therefore, the Contractor and the Commission have agreed to stipulate the amounts payable by the Contractor in the event of any such failure per this Section. The Contractor acknowledges and agrees that such Liquidated Damages are intended to compensate the Commission solely for the Contractor's failure to meet Contract requirements with respect to time of completion of the Work and shall not excuse the Contractor from liability from any other breach of Contract requirements, including any failure of the Work to conform to applicable requirements.

For each Project Bridge identified by the Commission on Form T, the Contractor shall limit Impact Days to those proposed on Form T for said Project Bridge. The Contractor shall pay the Commission Liquidated Damages in the amount of the Daily Value for said Project Bridge for each Impact Day in excess of that proposed on Form T. The Commission agrees to pay an Incentive to the Contractor equal to the Daily Value for said Project Bridge for each day the Impact Days are reduced. The sum of Incentives paid by the Commission for all Project Bridges listed on Form T shall not exceed ten million dollars (\$10,000,000). Liquidated Damages paid by the Contractor for exceeding Impact Days for Project Bridges listed on Form T shall be subject to and included in the requirements of Book 1, Section 17.1.4.

Project Bridges listed on Form R shall be opened to unrestricted traffic within the Closure Duration specified by the Contractor. In the event the Closure Duration is exceeded for a Project Bridge, the Contractor shall pay to the Commission, Liquidated Damages assessed at a rate of one thousand dollars (\$1,000) per Day in excess of the proposed Closure Duration plus ten (10) Days for said Project Bridge. In the event the Contractor opens a Project Bridge to unrestricted traffic prior to the Closure Duration proposed on Form R, the Commission agrees to pay an incentive in the amount of one thousand dollars (\$1,000) per actual Closure Day utilized less than the Proposed Closure Days. This incentive shall not exceed fifteen thousand dollars (\$15,000) per Project Bridge listed on Form R. The total incentive pay for Form R bridges shall not exceed five million dollars (\$5,000,000).

The Commission shall have the right to assess Liquidated Damages for failure by the Contractor to complete all Work by the completion date specified by the Contractor in the Proposal. Ten thousand dollars (\$10,000) per day in Liquidated Damages will be assessed for each day the Contractor is late completing all Work. The Commission agrees to pay an Incentive to the Contractor equal to ten thousand dollars (\$10,000) per day for each day the Contractor completes all Work prior to the date specified by

the Contractor in the Proposal. The sum of Incentives paid by the Commission for early completion of all Work shall not exceed two million dollars (\$2,000,000).

Liquidated Damages assessed for Contractor failure to meet Closure Duration requirements in Form R and Impact Days in Form T shall be withheld from final payment for each Project Bridge. Liquidated Damages for failure to complete all Work by the Final Completion date proposed by the Contractor shall be withheld from retainage.

The Commission shall have the right to assess Liquidated Damages for failure to meet the DBE goal, as determined by the MoDOT's Civil Rights office, subject to Section 19, and in accordance with Section 7.2.1, in an amount up to the portion of the goal that was not met, which amount shall be paid within 30 Calendar Days of receipt of an invoice from the Commission.

The Commission shall have the right to assess Liquidated Damages for failure to meet the training requirements, in accordance with Section 7.3, in the amount of five dollars (\$5.00) per hour for each hour of the goal not met, in an amount up to the portion of the goal that was not met, which amount shall be paid within 30 Calendar Days of receipt of an invoice from the Commission.

17.1.2 Assessments of Incentive

The maximum amount of Incentive payable to the Contractor pursuant to Section 17 shall be seventeen million dollars (\$17,000,000) in the aggregate. The Incentive will be calculated and the maximum amount that may be earned is established independently of any assessment of Liquidated Damages.

17.1.3 Liquidated Damages Not Penalty

The amounts payable pursuant to Section 17.1.1 are payable as Liquidated Damages and not as a penalty and shall be the sole and exclusive remedy of the Commission for any delays in completion of the Work, including exceeding of any Day Limit, Construction Duration for Project Bridges listed on Form T, and Opening Date; provided, however, liability for, or payment of Liquidated Damages under Section 17.1.1 shall not relieve the Contractor from its obligations to complete the Work, or from any other duties, obligations or responsibilities which the Contractor has under the Contract

17.1.4 Reasonableness of Liquidated Damage Amounts

The Contractor acknowledges and agrees that the foregoing Liquidated Damages set forth in Section 17.1.1 have been set based on an evaluation by the Commission of damages, which it will incur in each of the above corresponding events, including additional interest expense as well as administrative costs. The Contractor and the Commission have discussed these evaluations and agree:

- a) that the amount of such damages arising out of delays in completion of the Work are impossible to ascertain as of the date of execution hereof; and
- b) the parties have agreed to, and bargained for, such Liquidated Damages 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 payable in

accordance with this Section are in the nature of liquidated damages and not a penalty and agrees that such sums are a reasonable pre-estimate of damages under the circumstances existing as of the date of execution and delivery of the Contract. The Contractor further acknowledges and agrees that Liquidated Damages may be owed even though no Event of Default has occurred. The Commission and Contractor further agree that the various categories of Liquidated Damages set forth in Section 17.1.1 are each intended to compensate the Commission for a different type of damage or loss arising out of or resulting from the failure of the Contractor to complete the Work timely. The Contractor waives and forfeits all right to claim that the recovery of any Liquidated Damages is duplicative of any other Liquidated Damages that the Commission may be entitled to recover under the Contract.

17.2 Offset; Waiver

17.2.1 Offset

The Commission shall deduct any amount owed by the Contractor to the Commission under Section 17 from any Payment Installment owed by the Commission to the Contractor under this Contract. For the avoidance of doubt, any Liquidated Damages that accrue and have not been paid when due may be deducted from any future Payment Installment, including any interest owed in accordance with Section 11.8.

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 Commission's right to receive Liquidated Damages hereunder or any rights or remedies otherwise available to the Commission.

17.3 Payment of Liquidated Damages

To the extent Liquidated Damages accrued prior to the date of any Payment Installment are not deducted from such Payment Installment pursuant to Section 17.2.1 because of a technical or administrative error, the Commission may send an invoice to the Contractor and such Liquidated Damages shall be payable by the Contractor to the Commission within 30 Calendar Days after the Contractor's receipt of the invoice therefor.

If the Contractor has earned an incentive for completing construction within the Total Exposure Day Limit, subject to the maximum dollar amounts set forth in Section 17.1.2, the Contractor will send an invoice to the Commission following the Final Completion of all Project Bridges with detailed supporting documentation. Such amount shall be paid to the Contractor by the Commission within 30 Calendar Days after the Commission's receipt of the invoice therefor.

18 INDEMNIFICATION

18.1 Indemnifications by Contractor

18.1.1 General Indemnities

Subject to Section 18.1.3, the Contractor shall release, defend, indemnify and hold



harmless the Commission 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:

- a) The breach or alleged breach of the Contract by any Contractor-Related Entity.
- b) The failure or alleged 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 Substances) or Governmental Approvals in performing the Work.
- c) Any alleged patent or copyright infringement or other allegedly 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 Commission or another Indemnified Party pursuant to the Contract; provided that this indemnity shall not apply to any infringement resulting from the Commission's failure to comply with specific written instructions regarding use provided to the Commission by the Contractor.
- d) The alleged negligent act or omission or willful misconduct of any Contractor-Related Entity or breach of Contract claim by any Contractor-Related Entity.
- e) Any and all claims by any governmental or taxing authority claiming taxes based on gross receipts, purchases or sales, or the use of any property or income of the 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.
- f) Any and all stop notices and/or Liens filed in connection with the Work, including all expenses and attorneys', accountants' and expert witness fees and costs incurred in discharging any stop notice or Lien, provided that the Commission is not in default in payments owing to the Contractor with respect to such Work.
- g) Any spill or release or threatened spill or release of Hazardous Substances:
 - 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.
- h) 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 23.1, or failure of any Contractor-Related Entity to cooperate reasonably with other contractors in accordance therewith.

18.1.2 Design Defects

Subject to Section 18.1.3, the Contractor shall release, defend, indemnify and hold harmless 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 Errors in the Design Documents, regardless of whether such Errors were also included in the Basic Configuration or Reference Documents. The Contractor agrees that, because the Basic Configuration and Reference Documents are subject to review and modification by the Contractor, it is appropriate for the Contractor to assume liability for Errors in the completed Project even though they may be related to Errors in the Basic Configuration or Reference Documents.

