
PROGRESSIVE DESIGN-BUILD CONTRACT

PID 110873

Project (24)3002

JEF SR7 25.67 Mine Subsidence
Restoration

~~FINAL – March 1~~ Addendum – April 5, 2024

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B	Contract Particulars
C	Proposal Commitments

Exhibit	Title
D	Key Personnel
E	Technical Requirements
F	Mine Grouting and Overburden Execution Plan Requirements
G	Opinion of Probable Cost (OPC) and Pricing Process
H	Force Account Provisions
I	Delay Costs
J	Unit Pricing Provisions
K	Form of Payment and Performance Bonds
L	Disadvantaged Business Enterprise (DBE) Performance Plan and Good Faith Efforts
M	Disadvantaged Business Enterprise (DBE) Trucking; DBE Materials and Supplies Vendors (MSVs)
N	Contract Provisions for Federal Aid Construction Contracts
O	Notice of Requirement of Affirmative Action to Ensure Equal Employment Opportunity and Workforce Diversity Requirements on all ODOT Administered Federally Funded Projects
P	On-the-Job Training Program
Q	Prompt Payment – ODOT Let Construction Projects
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S	[RESERVED]
T	Critical Path Method Progress Schedule
U	[RESERVED]
V	[RESERVED]
W	Price Fluctuation Clauses
X	Digital Data for Material Ticketing
Y	[RESERVED]
Z	Risk Register
AA	[RESERVED]

PROGRESSIVE DESIGN-BUILD CONTRACT

JEF-SR7-25.67 Mine Subsidence | PID 110873

This Progressive Design-Build Contract (hereinafter the “PDBC”) for JEF-SR7-25.67 Mine Subsidence | PID 110873 Project is entered into as of _____ (the “Effective Date”), by and between the State of Ohio, Department of Transportation (hereinafter the “Department”), acting through its Director and _____ (hereafter the “Contractor”, “Design-Build Team” or “DBT” and together with the Department, hereinafter referred to as the “Parties”).

WITNESSTH:

WHEREAS, on _____, 202_, the Department seeks to expedite the development, design, installation, and construction of mine remediation and pavement resurfacing under a collaborative process with the Department pursuant to attached Exhibit E (Technical Requirements) (collectively, the “Project”).

WHEREAS, pursuant to Section 5517.011 of the Ohio Revised Code and related provisions of Ohio law and federal law, the Department issued a Request for Proposals (RFP) together with Instructions to Offerors (ITO) for the Project on _____, 2024.

WHEREAS, in response to the RFP, the Department received ___ Proposals on _____, 2024.

WHEREAS, the Department evaluated the Proposals and determined that the Contractor’s Proposal was the response to the RFP that provided the apparent best value as described in the ITO, which ultimately led the Department to award this PDBC to the Contractor.

WHEREAS, this PDBC and the other Contract Documents collectively constitute a part of the Contract and are entered into in accordance with the provisions of the RFP.

WHEREAS, the Parties intend for this PDBC to be progressive-design-build contract obligating the Contractor to perform all work necessary to complete the Project, which work, subject to the Department’s rights to terminate this PDBC for convenience, shall be conducted in two phases consisting of (i) a Phase 1 comprised of (a) Sub-Phase 1A (Proof-of-Concept), (b) Sub-Phase 1B and (ii) Phase 2.

NOW, THEREFORE, in consideration of the mutual covenants herein set forth to be kept and performed, it is agreed by the Parties as follows:

1 CONTRACT DOCUMENTS AND INTERPRETATION

1.1 Governing Contract Documents

1.1.1 Intent of the Contract Documents

The Parties acknowledge and agree that the intent of the Contract Documents is to provide for the design, construction, administration, and completion of the Work. The Contractor hereby covenants and agrees to perform the Work in accordance with the Contract Documents.

1.1.2 Project Methodology

The Project shall utilize a Progressive Design-Build process to procure, award, and complete the Work as further described under Section 2 (Progressive Design-Build Approach) hereof.

1.1.3 Project Standards

The Project Standards as set forth in the Technical Requirements together with any subsequently approved Standards Deviation(s) in accordance with Section 4.1.5 (Standards Deviations) hereof shall govern the Project. In the event there are conflicts between this PDBC and the ODOT 2023 Construction Material Specifications 100 General Provisions (ODOT C&MS 100 Series Specifications), the PDBC will control. The Project Standards as modified by any approved Standards Deviation(s) shall be implemented by the Department in accordance with the Technical Requirements and subsequently approved Work Package Proposals.

1.1.4 Contract Management

This PDBC shall be managed in accordance with the laws of the State of Ohio and the Project Standards.

1.1.5 Conflicts Among Project Standards

The Department will resolve conflicts, ambiguities, or inconsistencies among the Project Standards with reference to the following order of precedence:

- A. The Project Scope including approved Standards Deviations;
- B. The Technical Requirements in Exhibit E;
- C. Proposal Commitments in Exhibit C (Proposal Commitments) and Special Provisions;
- D. Supplemental Specifications; and
- E. Standard Construction Drawings applicable to the corresponding Work.

The Contractor hereby covenants and agrees to notify the Department in writing of any conflicts, ambiguities or inconsistencies among the Project Standards upon identification of the same, after which the Department shall review such conflict and issue a determination, which shall be determinative and binding upon the Contractor.

1.2 Definitions

Exhibit A (Acronyms and Definitions) contains definitions applicable to the Contract Documents.

1.3 Contract Documents Order of Precedence

In the event of conflict among the Contract Documents during the performance of the Work with respect to a particular Phase, the order of precedence of contractual incorporation shall be:

- A. Change Orders issued subsequent to the then-current Phase Change Order;
- B. The applicable Phase Change Order;
- C. Supplemental Agreements;
- D. This PDBC and Exhibits; and
- E. All Submittals prepared during the performance of the corresponding Work that the Department determines in writing shall be Contract Documents.

1.4 Interpretation and Construction of Contract Documents

In the Contract Documents, where appropriate:

- A. The singular includes the plural and vice versa; and
- 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 Effective Date.

Unless otherwise specified, lists contained in the Contract Documents shall not be deemed all-inclusive. The Contractor acknowledges and agrees that it had the opportunity and obligation, prior to submission of each Work Package Proposal, to review the Contract Documents and to bring to the Department's attention any conflicts or ambiguities contained therein. The Department's answers to the questions posed during the RFP process shall in no event be deemed part of the Contract Documents and shall not be binding in interpreting the Contract Documents unless included in the Contract Documents pursuant to an addendum or amendment thereto or specifically directed in writing by the Department.

The fact that the Contract Documents omit or misdescribe any detail of the Work that is otherwise necessary to carry out the intent of the Contract Documents and delivery of the Project, or that are customarily performed, shall not relieve the Contractor from its obligation to perform such omitted or misdescribed details as if fully and correctly set forth in the Contract Documents, which omissions, correction of misdescriptions, or performance of those aspects customarily performed shall not in itself be the basis for contractual relief, or other claim at law or in equity.

Wherever the word "including," and variants, shall be deemed to be followed by the words "without limitation". "Or" means the inclusive connotation of "or" (i.e., meaning one, some, or all of a number of possibilities). "May," when used in the context of the PDBC shall mean a power or right exercisable by the Department (or designee) means the power to exercise that right or power in its sole discretion. "May," when used in all other contexts, indicates permission by the Department for the Contractor, or one of its Affiliates or Subcontractors, to do (or refrain from doing) an action.

All references inconsistent with any terms of this PDBC, including to measurement and payment in the Standard Specifications, shall not apply. Measurement and payment shall be deemed as references to equivalent provisions in this PDBC.

All references to time are to prevailing Eastern Standard time. Reference to a right include any benefit, remedy, discretion, authority, or power associated with such right.

1.5 Term

Without limiting Section 26.5 (Survival) and post-termination obligations under Section 21 (Termination for Convenience), this PDBC shall take effect on the Effective Date and will remain in effect until terminated in accordance with the terms of the Contract Documents.

1.6 Federal Requirements

- A. The Project will be funded in part with federal funds. Notwithstanding any provision to the contrary in the Contract Documents, if any conflict is identified between any Federal Requirement set forth in Exhibit L (Disadvantaged Business Enterprise (DBE) Performance Plan and Good Faith Efforts), Exhibit M (Disadvantaged Business Enterprise (DBE) Trucking, DBE Materials and Supplies Vendors (MSVs)), Exhibit N (Contract Provisions for Federal Aid Construction Contracts), and the requirements of the Contract Documents, the Federal Requirements shall prevail over any such conflicting provisions.
- B. The Contractor shall comply with and shall cause its Subcontractors and Subconsultants of all tiers to comply with all applicable Federal Requirements. The Contractor shall include the Federal Requirements in all Subcontracts on the Project, so that such provisions will be binding upon each Subcontractor or Subconsultant working on the Project. The Contractor shall take such action with respect to any Subcontract or purchase order as the Department may direct as means of enforcing such provisions.
- C. **Compliance with 23 CFR 636.109:** Federal Requirements prohibit private entities from independently preparing NEPA documents or from having any decision-making responsibility in the NEPA process. Therefore, the Department shall retain all NEPA decision-making responsibility, and the Contractor acknowledges and agrees that it shall be strictly limited to producing studies and providing information related to the environmental process in accordance with all applicable restrictions of the NEPA process and FHWA policies and rules. With respect to the NEPA process, the Contractor acknowledges and agrees as to the following:
 - a. No commitments are made to any alternative being evaluated in the NEPA process and that the comparative merits of all alternatives presented in the NEPA document, including the no-build alternative, will be evaluated and fairly considered. Subject to, and in accordance with, Section 21 (Termination for Convenience), if the Department proceeds with the no-build alternative, this PDBC will be terminated for convenience.
 - b. All NEPA related documents reference in this Section 1.6 are provided in the Reference Information Documents.
- D. **Disadvantaged Business Enterprises:** It is the policy of the Department that Disadvantaged Business Enterprises (DBEs), as defined in 49 CFR Part 26, and other small businesses shall have the opportunity to compete fairly in contracts financed in whole or in part with public funds. Consistent with this policy, the Department will not allow any person or business to be excluded from participation in, denied the benefits of, or otherwise be discriminated against in connection with the award and

performance of any U.S. Department of Transportation assisted contract because of sex, race, religion, or national origin, as to be further discussed below in Section 9.2 (Labor Laws to be Observed).

- E. **Davis-Bacon Act:** Commencing upon the Phase 2 Change Order, the wages paid to laborers performing Work on the Project will be subject to the requirements of the Davis-Bacon Act (40 U.S.C. §§ 3141 to 3148), as further specified in Exhibit N. The Contractor shall identify and establish the prevailing wages applicable to the work classifications performing Phase 2 Work with reference to applicable wage determinations for the corresponding work classifications performing the Work. The Contractor acknowledges and agrees that initial wage determinations and/or wage classifications identified within the initial wage determination(s) will be subject to revision from time to time, including prior to the execution of the Phase 2 Change Order. As such, the Contractor further acknowledges and agrees that any Price Proposal must incorporate the prevailing wage rates incorporated in the then-current wage determinations pertaining to the relevant wage classifications engaged in the Work. For avoidance of doubt, the Contractor shall bear any and all costs attributable to the failure to utilize current wage determination(s) and shall have no Claim against the Department on account of such changes to any wage determination or the wage classifications addressed therein.

1.7 Standard of Care

The Contractor shall cause all Work to conform to the Project Standards, including but not limited to, the Project Standards, and FHWA and AASHTO standards, practices, policies, guidelines and specifications.

Contractor represents and warrants that it is experienced in public infrastructure projects, including, but not limited to, the design and construction of similar projects under comparable project condition. Given that status, experience and expertise, Contractor represents, covenants, and agrees that all of the services to be furnished by Contractor under or pursuant to this PDBC from the Effective Date until Completion of the Contract, and services in connection with the Project and all obligations to meet certain requirements described herein, shall be performed in a manner consistent with that industry standard of professional care applicable when performing services for projects such as the Project, including without limitation, the skill, diligence and quality which is exercised by design-build firms or entities engaged in the planning, design, construction and administration of projects of similar scope, function, size, quality, and detail. (the "Standard of Care").

2 PROGRESSIVE DESIGN-BUILD APPROACH

2.1 Project Phases

The Work shall be performed by the Contractor in two phases: (1) the Preconstruction Phase (Phase 1) consisting of (a) the Proof-of-Concept Phase (Sub-Phase 1A), (b) the Project Development Phase (Sub-Phase 1B); and (2) the Final Design and Construction Phase (Phase 2).

2.2 Project Meetings

The Contractor and Contractor's Designer covenants and agrees to attend all of the meetings set forth herein, as necessary as determined by the Department and in Section 2.2 (Phase 1 Meetings) of Exhibit E (Technical Requirements). The Contractor further covenants and agrees to attend such additional meetings as may be required from time to time in the Department's reasonable discretion for special purposes. The Contractor acknowledges and agrees that such meetings will include the applicable Contractor's Representative, the DBT's Project Manager, the Department and, based upon the content of the corresponding meeting, other active participants invited by the Department.

2.3 Phase 1: Preconstruction

2.3.1 Pre-Sub-Phase 1A Work

Following the Effective Date, the Department and the Contractor shall conduct regular meetings to finalize the Sub-Phase 1A Work and Sub-Phase 1A Project Scope (the "Sub-Phase 1A Proposal"). The Contractor shall submit the Sub-Phase 1A Proposal to the Department in a form agreed to by the Parties, which shall include (a) a draft of the Sub-Phase 1A Project Scope, including all plans, reports, and other documents required to be developed by the Contractor, (b) a projected schedule for the performance of such Sub-Phase 1A Work, and (c) a Price Proposal that includes the Maximum Sub-Phase 1A Prime Compensation as indicated in Exhibit B (Contract Particulars).

Following the Contractor's submission of the draft Sub-Phase 1A Proposal, the Department shall review the draft Sub-Phase 1A Proposal, and the Department and the Contractor shall engage in good faith negotiations to finalize the terms and conditions of the Sub-Phase 1A Proposal to be incorporated into the Sub-Phase 1A Change Order. At the Department's request, the Contractor shall meet with the Department to review and discuss the draft Sub-Phase 1A Proposal and adjustments to the Sub-Phase 1A Project Scope. When the Parties have agreed to the Sub-Phase 1A Proposal, the Department shall prepare the Sub-Phase 1A Change Order incorporating the Sub-Phase 1A Proposal.

The Contractor's compensation for the preparation and negotiation of the Sub-Phase 1A Change Order shall be determined based upon agreed upon hourly rates as described in Section 11.2 (Compensation for Sub-Phase 1A Work), multiplied by the number of hours (or portions thereof) expended by Contractor's personnel engaged in the preparation and negotiation of the Sub-Phase 1A Change Order and shall be paid by the Department in conjunction with the first invoice submitted by the Contractor after the issuance of the Sub-Phase 1A NTP; provided however, in the event the Parties do not agree upon the terms and conditions of the Sub-Phase 1A Proposal or fail to execute the Sub-Phase 1A Change Order, then the Department may exercise its right to terminate this PDBC under Section 21 (Termination for Convenience).

2.3.2 Sub-Phase 1A: Proof of Concept

Phase 1 and Sub-Phase 1A shall commence upon the Department's issuance of the Sub-Phase 1A NTP and shall continue until the earlier of (i) the Department exercising its right to terminate this PDBC under Section 21 (Termination for Convenience), or (ii) the final completion date for

the Sub-Phase 1A Work as shown in the Sub-Phase 1A Proposal schedule. In the event the Department and the Contractor identify and mutually agree upon the necessity for adjustments to the Sub-Phase 1A Project Scope, including adjustments pertaining to the Maximum Sub-Phase 1A Prime Compensation, the Department shall prepare a Change Order incorporating such adjustments into the Sub-Phase 1A Project Scope.

2.3.2.1 Sub-Phase 1B: Proposal

During Sub-Phase 1A, the Department and the Contractor covenant and agree to hold regular meetings to mutually develop the Sub-Phase 1B Scope and establish the terms and conditions of the Sub-Phase 1B Change Order. In conjunction with the foregoing negotiations, the Contractor shall submit to the Department a draft Sub-Phase 1B proposal (the "Sub-Phase 1B Proposal") in a form agreed to by the Parties, which shall include (a) a proposed scope of work for Sub-Phase 1B Project Scope, including a list of all plans, reports, and other documents required to be developed by the Contractor, (b) a schedule for the performance of such Sub-Phase 1B Work and a preliminary schedule for the Phase 2 Work as required by Exhibit T (Critical Path Method Progress Schedule) and (c) a Price Proposal that includes the proposed Maximum Sub-Phase 1B Prime Compensation as indicated in Exhibit B (Contract Particulars).

The Department shall review the Contractor's Sub-Phase 1B Proposal and the Department and the Contractor shall engage in good faith negotiations to finalize the Sub-Phase 1B Proposal prior to the expiration of Sub-Phase 1A. At the Department's request, the Contractor shall meet with the Department to review and discuss the draft Sub-Phase 1B Proposal and adjust the Sub-Phase 1B Scope. When the Parties have agreed to the Sub-Phase 1B Proposal, the Department shall prepare a Sub-Phase 1B Change Order incorporating the Sub-Phase 1B Proposal.

2.3.3 Sub-Phase 1B: Project Development

Sub-Phase 1B commences upon the Department's issuance of a Sub-Phase 1B NTP and shall continue until the sooner to occur of (i) the Department exercising its rights to terminate this PDBC under Section 21 (Termination for Convenience), or (ii) the final completion date for Sub-Phase 1B as set forth in the Sub-Phase 1B Change Order. In the event the Department and the Contractor identify and mutually agree upon the necessity for adjustments to the Sub-Phase 1B Project Scope, including adjustments pertaining to the Maximum Sub-Phase 1B Prime Compensation, the Department shall prepare a Change Order incorporating such adjustments into the Sub-Phase 1B Project Scope.

2.3.3.1 Reserved

2.3.3.2 Phase 2 Proposal

As part of its obligations during the performance of the Phase 1 Work, the Contractor shall develop and submit a proposal to perform the Phase 2 Work (the "Phase 2 Proposal"). Upon the Department's acceptance of the Phase 2 Proposal, the Parties shall execute the Phase 2 Change Order.

Within 30 Days of the Department's completion of the Sub-Phase 1B work, the Contractor shall submit its draft Phase 2 Proposal to the Department. Upon submittal to the Department by the Contractor, the Phase 2 Proposal shall constitute an offer that is binding on the Contractor.

The Phase 2 Proposal shall be in the form agreed by the Parties during Sub-Phase 1B and shall include:

- A. The Contract Price for the Work, together with all required supporting forms and information as required by Exhibit G (Opinion of Probable Cost (OPC) and Pricing Process);
- B. Proposed updates to the Baseline Project Schedule to incorporate the Phase 2 Work, including the Substantial Completion Deadline and the Completion of the Contract Deadline;
- C. The proposed organization chart for Phase 2 and a description of any additions or changes to the Key Personnel, in each case in the form and with the supporting information required under Section 10 (Authorized Representatives and Key Personnel);
- D. A report that summarizes the agreed assumptions upon which the Phase 2 Proposal is based, if any;
- E. The Phase 2 Project Scope developed in accordance with Section 3.3 (Phase 2 Project Scope);
- F. DBE Forms required in accordance with Section 9 (Labor Requirements);
- G. An updated DBE Performance Plan prepared in accordance with Exhibit L (Disadvantaged Business Enterprise (DBE) Performance Plan and Good Faith Efforts) evidencing how the Contractor will achieve its listed commitments for the Phase 2 Work through the utilization of DBE firms;
- H. Completed certifications for the Phase 2 Proposal completed in the form agreed by the parties during Sub-Phase 1B;
- I. A list of the Design Documents, including all addenda thereto, used in preparation of the GMP, including a list of the clarifications and assumptions made to supplement the information contained in the Design Documents;
- J. The studies, plans, and reports generated as part of Sub-Phase 1B, including any site investigation reports, the Utility Map, ROW Plans, and DBE Performance Plan;
- K. Any other document, report, or information required under the terms of this PDBC to be submitted with or as part of the Phase 2 Proposal;
- L. Such other supporting documentation as may be reasonably requested by the Department; and
- M. The allocation between the Contractor and the Department of the management and financial responsibility for the Risk Register Events set forth in the Risk Register.

Portions of the Phase 2 Proposal may be attached at the Department's discretion, as exhibits and incorporated into the Phase 2 Change Order and if attached will become binding Contractor commitments under the PDBC, as amended.

2.3.3.3 Phase 2 Proposal Review and Negotiations

2.3.3.3.1 Initial Review and Negotiation of Phase 2 Proposal

The Contractor shall, upon request by the Department, present the Phase 2 Proposal to the Department and others invited by the Department to attend the proposal meeting.

If the Phase 2 Proposal submitted by the Contractor is acceptable to the Department, in its sole discretion, the Department will Notify the Contractor of its acceptance, following which:

- A. The Parties will execute the Phase 2 Change Order; and
- B. subject to all other conditions under Section 2.8 (Notices to Proceed) being satisfied, the Department will issue the Phase 2 NTP.

If the Department, in its sole discretion, notifies the Contractor that the Phase 2 Proposal is not acceptable, then the Contractor and the Department shall enter into good faith negotiations prior to which the Contractor shall resubmit its Phase 2 Proposal incorporating those terms and conditions upon which the Contractor and the Department are in agreement. The Parties shall continue to negotiate until the earlier of (i) the Department's acceptance of the resubmitted Phase 2 Proposal, (ii) the Department's election to issue a written notice to not proceed to the Contractor in accordance with Section 2.3.3.3.2 (Failure to Agree to a Phase 2 Change Order), (iii) the expiration of the term of Sub-Phase 1B as set forth under the Sub-Phase 1B Change Order, or (iv) the Department's election to terminate this PDBC for convenience in accordance with Section 21 (Termination for Convenience).

2.3.3.3.2 Failure to Agree to a Phase 2 Change Order

Without limiting the Department's rights under Section 21 (Termination for Convenience), with respect to the Phase 2 Proposal the Department may by a written notice delivered to the Contractor either:

- A. Not proceed with requiring the Contractor to submit a Phase 2 Proposal, including as a result of a delay or failure in the satisfaction of the conditions under Section 2.3.3.2 (Phase 2 Proposal); or
- B. Reject, at its sole discretion, the Phase 2 Proposal and not proceed to negotiate, agree or execute a Phase 2 Change Order.

2.3.3.3.3 Actions Following Notice of Failure to Agree Phase 2 Change Order

Following delivery of a written notice under Section 2.3.3.3.2 (Failure to Agree to a Phase 2 Change Order) or a failure by either Party to execute a Phase 2 Change Order after the Department's acceptance of the Phase 2 Proposal in accordance with Section 2.3.3.3.1 (Initial Review and Negotiation of Phase 2 Proposal):

- B. The Contractor shall continue to perform and complete the Phase 1B Work (other than that part of the Phase 1B Work requiring preparation of a Phase 2 Proposal or solely for the purposes of preparing a Phase 2 Proposal);
- C. Upon the Department's written notice, the Contractor shall assign to the Department all of the right, title, and interest of the Contractor in and to the work products developed under the Phase 1 Work; including the Phase 1 Design Work; if the

Department elects to terminate the Contractor prior to completion of Final Design Documents, the Contractor shall be released from all liability (under contract, tort, or any other legal theory) that may arise in relation to any Department use of the design produced by the Contractor. Final Design Documents approved and signed by the Engineer of Record shall remain the liability of the Contractor.

- D. Upon completion and the Department's written acceptance of the Phase 1 Design Work and any remaining obligations under the Phase 1B Work, this PDBC will expire in accordance with Section 1.5 (Term);
- E. Title to the Design Work will remain vested in or pass to the Department in accordance with Section 26.15 (Ownership and Copyright of Submittals). Any Submittals which are provided to the Department by the Contractor or Subcontractors as part of the Phase 1 Work may be used and disclosed by the Department in accordance with Section 26.16 (Intellectual Property);
- F. The Department may, in its sole discretion, proceed with any other action as the Department deems appropriate for delivery of the Phase 2 Work, including soliciting from, negotiating with, or awarding a contract to any other Person for any part of the Phase 2 Work; and
- G. The Department may, in its sole discretion, terminate this PDBC pursuant to Section 21 (Termination for Convenience) if it determines to not proceed with the Phase 2 Work.

2.4 Phase 2: Final Design and Construction

2.4.1 Phase 2 Change Order

Phase 2 shall commence upon the Department's issuance of a Phase 2 NTP and shall continue until the end of the term of the Phase 2 Work as set forth in the Phase 2 Change Order.

The Phase 2 Change Order shall include the content specified in the Project Scope and generally apply to all Work Packages. The executed Phase 2 Change Order shall not be modified except through a Change Order.

2.5 Development of Change Orders and Work Packages

2.5.1 Open Book Basis of Negotiations

The development of all Change Orders and Work Packages shall be on an Open Book Basis, and the Department and applicable Authorized Representatives shall have the right to access all records, accounts, and other data used by the Contractor in connection with the preparation of any draft or final Proposal, subject to the provisions of Section 25.7 (Escrow Documents). The Contract Price shall be developed in a cooperative manner in accordance with the guidelines and principles described in Exhibit G (Opinion of Probable Cost (OPC) and Pricing Process).

2.5.1.1 Calculation of the Contract Price

The Contract Price for the Phase 2 Work shall be computed as the Contractor's reasonable, good faith estimate of the cost of the Phase 2 Work authorized therein in a format developed pursuant to the protocols in Exhibit G (Opinion of Probable Cost (OPC) and Pricing Process).

The backup support for the calculation of the Contract Price shall be provided to the Department in a manner and in the format developed pursuant to the protocols in Exhibit G (Opinion of Probable Cost (OPC) and Pricing Process).

2.6 Risk Identification, Pricing and Assignment

2.6.1 Risk Approach

The Parties will adopt a collaborative approach to risk identification, pricing and risk assignment and the Contractor shall cooperate with the Department to:

- A. Develop, review and make updates to the Risk Register, attached hereto as Exhibit Z (Risk Register) including identifying new risks and reflecting discussions and decisions made during risk management meetings;
- B. Develop proposals and seek solutions for avoiding and mitigating the risks listed on the Risk Register during the development of the Design Documents and the development of the Baseline Schedule;
- C. Develop qualitative and quantitative analysis of the risks;
- D. Develop methods to track costs and time incurred directly associated with such risks;
- E. Consider different approaches to the risk allocation for the Construction Work and determine the allocation of financial responsibility and management responsibility with respect to Risk Register Events for the purposes of developing OPCs and the Phase 2 Proposal;
- F. Determine the specific mitigation actions to be taken by each Party in response to the risks listed on the Risk Register;
- G. Close in the Risk Register those risks which have been avoided or passed and document the resolution; and
- H. Otherwise assess, review and monitor risks and risk response strategies as required under the Project Scope.

Risks applicable to the Work will be identified jointly during Phase 1 and the Parties shall endeavor to agree to: (i) the probability of occurrence; (ii) ranges of potential cost impact; (iii) the allocation of financial responsibility; (iv) the designation of primary management responsibility; (v) potential schedule impacts and (vi) mitigation measures.

During the negotiation of the Phase 2 Change Order, the Department will consider changes to the initial allocation of financial responsibility and the designation of primary management responsibility with respect to each Risk Register Event in accordance with the process outlined in this Section 2.6.1 (Risk Approach), after which any such changes shall be accounted for during the development of each initial GMP Price Proposal and thereafter incorporated into the terms and conditions of the corresponding Change Order.

2.6.1.1 Risk Register

The Parties shall develop a Risk Register with respect to the entire Project in accordance with the guidelines and principles described in this Section 2.6 (Risk Identification, Pricing and Assignment) and Section 18.1 (Partnering).

The Contractor shall be responsible for maintaining and updating the Risk Register. The Risk Register shall identify potential risk issues related to Work (each a "Risk Register Event"). All Risk Register Events shall be primarily categorized as either a Department Risk or a Contractor Risk and shall include a designation of management responsibility and financial responsibility for the corresponding Risk Register Event.

If the Parties determine that financial responsibility for a Risk Register Event is shared by both the Department and the Contractor, then such Risk Register Event shall constitute a Provisional Sum and the corresponding entry on the Risk Register will provide the Department's share of the financial or management responsibility for the Risk Register Event and the Contractor's share of the financial or management responsibility for the Risk Register Event and will be categorized as both a "Department Risk" and a "Contractor Risk". An example of a shared Risk Register Event is provided as the first row on the Risk Register attached as Exhibit Z (Risk Register).

The Risk Register shall include dates on which the Department gives its approval of a particular Risk Register Event, and the Risk Register Event shall be deemed as being in effect of that date. The Phase 2 Change Orders shall include the most-current Risk Register as of the effective date of the corresponding Change Order updated with all Risk Register Events reasonably expected to be applicable to the corresponding Work Package.

2.6.1.1.1 Department Risks

All Risk Register Events that are a Department Risk shall (i) assign management responsibility for such Risk Register Event to either the Department or the Contractor, (ii) assign financial responsibility for such Risk Register Event to the Department and/or the Contractor, and (iii) describe the types and extent of relief that the Contractor shall be entitled to seek upon occurrence of the Risk Register Event. Risk Register Events that are Department Risks may also include requirements for determining of time impacts, payment requirements, and other terms.

If a Risk Register Event occurs while performing Construction Work, and the Risk Register Event is a Department Risk, then the Contractor shall be entitled to seek a Change Order in accordance with Section 12.4 (Change Orders).

2.6.1.1.2 Provisional Sums

Provisional Sums may be utilized as a method to manage financial responsibility for Risk Register Events that are Department Risks or, if mutually agreed upon by the Department and the Contractor to manage shared financial responsibility with respect to a specific Risk Register Event. Risk Register Events utilizing Provisional Sums shall specify:

1. the amount of any Provisional Sum;

2. whether the Provisional Sum is solely the responsibility of the Department (in which case, the Department may elect to include amounts in any Department's Risk Contingency) or whether the Provisional Sum is a Shared Provisional Sum;
3. terms for sharing and disbursement of the Provisional Sum residue; provided however, to the extent any Provisional Sum is included in either the Contractor's Risk Contingency or any Department Risk Contingency, then such residue shall be allocated in accordance with the terms and conditions pertaining to the distribution of excess held in such contingency;
4. the types and extent of relief (cost and/or schedule) that the Contractor is provided upon occurrence of the Risk Register Event;
5. whether the Risk Register Event provides for relief in accordance with this PDBC if the Provisional Sum, Shared Provisional Sum, or other identified relief is exhausted. If relief in accordance with this PDBC is provided for, and allocated to the Department, then the Contractor must submit a written Notice of Potential Change Order in accordance with Section 12.4 (Change Orders). For any portion of a Provisional Sum for which the Contractor agrees to assume financial responsibility, the Contractor's relief shall be to draw upon the Contractor's Risk Contingency; and
6. any required mitigation efforts to be taken by the Contractor or the Department.

2.6.1.1.3 Contractor Risks

All Risk Register Events for which the Contractor is assigned financial responsibility (each a "Contractor Risk") will be included in the Contractor's Risk Contingency established under each initial GMP Price Proposal. If a Risk Register Event occurs while performing Construction Work, and the Risk Register Event is a Contractor Risk, then the Contractor shall be entitled to request amounts from the Contractor's Risk Contingency to pay for the costs of such Contractor Risk; provided, upon the exhaustion of the Contractor's Risk Contingency, Contractor shall not be entitled to seek any additional costs attributable to the occurrence of the Contractor Risk; provided further, under no circumstances shall the Contractor be entitled to seek schedule relief for the occurrence of the Risk Register Event beyond that identified in the Risk Register.

2.7 Cost Submittals

2.7.1 Sub-Phase 1B Opinion of Probable Cost

In collaboration with the Department, the Contractor shall develop an Opinion of Probable Cost (OPC) for the Phase 2 Work developed in accordance with Exhibit G (Opinion of Probable Cost (OPC) and Pricing Process).