18.1.3 Losses Due to Negligence of Indemnified Parties

The Contractor's indemnity obligations under Sections 18.1.1 and 18.1.2 shall not extend to any loss, damage or cost to the extent that such loss, damage or cost was caused by the negligence or willful misconduct of such Indemnified Party or its agents, servants or independent contractors who are directly responsible to such Indemnified Party.

18.1.4 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.

18.1.5 Reliance on Contractor's Performance

The Contractor hereby acknowledges and agrees that it is the Contractor's obligation to cause the Project to be designed and 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 Commission 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.

18.1.6 Indemnities in Connection with Utilities

18.1.6.1 The Contractor is advised that each MUA contains provisions for the Contractor to

indemnify, save and hold harmless the Utility Owner, its employees and agents with respect to certain matters. The Contractor hereby agrees to and shall perform and comply with such provisions of the MUAs for the benefit of the Utility Owners, their employees and agents.

- 18.1.6.2** The Contractor is also advised that the MUAs may include certain agreements by the Commission to indemnify, defend and hold harmless the Utility Owners 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 Utility Owners, in addition to the Indemnified Parties, with respect to all such matters.

18.2 Responsibility of the Commission for Certain Hazardous Substances

18.2.1 Pre-Existing Site Contamination

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

- a) pre-existing Site contamination, whether known or unknown, except as otherwise provided in Section 18.1.1(7);
- b) the non-negligent performance by the Contractor, its employees, agents, officers or Subcontractors or any other Persons for whom the Contractor may be contractually or legally responsible, in the handling of such Hazardous Substances; and/or
- c) the activities of any Persons not described in b) above, including the Commission.

Accordingly, for the purposes of the Contract only, the Commission shall reimburse the Contractor for Remediation Work (through payment of the Contract Price, as it may be increased by Change Order pursuant to Section 13), and will be responsible for, any and all claims, damages, losses, liabilities, costs and expenses, including the Contractor's attorneys' fees, arising out of, or in connection with, bodily injury (including death) to persons, damage to property or environmental removal or response costs arising out of the presence, release or threatened release of Hazardous Substances on or from the Site, irrespective of whether such substances were generated or introduced on the Site before or after execution of the Contract and irrespective of whether the Commission was aware of, or directly involved in, the generation or introduction of such materials, but specifically excluding from any obligation of responsibility for those conditions for which the Contractor has agreed to be responsible as described in Section 18.1.1 g).

18.2.2 Generator Number for Hazardous Waste Remediation

Except for Hazardous Substances for which the Contractor is responsible as described in Section 18.1.1 g), without contradiction of any assertion by the Commission of third-party liability, and for purposes of the Contract only:

- a) The Contractor shall not be required to execute any hazardous waste manifests as a "generator."
- b) Hazardous Substances 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 Commission or another Person designated by the Commission.

18.3 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.

18.4 Comprehensive Environmental Response, Compensation, and Liability Act Agreement

Without limiting their generality, the indemnities set forth in Section 18.1.1 g) are intended to operate as agreements pursuant to Section 107(e) of the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), 42 U.S.C. Section 9607(e), to insure, protect, hold harmless and indemnify the parties indemnified in said Section 18.1.1 g).

19 PARTNERING, CLAIMS FOR ADJUSTMENT AND DISPUTES

19.1 Partnering

The Commission and the Contractor, its Subcontractors and other stakeholders where appropriate agree to utilize a formal partnering process on this project. 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 Commission anticipates a partnering effort involving the executive management, Project management, Project staff and others. Any cost associated with effectuating partnering will be agreed to by both the Contractor and the Commission and will be shared equally with no change in the Contract Price. The Contractor shall pay all costs and submit paid invoices to the Commission for 50 percent reimbursement.

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 Commission-Contractor issue resolution efforts through partnering are not successful. No dispute shall be brought before the DRB until Executive Management discussions have been held between the Contractor and the Commission. 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; General Provisions

All Disputes between the Contractor and the Commission (or, as provided by Section 19.6.3, between the Contractor's Subcontractors and the Commission) that have not been resolved by the parties through the partnering process shall be resolved as provided by this Section.

19.2.1 Disputes; Disputes Governed by this Section; Priorities; Disputes Involving Utility Owners

A "Dispute" is 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 Commission, including any direction, instruction, interpretation, or determination by the Commission; provided, however, that this Section shall not apply to, and the DRB shall not have the authority to consider, claims that are not actionable against the Commission by the Contractor on its own behalf or on behalf of any of its Subcontractors in accordance with Section 19.6.3; claims arising in tort; claims relating to the scope or applicability of indemnities provided under the Contract Documents; claims relating to matters within the sole discretion of the Commission; claims for injunctive relief; claims against insurance companies; or claims which are within the scope of Section 19.2.2. When a Dispute occurs, the Contractor shall pursue resolution through the process set forth in this Section.

Participation in and completion of this dispute resolution process is a condition precedent to the filing of a civil action in a court of proper jurisdiction, or a demand for arbitration pursuant to Sec. 226.096, RSMo.

Hereafter, all references to Disputes brought by the Contractor refer also to Disputes brought by the Contractor on behalf of any of its Subcontractors, provided that the additional requirements of Section 19.6.3 are complied with.

If a Dispute arises relating to a MUA or a Work Order or the Utility Work there under, 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 MUA, and the Contractor shall participate in such dispute resolution process as appropriate to resolve such dispute.

19.2.2 Overview of Process

The dispute resolution process shall involve the following steps, each of which must be taken before the next is available, provided, however, that the Commission may submit claims to the DRB at any time and that the parties may, by mutual agreement, submit their dispute to mediation or other alternate dispute resolution process at any time:

- a) If the parties are not able to resolve a Dispute through the partnering process, the Contractor and the Commission shall file a joint position paper with the DRB, on the basis of which the DRB will render its initial decision.

- b) Either party may file with the Project Director exceptions to the initial decision of the DRB within 30 days of service of the initial decision of the DRB.
- c) If neither party files an exception to the initial decision of the DRB, the decision of the DRB becomes the final decision of the DRB, and the parties shall proceed with performance of the Contract in accordance with the decision.
- d) Failure to file the exceptions described above shall result in a waiver by the Contractor of the right to seek relief, via civil suit or an arbitration proceeding pursuant to § 226.096, RSMo.
- e) Any party who files exception(s) to the initial decision of the DRB shall be afforded a formal hearing before the DRB in accordance with the rules of procedure adopted by the DRB, after which the DRB shall file its final decision.
- f) If either party is dissatisfied with the final decision of the DRB, it may only file suit in the Circuit Court of Cole County or, if the dissatisfied party is the Contractor, it may demand arbitration pursuant to § 226.096, RSMo.
- g) All proceedings of the DRB shall be confidential pursuant to § 435.014, RSMo, as amended.
- h) If the parties are not able to resolve a Dispute as provided in this Section, then either party may commence legal action on such Dispute only in the Circuit Court of Cole County, Missouri.

19.2.3 Continuation of Work

At all times during this Dispute resolution process or any subsequent 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 Project Work diligently, without delay, in accordance with all provisions of the Contract Documents.

19.2.4 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 Commission access to these and all other records needed for evaluating the disputed issue(s) as determined by the Commission. These records shall be retained for a period of not less than six years from the date of resolution of the Dispute.

19.3 Procedure and Schedule for Dispute Resolution

19.3.1 Time Periods

Disputes shall be considered as quickly as possible, taking into consideration the particular circumstances and the time required to prepare detailed documentation.

19.3.2 Written Protest and Submittal to Dispute Resolution Board

If the Contractor disagrees with anything required in any written order from the Commission, including any direction, instruction, interpretation, rejection or

modification of a proposed Change Order, or determination by the Commission, and the parties have not been able to resolve the disagreement through the partnering efforts set forth in Section 19.1, the Contractor shall comply with the following procedures:

- a) Within two weeks (or as mutually agreed by the Commission and the Contractor) after the date on which the Contractor and the Commission first become aware that the dispute, decision, action, or order to which the Contractor objects, cannot be resolved through the partnering efforts of the parties, the Contractor shall meet with the Commission and attempt to agree upon a statement of the disputed issue. Within one week after meeting with the Commission (or as mutually agreed by the Commission and the Contractor), the Contractor shall provide to the Commission its position, including the information required in Section 13.3.2.
- b) The Contractor also shall submit a sworn certification in a form acceptable to the Commission, 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 Contract Price and time, and includes all delay claims and direct and indirect costs sought by the Contractor;
 - iii. the supporting cost and pricing data are accurate, current and complete;
 - 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.
- c) 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, the Contractor shall be deemed to have waived the right to collect any and all costs incurred prior to the date of delivery of the Claim or protest, and shall be deemed to have waived the right to seek an extension of the Completion Deadlines with respect to any delay in the Critical Path which occurred prior to the date of the protest. The Contractor's failure shall also constitute a waiver of the right to bring the Claim or protest before the DRB. This waiver shall occur whether or not there is any showing of prejudice to the Commission resulting from the delay in filing the protest.