2.7.2 Cost Submittals during Sub-Phase 1B (GMP)

The Contractor shall develop the Design Documents to a level of detail required in the Sub-Phase 1B Project Scope and sufficient to support the Phase 2 Proposal.

The Contractor shall submit the Phase 2 Proposal for the Phase 2 Work following the protocols in Exhibit G (Opinion of Probable Cost (OPC) and Pricing Process). The Contractor is entitled to treat such Submittals as Escrow Documents in accordance with Section 25.7 (Escrow Documents). The Contractor shall develop each initial GMP Price Proposal through negotiation

on an Open Book Basis, allowing the Department to review and evaluate all cost data and underlying assumptions, supported by a transparent and competitive Subcontractor procurement processes further described in Section 8 (Subcontracting Requirements), and subject to the self-performance provisions described in Section 8 (Subcontracting Requirements).

The Contract Price for each Work Package will be based on the reasonably estimated actual cost of completing the associated Work as further described in Exhibit G.

2.8 Notices to Proceed (NTP)

2.8.1 Contractor's Obligations

All obligations of the Contractor under this Section 2.8 shall be completed by the Contractor in such a manner that there is no material adverse impact to the designated Completion Deadlines under the Project Schedule.

2.8.2 Notice to Proceed for the Sub-Phase 1A Work

The Contractor shall perform or permit performance of any part of the Sub-Phase 1A Work on the Commencement Date stated in the Sub-Phase 1A NTP. The Department will issue the Sub-Phase 1A NTP no later than 30 Days after the following conditions have been satisfied:

- A. The PDBC has been executed and the Contractor has submitted and the Department has accepted the Sub-Phase 1A Proposal;
- B. The Department has received the Contractor's required insurance certificates and associated documentation for the Sub-Phase 1A Services in accordance with Section 17 (Insurance Requirements); and
- C. The Contractor has designated the initial Contractor's Representative in accordance with Section 10.1 (Authorized Representatives).

2.8.3 Notice to Proceed for the Sub-Phase 1B Work

The Contractor shall not perform or permit performance of any part of the Sub-Phase 1B Work until the Commencement Date stated in the Sub-Phase 1B NTP. The Department will issue the Sub-Phase 1B NTP no later than 30 Days after the following conditions have been satisfied:

- A. The Parties have agreed and executed the Sub-Phase 1B Change Order;
- B. The Department has received the Contractor's required insurance certificates and associated documentation for the Sub-Phase 1B Work in accordance with Section 17 (Insurance Requirements); and
- C. The Contractor has satisfied any other conditions to the issuance of Phase 1B NTP as agreed by the Parties during Phase 1A.

2.8.4 Reserved

2.8.5 Notice to Proceed for Phase 2 Work

The Contractor shall not perform or permit the performance of any part of the Phase 2 Work until the Commencement Date stated in the Phase 2 NTP. The Department will issue the Phase 2 NTP no later than 45 Days after the following conditions have been satisfied:

- A. The Parties have agreed and executed the Phase 2 Change Order;
- B. The Department has received the Contractor's Performance Bonds and Payment Bonds and required insurance certificates and documentation for the Phase 2 Work in accordance with the Phase 2 Change Order;
- C. The Contractor has completed any other conditions precedent to the issuance of the Phase 2 NTP under the Phase 2 Change Order;
- D. The Contractor has obtained any and all Governmental Approvals (other than any Department-Provided Approvals) required to commence the performance of the Phase 2 Work;
- E. The Department has approved the Project Baseline Schedule; and
- F. There has been a final NEPA decision as described in Section 1.6 (b) (Federal Requirements) regarding the Project.

Issuance of Phase 2 NTP authorizes the Contractor to perform all other Work and activities pertaining to the Project.

2.9 The Department's Rights

By entering into this PDBC, the Department is not obligating itself to authorize Construction Work on any component of the Project.

The Department will, in its sole discretion, determine:

- A. Whether or not it is in the best interest of the Department and the general public for the Department to continue to work with the Contractor after completion of the Phase 1 Work;
- B. Whether or not to require that the Contractor submit a Phase 2 Proposal;
- C. Whether or not to accept the Contractor's Phase 2 Proposal or execute the Phase 2 Change Order.

The Contractor is not entitled to claim or seek payment from the Department of any amount as a result of the Department making a determination not to proceed with requiring submittal of a Phase 2 Proposal, a Phase 2 Change Order, or otherwise authorize the Contractor to perform the Phase 2 Work (in whole or part) or to award the Phase 2 Work (in whole or in part) to another Person or taking any other action or exercising any other right under this Section 2.9.

The Department's rights under Section 2.3.3.3.2 (Failure to Agree to a Phase 2 Change Order) are without prejudice to its rights and remedies for a Contractor Default under Section 19 (Default), including where such Contractor Default results in a failure to agree to a Phase 2 Change Order, and the Department may terminate this PDBC for any or no reason at its

convenience in accordance with Section 21 (Termination for Convenience). For avoidance of doubt, the failure of the Parties to agree to a Phase 2 Change Order shall not constitute a Contractor Default hereunder.

2.10 Reserved

3 PROGRESSIVE DESIGN-BUILD REQUIREMENTS

3.1 Sub-Phase 1A Project Scope

The Sub-Phase 1A Project Scope shall include the following activities and deliverables:

- A. The Mine Grouting and Overburden Execution Plan as further described in Exhibit F (Mine Grouting and Overburden Execution Plan Requirements);
- B. Development of a preliminary Project Schedule for all Phases;
- C. Begin establishing the Project Risk Register and pricing of risks as further described in Section 2.6 (Risk Identification, Pricing and Assignment);
- D. Begin development of the Cost Model and Estimating Methodology Report for development of each initial GMP Price Proposal as further described in Exhibit G (Opinion of Probable Cost (OPC) and Pricing Process); and
- E. Development of the Sub-Phase 1B Proposal.

3.2 Sub-Phase 1B Project Scope

The Sub-Phase 1B Project Scope will be developed and agreed during Sub-Phase 1A and is expected to include the following activities and deliverables:

- A. DBE Performance Plan, DBE Outreach Plan and associated plans as described in Exhibit L (Disadvantaged Business Enterprise and Good Faith Efforts) for Phase 2 including the setting of a DBE participation target for the Design and Construction Work;
- B. Environmental documents and Submittals as further described in Section 8 of Exhibit E (Technical Requirements);
- C. Utilities coordination as further described in Section 10 of Exhibit E (Technical Requirements);
- D. Assisting the Department in the Development of Utility Agreements;
- E. Further development of the Phase 2 Project Scope including evaluation of Project Standards;
- F. Development of the Phase 2 Baseline Schedule to the stage and level of detail described in Exhibit T (Critical Path Method Progress Schedule);
- G. Further development of the Project Risk Register and the allocation and management of risk;
- H. Assist in the development of cost and risk sharing mechanisms for Phase 2;
- I. Further design and engineering development of the selected alternative including updated constructability analysis to the appropriate level of detail for GMP proposal development for the Phase 2 Change Order;
- J. Preparation of procurement packages and selection of Subcontractors in accordance with Subcontractor Bidding and Selection Plan;
- K. Causing the conduct of required investigations and surveys including geotechnical and SUE and reporting the results and setting forth the potential impact on the Project;

- L. Further investigation and analyses such as structural, hydraulic, drainage, geotechnical as necessary and appropriate to develop the Design Documents and the Baseline Schedule;
- M. Coordinate with the State to develop each GMP Price Proposal pursuant to Exhibit G (Opinion of Probable Cost (OPC) and Pricing Process);
- N. Submit Phase 2 Proposal; and
- O. Required Payment Bond and Performance Bond for Phase 2.

3.3 Phase 2 Project Scope

The Phase 2 Project Scope shall include performance requirements, Project Standards, Specifications, the Technical Requirements, drawings and other documents applicable to the Phase 2 Work, as set forth in the Phase 2 Change Order, and describing the Contractor's responsibilities. The Department's initial requirements and a framework for the Phase 2 Project Scope shall be developed and agreed between the Parties as part of the Sub-Phase 1B Work. The Department is entitled to supplement the Phase 2 Project Scope at any time during Phase 1 and any impact, if any, upon the Phase 1 Work will be administered through the process described in Section 12 (Contract Changes). The Contractor is responsible for identifying additions or amendments to the Phase 2 Project Scope necessary to appropriately define and perform the Work and, subject to the Department's approval, such additions and amendments may be incorporated into the Phase 2 Project Scope during Phase 1.

The Phase 2 Project Scope will be considered a part of and included in an exhibit to the PDBC at the execution of the Phase 2 Change Order and at that time will incorporate and supersede all matters governing the Phase 2 Work that formerly appeared in the Technical Requirements. Subsequent changes to the Phase 2 Project Scope will be in accordance with the Change Order process as set forth in Section 12.

3.4 Project Standards

An initial list of Project Standards is included in Section 7.1 (Governing Regulations) of Exhibit E (Technical Requirements). The Department shall supplement the Standards to the Project Scope during Phase 1 and any impact upon the Phase 1 Work, if any, will be administered through the process in Section 12 (Contract Changes). The Contractor is responsible for identifying additional Project Standards necessary and appropriate to define and perform the Work and, subject to the Department's approval, may add these to the Project Scope during Phase 1 pursuant to Section 4.1.5 (Standards Deviations).

3.5 Reference Information Documents

3.5.1 Review of RIDs and Project Site

Project Reference Information Documents (RIDs) are available to the Contractor at the following location:

<https://ftp.dot.state.oh.us/pub/construction/JEF7MineGroutPDB/RID/>

RIDs may include electronic copies of existing reports, plans, photographs, topographic mapping, traffic data and projections, utility information, administrative guidelines, directives, technical manuals, specifications, and other documents pertinent to the Work.

The Contractor shall review and analyze the RIDs, including but not limited to, the boring logs and other geotechnical information, drainage information, and environmental information contained therein, and inspect and examine the Project Site and surrounding locations.

The Contractor hereby agrees and acknowledges that as a result of its review and analysis of the RIDs, its inspection and examination of the Project Site and surrounding areas, the Contractor is familiar with the Project Site and acknowledges and agrees that it is responsible for determining and obtaining any additional information and testing the Contractor deems necessary and appropriate to perform the Work in accordance with the Contract Documents.

The Department may review Submittals based upon the RIDs and provide comments where necessary. Such review shall not relieve the Contractor of any obligation concerning accuracy or completeness of Submittals based upon the RIDs.

Additional Documents may be proposed to be added to the RIDs by either Party at any time during Phase 1. For the Phase 1 or Phase 2 Work, portions of the RIDs may be explicitly referenced in a Change Order for the purpose of defining the Department's requirements. Such portions are deemed incorporated in the PDBC solely to the extent that they are so referenced. In the performance of the Phase 2 Work, the Contractor may rely on the RIDs only to the extent expressly agreed upon and set forth in a Change Order.

3.6 Contractor's Responsibility for Constructability, Safety and Life-Cycle Performance

The Contractor assumes responsibility for the professional quality, technical accuracy, timely development and completion, and coordination of the Design Documents and all other Professional Services. The Contractor shall review the Design Documents for constructability and safety and shall cooperate with the Department to demonstrate that the design optimizes maintenance, and life cycle performance of all elements of the Project and allows safe, efficient, and cost-effective operation of the Project.

3.7 Project Schedule

The Contractor shall prepare, provide, update and maintain the Project Schedule throughout each Phase. The Project Schedule shall be prepared in accordance with the requirements of Exhibit T (Critical Path Method Progress Schedule) and the Project Scope.

The Contractor shall perform and complete all Phase 1 Work, notwithstanding the execution of the Phase 2 Change Order and the resulting concurrent obligation to perform any Phase 2 Work.

3.8 Governmental Approvals

The Parties will collaborate and fulfill their respective responsibilities during Phase 1 to obtain Governmental Approvals required prior to Construction. Following the execution of the Phase 2 Change Order, the Contractor will be responsible to apply for and obtain all remaining Governmental Approvals or any modifications to Governmental Approvals already obtained.

As part of the Phase 2 Work the Contractor shall procure all Governmental Approvals; pay all charges, fees, and taxes; and provide all notices necessary and incidental to the due and lawful prosecution of the Work. It is the responsibility of the Contractor to obtain any Governmental

Approvals and pay any costs required by the local road or street agency for the use of any Right of Way in connection with the Work.

Added April 5, 2024

4 DESIGN REQUIREMENTS AND SUBMITTALS

4.1 Design of the Project

4.1.1 Design Progress Meetings

The Contractor shall hold regularly scheduled Design Progress Meetings as agreed upon by the Parties and shall coordinate with the Department to determine agenda topics prior to each meeting. The purpose of Design Progress Meetings is to keep open communication between the Designer and the Department to discuss design approaches, anticipated submissions, and status of design submissions being reviewed by the Department. The Contractor's personnel are required to participate in all Design progress meetings. Refer to Section 2.2.4 (Design Progress Meeting) of Exhibit E (Technical requirements) for further details.

4.1.2 Infeasibility of Design

Infeasibility of accepted Contractor designs, errors in the Design Documents, or improper Contractor design assumptions shall not be considered a revision to the Contract Documents.

4.1.3 Design Responsibilities

The Contractor shall perform the Professional Services in accordance with the Governing Regulations set forth in Section 7.1 (Governing Regulations) of Exhibit E (Technical Requirements) as may be amended by the Project Scope. The Contractor shall:

- A. Consult with Department to understand the requirements for the Project and review available data.
- B. Advise the Department as to the necessity of providing or obtaining from others additional reports, data or services and assist the Department in obtaining such reports, data, or services.
- C. Develop Ohio Maintenance of Traffic (MOT) plans in accordance with the Standard Construction Drawings, Location and Design Manual, and OMUTCD.
- D. Develop and maintain and make available to the Department a project record which includes all significant events (changes, comments, etc.) which influenced the development of the Project.
- E. Perform any surveys required for the Project.
- F. Perform hydraulic analysis as set forth in the Project Scope. The results of the analyses must show no harmful interference to adjacent riparian vegetation (along streams) resulting from the Work. Results must be certified by the Contractor.
- G. Perform any additional needed soils surveys, soils borings, and geotechnical investigations, as appropriate with analysis necessary to develop the Design Documents.
- H. Reference the appropriate Project Standards, including the ODOT Construction and Materials Specifications in the Plans for all Construction Work to be performed and all Materials to be furnished.
- I. Provide Plans, specifications and supporting documents for review by the Department at each stage of plan development required by the Project Scope.

- J. Provide written approval on Contractor accepted Shop Drawing(s). Contractor's written approval shall be provided with all Submittals to the Department.
- K. Provide approval between the Designer and the individual within the Contractor's organization responsible for erection and temporary works regarding acceptability of developed Engineered Drawings identified in the following ODOT C&MS Sections: 501.05.A 1 (Bracing adjacent to railroad tracks), 501.05A 2 (Demolition of Structures over or within 14 feet of railroad tracks), 501.05.A 3 (Erection of structural members over or within 14 feet of railroad tracks), 501.05B 3 (Falsework for cast-in-place concrete slab bridges), & 501.05B 6 (Total load applied during construction exceeds 75 percent of legal limit). Contractor's written approval shall be provided with the Submittal to the Department. Any Engineered Drawings requiring approval from entities not employed by the Department shall be in format following L&D standards.

4.1.4 Design and Professional Services Prequalification

Design Work or Professional Services that requires prequalification may only be performed by firms that are prequalified for that Work at the time of performance of the Design Work or Professional Services.

The Contractor shall cause the Designer and all other Subconsultants performing Design Work or Professional Services to be prequalified by ODOT as appropriate for the Work and in the category for which each organization is performing the Work.

The Designer and all Subconsultants' names and addresses must be the same as those on file with ODOT. All Professional Services must comply with Section 4733.16 of the Ohio Revised Code.

The Contractor shall interpret all references to guidelines, recommendations and considerations within applicable design manuals as minimum requirements except when specifically excluded within the Project Scope. The Contractor shall perform recommended evaluations if not provided by the Department.

4.1.5 Standards Deviations

The Contractor shall perform an analysis and submit to the Department for review and approval any proposed deviation in any Project Standards or Governing Regulation. The Contractor's analysis shall indicate the reasons for a Standards Deviation and shall propose an acceptable solution. A Standards Deviation shall not be included in the Design Documents without the Department's written approval.

4.1.6 Engineering Properties of Subsurface Conditions

The Contractor shall determine the engineering properties of all subsurface conditions and Materials for design and construction of the Work. The Contractor shall base such subsurface determinations on exploration data and information provided by the Department and procured by the Contractor, local and regional geologic and hydrogeologic mapping and publications, and experience in similar geologic settings and construction. The Contractor covenants and agrees to perform all interpretation and interpolation of geotechnical information in a manner which would be reasonably exercised by members of the engineering profession practicing under geological and regional conditions similar to those of the site of the Project. The Contractor acknowledges and agrees that all use of, interpretation of, and interpolation of the geotechnical

data and information for design and construction, both at specific exploration locations and between locations, are the sole responsibility of the Contractor.

4.2 Department's Responsibilities for Design Activities

The Contractor shall submit the Design Documents to the Department. The Department reserves the right to review and comment on the Design Documents in accordance with Section 4.8 (Department Review of Contractor Submittals). The Contractor shall cause the Designer and Subconsultants, if appropriate, to be available throughout the Term to answer questions, issue clarifications, and correct errors and omissions.

The Department shall have the discretion to determine the level of review required for any Submittal in accordance with Section 4.7 (Contractor Submittals Listing & Schedule). The Contractor bears sole responsibility for the quality, accuracy, completeness, and compliance with the requirements of the Contract Documents regardless of the Department's level of review.

The Department's failure to identify improper or incorrect design shall not, in any way, prevent later rejection of a Design Document if an improper or incorrect design is discovered, or obligate the Department to grant acceptance under Section 5.14.4 (Completion of the Contract and Continuation of Contractor's Responsibilities).

4.3 Errors and Omissions

The Contractor shall be responsible for the accuracy of the Design Work and shall promptly make necessary revisions or corrections resulting from its negligence, errors or omissions. The Department's use of the Contractor's services shall not relieve the Contractor of any responsibility for subsequent correction of its negligent act, error or omission or for clarification of ambiguities.

In the event of any negligent act, error or omission which the Department determines to be the responsibility of the Contractor, the correction, repair or reconstruction of which may require additional field or office work, the Contractor shall perform such corrective action as may be necessary.

The Contractor shall be responsible for damages including but not limited to economic waste, direct and indirect damages incurred as a result of its negligent act, error or omission, and for losses or costs to repair or remedy construction.

4.4 Financial and Cost Accounting Requirements for Errors and Omissions

When notified by the Department of a potential error or omission in the Work, the Contractor shall establish and maintain financial and related cost accounting records to segregate all costs associated with evaluation and correction of the potential error or omission. All costs associated with errors and omissions, including directly-associated costs (e.g., legal, accounting, and other professional fees), shall be borne by the Contractor and may not be charged to the Department directly or through overhead with respect to this Project.

4.5 Submittals and Documentation

The Contractor shall make all Submittals to the Department in accordance with Section 21.5 (Document Management) of Exhibit E (Technical Requirements) and as set forth in in the Project Scope. The Contractor covenants and agrees to provide all information requested by the Department as a result of a request made pursuant to the Ohio Open Records Law Ohio Rev. Code sec. 149.43 et seq. within the timeframe provided to the Contractor in conjunction with such request.

4.6 Review of Submittals

The Contractor covenants and agrees to verify that there are no conflicts between Buildable Units in such Submittals being reviewed and any previously approved Design Documents. The Contractor shall submit Design Documents to applicable agencies requiring review in a format following L&D Manuals.

4.7 Contractor Submittals Listing & Schedule

- A. The Contractor shall submit to the Department for review and acceptance, a comprehensive list and schedule for Contractor Submittals with the dates of each Submittal in order to achieve the Completion Deadlines (the "Contractor Submittals Listing & Schedule").
- B. In Contractor Submittals Listing & Schedule, the Contractor shall distinguish between Submittals required to be reviewed and approved by the Department and those for informational purposes only. In addition, the Contractor Submittals Listing & Schedule shall include:
 1. A description of any Contractor Submittals that are not already described in the Contract Documents including identifying the contents and purpose;
 2. The planned schedule for submittal of the Contractor Submittals, which shall be consistent with the Project Schedule and any time period for Submittals under this PDBC;
 3. The required or proposed level of review to be provided by the Department; and
 4. Any required reviews or approvals of Contractor Submittals by third parties.
- C. The Contractor shall maintain, update, and re-submit the Contractor Submittals Listing & Schedule:
 1. At least monthly if there have been any material changes in the prior month;
 2. Together with submittal of its Phase 2 Proposal; and
 3. During the performance of the Phase 2 Work to establish all Submittals associated with Final Design, the Construction Work and the As-Built Drawings.
- D. The Department will complete its review of the initial Contractor Submittals Listing & Schedule and any update to it, issue its comments, and confirm its acceptance or rejection, within 15 Days of receipt. If the Department does not provide its acceptance or rejection or provide comments within such time period, the Contractor may proceed to submit Contractor Submittals in accordance with the Contractor Submittals Listing & Schedule.

4.8 Department Review of Contractor Submittals

- A. The Contractor shall submit all Contractor Submittals to the Department within the time periods under the accepted Contractor Submittals Listing & Schedule.
- B. For those Contractor Submittals which have been designated as requiring the Department's review and approval, unless a different review period is agreed between the Parties and inserted in the Contractor Submittals Listing & Schedule, the Department will complete its review, issue its comments, and confirm its approval or rejection, within a timeframe agreed during Phase 1.
- C. At each stage of the Project, concurrent submissions above the prescribed amount will be subject to additional review periods. The additional review period will consider the submission size and complexity. The Department will partner with the Contractor with respect to additional review times and submission numbers in an effort to meet the Project Schedule. The Department will provide the additional timeframe needed for review on the next working day following submission.
- D. If the Department does not provide its approval or disapproval of a Contractor Submittal within the review period set forth in item B above, the Contractor shall provide a Notice to the Department stating the date on which the Department's disposition should have been received. If the Department fails to respond within a further 2 Working Days thereafter, the Contractor may seek an extension of time and reimbursement under Section 13 (Time Extension to the Completion Deadlines and Payment for Excusable Delays) if the absence of Department approval or disapproval of the Submittal materially adversely impacts the Critical Path of the Baseline Schedule.

4.9 Contractor Analysis of the Department Review Comments

- A. The Contractor shall provide Notice to the Department in writing within 7 Days after receipt of any Department comments to a Contractor Submittal if the Contractor determines that incorporation of any comment(s) would cause the Submittal to become deficient in any respect, would materially increase the scope of the Work, amount to a Change Order, would give rise to a delay that materially adversely impacts the Critical Path of the Baseline Schedule or would otherwise materially adversely affect in any manner the performance of the Work. Upon receipt of a notification from the Contractor, the Department will have the right to modify the comment(s) and/or address the issues raised in the Contractor's notice in question.
- B. The Contractor's failure to provide Notice to the Department in accordance with this Section 4.9 shall constitute the Contractor's full acceptance of the Department's comments, the Contractor's full acceptance of all responsibility for resulting changes to the Contractor Submittals, and the Contractor's full acceptance that the comment does not constitute a change to the Work.
- C. Prior to execution of the Phase 2 Change Order, the Contractor shall review and evaluate any Department comments to a Contractor Submittal provided as part of the Phase 1 Work for the purposes of the preparation of its Phase 2 Proposal, including providing recommendations to the Department for different approaches so as to achieve value for money and cost and schedule certainty for the Phase 2 Work.
- D. Following receipt of the Contractor's recommendations, the Department will resolve the treatment and approach to the comment as it applies to the Phase 2 Work and

provide Notice to the Contractor of any related assumptions to apply to the Phase 2 Proposal.

4.10 Contractor Revision and Re-submittal

The Contractor shall revise all Contractor Submittals to include a disposition of all the Department-provided comments (including revisions to previous comments) and resubmit such Contractor Submittals to the Department for review and approval by the Department.

4.11 Plans and Working Drawings

The Plans shall show details of structures, the lines and grades, typical cross-sections of the Roadway, and the location and design of structures.

The Contractor shall prepare Working Drawings when required by the Contract Documents and after verifying applicable field and plan elevations, dimensions, and geometries. Where Work consists of repairs, extension, or alteration of existing structures, the Contractor shall take measurements of existing structures to accurately join old and new Work.

Unless otherwise indicated, the Department will review Working Drawing Submittals to ensure conformance with the PDBC and to provide the Contractor a written response to document the results of its review as follows:

- A. "ACCEPTED" – The Department accepts the Submittal for construction, fabrication, or manufacture.
- B. "ACCEPTED AS NOTED" – The Department accepts the Submittal for construction, fabrication, or manufacture, subject to the Contractor's compliance with all Department comments or corrections to the Submittal. If also marked "RESUBMIT," the Department still accepts the submittal, but requires the Contractor to provide a corrected submittal to the Department.
- C. "NOT ACCEPTED" – The Department does not accept the Submittal. The Submittal does not conform to Contract requirements. Do not begin construction, fabrication, or manufacture of Work included in the Submittal. Revise the submittal to comply with Department comments or corrections and Contract requirements and provide the revised Submittal to the Department for another review.

"Accepted" and "Accepted as Noted" Working Drawings are Contract Documents. The Department's acceptance will not relieve the Contractor of responsibility to complete the Work according to the Contract Documents nor relieve a signatory engineer's responsibility as defined by OAC 4733-23.

5 CONTROL OF WORK

5.1 Authority of the Department

The Department shall determine in its sole discretion:

- A. The quality and acceptability of Materials furnished;
- B. The quantity of Work performed;
- C. The Contractor's rate of progress;
- D. The interpretation of the Contract Documents;
- E. Acceptable fulfillment of the Contract;
- F. Contractor compensation; and
- G. The acceptability of the Contractor's Design and Design Documents.

The Department's acceptance of the Work or any portion thereof does not constitute a waiver of the Department's right to pursue any and all legal remedies for Nonconforming Work or Work performed by the Contractor in an un-workmanlike manner.

The Department will not supervise, direct or have control or authority over, nor be responsible for the Subcontractors' or Subconsultants' means, methods, techniques, sequences or procedures of construction, design, or the safety precautions and programs incident thereto, or for any failure of Contractor to comply with Laws and regulations applicable to the furnishing or performance of the Work.

The Department will not be responsible for the Contractor's failure to perform or furnish the Work in accordance with the Contract Documents. The Department may order immediate remediation of conditions which endanger the public safety or welfare as set forth in Section 5.10.6 (Public Convenience and Safety), Section 5.11.1 (Maintenance During Construction), Section 5.11.2 (Failure to Maintain Roadway or Structure), Section 5.11.6 (Protection and Restoration of Property), Section 5.12 (Contractor's Use of the Right of Way or Other Department-Owned Property), and Section 17 (Insurance Requirements).

5.2 Phase 2 Preconstruction and Progress Meetings

The Contractor shall meet with the Department for a preconstruction meeting before beginning the Construction Work.

At or before the preconstruction meeting, the Contractor shall submit the updated Progress Schedule to the Department and furnish to the Department a list of proposed Subcontractors not included in the Phase 2 Change Order, as applicable. If the Contractor fails to deliver the required submissions to the Department at or before the preconstruction meeting, the Department may order the meeting suspended until the required submissions are furnished to the Department. The Contractor shall not be permitted to commence the corresponding Construction Work until the meeting is reconvened and concluded or the Department gives specific written permission to proceed with the corresponding Construction Work.

The Contractor covenants and agrees to conduct monthly Progress Meetings with the Department unless an alternate frequency is otherwise determined and agreed upon in writing by the Department at the preconstruction meeting. The Contractor covenants and agrees to

coordinate with the Department to determine agenda topics prior to each meeting. The purpose of Progress Meetings is to maintain and foster open communication between the Contractor and the department.

5.3 Cooperation Between Contractors

At any time, the Department may contract for other work on or near the Project.

Separate Contractors working within the limits of the Project shall conduct their work without interfering with or hindering the progress or completion of Work being performed by other Contractors and shall cooperate with each other as directed by the Engineer.

5.4 Authority and Duties of Inspector

The Department, acting through its Inspectors, is authorized to inspect the Work and the preparation, fabrication, or manufacture of Materials; provided however, Inspectors are not authorized to alter or waive requirements of the Contract Documents and the Contractor shall not be entitled to rely on any such alteration or waiver by any such Inspector. Inspectors are authorized to: (i) notify the Contractor of Work that does not conform to the Contract Documents; (ii) reject Materials that do not conform to Specification requirements; and (iii) until the issue is decided by the Department, suspend portions of the Work if there is a question regarding the Contract Documents, use of unapproved Material, or safety. Inspectors are not obligated or authorized to provide direction, superintendence, or guidance to the Contractor, its crew, its Subcontractors, Subconsultants, or Suppliers to accomplish the Work.

Any action or inaction of the Inspector does not constitute a waiver of the Department's right to pursue any and all legal remedies for Nonconforming Work, or work performed by the Contractor in an un-workmanlike manner.

5.5 Inspection of Work

The Contractor acknowledges and agrees that the Department, in its sole discretion, may elect to inspect Materials and the Work. The Contractor covenants and agrees to provide the Department or its representatives, including its Inspectors, with access to the Work, information, and assistance necessary to conduct a complete inspection of the Work or applicable portions thereof. Notwithstanding anything to the contrary contained herein, the Contractor shall notify the Department at least 24 hours prior to all testing and inspection needs. Modifications to previously provided inspection notices are considered new notices and will follow the 24 hour prior notice requirement.

When directed by the Department, the Contractor shall remove or uncover completed Work to allow inspection. After the Department's inspection, the Contractor shall restore the Work according to the requirements of the Contract Documents. If the inspected Work conformed to the requirements of the Contract Documents, the Department will pay for uncovering or removing and restoring the Work as Extra Work according to Section 12 (Contract Changes). The Department will not pay for uncovering or removing and restoring Nonconforming Work.

The Department shall have the discretion to determine the level of inspection for any item of Work. The Contractor bears sole responsibility for the quality of Work and compliance with the Contract Documents regardless of the Department's level of inspection.

The Department's failure to identify Nonconforming Work shall not, in any way, prevent the Department's subsequent rejection if Nonconforming Work is discovered, or obligate the Department to grant acceptance under Section 5.14.4 (Completion of the Contract and Continuation of the Contractor's Responsibilities).

Inspection of Work may also include inspection by representatives of the federal government, other Government Entities or railroad corporations that pay a portion of the cost of the Work. Such inspections will not make such organizations a party to the PDBC and will not be considered as interfering with the rights of the Contractor or Department.

5.6 No Waiver of Legal Rights

Subject to Section 26.1 (Waivers), the following Department actions do not waive the Department's rights or powers under the Contract, or any right to damages herein provided:

- A. Inspection by the Department or by any of Department Inspectors or representatives.
- B. Review of Design Documents by the Department's Project Manager, or any of the Department's representatives.
- C. Any order, measurements, or certificate by the Department or its representatives.
- D. Any order by the Department or its representatives for the payments of money or the withholding of money.
- E. Acceptance of any Work.
- F. Any extension of time.
- G. Any possession taken by the State or its representatives.

The Department will not consider any waiver of a breach of this PDBC to be a waiver of any other subsequent breach.

5.7 Furnishing Right-of-Way

The Department will provide the Contractor with legal access rights to the Project ROW during the performance of the Phase 1 Work in compliance with Section 9 (Right-of-Way) of Exhibit E (Technical Requirements) as may be amended in the Project Scope, including ingress and egress from a public Road.

The Contractor shall comply with the requirements of ORC 5517.01 and shall notify the property owner or person in possession of the property at least 48 hours prior to entry into said property. The notification format shall be approved by the before use.