19.3.3 Commission Response

Within 30 days of receipt of the Contractor's position, the Commission shall provide its response to the Contractor's claim in a joint position paper, and shall deliver to the Contractor and to the DRB the completed joint position paper. The Commission's response shall include a detailed statement setting forth each factual and legal defense to the claims, together with all documents that establish each defense. Any counterclaim shall set forth its nature, its factual and legal bases and all remedies sought, together with all documents that establish each counterclaim. If the

Commission has set forth a counterclaim, the Contractor shall insert a detailed statement setting forth each factual and legal defense to the counterclaim in the joint position paper, and shall submit the revised final joint position paper to the DRB and the Commission within 21 days after receipt of the Commission's statement of its counterclaim.

19.3.4 Commission Disputes

The Commission shall have the right to bring a Dispute before the DRB at any time, without the necessity of providing a written protest or claim, or following the procedures described in 19.3.2 b) and c) above. In the event the Commission brings a Dispute to the DRB, the procedures set forth in Section 19.6 relating to the Contractor Disputes shall apply; provided, however, the Commission shall not be required to submit the certification referred to in Section 19.3.2, subsection 2, and the Contractor shall be required to submit such certification with respect to any counterclaims asserted by the Contractor.

19.4 Dispute Resolution Board

The DRB shall consist of three members. One member will be selected by the Commission and approved by the Contractor. One member will be selected by the Contractor and Approved by the Commission. A third member will be selected by the first two members and approved by both the Commission and the Contractor. The third member will act as chairperson for all DRB Activities.

19.4.1 Experience of Dispute Resolution Board Members

It is desirable that all prospective DRB members be experienced with highway design and construction and environmental compliance, as well as with resolution of disputes involving interpretation of design/build contracts. The goal in selecting the third member is to complement the dispute resolution experience of the first two and to provide leadership for the DRB's Activities. The third member shall be a lawyer or retired judge.

19.4.2 Avoidance of Appearance of Conflict

It is imperative that potential DRB members show no partiality to either the Contractor or the Commission, or have any conflict of interest.

- a) No member shall be an Affiliate or otherwise have a financial interest in the Contract or in the outcome of any Dispute decided hereunder, except for the right to receive payment for serving on the DRB.
- b) No member shall have ever been previously employed (or have his/her employer employed) by the Commission, the Contractor or any Affiliate, within two years prior to the Proposal Due Date, except for fee-based consulting services on other projects which are disclosed to all parties, or have had financial ties to any party or Affiliate of any party to the Contract.
- c) No member shall have had substantial prior involvement in the Project or relationship with any party or Affiliate of a nature which would be grounds for disqualification of a judge, or which could otherwise compromise his or her ability to impartially resolve Disputes.



- d) No member shall accept employment with the Commission, the Contractor or any Affiliate during the term hereof and for so long thereafter as any obligations remain outstanding under the Contract Documents, except as a member of other disputes boards.
- e) No member shall discuss employment with the Contractor, any Affiliate or the Commission or any consultants working on the Project during the term hereof and for so long thereafter as any obligations remain outstanding under the Contract Documents.

19.4.3 Submission of Disclosure Statements

Before their appointments are final, the first two nominated members shall submit complete disclosure statements for the approval of both the Commission and the Contractor. Each statement shall include a resume of experience, together with a declaration describing all past, present and anticipated or planned future relationships to the Project and with all parties involved in the Contract, including disclosure of past or current professional or close personal relationships with the Contractor, any Affiliate, the Commission or its consultants working on the Project, or with any key member of any such Person. The third DRB member shall supply such a statement to the first two DRB members and to the Commission and the Contractor before his or her appointment is final.

19.4.4 Selection Process

Within 90 days after NTP2, the Commission and the Contractor shall submit two names of prospective DRB members to each other for approval and provide information regarding the selected individual to the other party. The Commission and the Contractor agree to meet as often as necessary to select four prospective DRB members between them (the "Pre-Approved DRB List").

At any time after the parties have agreed to the Pre-Approved DRB List, either the Commission or the Contractor may request to the other in writing that the DRB be convened. Such request shall include its prospective DRB member, selected from the Pre-Approved DRB List. Within 30 days after receipt of such notice, the other party shall select its Dispute Resolution Board member from the Pre-Approved DRB List. Immediately upon approval of the first two members, the two members shall begin selection of the third member from the Pre-Approved DRB List. The first two members shall ensure that the third member meets all of the criteria listed above. The third member shall be selected within four weeks after the first two members are notified to proceed with the selection. In the event of an impasse in selection of the third member, that member shall be selected by mutual agreement of the Commission and the Contractor. In so doing, they may, but are not required to, consider the nominees offered by the first two members. If the Commission and the Contractor cannot agree in the selection of the third member, then each party may submit a list of up to five candidates to a court of competent jurisdiction for judicial resolution of the selection of the third member.

19.4.5 Execution of Agreements

Promptly upon approval of the DRB members, the Commission, the Contractor, and the individual DRB members shall enter into three-party agreements in the form of Exhibit K hereto which set forth the terms and conditions which apply to the services

to be provided by the members. The Commission, the Contractor, and all three members of the DRB shall execute the DRB Agreement within four weeks after the selection of the third member.

19.4.6 Reconstitution of Dispute Resolution Board

The Commission and the Contractor shall each have the right, one time only, to require appointments of a new DRB to resolve future Disputes, which right may be exercised at any time by delivery of notice to such effect to the other party and to the DRB. In such event, a new DRB Agreement, in the same form as Exhibit K hereto, shall be executed establishing a new board, and except as otherwise mutually agreed by the Commission and the Contractor, the work to be performed by the DRB shall be limited to Disputes submitted to the DRB before delivery of the notice requiring appointment of a new board.

19.5 Operation

The DRB shall formulate its own rules of operation , in accordance with the DRB Agreement.

19.5.1 Progress Reports

In order to keep abreast of design and construction development and progress, the members will be provided regular written progress reports and other relevant data from the Commission and the Contractor.

19.5.2 Regular Meetings

Once convened, the DRB shall visit the Project and meet with representatives of the Commission and the Contractor at least annually, and at more regular intervals if the Commission and the Contractor agree that more regular meetings are necessary. The regular meetings shall be held at the job site. Each meeting shall consist of an informal round table discussion followed by a field review of the Project. The round table discussion shall be attended by selected personnel from the Commission and the Contractor. The agenda shall generally include the following:

- a) Meeting convened by the chair of the DRB.
- b) Opening remarks by the Commission.
- c) A description by the Contractor of Work accomplished since the last meeting, current status of the current Monthly Progress Schedule, schedule for future Work, potential Disputes and proposed solutions for any problems.
- d) Discussion by the Commission of the Work schedule as the Commission views it, potential Disputes, and status of past Disputes.
- e) Set tentative date for next meeting.

If it is considered necessary by the parties, the Contractor will prepare minutes of regular meetings and circulate them for comments, revisions, and/or approval of all concerned. The field inspection shall cover all active segments of the work. The DRB shall be accompanied by representatives of both the Commission and the Contractor.

19.5.3 No Ex Parte Communications

The parties are expressly prohibited from seeking advice from, consulting with, or discussing any aspect of an existing or potential Dispute with, any member of the DRB, unless duly authorized representatives of both parties agree otherwise, in writing.

19.5.4 Compensation

Each party shall be responsible for payment of the DRB member selected by it and shall enter into a separate agreement for payment with its selected member. The Contractor shall enter into an agreement with the third DRB member and a certified court reporter, if necessary, and shall pay all costs and submit paid invoices to the Commission for 50 percent reimbursement for the services and expenses of the third DRB member and the services of a certified court reporter.

19.6 Procedures Before Dispute Resolution Board

19.6.1 Impartiality of Dispute Resolution Board

The DRB shall fairly and impartially consider Disputes referred to it, and shall provide an initial decision, as described in Section 19.6.2, to the Commission.

19.6.2 DRB Procedure for Dispute Resolution

Within ten days after the date of receipt of the Commission's answer or the Contractor's response to the Commission's counterclaim, whichever occurs later, the DRB shall set a date for a hearing on the Dispute.