The Sub-Phase 1A NTP shall constitute permission for the Contractor to occupy public Right-of-Way within the Project area for the performance of the Phase 1 Work in compliance with Section 9 (Right of Way) of Exhibit E (Technical Requirements) as may be amended in the Project Scope.

The Department is responsible for securing all necessary Project ROW in advance of Construction Work. Provisions governing access dates to each parcel are set forth in Section 9 of Exhibit E (Technical Requirements) as may be amended in the Project Scope. Any exceptions will be identified at the time of the Phase 2 NTP. If any parcels have not already been cleared for access by the Contractor on the date of the Phase 2 NTP, the Department will

identify in the Phase 2 Change Order the specific dates such parcels will be made available to the Contractor.

Where proposed Work is beyond the Project ROW limits, the Contractor shall not commence any Construction Work outside of the Project ROW until notified by the Department that the needed additional Project ROW has been acquired and is otherwise available for Construction Work.

5.8 Unauthorized and Nonconforming Work

5.8.1 Nonconforming and Unauthorized Work

The Contractor shall correct any Nonconforming Work in the manner and within the time frames required by the Contract Documents, at no cost to the Department. The Department may reject or require the Contractor to remedy any Nonconforming Work and/or identify additional Work that must be done to bring the Project into compliance with Contract Document requirements at any time prior to Completion of the Contract, whether or not previous oversight, spot checks, audits, reviews, tests, inspections, acceptances, or approvals were conducted by any Person.

Unauthorized Work is Work done contrary to the instructions of the Department, beyond the plan lines, or any Extra Work done without the Department's permission. The Department will not pay for Unauthorized Work. The Department may order the Contractor to remove or replace Unauthorized Work at no expense to the Department.

If the Contractor fails to comply with the Department's orders under the provisions of this Section 5.9.1 (Nonconforming and Unauthorized Work), the Department may correct or remove and replace Nonconforming Work or Unauthorized Work and deduct the costs from the Contract Price.

5.8.2 Nonconforming Work Compensation Adjustment

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

1. The amount allocated to such Work in the Price Proposal;
2. The Contractor's cost savings associated with its failure to perform the Work in accordance with the Contract Document requirements; or
3. The amount deemed appropriate by the Department to provide compensation for impacts to affected parties such as future maintenance and/or other costs relating to the Nonconforming Work.

5.9 Construction Requirements

5.9.1 Prosecution and Progress

The Contractor shall notify the Department in writing at least 24 hours before starting construction of each Buildable Unit of Work. If the prosecution of the Work is suspended, the Contractor shall notify the Department in writing a minimum of 24 hours in advance of resuming construction.

The Contractor shall pursue the Work diligently and continuously as to achieve the Completion Deadlines for each Milestone and achieve Substantial Completion of the Project by the Substantial Completion Deadline.

5.9.2 Limitation of Operations

The Contractor shall limit operations to prevent unnecessary inconvenience to the traveling public in accordance with the MOT. If the Department concludes that the extent of the Contractor's Work unnecessarily inconveniences the public or concludes limiting operations are necessary to protect existing facilities or completed Construction Work from damage, the Department will require the Contractor to finish portions of Work in progress before starting new Work.

5.9.3 Load Restrictions

The Contractor shall comply with all legal load restrictions when hauling Materials on public roads.

The Contractor shall operate Equipment of a weight or so loaded as to not cause damage to Structures, to Roads, or to other types of construction. The Contractor shall comply with ODOT C&MS subsection 501.05.B.6 (Total load applied to a structure during construction exceeds 75 percent of legal limit) for allowed loads on Bridges for Work undertaken in Ohio.

The Contractor shall not (i) use off road vehicles on bases or pavements unless permitted by the Department in writing, (ii) haul on concrete pavement, base, or Structures before the expiration of the curing period or (iii) exceed the legal load limits in this section unless permitted by the Department in writing.

5.9.4 Haul Roads

Prior to hauling Equipment or Materials, the Contractor shall provide written notification to the Department of the specific roads or streets on the haul route. If the haul route includes roads and streets that are not under the jurisdiction and control of the State of Ohio and the Department determines that State controlled roads are not available or practical for a haul route, the Contractor may use local roads and streets that are not restricted by the relevant Government Entity. If the Department determines that state controlled roads are available and practical for a haul route, the Contractor shall revise the proposed haul route provided in the original written notification and resubmit to the Department.

If the Department determines that haul route roads were properly used by the Contractor for any purpose in connection with the Work and that the haul route roads were damaged, then the Department may order the Contractor to perform immediate and practical repairs to ensure reasonably normal traveling conditions. The Department will pay for repairs according to applicable provisions of Section 12 (Contract Changes).

The Contractor shall not file a Claim for delays or other impacts to the Work caused by disputes with Government Entities regarding the use of local roads or streets as haul routes. The Contractor shall save the Department harmless for any closures or hauling restrictions outside the Project Limits beyond the control of the Department.

5.9.5 Reserved

5.9.6 Public Convenience and Safety

At all times, the Contractor shall ensure that the Work interferes as little as possible with the normal unrestricted flow of traffic. The Contractor shall provide for the safety and convenience of the general public and the residents adjacent to the Project Site and the protection of persons and property. Furthermore, the Contractor shall not close any highways or streets unless specifically allowed by the PDBC per Section 11.10.2 (Lane Closure Deductions).

Any illegal drugs, drug paraphernalia, mobile drug labs or dumps, weapons or firearms found on the Project ROW shall be considered a potential crime scene and shall not be handled or moved. In such an event, the Contractor shall immediately notify law enforcement and the Department.

5.9.7 Sanitary Provisions

The Contractor shall provide and maintain sanitary accommodations in a neat condition for the use of employees and Department representatives that comply with the requirements of the State and local Boards of Health, or of other Government Entities having jurisdiction over the Project.

5.9.8 Bridges over Navigable Waters

The Contractor shall conduct all Work on navigable waters so that it does not interfere with free navigation of the waterways and that it does not alter the existing navigable depths, except as allowed by permit issued by the U.S. Coast Guard.

5.9.9 Use of Explosives

Use of explosives is prohibited for this Project.

5.9.10 Unmanned Aircraft Systems

If the project requires or anticipates the use of unmanned aircraft systems within Project Right-of-Way, the Contractor will follow proper risk assessment and federal regulations in accordance with ODOT Supplement 1132 in Ohio.

5.10 Damage to the Work and Maintenance During Construction

5.10.1 Maintenance During Construction

The Contractor shall maintain the Work during construction and until the Department accepts the Work under Section 5.14.4 (Completion of the Contract and Continuation of Contractor's Responsibilities). The Contractor is responsible for damage done by its Equipment.

The Contractor shall maintain the previous courses or subgrade during all construction operations, when placing a course upon other courses of embankment, base, subgrade, concrete or asphalt pavement, or other similar items previously constructed. This maintenance includes, but is not limited to draining, re-compacting, re-grading, or if destroyed, the removal of Work previously accepted by the Department.

The Contractor shall maintain the post construction storm water Best Management Practice (BMP) features. The Contractor shall prevent sediment laden surface water from coming in contact with the BMP features during construction.

The Contractor shall maintain the Work during the Construction Period and before acceptance of the Work under Section 5.14.4. The Department will not provide additional compensation for maintenance Work. All cost of maintenance Work during construction and before the project is accepted shall be included in the Contract Price and the Contractor will not be paid an additional amount for such Work.

Snow and ice control during the Construction Period will be by the Department and applicable Government Entities.

The Contractor shall not be required to assume any maintenance responsibilities until NTP for Construction Work pursuant to the Phase 2 Change Order, following which the Contractor shall be responsible for maintenance of existing facilities within the Project Limits as described herein.

The Contractor shall perform a baseline inspection and submit a baseline inspection report that shall be used as a benchmark to determine the minimum required maintenance condition of all existing project elements throughout the Construction Period. The baseline inspection report shall identify any existing defects, safety issues, or elements requiring repair on detour routes. The report will include mitigation measures for all identified defects, safety issues, or elements requiring repair. Prior to and during detour use, the Contractor shall make repairs to the detour route to ensure it is reasonably smooth and free from holes, ruts, ridges, bumps, dust, standing water, and other items required to maintain safe driving conditions. Once the detour is removed and traffic returned to its normal pattern, the detour route shall be restored to a condition that is equivalent to that which existed prior to its use for this purpose.

The Contractor shall maintain all elements within the Project limits such that the baseline element condition is equaled or exceeded.

5.10.2 Failure to Maintain Roadway or Structure

If the Contractor, at any time, fails to comply with the provisions of Section 5.11.1 (Maintenance During Construction), the Department will immediately notify the Contractor of such noncompliance. If the Contractor fails to remedy unsatisfactory maintenance within 24 hours after receipt of such notice, the Department may immediately proceed to maintain the Project, and deduct the entire cost of this maintenance from monies due or to become due the Contractor in accordance with the Contract Documents.

5.10.3 Contractor Responsibility for Work

Until the Department accepts the Work during by issuing a Notice of Final Completion pursuant to Section 5.14.2.2 (Notice of Completion), the Contractor is responsible for the Project and shall take every precaution against injury or damage to any part thereof by the action of the elements or from any other cause, whether arising from the execution or from the non-execution of the Work. The Contractor shall rebuild, repair, restore, and make good all injuries or damages to any portion of the Work occasioned by any of the above causes before Completion of the Contract. The Contractor shall bear the expense of the repairs except when damage to the Work was due to a Force Majeure Event, as set forth in Section 14 (Force Majeure Events), without the fault or negligence of the Contractor.

5.10.4 Damage by Traffic Using Substantially Completed Work

In the event that the Department determines that damage to completed permanent items of Work results from traffic using a substantially completed section of Roadway, the Department may compensate the Contractor for repair of the damage as authorized by Change Order. Additionally, if traffic permanently damages beyond use the following temporary maintenance of traffic items, the Department will compensate the Contractor for replacement of the item as authorized by Change Order:

1. Arrow board;
2. Work zone signal, pole, or controller;
3. Lighting unit or pole;
4. Changeable message sign;
5. Work Zone Impact Attenuator;
6. Truck Mounted Impact Attenuator; or
7. Digital Speed Limit Sign Assembly.

To receive compensation for the damage to permanent items of Work or temporary maintenance of traffic items named above, the Contractor must first meet the following requirements.

- A. Notify the Department of each occurrence of damage in writing within 10 Days.
- B. Contact the local law enforcement agency to determine if the accident was investigated and a report filed. If an accident report was filed, obtain the report and notify the motorist, and copy their insurance company, via certified mail informing both that the motorist is responsible for the cost of damage repairs. If the motorist does not respond within 30 Days, make a second attempt to contact the motorist and copy the insurance company via certified mail.
- C. If no response is received from the motorist or insurance company within 30 Days of the motorist receipt of the second notice, send a letter to the Department within eighteen months of the event and include documentation of good faith effort to seek recovery from responsible parties.
- D. The Department will make an adjustment according to Section 13 (Time Extension to the Completion Deadlines and Payment for Excusable Delays) and Section 12.8 (Changes and Extra Work Price Determination) to compensate the Contractor for the added costs and delays, if any, resulting from the repair or replacement of damaged Work.

If there is no accident report on file and no means of identifying the responsible motorist, the Contractor will be compensated to repair the damaged Work.

In case of suspension of Work by the Contractor or under the provisions of Section 20.2 (Department Suspension for Cause), the Contractor shall be responsible for the Project and shall take necessary precautions to prevent damage to the Project; provide for normal drainage; and erect any necessary temporary structures, signs, or other facilities at its expense. During such period of suspension of Work, properly and continuously maintain in an acceptable growing condition all living material in newly established plantings, seedings, and soddings

furnished under the Contract Documents, and take adequate precautions to protect new tree growth and other vegetative growth against injury.

5.10.5 Removal of Graffiti

The Department may direct the Contractor to remove graffiti any time during the Work. The Department will make an adjustment according to Section 13 (Time Extension to the Completion Deadlines and Payment for Excusable Delays) for delay impacts to Critical Path activities and Section 12.8 (Changes and Extra Work Price Determination) to compensate the Contractor for the added costs, if any, resulting from all ordered graffiti removal.

5.10.6 Protection and Restoration of Property

The Contractor is responsible for the preservation of all public and private property impacted by the Contractor's operations.

The Contractor is responsible for all damage or injury to property, during the prosecution of the Work, resulting from any act, omission, neglect, Nonconforming Work or misconduct in the manner or method of executing the Work. The Contractor will remain responsible for all damage and injury to property until the Project is accepted under Section 5.14.4 (Completion of the Contract and Continuation of Contractor's Responsibilities).

If the Contractor causes any direct or indirect damage or injury to public or private property by any act, omission, neglect, or misconduct in the execution or the non-execution of the Work, then it must restore, at its own expense, the property to a condition similar or equal to that existing before the damage or injury.

If mail boxes, road, or street name signs and supports interfere with the Work, the Contractor shall remove and erect those items in a temporary location during the Construction Period in a manner satisfactory to and as directed by the Department. After Substantial Completion of the Work and before Completion of the Contract, the Contractor shall erect the mailboxes, road, or street name signs and supports in their permanent locations according to the Plans unless otherwise directed by the Department.

The Contractor shall cooperate with the Department in protecting and preserving survey monuments that are affected by the Work as required by ORC 5519. At the beginning of the Work, the Contractor shall verify the position of all survey monuments in the area to be improved, according to ODOT C&MS Section 623 (Construction Layout Stakes and Survey Monuments). If survey monuments not shown in the Contract Documents are unexpectedly encountered, then the Contractor shall protect, reference, and preserve those survey monuments in the same manner as survey monuments that are shown in the Contract Documents.

The Contractor shall not create staging areas, store Materials and Equipment, or borrow or waste materials in areas identified as an environmental resources areas in the Contract Documents. All properties to be utilized by the Contractor outside the Project Limits shall be cleared for all environmental resource impacts prior to the beginning of Construction Work. Environmental resources include but may not be limited to:

1. Cultural Resources:

- a. Buildings, structures, objects, and sites eligible for or listed on the National Register of Historic Places; and
 - b. Historic or prehistoric human remains, cemeteries, and/or burial sites (pursuant with ORC 2909.05.
2. Ecological Resources:
 - a. Wetlands;
 - b. Streams; and
 - c. Wooded areas with trees to be removed in excess of 8 inches diameter at breast height.
 3. Public Lands:
 - a. Lands meeting the criteria of 49 U.S.C. 303, 23 CFR 771.135: 4(f); and
 - b. Lands meeting the criteria of 16 U.S.C. 4601-4, 36 CFR 59.1: 6(f).
 4. FEMA Mapped 100 year Floodplains; and
 5. Hazardous Waste Areas.

Except for locations utilized specifically for:

1. Reuse of Clean Hard Fill as described in CA-EW-20 (ODOT Beneficial Reuse Form). Prior to transferring Clean Hard Fill from the project, fully execute form CA-EW-20 and provide appropriate documentation to the Department as described for each reuse option.

All areas proposed to be utilized by the Contractor outside the Project Limits and not described above shall be reviewed by environmental Subcontractor(s) that are prequalified by the Department for each environmental resource. The Contractor shall cause the environmental Subconsultant(s) to certify that the proposed site to be utilized for the Contractor will not impact:

1. Cultural Resources;
2. Ecological Resources;
3. Public Lands;
4. FEMA Mapped 100 year Floodplains; or
5. Hazardous Waste Areas.

The Contractor shall provide all documentation and the environmental Subconsultant certification to the Department.

In the event that the areas proposed for use by the Contractor outside the Project ROW contain environmental resources, the Contractor shall be responsible to the Department for all environmental clearances and permits prior to the beginning Construction Work.

5.10.7 Contractor's Responsibility for Utility Property and Services

At points where the Contractor's operations are adjacent to properties of railway, cable, telephone, and power companies, or are adjacent to other property, and any damage to their property may result in considerable expense, loss, or inconvenience, the Contractor shall not commence with the operation until all arrangements necessary for the protection of the property

have been made. The Contractor shall ensure continuity of Utility service as further described in Section 10 of Exhibit E (Technical Requirements).

The Contractor shall cooperate with the owners of any underground or overhead utility lines in their removal and rearrangement operations to ensure these operations progress in a reasonable manner, that duplication of rearrangement Work may be reduced to a minimum, and that services rendered by those parties will not be unnecessarily interrupted.

In the event interruption to underground or overhead utility services results from an accidental breakage or from being exposed or unsupported, the Contractor shall immediately alert the occupants of nearby premises as to any emergency that the accidental breakage may create at or near such premises. The Contractor shall then notify the Department and the Utility Owner of the utility facility of the disruption and cooperate with the said Utility Owner or operator in the restoration of service. If utility service is interrupted, the Contractor shall perform the repair work continuously until the service is restored unless the repair work is performed by the Utility Owner. The Contractor shall not begin Work around fire hydrants until the local fire authority approves provisions for continued service.

5.11 Contractor's Use of the Project Right of Way or Other Department-Owned Property

5.11.1 Disposal of Waste Material and Construction Debris and Excavation of Borrow on the Project Right of Way or on Other Department-Owned Property

The Contractor shall dispose of waste material according to Section 5.13.2 (Borrow and Waste Areas) and dispose of construction debris according to Section 5.13.5 (Construction and Demolition Debris). In addition to the rights granted in Section 5.13.3 (Rights In and use of Materials Found in the Work), the Contractor's use of the Project ROW or other Department-owned property for the disposal of waste material and construction debris and excavation of borrow material is restricted as follows:

- A. If the Contract Documents identify locations for the disposal of waste material and construction debris or excavation of borrow material within the Project ROW or on other Department-owned property, then only perform these operations in these designated locations.
- B. If the Contract Documents do not identify locations for the disposal of waste material and construction debris or excavation of borrow material within the Project ROW or on other Department-owned property, then do not assume that the Department will make such locations available.

If the Contractor's request to use locations within the Project ROW or on other Department-owned property is approved by the Department, then the Department will allow the Contractor to dispose of waste material and construction debris or excavate borrow material for a negotiated fee per cubic yard.

5.11.2 Contractor's Use of Portable Plants Within the Project Right of Way or on Other Department-Owned Property

The Contractor's use of portable plants within the Project ROW or on other Department-owned property is limited.

The Contract Documents do not identify locations within the Project ROW or on other Department-owned to place a portable plant. The Contractor shall not assume that the Department will make such locations available.

5.11.3 Placement of a Portable Plant within the Project Right of Way or on Other Department-Owned Property

To place a portable plant within the Project ROW or on other Department-owned property, the Contractor shall comply with the following requirements:

- A. Local noise ordinances.
- B. Obtain any necessary EPA permits for the operation of the plant. Provide the Department with a copy of the information submitted to obtain the permit and a copy of the permit.
- C. Provide the Department written certification that the plant will supply Material only for the Project for which it was approved. The plant shall not be used to supply any other project or to sell materials commercially.
- D. Submit an ingress/egress plan to the Department for approval that details the anticipated truck movements and provides acceptable protection, warning, and guidance to motorists, pedestrians, and the workers.

5.11.4 Equipment Storage and Staging

The Contractor may use, fee-free, any portion of the Project ROW for staging, Equipment storage, or an office site with the approval of the Department, provided such usages do not interfere with the Work and are not prohibited by the Contract Documents.

5.11.5 Equipment Removal and Site Restoration

The Contractor shall remove all Contractor Equipment and completely restore all utilized sites as required by Section 5.13.4 (Cleaning Up) before Completion of the Contract as provided in Section 5.14.4 (Completion of the Contract and Continuation of the Contractor's Responsibilities).

5.12 Environmental Requirements

5.12.1 Environmental Protection

The Contractor shall comply with all Federal, State, and local laws and regulations controlling pollution of the environment. The Contractor shall avoid polluting streams, lakes, ponds, and reservoirs with fuels, oils, bitumens, chemicals, sediments, or other harmful materials, and avoid polluting the atmosphere with particulate and gaseous matter.

By execution of this PDBC, the Contractor, will be deemed to have stipulated as follows:

- A. That any facility that is or will be utilized in the performance of this contract, unless such contract is exempt under the Clean Air Act, as amended (42 U.S.C. 1857 et seq., as amended by Pub.L. 91-604), and under the Federal Water Pollution Control Act, as amended (33 U.S.C. 1251 et seq., as amended by Pub.L. 92-500), Executive Order 11738, and regulations in implementation thereof (40 CFR 15) is not listed, on the date of contract award, on the U.S. Environmental Protection Agency (EPA) List of Violating Facilities pursuant to 40 CFR 15.20.
- B. That the Contractor agrees to comply and remain in compliance with all the requirements of Section 114 of the Clean Air Act and Section 308 of the Federal Water Pollution Control Act and all regulations and guidelines listed thereunder.
- C. That the Contractor shall promptly notify the Department of the receipt of any communication from the Director, Office of Federal Activities, EPA, indicating that a facility that is or will be utilized for the contract is under consideration to be listed on the EPA List of Violating Facilities.
- D. That the Contractor agrees to include or cause to be included the requirements of paragraph A. through D. of this Section 5.13.1 in every nonexempt subcontract, and further agrees to take such action as the government may direct as a means of enforcing such requirements.

The following provisions with respect to permits shall be read in conjunction with Section 8 (Permitting) of Exhibit E (Technical Requirements).

Fording of streams is prohibited.

Causeways for stream and river crossings or for Work below a Bridge are permitted provided:

- A. The causeway complies with the requirements of the 404 Permit the Department obtained for the Project.
- B. The Contractor obtains a 404 Permit from the U.S. Army Corps of Engineers if the Department has not obtained such a permit. The Contractor shall obtain the 404 Permit prior to beginning construction of the causeway. The Department does not guarantee that the Contractor will be able to obtain a 404 Permit.

The Contractor shall comply with the Ohio Water Pollution Control Act (OWPCA), (ORC Chapter 6111). The Department will obtain a storm water permit when the plan work acreage requires a permit. The Contractor shall apply for a permit to cover operations outside the Project limits shown on the plans as required by the OWPCA provisions. When the Department has not applied for a permit on the Project and a permit is required because of the total area of the Contractor's Work, the Contractor shall apply for, obtain, and comply with the required permit for both the Work within Project Limits and the Contractor's Work.

The Department has obtained the required permits from the U.S. Army Corps of Engineers and Ohio EPA for Work in the "Waters of the United States" and isolated wetlands under ORC Chapter 6111. The Contractor shall comply with the requirements of these permits.

When Equipment is working next to a stream, lake, pond, or reservoir, appropriate spill response Equipment is required. The Contractor shall not stockpile erodible material next to a stream, lake, pond, or reservoir.

The Contractor shall take precautions to avoid demolition debris and discharges associated with the excavation and hauling of material from entering the stream. In addition, the Contractor shall remove any material that does fall into the stream as soon as possible.

When excavating in or adjacent to streams, the Contractor shall separate such areas from the main stream by a dike or barrier to keep sediment from entering the stream. The Contractor shall take care during the construction and removal of such barriers to minimize sediment entering the stream.

The Contractor shall contain, collect, characterize and legally dispose of all liquid waste and sludge generated during the Work. The Contractor shall not mix wastes with storm water. The Contractor shall not discharge any liquid waste without the appropriate regulatory permits. The Contractor shall manage liquid waste and sludge in accordance with ORC Chapter 6111 and all other laws, regulations, permits and local ordinances relating to this waste.

The Contractor shall control the fugitive dust generated by the Work according to OAC-3745-17-07(B), OAC-3745-17-08, OAC-3745-15-07, and OAC-3745-17-03 and local ordinances and regulations. Prior to the initiation of abrasive coating removal, pavement cutting or any other construction operation that generates dust, the Contractor shall demonstrate to the Department that construction related dust will be controlled with appropriate Reasonable Available Control Measures (RACM) as described in OEPA Engineering Guide #57 (<http://epa.ohio.gov/dapc/engineer/equides.aspx>).

In addition, the Contractor shall use dust control measures when fugitive dust creates unsafe conditions as determined by the Department.

In Ohio, the Contractor shall perform open burning according to Section 5.13.2 (Borrow and Waste Areas).

5.12.2 Borrow and Waste Areas

Prior to beginning borrow or wasting operations, the Contractor shall obtain the Department's written approval of a detailed operation plan (which shall be updated as necessary prior to each occasion on which the Contractor intends to begin new borrow or wasting operations) that addresses the following concerns:

- A. Control of drainage water;
- B. Cleanup, shaping, and restoration of disturbed areas;
- C. Disposal of Regulated Materials;
- D. Avoidance of regulated areas;
- E. Excavation and filling of waste and borrow areas;
- F. Saving of topsoil; and
- G. Temporary Sediment and Erosion Control BMPs required for compliance under the Clean Water Act, Ohio Water Pollution Control Act, (OWPCA) (ORC Chapter 6111), and the NPDES permit.

The Contractor shall perform all engineering, including any field investigation, necessary to ensure long term stability of all side slopes and foundations of all borrow and waste areas. The Contractor shall also furnish a certification by a Registered Engineer attesting to the stability of

all borrow and waste areas. All damage resulting from the instability of borrow and waste areas, the removal of borrow materials, the placement of waste materials, or the hauling of material to and from these areas is the sole responsibility of the Contractor. Repairs to approved haul roads will be made in accordance with Section 5.10.4 (Haul Roads).

The Contractor shall ensure that all side slopes of all waste areas do not reduce horizontal sight distance as defined by the Department's Location and Design Manual.

The Contractor shall (i) have the proposed borrow and waste areas reviewed by an environmental Subconsultant that is pre-qualified by the Department as appropriate for ecological work; and (ii) have the environmental Subconsultant certify that the proposed borrow and waste operations will not impact the "Waters of the United States" or an isolated wetland. If Subconsultant certification is not provided, the Contractor shall obtain the 404/401 permits necessary to perform the operations as proposed. The Contractor shall have the environmental Subconsultant certify that the Work conforms to the requirements of the permit(s). The Contractor shall provide all documentation submitted to obtain the appropriate permit(s) and a copy of the permit(s) to the Department.

If burning is permitted in Ohio under the OAC-3745-19 and ORC 1503.18, the Contractor shall submit a copy of the Ohio EPA permit and the Ohio DNR permit to the Department and copies of all information used to obtain the permit.

Prior to the disposal of waste materials, the Contractor shall submit to the Department an executed copy of the contract or permission statement from the property owner. The contract or permission statement must indicate that the waste materials are not the property of the Department. Further, the contract or permission statement must expressly state that the Department is not a party to the contract or permission statement and that the Contractor and property owner will hold the Department harmless from claims that may arise from their contract or permission statement.

The Contractor shall restore all borrow or waste areas including cleanup, shaping, replacement of topsoil, and establishment of vegetative cover by seeding and mulching according to Section 5.13.4 (Cleaning Up) and Ohio Item 659 (Seeding and Mulching) where in Ohio. The Contractor shall ensure the restored area is well drained unless approval is given by the Department to convert a pit area into a pond or lake, in which case confine restoration measures to the disturbed areas above the anticipated normal water level.

For waste sites shown on the plan, the plan will indicate if the clearances have or have not been obtained for the project right-of-way locations. No extension of time or additional compensation will be paid for any delays due to not having the written permit(s) to waste in a floodplain.

The allowed use of Project ROW and other Department property for borrow and waste is detailed in Section 5.13.3 (Rights in and Use of Materials Found in the Work) and Section 5.12 (Contractor's Use of the Project ROW or Other Department-Owned Property).

Borrow and Waste Area shall adhere to Section 5.11.6 (Protection and Restoration of Property).

5.12.3 Rights In and Use of Materials Found in the Work

Upon obtaining the Department's approval, the Contractor may use material, such as stone, gravel, or sand, found in the plan excavation for another Contract Item. The Contractor shall

excavate or remove material only from within the grading limits, as indicated by the slope and grade lines.

5.12.4 Cleaning Up

The Contractor shall maintain the Project in a presentable condition. The Contractor shall remove all rubbish, layout stakes, sediment control devices as directed by the Department, excess material, temporary structures, and Equipment, including stream channels and banks within the Right-of-Way at drainage structures, and all borrow and waste areas, storage sites, temporary plant sites, haul roads, and other ground occupied by the contractor in connection with the Work. The Contractor shall establish suitable vegetative cover in these areas by seeding and mulching according to Item 659, except for cultivated fields and leave the Project Site in an acceptable condition as determined by the Department.

5.12.5 Construction and Demolition Debris

In Ohio, the Contractor shall follow OAC-3745-37, OAC-3745-400, and ORC Chapter 3714 which regulate the use and disposal of construction and demolition debris.

The Contractor shall legally dispose, reuse within the Project or recycle debris containing wood, road metal, plaster, asphalt, brick and/or stone, at a licensed construction and demolition debris site, recycling facility, or, with respect to the reuse of any such materials, at the designated location within the Project Site.

Under the regulations cited above the disposal of brush, trees, stumps, tree trimmings, branches, weeds, leaves, grass, shrubbery, yard trimmings, crop residue, and other plant matter is restricted. If allowed by the Contract Documents, the Contractor may waste brush, trees, stumps, tree trimming, branches, weeds, leaves, grass, shrubbery, yard trimmings, crop residue, and other plant matter within the Project ROW. Otherwise, the Contractor shall submit a plan and any required permits to legally dispose of these materials off the Project ROW to the Department and shall provide all documents submitted to obtain any permits to the Department.

When reusing PCC, the Contractor shall (i) mix the PCC with at least 30 percent natural soil to construct an inner core in the waste area; (ii) cover this inner core with 3 feet (1.0 m) of natural soil on the top and 8 feet (2.4 m) on the side slopes; and (iii) place and compact the material according to ODOT C&MS 203.06.D (Spreading and Compacting Random Materials) to prevent future settlement and sliding.

Clean Hard Fill consisting of reinforced or non-reinforced concrete, asphalt concrete, brick, block, tile or stone that is free of all steel as per ODOT C&MS 703.16 (Suitable Materials for Embankment Construction) shall be managed in one or more of the following ways:

- A. Recycled into a usable construction material;
- B. Disposed in licensed construction and demolition debris facility; or
- C. Used in legitimate fill operations on the site of generation according to Section 5.13.2 (Borrow and Waste Areas).

The Contractor shall notify the local Board of Health or the local EPA office 7 Days before placing Clean Hard Fill off the Project ROW and shall submit copies of this notification to the Department. Prior to transferring Clean Hard Fill from the Project Site, the Contractor shall fully

execute form CA-EW-20 and provide appropriate documentation to the Department as described for each reuse option as described in CA-EW-20 (ODOT Beneficial Reuse Form).

5.12.6 Regulated Materials

With respect to known Regulated Materials and Contractor-Generated Regulated Materials (defined herein), the Contractor is solely responsible for:

- A. complying with all regulatory requirements, applicable Laws, and Governmental Approvals pertaining to Regulated Materials located at the Site or any portion thereof;
- B. collecting, containing, characterizing, and properly disposing of all Regulated Materials, including waste generated or encountered during the Work;
- C. ensuring that the Site is properly managed during the Work so that Regulated Materials do not migrate outside the Site;
- D. using reasonable efforts, including design modification and/or construction techniques, to avoid excavation or dewatering in areas of the Site containing known Regulated Materials;
- E. unless otherwise expressly provided in this PDBC, making its own arrangements for storing and disposing of waste and excess substances generated from the Contractor's performance of the Work utilizing storage and disposal facilities that are properly licensed and permitted for such storage and disposal in accordance with applicable Law and regulatory requirements, including notifying the Department and making alternative arrangements of any such storage or Disposal Facility loses its permitted status during the Term;
- F. using, containing, storing, managing, transporting and disposing of all Contractor-Generated Regulated Materials (defined herein) in accordance with this PDBC and all applicable Law and regulatory requirements, including obtaining an "EPA Identification Number," and signing of waste manifests, bills of lading, chain of custody and waste profiles;
- G. coordinating removal and disposal of all Contractor-Generated Regulated Materials upon Substantial Completion or the earlier termination of this PDBC for any reason, in accordance with this PDBC, and all applicable Law and regulatory requirements, including demonstrating such removal, remediation disposal necessary for protection of human health and the environment to the reasonable satisfaction of the Department and providing the Department with copies of all records relating to such removal remediation and disposal;
- H. paying all associated costs and obtaining all necessary permits for a legal disposal site beyond the Site; and
- I. paying all penalties, expenses (including attorneys' fees and costs), costs suits, judgments, claims, actions, damages (including damages to natural resources, property or persons), delays and liability associated with arising out of, or related to any Contractor-Generated Regulated Materials.