The DRB may hold an informal proceeding prior to holding a hearing as set forth below if the DRB feels that it would be beneficial. If the DRB holds an informal meeting, however, it shall be recorded and the individuals making presentations shall be sworn in by the Chair of the DRB. At the conclusion of an informal proceeding, the DRB shall issue an informal recommendation to the parties based on the issues raised at the informal proceeding. However, either party may request that the DRB proceed with a hearing as set forth below.

The hearing shall be held in accordance with the rules of operation established by the DRB pursuant to paragraph 19.5, above.

After the hearing on a Dispute is concluded, the DRB shall meet to formulate findings and conclusions upon all material issues of fact, law, or discretion presented by the record regarding resolution of the Dispute. All DRB deliberations shall be conducted in private and shall be confidential. The DRB shall make a concerted effort to reach a unanimous decision. The DRB shall base its findings and conclusions on the terms of the Contract Documents, established principles of law, statutes and regulations deemed by the DRB to be applicable, and the facts and circumstances of the Dispute as found by the DRB, and the information provided by the parties.

Within 30 days after the hearing (or such other time as is mutually agreed among the parties but not to exceed 60 days), the DRB shall prepare an initial decision, which shall be served on the Contractor and the Commission. The initial decision shall include a statement of findings and conclusions upon all the material issues of fact, law, or discretion presented by the record, and the appropriate order, sanction, relief or demand of the DRB.

Within 30 days after service of the DRB's initial decision, either the Contractor or the Commission may file exceptions to the initial decision.

19.6.3 Dispute Resolution: Additional Requirements for Subcontractor Demands

For purposes of this Section 19, a "Subcontractor Demand" shall include any claim by a Subcontractor (including also any pass-through claims by a lower tier Subcontractor) against the Contractor that is actionable by the Contractor against the Commission and arises from work, services or materials provided or to be provided under the Contract Documents. If the Contractor determines to pursue a Claim against the Commission that includes a Subcontractor Demand, the following additional conditions shall apply:

- a) The Contractor shall identify clearly in all submissions pursuant to this Section 19, that portion of the claim that involves a Subcontractor.
- b) The Contractor shall include, as part of its submission pursuant to Section 19, a certification in a form acceptable to the Commission by the Subcontractor's officer, partner or authorized representative with authority to bind the Subcontractor and with direct knowledge of the facts underlying the Subcontractor's claim. The Contractor also shall submit a Contractor's certification that:
 - i. the Contractor has investigated the basis of the Subcontractor's claims and has determined that all such claims are justified as to entitlement and amount of money and time requested, and has reviewed and verified the adequacy of all back-up documentation;
 - ii. the Subcontractor's claim has been prepared and submitted in accordance with the terms of the Contract Documents and the applicable Subcontract(s) and contains all information required by the Contract Documents and applicable Subcontract; and
 - iii. the Contractor has no reason to believe and does not believe that the factual basis for the Subcontractor's claim is falsely represented. Any claim under this Section 19 involving Subcontractor Work shall be considered incomplete if it is not accompanied by such analysis and certification.
- c) At any DRB hearing on a Dispute that includes one or more Subcontractor claims, the Contractor shall require that each Subcontractor that is involved in the Dispute have present an authorized representative with actual knowledge of the facts underlying the Subcontractor's claim to assist in presenting the Subcontractor's claim and to answer questions raised by the DRB members or the Commission's Representatives.
- d) Failure of the Contractor to assert a Subcontractor's claim on behalf of any Subcontractor or Supplier at the time of submission of Contractor's Claims, as provided hereunder, shall constitute a release of the Commission by the Contractor on account of such Subcontractor's claim.
- e) The Contractor shall require in all Subcontracts that all Subcontractors and suppliers of any tier:

- i. agree to submit Subcontractor's claims to the Contractor in a proper form and in sufficient time to allow processing by the Contractor in accordance with this Section 19;
 - ii. agree to be bound by the terms of this Section 19 to the extent applicable to Subcontractor's claims;
 - iii. agree that, to the extent a Subcontractor's claim is involved, completion of all steps required under this Section 19 shall be a condition precedent to pursuit by the Subcontractor of any other remedies permitted by Law, including institution of a lawsuit against the Contractor;
 - iv. agree that any Subcontractor's claim brought against a bonding company, that also is actionable against the Commission through the Contractor, shall be stayed until completion of all steps required under this Section 19; and
 - v. agree that the existence of a Dispute resolution process for Disputes involving Subcontractor's Demands shall not be deemed to create any claim, right or cause of action by any Subcontractor or Supplier against the Commission.
- f) Notwithstanding the foregoing, this Section 19 shall not apply to, and the DRB shall not have the authority to consider:
- i. any Subcontractor claim between the Subcontractor(s) and the Contractor that is not actionable by the Contractor against the Commission;
 - ii. any Subcontractor claim based on remedies expressly created by statute;
 - iii. any Subcontractor claim that is covered by insurance; or
 - iv. any Subcontractor claim that is actionable only against a bonding company.

20 ACCEPTANCE OF PROJECT

20.1 Completion Requirements

20.1.1 Acceptance of Structure

As a condition to its obligation to make Payment to the Contractor based on an Application for Payment for any Project Bridge, the Commission shall have received a completed Form C-242 (Exhibit F) from the Contractor, releasing and waiving any claims against the Indemnified Parties and those matters identified in any notices listed as outstanding in the Application for Payment, and which form is otherwise reasonably satisfactory to the Commission.

Exhibit F shall be accompanied by an affidavit from the Contractor certifying:

- a) that it has resolved any claims made by Subcontractors, Utility Owners and others against the Contractor or the Project by furnishing a bond satisfactory to the Commission in respect thereof;
- b) that it has no reason to believe that any person has a valid claim against the Contractor or the Project which has not been communicated in writing by the Contractor to the Commission as of the date of the certificate; and
- c) that any applicable guarantees and warranties are in full force and effect.

20.1.1.1 Procedure for Acceptance of Structure

- a) As a pre-requisite to Acceptance of Structure with respect to any Project Bridges the Contractor shall provide written notice to the Commission when each of the following have been completed with respect to a Project Bridge:
 - i. copies of all Released for Construction Documents have been provided to the Commission;
 - ii. copies of any required waste disposal agreements have been provided to the Commission;
 - iii. all deeds for Right of Way, if any, acquired by the Contractor have been provided to the Commission;
 - iv. all New Utility Agreements or Easements acquired by the Contractor have been provided to the Commission;
 - v. all Location Survey Plans for New Land Acquisition required for any Additional Right of Way purchases have been provided to the Commission;
 - vi. all applicable Governmental Approvals required for such Project Bridge have been obtained by the Contractor; and
 - vii. a certification from the Contractor's PE that oversaw the Work shall have been provided to the Commission certifying that the performance of the Work with respect to such Project Bridge has been completed in accordance with the Contract Documents, including all Environmental Approvals, and that such Project Bridge is available for unrestricted, beneficial use by the public in accordance with the Design Documents, with the exception of any Punch List Items noted.
- b) The Closure Duration or the Impact Days for any given Project Bridge will be deemed to have ended on the date when the Contractor opens the road to unrestricted traffic and the Commission has been notified of such opening with the *Notice of Intent to Perform Work* form, for purposes of calculating relevant Liquidated Damages or incentives in accordance with Section 17.1; but if the Project Bridge has to be closed again for completion of Punch List items, the additional Closure Duration or Impact Days will be added to the original Closure Duration or Impact Days used to calculate Liquidated Damages or incentives. Once the notice referred to in Section a) above has been received, the Commission will perform a general inspection within 2 Business Days to ensure the safety features are in place. Acceptance of Structure will be considered achieved upon the fulfillment of the following conditions:

- i. satisfactory completion of a safety inspection and opening of project bridge to reasonably unrestricted traffic; and
- ii. receipt of the Punch List, prior to or at such safety inspection.

The Commission will deliver a certificate of Acceptance of Structure or notify the Contractor in writing setting forth, as applicable, why such Project Bridge has not satisfied the requirements of Acceptance of Structure, within 30 Calendar Days following such safety inspection. In the event the Commission fails to perform such inspection within 5 Business Days after the receipt of the notice referred to in Section 20.1.1.1 a) above, the safety inspection will be considered satisfactory and subject to b) above, Acceptance of Structure will have been achieved with respect to such Project Bridge.

20.1.1.2 Punch List

The Quality Manual shall establish procedures and schedules for preparing a Punch List for each Project Bridge and completing Punch List work. Such procedures and schedules shall conform to the following provisions:

- a) The preparation of the Punch List shall be coordinated with or prior to the Inspection regarding Acceptance of Structure of a Project Bridge.
- b) The schedule established for the completion of Punch List work shall take into account seasonal weather conditions, but in no case shall exceed 6 months beyond Acceptance of Structure.
- c) The Contractor shall immediately commence work on the Punch List items for each Project Bridge and diligently prosecute such work to achieve Final Completion of such Project Bridge, within the time period established in accordance with the Quality Manual.

20.1.1.3 Final Completion of a Project Bridge

The Contractor shall provide the Commission with written notification when Contractor determines it has achieved Final Completion with respect to a Project Bridge. Final Completion to a Project Bridge shall occur when all Punch List Items have been satisfactorily addressed and the following have been completed in a satisfactory form, as applicable:

- a) all Design Documents, ROW documents, surveys, test data and other deliverables required under the Contract Documents for such Project Bridge have been provided to the Commission
- b) an *Equipment and Materials List* for any new signal or lighting component have been provided to the Commission;
- c) an *Affidavit for Compliance with Prevailing Wage Law* for every Subcontractor that worked on such Project Bridge(s) have been provided to the Commission;
- d) all alignment points as part of the As-Built Documents for such Project Bridge have been provided to the Commission; and
- e) all applicable third party approvals relating to the Work by the Contractor on such Project Bridge shall have been obtained by the Contractor and all third

parties shall have completed all work necessary for the Contractor to complete such Work, including all such approvals and Work required from Utility Owners under any applicable MRUA and Section 6 of Book 2.

During the 10 Business Day period following receipt of such notification, the Contractor and the Commission shall meet and confer and exchange information on a regular cooperative basis with the goal being the Commission's Inspection and review of the Punch List work for the Project Bridge and the Commission's issuance of a written certificate of Final Completion of a Project Bridge which represents the Commission's acknowledgement that an individual Project Bridge has been replaced and meets the requirements the Contract.

Within 5 Business Days after expiration of such 10 Business Day period, the Commission shall either issue a certificate of Final Completion with respect to such Project Bridge or notify the Contractor in writing setting forth, as applicable, why Final Completion of such Project Bridge has not been achieved. If the Contractor does not agree as to the date of Final Completion of a Project Bridge, such Dispute shall be resolved pursuant to Section 19.

20.2 Overpayments; No Relief from Continuing Obligations

Final Acceptance will not prevent the Commission from correcting any certificate made before or after completion of the Work or from recovering from the Contractor, the Financial Assurance Package provider(s), or both, the amount of any "overpayment" under the Contract. The term "overpayments" shall mean any portion of a Payment Installment the Contractor receives due to a calculation, computer, technological or accounting error that they are not entitled to. For the avoidance of doubt, "overpayments" will not include the ability to withhold funds for disputed or deficient work. A waiver on the part of the Commission of any breach by the Contractor shall not be held to be a waiver of any other breach, including any subsequent breach.

20.3 Direction to Open Following Contractor Failure to Perform

If the Contractor is delinquent in completing any features of the Work, the Commission may, but is not obligated to, order all or a portion of the Project opened to traffic. The Contractor shall then conduct the remainder of the construction operations, minimizing obstruction to traffic. The Contractor shall not receive any added compensation due to the added costs attributable to the opening of the Project to traffic as provided in this Section.

Opening of portions of the Project prior to Acceptance of Structure does not constitute Acceptance of Structure or a waiver of any provisions of the Contract Documents.

20.4 Assignment of Causes of Action

The Contractor hereby offers and agrees to assign to the Commission 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. Section 15), arising from purchases of goods, services or Materials pursuant to the Contract or any Subcontract. This assignment shall be made and become effective at the time the Commission tenders final payment to the Contractor, without further acknowledgment by the parties.

20.4 Final Acceptance

As a condition of Final Acceptance, the Contractor shall provide written notice to the Commission that all Work has been completed for all Project Bridges, including, without limitation, all Punch List Items.

20.5 Notice of Project Completion

Upon receipt of the Contractor's notice under Section 20.3, the Commission will verify that:

- a) All Nonconforming Work identified as prerequisites to completion of the Project has been corrected.
- b) All Punch List items identified as prerequisites to completion of the Project have been completed.
- c) All other requirements identified as prerequisites to completion of the Project have been met.

If any Work does not meet the requirements of the Contract Documents or Work has not been completed, the Commission will promptly advise the Contractor as to Nonconforming Work or incomplete Work necessary to be corrected as a condition to Project Completion. Upon correction of the Nonconforming Work (excluding Punch List items identified for Final Acceptance), the Contractor shall provide written notification to the Commission and the Commission will verify that all prerequisites to Project Completion have been met and will issue a Notice of Project Completion

20.6 Affidavit of Final Completion

The Contractor shall provide to the Commission an executed sworn Affidavit of Final Completion in accordance with this Section 20.5 when all of the following have occurred:

- a) The Commission has received all Released for Construction Documents, Design Documents, As-Built Documents, ROW record maps, surveys, test data, and other deliverables required under the Contract Documents for the Project.
- b) The Contractor has furnished to the Commission certifications from the Contractor's Construction Quality Manager, in form and substance satisfactory to the Commission, certifying that there are no outstanding Nonconforming Work or Punch List items.
- c) 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 Commission) have been satisfied in full or waived in writing by the Commission.

The Affidavit of Final Completion shall include the following statement:

To the best of the Contractor's knowledge and belief, the Work under the Contract has been completed in strict accordance with the Contract Documents, no lawful debts for labor or materials are outstanding and no federal excise tax has been included in the Contract Price; all requests for funds for undisputed work under the Contract, 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 Contract 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 Commission and any and all employees of the Commission 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 Contract.

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 Commission. The affidavit shall include a representation of the Contractor that it is diligently and in good faith contesting all 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.

20.7 Notice of Final Acceptance

Upon the Commission's receipt of the Affidavit of Final Completion, the Commission will verify that:

- a) All Nonconforming Work has been corrected (other than obligations which by their nature are required to be performed after Final Acceptance as determined by the Commission).
- b) All Punch List items have been completed (other than obligations which by their nature are required to be performed after Final Acceptance as determined by the Commission).
- c) All other requirements identified as prerequisites to Final Acceptance have been met.

If any Work does not meet the requirements of the Contract Documents or Work has not been completed, the Commission will promptly advise the Contractor as to Nonconforming Work or incomplete Work necessary to be corrected as a condition to Final Acceptance. Upon correction of the Nonconforming Work (including incomplete Work), the Contractor shall provide written notification to the Commission and the Commission will verify that all prerequisites to Final Acceptance have been met and will issue a Notice of Final Acceptance.

21 WARRANTIES

21.1 Warranties by Contractor

21.1.1 Project Warranties

The Contractor warrants that:

- a) All design Work furnished pursuant to the Contract Documents shall conform to all professional engineering principles generally accepted as standards of the industry in the State and shall be free of Errors.
- b) The construction Work furnished pursuant to the Contract Documents shall be performed in a workmanlike manner and shall conform to the standards of care and diligence normally practiced by recognized construction firms performing construction of a similar nature in the State.
- c) Materials and equipment furnished under the Contract Documents shall be of good quality and, when installed, shall be new.
- d) The Work shall meet all of the requirements of the Contract Documents.
- e) The specifications and/or drawings selected or prepared for use during construction are appropriate for their intended use.
- f) The Project shall be fit for use for the intended function.

21.1.2 Transfer of Title

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 Commission 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 Commission, free and clear of all Liens, upon the sooner of:

- a) incorporation into the Project; or
- b) payment by the Commission to Contractor of invoiced amounts pertaining thereto.

Notwithstanding any such passage of title, Contractor shall retain sole care, custody and control of such materials, equipment, tools and supplies, and shall exercise due care with respect thereto as part of the Work until Partial Acceptance or Final Acceptance or until Contractor is removed from the Project.

21.1.3 Project Warranty Term

The Warranty term for each element of the Project shall commence upon Acceptance thereof by the Commission or acceptance thereof by the appropriate Person who will own such element. Subject to extension under Section 21.2, the Warranties regarding all elements of the Project shall remain in effect until one year after Partial Acceptance or Final Acceptance, whichever is applicable and comes first in time, provided that the Warranty term for elements of the Project that will be owned by Persons other than the Commission (such as Utility Owners) shall remain

in effect for such term as may be required under the applicable agreement (such as MUAs). If the Commission determines that any of the Work has not met the standards set forth in this Section 21.1 at any time within the Warranty period, then the Contractor shall correct such Work as specified below within the one year warranty term.