5.12.7 Unknown Regulated Materials

5.12.7.1 Discovery of Unknown Regulated Materials

If the Contractor discovers any Unknown Regulated Materials in “material quantities” during the Work, the Contractor shall notify the Department immediately and include details with respect to any requirement to notify State or federal agencies under applicable Law. For the purposes of this Section 5.13.7, “material quantities” of an Unknown Regulated Material means quantities that initiate any reporting, investigation or remediation under any Environmental Law.

5.12.7.2 Continuing Work after discovery

After the discovery of any Unknown Regulated Materials that are not Contractor-Generated Regulated Materials, the Contractor shall not disturb, or further disturb the condition or interfere with the Department’s right or ability to investigate the condition, and shall suspend Work in the immediate area of the suspected Regulated Materials until the Department authorizes the Contractor to resume Work; provided however, during the pendency of the Department’s notice to continue Work, the Contractor shall continue Work on the unaffected areas of the Site.

5.12.7.3 Department’s responsibility and determination

The Department will promptly investigate any suspected Unknown Regulated Materials of which it has received notice under Section 5.13.7.1 (Discovery of Unknown Regulated Materials) that are not Contractor-Generated Regulated Materials, and thereafter evaluate whether the discovery of such Unknown Regulated Materials justify an increase in the Contract Price and/or an extension of the Contract Time, subject to the Contractor’s demonstration of the following:

- A. the Contractor has given timely notice of the corresponding condition and the Unknown Regulated Materials as required in this Section 5.13.7.3, and, where applicable, Section 13 (Time Extension to the Completion Deadlines and Payment for Excusable Delays) for Critical Path delay impacts and Section 12.8 (Changes and Extra Work Price Determination) to compensate the Contractor for the added costs and delay; and
- B. the Contractor has given the Department to investigate prior to the asserted condition and Unknown Regulated Materials being disturbed in accordance with this Section 5.13.7.3.

Any Disputes as to whether the conditions pertaining to Unknown Regulated Materials have caused a decrease or increase in the Contract Price or require an extension of the Contract Time shall be addressed in accordance with the Partnering and Dispute Resolution provisions set forth under Section 18 (Partnering and Dispute Resolution) hereof.

5.12.7.4 Third-party contractors

The Department reserves the right to use other third-party contractors to investigate and perform work to determine the nature and extent of any Unknown Regulated Materials on the Site that is not a Contractor-Generated Regulated Material and to handle and/or remove such Unknown Regulated Material from the applicable portion of the Site. Except as otherwise provided in this PDBC, the Department’s use of other third-party contractors shall not constitute a basis for the Contractor to submit an NPCO or EDR.

5.12.7.5 Generator Status

Except as otherwise provided herein, (i) the Contractor shall not be considered to be the “generator” of Regulated Materials located within or outside the Site; (ii) the Contractor shall not be required to execute any Regulated Materials manifests as a “generator”; provided however, for any Contractor-Generated Regulated Materials, the Contractor shall prepare such Regulated Materials manifests for the Department’s signature, and (iii) Regulated Materials encountered in the performance of the Work, shall be disposed of, if at all, utilizing an ‘EPA Identification Number’ or other appropriate legal device, including any RCRA identification number permitted under applicable Law and obtained by, and carried in the name of the Department, or another Person designated by the Department.

Notwithstanding anything to the contrary contained herein or under any applicable Law or Government Regulation, the Contractor (and not the Department) acknowledges and agrees that the Contractor shall be considered the “generator” under the following circumstances:

- A. the Regulated Materials are transported onto the Site by the Contractor or any Component Firm; or
- B. any spill, leak, emission, release, discharge, injection, escape, dumping or disposal of Regulated Materials into the soil, air, surface water, groundwater, or environment is caused by the Contractor or any Sub-Contractor, including the Contractor’s or any Component Firm’s breach of any applicable Law, Governmental Approval or this PDBC, and/or the negligence, or willful misconduct of the Contractor or any Component Firm ((A) and (B) together constitute “Contractor-Generated Regulated Materials”).

5.13 Completion Deadlines and Acceptance

5.13.1 Substantial Completion of the Work

5.13.1.1 Requirements for Substantial Completion

The following requirements must be satisfied for the Contractor to request a Substantial Completion Inspection of the Phase 2 Work, notice of which shall be provided by written notice from the Contractor to the Department:

- A. The Contractor has completed all project level punch lists provided by the Department.
- B. The Contractor has completed the Phase 2 Work in accordance with this PDBC (except for Work otherwise only required to be performed for the purposes of achieving Completion of the Contract) and the Work is ready for use for the purpose intended.
- C. The Contractor has ensured that the Work in connection with Substantial Completion has been performed in accordance with all requirements of the Contract Documents.
- D. The Contractor has ensured that the Project may be operated safely without injury to any Person or damage to the Project or any other property on or off the Site.
- E. The Contractor has received all applicable Governmental Approvals required for the Project.

- F. The Contractor has furnished to the Department certifications in form and substance satisfactory to the Department, certifying that the Design Documents meet all requirements of the Contract Documents.
- G. The Contractor has furnished to the Department certifications, in form and substance satisfactory to the Department, certifying that the Construction Work meets all requirement of the Contract Documents.
- H. There is no outstanding Nonconforming Work, or incomplete Work that would be necessary to achieve Substantial Completion identified by the Contractor or the Department.

5.13.1.2 Substantial Completion Inspection

Once the Department has reasonably verified that the conditions of Section 5.14.2.1 (Requirements for Substantial Completion) have been met, the Department shall perform a Substantial Completion Inspection of the Work that is subject to the foregoing written notice from the Contractor.

The Contractor hereby acknowledges and agrees that the Department's verification may require substantial time and will be dependent upon the number and severity of outstanding items requiring verification, as identified in Section 5.14.2 (Requirements for Substantial Completion). The Department agrees that it shall make reasonable efforts and act diligently in such verification. The Contractor shall allow 7 Days in the Project Schedule for this effort. In the event the Department finds that the conditions of Section 5.14.2.1 (Requirements for Substantial Completion) have not been met, the Department will reject the Contractor's request for a Substantial Completion Inspection. The Contractor will be notified of this rejection in writing.

If the Department notifies the Contractor that the conditions of Section 5.14.2.1 (Requirements for Substantial Completion) have not been met, then the Contractor shall resubmit its Substantial Completion notice to the Department upon correction or satisfaction of the outstanding requirements, and the Parties shall continue this process until (i) the Department notifies the Contractor that the Department will perform the Substantial Completion Inspection, (ii) the Contractor initiates Dispute Resolution Procedures under Section 18.2 hereof, or (iii) the PDBC is otherwise terminated in accordance with the terms of this PDBC.

The Substantial Completion Inspection shall be performed within 15 Days of the Department's verification. It shall serve as the Department's validation that the Work appears to have achieved Substantial Completion. The Substantial Completion Inspection does not waive any available rights or remedies of the Department, nor divest the Contractor of any responsibility for compliance with the Contract Documents or liability for damages.

Within 15 Days after the Department's inspection of the Work, the Department will issue a Substantial Completion Inspection report that will document the findings of the inspection, including categorizing the Work as one of the following:

- A. Unacceptable or not complete;
- B. Substantial Completion has been achieved with Substantial Completion Inspection Punch List items found by the Department; or
- C. Substantial Completion has been achieved.

If the Department finds the Work unacceptable or not complete, the Contractor will rectify the deficiencies and request another Substantial Completion Inspection pursuant to Section 5.14.2.2 (Requirements for Substantial Completion).

5.13.1.3 Notice of Substantial Completion

If the Department finds the Work substantially complete or substantially complete with Substantial Completion Inspection Punch List items, it will notify the Contractor in writing (Notice of Substantial Completion) within 7 days of issuing the Substantial Completion Inspection report. The Contractor's maintenance responsibilities will end and warranty periods will begin, on the date identified by the Department in the Notice of Substantial Completion, except for any maintenance related to unfinished Substantial Completion Inspection Punch List items. This shall not relieve the Contractor of responsibility to correct Nonconforming Work or repair damage caused by the Contractor or waive any other remedy to which the Department is entitled at Law or in equity. If a Notice of Substantial Completion is issued after the contractual deadline for Substantial Completion, Liquidated Damages or additional disincentives will apply.

5.13.1.4 Substantial Completion Inspection Punch List

If required, the Department will issue to the Contractor a written Substantial Completion Inspection Punch List as noted above as a condition of its acceptance of the Substantial Completion of the Work. The Department will receive and compile punch lists from all agencies that have authority to provide one prior to issuing the Substantial Completion Inspection Punch List. The Substantial Completion Inspection Punch List will stipulate a reasonable time to complete the required Work as determined by the Department. Failure of the Contractor to complete the Substantial Completion Inspection Punch List items by the stipulated time will result in the assessment of fifty percent of the Liquidated Damages according to Section 13.7 (Failure to Complete on Time) for each Day beyond the stipulated time the Substantial Completion Inspection Punch List work remains incomplete and beyond the Substantial Completion Deadline. If the performance of the Substantial Completion Inspection Punchlist requires impacts to traffic and those impacts occur beyond the Substantial Completion Deadline, Liquidated Damages according to Section 13.7 (Failure to Complete on Time) will be assessed for each traffic impacted Day at the full rate.

5.13.2 Final Completion of the Work

5.13.2.1 Requirements for Final Completion

The following requirements must be satisfied for the Contractor to achieve Final Completion of the Work, notice of which shall be provided by written notice from the Contractor to the Department:

- A. The Contractor has completed all Work, including all Substantial Completion Punch List items and other items specifically identified for Final Completion.
- B. The Contractor has ensured the Work in connection with Final Completion has been performed in accordance with the requirements of the Contract Documents.
- C. The Contractor has ensured that the Project may be operated safely without injury to any Person or damage to the Project or any other property on or off the Site.
- D. The Contractor has ensured that the Project is open for traffic and that no further Work is required.

- E. The Contractor has received all applicable Governmental Approvals required for the Project.
- F. The Contractor has furnished to the Department certifications, in form and substance satisfactory to the Department, certifying that the Design Documents meet all requirements of the Contract Documents.
- G. The Contractor has furnished to the Department certifications, in form and substance satisfactory to the Department, certifying that the Construction Work meets all requirement of the Contract Documents.
- H. There is no outstanding Nonconforming Work, or incomplete Work identified by the Contractor or the Department.
- I. All documentation, certification and submittals required by the Contract Documents have been received by the Department and all Federal Requirements have been satisfied.
- J. Final clean up including all of the Contractor's and each Subcontractor's and Subconsultant's personnel, supplies, Equipment, waste materials, rubbish, and temporary facilities have been removed from the applicable portion of the Site, the Contractor has restored and repaired all damage or injury arising from such removal to the satisfaction of the Department and the applicable portion of the Site and adjacent affected areas for which the Contractor is responsible are in good working order and condition.
- K. There are no overdue amounts owing to any Subcontractor or Supplier that remain unpaid, and the Contractor has resolved all, and there are no outstanding claims; actual, pending, or threatened claims against the Bonds; Liens on any materials, supplies, or equipment; or stop notices relating to the Project, including claims by Utility Owners.
- L. The Contractor has no reason to believe that any other Person has a valid claim against the Contractor, the Department, or the Project, which has not been communicated in writing by the Contractor to the Department as of the date of the written notice required by this Section 5.14.3.1.
- M. There is no existing default by the Contractor under any Utility Agreement, and no event has occurred which, with the passage 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.
- N. There exists no uncured breaches that with the giving of notice or passage or time, or both, could become Contractor Defaults.
- O. All guarantees, warranties and Bonds, as required by the Contract Documents, are in full force and effect.

5.13.2.2 Notice of Final Completion

In the event the Department finds that the conditions of Section 5.14.3.1 (Requirements for Final Completion) have not been met, the Department will advise the Contractor, in writing, of any deficient requirements. Upon correction, the Contractor shall provide an updated written notification under Section 5.14.3.1 (Requirements for Final Completion) to the Department. This process will continue until there are no identified items that are requirements for Final Completion, at which time the Department will issue a Notice of Final Completion.

Final Completion is reached upon the date identified by the Department in the Notice of Final Completion. The Contractor hereby acknowledges and agrees that the Department's verification of Notice of Final Completion may require substantial time and will be dependent upon the number and severity of outstanding items requiring verification, as identified in Section 5.14.2.7 (Requirements for Final Completion). The Department agrees that it shall make reasonable efforts and act diligently in such verification and, if appropriate, issuance of the Notice of Final Completion.

5.13.2.2.1 Final Completion Documentation Deficiencies

If during the Department's evaluation of the initial notification submitted by the Contractor under Section 5.14.3.1 (Requirements for Final Completion), the Department finds deficiencies with respect to project documentation, as required in Section 5.14.3.1, the Contractor shall have 45 Days from the date of the Department's initial notice to rectify these deficiencies.

5.13.3 Final Payment

No compensation for Unauthorized Work or Nonconforming Work shall be permitted. Final payment is based on the following:

- A. Receipt of Notice of Final Completion pursuant to Section 5.14.3.2 (Notice of Final Completion).
- B. Receipt of all original project files and notes utilized in the preparation of the survey, design and construction of the Project.
- C. Receipt of As-Built Drawings.

5.13.4 Completion of the Contract and Continuation of Contractor's Responsibilities

The PDBC is complete, except for items covered by the required bonds, when the Contractor receives final payment. The Department will issue a letter confirming Completion of the Contract, noting any exception as provided in ODOT C&MS Items 659 (Seeding and Mulching), and C&MS 661 (Planting Trees, Shrubs, Perennials and Vines), and any warranty. The date the final payment is approved by the Department constitutes acceptance for the purpose of ORC 5525.16. Neither Completion of the Contract nor Substantial Completion relieves the Contractor of any responsibilities to properly perform or correct the Work or to repair damage or waives any remedies to which the Department is entitled at law or in equity.

5.13.5 Opening Sections of Project to Traffic

The Department may order the Contractor to open a section of the Project to the safe use of traffic at any time. Unless such early opening is anticipated in the accepted MOT Plan included in the Phase 2 Change Order, the Department will make an adjustment according to Section 13 (Time Extension to the Completion Deadlines and Payment for Excusable Delays) for Critical Path delay impacts and Section 12.8 (Changes and Extra Work Price Determination) to compensate the Contractor for the added costs and delay, if any, resulting from such an opening.

6 CONTROL OF MATERIALS

6.1 Source of Supply and Quality Requirements

The Contractor shall notify the Department of the proposed sources of supply before the delivery of Materials. The Department is entitled to approve Materials at the source of supply before such Materials are delivered to the Project Site. If the proposed sources of supply cannot produce the specified Material, then the Contractor shall furnish Materials from alternate sources without adjustment to the Contract Price or Substantial Completion Deadline.

The Contractor shall comply with the requirements of Exhibit X (Digital Data for Material Ticketing).

If the Department determines that previously approved materials from any source are not uniform and satisfactory or that the product from any source proves unacceptable, the Contractor shall cease operations until the Contractor demonstrates to the Department's satisfaction that the material is acceptable. The Contractor shall not use material which, after approval, has in any way become unfit for use. The Contractor shall use only new materials unless approved by the Department.