21.1.4 Corrective Work

Within seven days of receipt by the Contractor of notice from the Commission 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 Commission shall mutually agree when and how the Contractor shall remedy such violation; provided, however, that in case of an emergency as indicated by the Commission in its notice requiring immediate curative action, the Contractor and the Commission shall agree on a remedy immediately upon notice by the Commission 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 Commission fail to reach such an agreement within such 7 Day period (or immediately, in the case of emergency conditions), then the Commission, after notice to the Contractor, shall have the right to perform or have performed by third parties the necessary remedy, and the costs thereof shall be borne by the Contractor. The Contractor shall reimburse the Commission for such costs within 30 days after the Contractor's receipt of invoice therefor. The Commission may agree to accept Nonconforming Work in accordance with Section 5.7.2.

The Commission and the Contractor shall conduct a walkthrough of the Site prior to expiration of the Warranty period and shall produce a Punch List of those items requiring Warranty Work.

21.1.5 Contractor's Costs of Correction of Work

All costs of correcting such rejected Work, including additional testing and inspections, shall be deemed included in the Contract Price. The Contractor shall reimburse the Commission and pay the Commission's expenses made necessary thereby within 30 days after the Contractor's receipt of invoice therefore. The Contractor shall be responsible for obtaining any required Governmental Approvals or other consents from any other Person in connection with the Warranty Work.

21.2 Warranty of Corrected Work

The Warranties shall apply to all Work redone, repaired, corrected or replaced pursuant to the terms of the Contract. The Warranties as to each redone, repaired, corrected or replaced element of the Work shall extend beyond the original warranty period if necessary to provide at least a 1-year warranty period following acceptance thereof by the Commission or acceptance thereof by the appropriate Person who will own such element.

21.3 Subcontractor Warranties

21.3.1 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 Commission, appropriate representations, warranties, guarantees and obligations with respect to the design, materials, workmanship, equipment, tools and supplies furnished by such Subcontractors, including all such representations, warranties, guarantees, and obligations required to be furnished by Subcontractors pursuant to the Contract Documents. All representations, warranties, guarantees, and obligations of Subcontractors shall:

- a) be written so as to survive all the Commission and the Contractor inspections, tests, and approvals; and
- b) run directly to and be enforceable by the Contractor and/or the Commission and their respective successors and assigns.

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

21.3.2 Enforcement

Upon receipt from the Commission of notice of a failure of any of the Work to satisfy any Subcontractor warranty, representation, guarantee, or obligation, the Contractor shall enforce or perform any such representation, warranty, guarantee, or obligation, in addition to the Contractor's other obligations hereunder. The Commission's rights under this Section 21.3.2 shall commence at the time such representation, warranty, guarantee, or obligation is furnished, and shall continue until the expiration of the Contractor's relevant Warranty (including extensions thereof under Section 21.2). Until such expiration, the Contractor shall be responsible for the cost of any equipment, material, labor (including re-engineering) or shipping, and the Contractor shall be required to replace or repair defective equipment, material or workmanship furnished by any Subcontractor.

21.4 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 design defects, latent construction defects, strict liability, negligence or fraud; provided, however, that, upon expiration of the Warranties, the Contractor shall have no further liability to the Commission hereunder for patent construction defects.

21.5 Warranty Beneficiaries

In addition to benefiting the Commission 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.

21.6 Remedies for Breach of Warranty

In addition to the Commission's other rights and remedies hereunder, at law or in equity, the Contractor shall be liable for actual damages resulting from its failure to

provide corrective Work in accordance with Section 21.1.4 and any breach of an express warranty or any defect in the Work.

21.7 Disputes

Any disagreement between the Commission 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 Commission pending resolution of the dispute.

22 DOCUMENTS AND RECORDS

22.1 Escrowed Proposal Documents

Within five Business Days after the Proposal Due Date, the Contractor shall have delivered its Escrowed Proposal Documents (EPD) to the Bank identified by the Proposer. Concurrently with submission of quotations or revisions to quotations provided in connection with formally proposed amendments to the Contract and concurrently with Approval of each Change Order, if appropriate, one copy of all documentary information used in preparation of the quotation or Change Order shall be added to the EPD. The EPD will be held in such cabinet or otherwise maintained subject to Section 22.1.1 until all of the following have occurred:

- a) 180 days have elapsed after expiration or earlier termination of the Warranties;
- b) all Disputes regarding the Contract have been settled; and
- c) final payment on the Contract has been made by the Commission and accepted by the Contractor.

22.1.1 Review of Escrowed Proposal Documents

The EPD shall be available during business hours for joint review by the Contractor and the Commission in connection with the resolution of Disputes, an audit under Section 22.3.5 (if the EPD are the subject of an audit) and as described in Section 22.1.6. The Commission shall be entitled to review all or any part of the EPD in order to satisfy itself regarding the applicability of the individual documents to the matter at issue. The Commission shall be entitled to make and retain copies of such documents as it deems appropriate in connection with any such matters, provided that the Commission has executed and delivered to the Contractor a confidentiality agreement specifying that all proprietary information contained in such documents will be kept confidential, that copies of such documents will not be distributed to any third parties other than the Commission's agents, attorneys, and experts, the DRB, and that all copies of such documents will be either destroyed or returned to the depository (or to the Contractor if the EPD have been returned to it) upon final resolution of the Disputes. The foregoing shall in no way be deemed a limitation on the Commission's discovery rights with respect to such documents.

22.1.2 Property of Contractor

The EPD are, and shall always remain, the property of the Contractor, and shall be considered to be in the Contractor's possession, subject to the Commission's right to

review the EPD as provided herein. The Commission acknowledges that the Contractor considers that the EPD constitute trade secrets or proprietary information. This acknowledgment is based upon the Commission's understanding that the information contained in the EPD is not known outside the Contractor's business, is known only to a limited extent and by a limited number of employees of the Contractor, is safeguarded while in the Contractor's possession, and may be valuable to the Contractor's business strategies, assumptions, and intended means, methods, and techniques. The Commission further acknowledges that the Contractor expended money in developing the information included in the EPD and further acknowledges that it would be difficult for a competitor to replicate the information contained therein. The Commission acknowledges that the EPD and the information contained therein are being provided to the Commission only because it is an express prerequisite to award of the Contract.

22.1.3 Representation and Warranty

The Contractor represents and warrants that the EPD provided concurrently with the Proposal constitute all of the information used in the preparation of its Proposal and agrees that no other Proposal preparation information will be considered in resolving Disputes or Claims. The Contractor also agrees that the EPD are not part of the Contract and that nothing in the EPD shall change or modify the Contract.

22.1.4 Contents of Escrowed Proposal Documents

The EPD provided with the Proposal shall, at a minimum, clearly detail how the components of the Proposal Price were determined and shall be adequate to enable a complete understanding and interpretation of how the Contractor arrived at the Proposal Price. The EPD provided in connection with quotations and Change Orders shall, inter alia, clearly detail how the total price and individual components of that price were determined and shall be adequate to enable a complete understanding and interpretation of how the Contractor arrives at its quotation and/or Change Order price. All Work shall be separated into sub-items as required to present a complete and detailed estimate of all costs. Crews, equipment, quantities, and rates of production shall be detailed. Estimates of costs shall be further divided into the Contractor's usual cost categories such as direct labor, repair labor, equipment ownership and operation, expendable materials, permanent materials, and subcontract costs as appropriate. Plant and equipment and indirect costs shall also be detailed in the Contractor's usual format. The Contractor's allocation of plant and equipment, indirect costs, contingencies, overhead and profit, and other items to each direct cost item shall be clearly identified. The EPD shall itemize the estimated costs of the Payment and Performance Bond and the insurance premiums for each coverage required to be provided by the Contractor under Section 9. The EPD shall include all assumptions, quantity takeoffs, rates of production, the Contractor internal equipment rental rates and progress calculations, quotes from Subcontractors (including Suppliers), memoranda, narratives, and all other information used by the Contractor to arrive at the Proposal Price. For each item of Work, the EPD shall itemize any related amounts not included in the stated price for such item such as any amount allocated for contingency.

22.1.5 Format of Escrowed Proposal Documents

The Contractor shall submit the EPD in the format actually used by the Contractor in

preparing its Proposal. It is not intended that the Contractor perform any significant extra work in the preparation of these documents. However, the Contractor represents and warrants that the EPD related to the Proposal have been personally examined prior to delivery to the Commission by an authorized officer of the Contractor and that they meet the requirements of Section 22.1.4 and are adequate to enable a complete understanding and interpretation of how the Contractor arrived at its Proposal Price. The Contractor further represents, warrants, and covenants that the EPD related to a Change Order, if applicable, will be personally examined prior to delivery to escrow by an authorized officer of the Contractor and that they meet the requirements of Section 22.1.4 and may be adequate to enable a complete understanding and interpretation of how the Contractor arrived at its Change Order price.

22.1.6 Review by the Commission

The Commission may, at any time, conduct a review of the EPD to determine whether it is complete. If the Commission determines that the EPD are incomplete, the Commission may request the Contractor to supply data to make the EPD complete. The Contractor shall provide all such data within three Business Days of the request, and at that time it will be date stamped, labeled to identify it as supplementary EPD information and added to the EPD. The Contractor shall have no right to add documents to the EPD except upon the Commission's request. At the Commission's option, which may be exercised at any time, any EPD associated with any Change Order or contract amendment shall be reviewed, organized, and indexed as described in the ITP.

22.1.7 Confidentiality

The EPD shall at all times be treated as proprietary and confidential non-public information and shall be used only for purposes described in Section 22.1.1. At the Contractor's request, confidentiality agreements shall be executed and delivered to the Contractor by the Commission's employees or agents who review or have access to the EPD.

22.2 Subcontractor Pricing Documents

The Contractor shall require each first tier Subcontractor to submit to the Contractor a copy of all documentary information used in determining its Subcontract price, immediately prior to executing the Subcontract or Change Orders or amendments thereto, to be held in the same manner as the EPD and which shall be accessible by the Contractor, the Commission, the DRB, and other dispute resolvers, on terms substantially similar to those contained herein. Each such Subcontract shall include a representation and warranty from the Subcontractor stating that its documentation constitutes all the documentary information used in establishing its Subcontract price. Each Subcontract that is not subject to the foregoing requirement shall include a provision that requires the Subcontractor to preserve all documentary information used in establishing its Subcontract price and to provide such documentation to the Contractor and/or the Commission in connection with any disputed change order made by such Subcontractor.

22.3 Project Records

22.3.1 Maintenance of Records

The Contractor shall maintain at the Contractor's 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.

22.3.2 Audit and Inspection Rights

The Contractor shall grant to the Commission, FHWA, and the U.S. Comptroller General and their respective authorized representatives, such audit and inspection rights and allow such Persons such access to and the right to copy such books and records (including all tax returns and supporting documentation filed with any Governmental Persons) as such Persons may reasonably request from time to time in connection with the issuance of Change Orders, the resolution of disputes, and such other matters as such Persons reasonably deems necessary for purposes of complying or verifying compliance with the Contract and Legal Requirements, including responding with requests pursuant to the Missouri Open Records Act. The Contractor shall grant to Utility Owners and their respective authorized representatives, such audit and inspection rights and all such Persons access to and the right to copy such books and records as such Persons may request in connection with the resolution of disputes or such other matters as such Persons reasonably deems necessary for purposes of complying or verifying compliance with the Utility-related Contractual or MUA requirements.

22.3.3 Audit of Force Account Work

Where the payment method for any Work is on a Force Account basis, such examination and audit rights shall include all books, records, documents and other evidence and accounting principles and practices sufficient to reflect properly all direct and indirect costs of whatever nature claimed to have been incurred and anticipated to be incurred for the performance of such Work. If an audit indicates the Contractor has been over-credited under a previous progress report or progress payment, that over-credit will be credited against current progress reports or payments.

22.3.4 Change Order Pricing Data

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

22.3.5 Claims Audits

All Claims filed against the Commission shall be subject to audit at any time following

the filing of the Claim. The audit may be performed by employees of the Commission or by an auditor under contract with the Commission. No notice is required before commencing any audit before 60 days after Final Acceptance. Thereafter, the Commission shall provide 20 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 Commission, 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 there under. At a minimum, the auditors shall have available to them the following documents:

- a) Daily time sheets and supervisor's daily reports.
- b) Union agreements.
- c) Insurance, welfare, and benefits records.
- d) Payroll registers.
- e) Earnings records.
- f) Payroll tax forms.
- g) Material invoices and requisitions.
- h) Material cost distribution worksheet.
- i) Equipment records (list of company equipment, rates, etc.).
- j) Subcontractors' (including Suppliers) and agents' invoices.
- k) Subcontractors' and agents' payment certificates.
- l) Canceled checks (payroll and Suppliers).
- m) Job cost report.
- n) Job payroll ledger.
- o) General ledger.
- p) Cash disbursements journal.
- q) E-mail, letters, and correspondence.
- r) Network servers, data storage devices, backup media.
- s) All documents that relate to each and every Claim together with all documents that support the amount of damages as to each Claim.
- t) 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 22.3.5 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 22.3.

22.4 Retention of Records

The Contractor shall maintain all records and documents relating to the Contract (including copies of all original documents delivered to the Commission) at the Contractor's Project Manager's office in the State until seven years after the earlier to occur of:

- a) the date Final Acceptance is achieved; or
- b) the termination date.

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

Notwithstanding the foregoing, all records which relate to Claims being processed or actions brought under the dispute resolution 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 Commission, 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).

22.5 Missouri Open Records (Sunshine) Law

22.5.1 Applicability of Law

The Contractor acknowledges and agrees that all records, documents, drawings, plans, specifications, and other materials in the Contractor's or the Commission's possession directly related to the Project, including materials submitted to the Commission by the Contractor, are subject to the provisions of the Missouri Open Records (Sunshine) Law. The Contractor shall be solely responsible for all determinations made by it under such Law and for clearly and prominently marking each and every page or sheet of its materials with trade secret, privileged information, or confidential commercial, financial, geological, or geophysical data as it determines to be appropriate. The Contractor is advised to contact legal counsel concerning such act and its application to the Contractor.

22.5.2 Confidential Materials

If any of the materials submitted by the Contractor to the Commission are clearly and prominently labeled trade secret, privileged information, or confidential commercial, financial, geological, or geophysical data by the Contractor, the Commission will endeavor to advise the Contractor of any request for the disclosure of such materials prior to making any such disclosure. Under no circumstances, however, will the Commission 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 Commission, except for any disclosure of trade secrets or proprietary information in violation of the confidentiality agreement described in Section 22.1.1.

22.5.3 Contractor to Defend Against Disclosure Request

In the event of litigation concerning the disclosure of any material submitted by the Contractor to the Commission, the Commission'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.

22.5.4 Cooperation with the Commission Regarding Missouri Open Records (Sunshine) Law Requests

In the event the Commission receives a Missouri Open Records (Sunshine) Law request for documents that are in the custody and control of the Contractor, the Contractor shall cooperate with the Commission in responding to the request in a timely manner under the Missouri Open Records (Sunshine) Law.

23 COOPERATION AND COORDINATION WITH OTHERS

23.1 Cooperation with Other Contractors

The Commission reserves the right to perform and to contract with others to perform other or additional work on or near the Sites. The Contractor shall cooperate with the Commission and such other contractors to the extent reasonably necessary for the performance by the Commission and such other contractors of their work and shall cause its employees, agents, officers and Subcontractors and other Persons with whom the Contractor may be contractually or legally responsible to so cooperate. If other separate contracts are awarded by the Commission, which affect the Work, the Contractor shall conduct its Work without interfering with or hindering the progress or completion of the work being performed by other contractors.

A specific listing of schedule and locations of projects currently planned by the Commission is provided in Book 4 *Statewide Transportation Program for 2008 – 2012*. This information is provided as a baseline for Commission project schedules.

The Contract Schedule shall form the baseline for the Contractor's project schedule.

The Commission shall coordinate any changes to the STIP with the Contract Schedule, and if the Contractor is performing duties during the Initial Construction Period, in accordance with the Contract Schedule, as published before conflicting work by the Commission or its contractors on the Site or detour was let or scheduled, then the Contractor shall be given priority on the Site.

Likewise, the Contractor shall coordinate the Contract Schedule with the STIP, and if the Commission is performing work in accordance with the STIP schedule, as published before conflicting work by the Contractor on the Site or Detour was let or scheduled, then the Commission shall be given priority on the Site.

23.2 Interference by Others

If the Commission, or any of the Commission's other contractors have hindered or interfered with the progress or completion of the Work, it will be considered a Relief

Event and/or Compensable Event pursuant to Sections 12 and 13.

If the Contractor or any related Subcontractors have hindered or interfered with progress or completion of the Commission's other scheduled contracts, the Contractor shall compensate the Commission's contractor for any claims for such interference prior to Final Completion of such Project Bridge.

Any disputes arising from this Section shall be settled in accordance with Section 19.

24 MISCELLANEOUS PROVISIONS

24.1 Amendments

The Contract may be amended only by a written instrument duly executed by the parties or their respective successors or assigns.

24.2 Waiver

24.2.1 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.

24.2.2 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.

24.2.3 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.

24.3 Independent Contractor

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

any relationship whatsoever between the Commission 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 Commission. 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.

24.4 Successors and Assigns

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

24.4.1 Assignment by the Commission

The Commission may assign all or part of its right, title and interest in and to the Contract, 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.

24.4.2 Assignment by Contractor

The Contractor may assign its rights to receive payment under the Contract Documents and may subcontract Work in accordance with the Approved Subcontracting and Small Business Plan and in compliance with the requirements of the Contract Documents. The Contractor shall not otherwise sublet, transfer, assign or dispose of any portion of the Contract, or delegate any of its duties hereunder, except with the Commission's prior written Approval. 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 Commission, in its sole discretion, has Approved such relief from responsibility.

24.5 Designation of, and Cooperation with Representatives

24.5.1 Designation of Representatives

Concurrently with execution hereof, the Commission and the Contractor shall each designate an individual or individuals who shall be authorized to make decisions and bind the parties on matters relating to the Contract Documents. Such designations may be changed by a subsequent writing delivered to the other party in accordance with Section 24.10. 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 Commission or the Contractor.

24.5.2 Cooperation

The Contractor shall cooperate with the Commission and all representatives of the Commission designated as described above.

24.6 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 Commission or the State of Missouri 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.

24.7 Survival

The dispute resolution provisions contained in Section 19, and all other provisions, which by their inherent character should survive termination of the Contract, shall survive the termination of the Contract.

24.8 Limitation on Third-Party Beneficiaries

It is not intended by any of the provisions of the Contract Documents to create any third-party beneficiary hereunder, or to authorize 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 Commission and a Subcontractor or any other Person except the Contractor.

24.9 No Personal Liability

The Commission's authorized representatives are acting solely as agents and representatives of the Commission 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 Commission for actions in their ordinary course of employment.

24.10 Notices and Communications

24.10.1 Delivery of Notices

Notices under the Contract Documents shall be in writing and:

- a) delivered personally;
- b) sent by certified mail, return receipt requested;
- c) sent by a recognized overnight mail or courier service, with delivery receipt requested; or
- d) sent by tele-facsimile communication followed by a hard copy or with receipt confirmed by telephone, to the following addresses (or to such other address as may from time to time be specified in writing by such Person):

All correspondence with the Contractor shall be sent to the Contractor's Project Manager or as otherwise directed by such Project Manager. The address for such communications shall be:

[Name:



Address:
Telephone:
Fax:
E-mail:]

All communications to the Commission shall be marked with the Commission's project identification number and shall be delivered to the Commission's Project Director, with copies to such additional Persons as may be designated by the Commission's Project Director, at the address set forth below:

Mail to:
Bridge Improvement Project Director
Missouri Department of Transportation
105 West Capitol
P.O. Box 270
Jefferson City, MO 65109

Send Parcel Post to:
Bridge Improvement Project Director
Missouri Department of Transportation
1320 Creek Trail Drive
Jefferson City, MO 65109

e-mail: safeandsound@modot.mo.gov

24.10.2 Receipt of Notices

Notices shall be deemed received when actually received in the office of the addressee (or by the addressee if personally delivered) or when delivery is refused, as shown on the receipt of the U. S. Postal Service, private carrier or other Person making the delivery. Notwithstanding the foregoing, notices sent by fax after 4:00 p.m. Central Standard Time And all other notices received after 5:00 p.m. Central Standard (as applicable) shall be deemed received on the first Business Day following delivery (that is, in order for a fax to be deemed received on the same day, at least the first page of the fax must have been received before 4:00 p.m.).

24.10.3 Copies of Correspondence to the Commission

The Contractor shall copy the Commission on all written correspondence pertaining to the Contract between the Contractor and any Person other than the Contractor's Subcontractors, consultants and attorneys.

24.11 Further Assurances

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

24.12 Illegal Immigrants

The Contractor shall comply with all the provisions of *Executive Order 07-13*, issued by the Honorable Matt Blunt, Governor of Missouri, on the sixth (6th) day of March, 2007. This executive order, which promulgates the State of Missouri's position to not tolerate persons who contract with the state engaging in or supporting illegal activities of employing individuals who are not eligible to work in the United States, is incorporated herein by reference and made a part of this Contract.

- a) By signing this Contract, the Contractor hereby certifies that any employee of the Contractor assigned to perform services under the contract is eligible and authorized to work in the United States in compliance with Federal law.
- b) Notwithstanding any other provision in this Contract to the contrary, in the event the Contractor fails to comply with the provisions of the *Executive Order 07-13*, or in the event the Commission has reasonable cause to believe that the Contractor has knowingly employed individuals who are not eligible to work in the United States in violation of Federal law, the Commission reserves the right to impose such contract sanctions as it may determine to be appropriate, including but not limited to contract cancellation, termination or suspension in whole or in part or both.

The Contractor shall include the provisions of paragraph 26.14 of this Contract in every subcontract, including procurements of materials and leases of equipment, unless exempted by the statutes, executive order, administrative rules or instructions issued by the Commission. The Contractor will take such action with respect to any subcontract or procurement as the Commission may reasonably direct as a means of enforcing such provisions, including sanctions for noncompliance; provided that in the event the Contractor becomes involved or is threatened with litigation with a subcontractor or supplier as a result of such direction, the Contractor may request the Commission to enter into such litigation to protect the interests of the Commission. If so requested, entry into the litigation is solely within the Commission's discretion.

24.13 Severability

If any clause, provision, Section or part of the Contract is ruled invalid under Section 19 or otherwise by a court of competent jurisdiction, then the parties shall:

- a) promptly meet and negotiate a substitute for such clause, provision, Section or part, which shall, to the greatest extent legally permissible, effect the original intent of the parties, including an equitable adjustment to the Contract Price to account for any change in the Work resulting from such invalidated portion; and
- b) 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 the Contract, which shall be construed and enforced as if the Contract did not contain such invalid or unenforceable clause, provision, Section or part.



24.14 Headings

The captions of the Sections of the Contract Documents are for convenience only and shall not be deemed part of the Contract or considered in construing the Contract.

24.15 Governing Law

The Contract Documents shall be governed by and construed in accordance with the law of the State of Missouri. Venue for any legal action in connection with the Contract shall lie in the Circuit Court of Cole County, Missouri.

The Contractor shall prepare its bid, taking into account 144.062 RSMo, as amended by Senate Bill 22 and adopted by the General Assembly of Missouri in the 2007 legislative session, which provides that Commission and MoDOT project contractors are exempt from the payment of sales taxes on certain applicable costs.

24.16 Buy America

The Contractor agrees to abide by the provisions of the Buy America requirements of the 23 CFR 635.410, as amended.

24.17 Convict Produced Materials

The Contractor agrees to abide by the provisions of the Convict Produced Materials requirements of the 23 CFR 635.417, as amended.

24.18 Entire Agreement

The Contract Documents contain the entire understanding of the parties with respect to the subject matter hereof and supersede all prior agreements, understandings, statements, representations and negotiations between the parties with respect to its subject matter.

24.19 Authority to Execute

The signers of this Contract warrant that they are acting officially and properly on behalf of their respective institutions and have been duly authorized, directed and empowered to execute this Contract.

24.20 No Adverse Influence

This Contract shall not be construed more strongly against one party or the other. The parties to this Contract had equal access to, input with respect to and influence over the provisions of this Contract. Accordingly, no rule of construction which requires that any allegedly ambiguous provision be interpreted more strongly against one party than the other shall be used in interpreting this Contract.

24.21 Voluntary Nature of Contract

Each party to this Contract warrants and certifies that it enters into this transaction and executes this Contract freely and voluntarily and without being in a state of duress or under threats or coercion.



24.22 Counterparts

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.



IN WITNESS WHEREOF, the parties have entered into this Contract on the date last written below

Executed by the Contractor this ____ day of _____, 20__.

Executed by the Commission this ____ day of _____, 20__.

MISSOURI HIGHWAYS AND
TRANSPORTATION COMMISSION

CONTRACTOR

By _____

Title: _____

Title _____

ATTEST:

ATTEST:

Secretary to the Commission

Title: _____

APPROVED AS TO FORM:

APPROVED AS TO FORM:

Commission Counsel

Title: _____