6.2 Samples, Tests, and Cited Specifications

The Department will inspect and determine whether the Materials comply with the specified requirements before they are incorporated into the Work. The Department may sample and test Materials or require certifications. Unless specified, the Department will pay for the tests and test Materials according to AASHTO, ASTM, or other methods complying with the Standard of Care. A qualified representative of the Department will take test samples according to Departmental procedures. Any reference to other specifications or testing methods shall mean the version in effect at the date of the applicable Work Package Proposal. All Materials being used are subject to inspection, test, or rejection at any time before their incorporation into the Work. The Department will furnish copies of the tests to the Contractor's Representative upon request. Furnish the required samples and specified Material Certifications.

The Contractor shall equip all transports and distributors hauling asphalt material with an approved submerged asphalt material sampling device.

6.3 Small Quantities and Materials for Temporary Application

The Department may accept small quantities and Materials for temporary application that are not intended for permanent incorporation in the Work. The Department may accept these small quantities and Materials for temporary application in either of the following cases:

- A. Where similar Materials from the same source have recently been approved.
- B. Where the Materials, in the judgment of the Department, will serve the intended purpose.

6.4 Plant Sampling and Testing Plan

The Department is entitled to undertake the inspection of Materials at the source.

In the event plant sampling and testing is undertaken, the Contractor and its Material provider shall:

- A. Cooperate and assist the Department with the inspection of Materials. Provide full entry to the Department at all times to such parts of the plant as may concern the manufacture or production of the Materials being furnished. Agree to all documentation and inspection requirements of ODOT C&MS Section 106.04 (Plant sampling and testing plan).
- B. If required by the Department, arrange for the Department's Inspector to use an approved building on the site of the plant. The building should be located near the plant and independent of any building used by the Material producer.
- C. Maintain and provide adequate safety measures at the plant at all times.

The Department reserves the right to retest all Materials that have been tested and accepted at the source of supply before their incorporation into the Work. After Materials that have been tested by the Department at the plant have been delivered to the Site, the Department may reject any such Materials that when retested do not meet the requirements of the Contract Documents.

6.5 Storage of Materials

The Contractor shall properly store all Materials to ensure the preservation of their quality and fitness for the Work. The Department may re-inspect stored Materials before their incorporation into the Work, notwithstanding any testing and inspection the Department may have undertaken before storage. The Contractor shall locate stored Materials to facilitate the Department's prompt inspection. The Contractor may use portions of the Project ROW for storage with the Department's approval. Any Materials storage space outside the Project ROW shall be provided at the Contractor's expense. The Contractor shall not use private property for storage purposes without written permission from the owner or lessee. If requested by the Department, the Contractor shall furnish copies of the written permission. The Contractor shall restore all storage sites to their original condition at no expense to the Department. The Contractor and property owner shall hold the Department harmless from claims that may arise as a result of the contract or permission statement between the property owner / lessee and the Contractor. This Section 6.5 does not apply to the stripping and storing of topsoil, or to other Materials salvaged from the Work.

Areas used to store Materials shall conform to Section 5.11.6 (Protection and Restoration of Property).

Payment for materials and equipment manufactured for the Project and stored on or off the Project Site shall be conditioned upon compliance by the Contractor with procedures satisfactory to the Department to establish the Department's title to such materials and equipment or otherwise protect the Department's interest, and shall include applicable insurance, storage and transportation to the Project Site, for such materials and equipment stored off the Project Site. The Contractor shall also comply with the following specific requirements:

- A. Title to such materials shall be vested in the Department, as evidenced by documentation satisfactory in form and substance to the Department, including, without limitation, recorded financing statements, UCC filings and UCC searches.

- B. The Contractor shall submit to the Department a written list identifying each location where materials are stored off the Project Site and the value of materials at each location.
- C. The consent of any surety shall be obtained to the extent required prior to payment for any materials stored off the Project Site.
- D. Representatives of the Department shall have the right to make inspections of the storage areas at any time.
- E. Such materials shall be (1) protected from diversion, destruction, theft and damage to the satisfaction of the Department, (2) specifically marked for use on the Project, and (3) segregated from other materials at the storage facility.

The Contractor shall reimburse the Department for any loss or damage to such unincorporated materials or equipment not covered by insurance.

Areas used to store Materials shall conform to Section 5.11.6 (Protection and Restoration of Property).

6.6 Handling Materials

The Contractor shall:

- a. Handle all Materials in such manner as to preserve their quality and fitness for the Work;
- b. Transport aggregates from the storage site to the Project Site in vehicles constructed to prevent loss or segregation of Materials after loading and measuring; and
- c. Ensure that there are no inconsistencies in the quantities of Materials loaded for delivery and the quantities actually received at the place of operations.

6.7 Unacceptable Materials

Unacceptable Materials are all Materials not conforming to the requirements of the Contract Documents at the time they are used and shall be considered Nonconforming Work. The Contractor shall immediately remove all unacceptable Materials from the Project Site unless otherwise instructed by the Department. The Department will determine if unacceptable Materials may remain according to the process set forth in ODOT Supplement 1102 (Acceptance of Non-Specification Material on Construction Projects). The Department must approve the use of previously identified unacceptable Materials that have been corrected or repaired before such Materials are incorporated into the Work. If the Contractor fails to comply immediately with any order of the Department made under the provisions of this Section 6.7, the Department will have authority to remove and replace unacceptable Materials and to deduct the cost of removal and replacement from any monies due or to become due to the Contractor.

6.8 Department-Furnished Material

The Contractor shall furnish all Materials required to complete the Work, except as otherwise agreed to in writing and documented in a Work Package Proposal.

The Department will deliver any Department-furnished Materials to the Contractor at the points specified in the Contract Documents.

The Contractor shall include the cost of handling and placing of all Department-furnished Materials in the Contract Price for the Contract Item for which they are used.

The Department will hold the Contractor responsible for all Department-furnished Materials upon their delivery to the Project Site. The Department will make deductions from any monies due the Contractor to make good any shortages and deficiencies, for any cause whatsoever, and for any damage that may occur to such Materials after such delivery, and for any demurrage charges.

6.9 Products Made in the United States

The Contractor shall comply with the requirements set forth in Exhibit N (Contract Provisions for Federal Aid Contracts) Attachment 5.

6.10 Qualified Products List

The Department may use Qualified Product Lists (QPL) for approval of manufactured Materials. The Contractor shall provide the Department documentation according to the Department's standard procedure that, at the time of delivery, the Material provided is on ODOT's QPL.

6.11 Maritime Transportation

The Contractor shall ensure that Project-specific Materials or Equipment transported by ocean vessel are in compliance with 46 CFR 381 and the Cargo Preference Act. The Contractor shall transport at least 50% of any Equipment or Materials on privately owned United States-flag commercial vessels, if available.

6.12 Field Welder Certification Requirements

All field welding must be performed by a certified welder unless otherwise noted. Welder's or welding operator's qualifications to perform field welding shall remain effective for 2 years from the date of test unless:

- (a) The welder or welding operator is not engaged in the welding process for which the welder or welding operator is qualified for a period exceeding 6 months; or
- (b) In the judgment of the Department, there is reason to question the welder's or welding operator's ability.

The Contractor shall keep records of the types of welds and dates engaged in welding within the two-year period to maintain the welder's or welding operator's qualification. If the Contractor fails to maintain such records for review and use in each project's records, the Department will require the welder or welding operator to be retested at any time.

7 UTILITIES

7.1 Utilities

The Contractor shall design the Project to keep the scope and extent of utility conflicts and relocations to a reasonable minimum consistent with the Project Goals.

Unless otherwise provided for by the Contract Documents, the Department will direct Utility Owners to relocate or adjust water lines, gas lines, wire lines, service connections, water and gas meter boxes, water and gas valve boxes, light standards, cableways, signals, and all other utility appurtenances within the Project Limits, such work by the Utility Owner being compensable to the Contractor except as otherwise provide in this Section 7.1.

The Contractor shall cooperate fully with each Utility Owner and make every effort to avoid delays and conflicts. The Project Schedule shall contain and include all reasonable effort required to resolve utility conflicts. When Utility Relocations are necessary, coordination and scheduling of these relocations with the involved Utility Owners shall be the responsibility of the Contractor.

If required under any Work Package Proposal, the design for all Utility Relocations within the Project Limits shall be coordinated by the Contractor. The Contractor shall determine and show on the Plans the names of all existing Utilities within Project Limits. The contractor shall reference Section 10 (Utilities) of Exhibit E (Technical Requirements) for design and coordination requirements.

If the Contractor is directed by a Utility Owner to perform any work not specifically identified as Utility Relocation Work within the Contract Documents, the Department will not compensate the Contractor for this work unless the Department approves the request in writing before the work begins. If the work is not preapproved by the Department, the Contractor will be responsible for obtaining reimbursement for its work from the Utility Owner which directed the Contractor to perform the work.

In the event that the Contractor requests that additional work not specifically contained in Contract Documents be performed by a Utility Owner, the Contractor will be responsible for reimbursing the Utility Owner for the additional work unless the Department has agreed in writing to pay for the additional work before the work begins.

The Contract Documents (including the Utility Agreements) will describe the Utility Relocation Work and indicate a time frame or date when the Department expects the Utility Owners to complete Utility Relocation Work. The Contractor shall provide adequate notification to Utility Owners performing Utility Relocation Work to prevent conflict with the Contractor's schedule of operations. The Contractor shall also indicate the various utility items, impacted utilities and indicate the time frame or date when the Utility Owners are expected to complete Utility Relocation Work in the Design Documents.

If a Utility Owner fails to perform Utility Relocation Work as provided for in the Contract Documents or Utility Agreements and the Contractor sustains losses or delays that could not have been avoided by the judicious design efforts, and reasonable accommodation or by judicious handling of forces, Equipment, and plant, or by reasonable revisions to the schedule of operations, then the Department will adjust the PDBC according to Section 13 (Time Extension to the Completion Deadlines and Payment for Excusable Delays) for Critical Path delay impacts

and Section 12.8 (Changes and Extra Work Price Determination). The Contractor shall be eligible for additional compensation and extension of contract time only if:

- A. The Contractor has made every effort to prosecute the Work and mitigate impacts despite any delays encountered or revisions in the Contractor's scheduling of Work.
- B. The Contractor has made a reasonable effort to design and construct the Work to reasonably avoid the Utilities.

In accordance with ORC 153.64 for Work performed in Ohio, the Contractor shall notify the Department, the registered utility protection service, and any Utility Owners that are not members of the registered utility protection service at least 2 Workdays prior to commencing construction operations in an area that may affect underground utilities shown on the Plans.

Utility Owners in Ohio are required under applicable codes and regulations, to start staking, marking, or otherwise designating the location, course, ± 2 feet (± 0.6 m), together with the approximate depth of Utilities in the construction area within 48 hours after notice is received, excluding Saturdays, Sundays, and legal holidays.

7.2 Utility Betterments

If a Utility Owner has requested that the Contractor design or construct a Betterment, the Contractor shall be responsible for negotiating and agreeing to the terms of the Betterment directly with the Utility Owner. The Contractor shall not perform any Work associated with a Betterment unless such Work has been subject to the Department's concurrence.

If the Contractor and the Utility Owner agree that a Betterment will be performed as part of a Utility Relocation, then:

- A. The terms agreed between the Contractor and the Utility Owner for performance of such Betterment shall be addressed in an amendment to the applicable Utility Agreement;
- B. Such Betterment will be subject to the same standards and requirements as if it were a necessary Utility Relocation;
- C. The Contractor shall undertake such Betterment in accordance with the requirements for Utility Relocation Work; and
- D. If the Betterment is not completed in accordance with the initial Change Order, the Department shall be entitled to a subsequent Change Order to omit or adjust the scope of the work and the Contractor's compensation to suit the Work performed.

7.3 Reserved

8 SUBCONTRACTING REQUIREMENTS

8.1 Compliance with Subcontracting Requirements

The Contractor shall comply with all applicable requirements of the Contract Documents relating to Subcontracts and shall ensure that all Subcontractors and Subconsultants performing Work on the Project comply with all applicable requirements of the Contract Documents relating to Subcontracts and subcontracting generally.

8.2 Limitation on Subcontracted Work

The Contractor shall perform Phase 2 Work amounting to not less than 5035 percent of the Contract Price with its own organization, unless otherwise approved by the Department. The phrase "its own organization" includes only workers employed and paid directly by the Contractor or the Principal Participants, inclusive of employees who are employed by a lease agreement acceptable to the Department, and Equipment owned or rented with or without operators by the Contractor. The phrase does not include employees or equipment of a Designer, Subconsultant, Subcontractor, assignee, or agent of the Contractor.

The Subcontractor Bidding and Selection Plan shall identify self-performance and subcontracting percentages and shall separately identify the percentage of the Work that the Contractor intends to subcontract to Affiliates and the percentage of the Work that the Contractor intends to subcontract through an arm's length transaction in which the Contractor and Affiliates may not bid. The Contractor's percentage of the total Contract Price includes the cost of Materials and manufactured products purchased by the Contractor, but not the cost of Materials and manufactured products purchased by Subcontractors.

The Department will calculate the Contractor's percentage based on the quantities shown in each Work Package_Proposal and the unit prices of the Contract Items to be performed by the Contractor's organization. If the Contractor performs only a portion of a Contract Item, then the Department will determine the proportional value administratively on the same basis. The Department will follow this procedure even when the part not subcontracted consists only of the procurement of Materials. However, if a firm both sells the Materials to the Contractor and performs the Work of incorporating the Materials into the Project, then the Department will consider these two phases in combination and as a single subcontract. If an affiliate of the firm either sells the Materials or performs the Work, the Department may refuse approval. An affiliate is one who has some common ownership or other close relation to said firm.

The Contractor shall use actual Subcontractor and Subconsultant prices for calculating compliance with any Disadvantaged Business Enterprise (DBE) percentage subcontracting and subconsulting obligations. If only a part of a Contract Item is sublet, then determine its proportional value administratively on the same basis. The Department will follow this procedure even when the part not sublet consists only of procuring Materials. However, if a firm both sells the Materials to the Contractor and performs the Work of incorporating the Materials into the Project, then the Department will consider these two phases in combination and as a single Subcontract. If an affiliate of the firm either sells the Materials or performs the Work, the Department may refuse approval.

8.3 Limitation on Organizational Changes

The Contractor shall not add, delete, or change the role of any Major Participant without the prior written approval of the Department.

8.4 Selection of Subcontractors

Prior to awarding any Subcontract for the Construction Work or the supply of Materials or Equipment, the Contractor shall be required, for each subcontract package, to solicit the minimum number of competitive bids set forth in the Subcontractor Bidding and Selection Plan. Following analysis of the bids in accordance with the Subcontractor Bidding and Selection Plan, the Contractor shall be entitled to award the subcontract package to the Subcontractor agreed by the Parties to offer the best value. In the event that the selected Subcontractor's bid exceeds a reasonable amount as determined by the Department, the Department shall be entitled to require the Contractor, at no additional cost to the Department, to re-package, re-bid or value engineer the subcontract package one time per subcontract package.

Subcontracted Work that is not competitively bid will be subject to the pricing process included in Exhibit G (Opinion of Probable Cost (OPC) and Pricing Process). In the event that the selected Subcontractor's bid exceeds a reasonable amount as determined by the Department, the Department shall be entitled to require the Contractor, at no additional cost to the Department, to competitively procure the Work.

8.5 Substitution of Subcontractors

The Contractor shall not substitute any Subcontractor or Subconsultant with another Subcontractor or Subconsultant or cause any subcontracted Work to be performed by any Person other than the approved Subcontractor of Subconsultant, unless:

- A. The approved Subcontractor or Subconsultant, after having reasonable opportunity to do so, fails or refuses to execute a Subcontract that incorporates the requirements of the Contract Documents and/or, if applicable, the terms of such Subcontractor's written bid or proposal;
- B. The Subcontractor or Subconsultant fails or refuses to perform the Work under the Subcontract;
- C. The Subcontractor or Subconsultant is substantially delaying or disrupting the progress of the Work;
- D. The Subcontractor or Subconsultant fails or refuses to meet the insurance or bonding requirements set forth in this Contract;
- E. Work performed by the Subcontractor or Subconsultant is unsatisfactory and not in substantial accordance with the Contract Documents;
- F. The Subcontractor or Subconsultant is not licensed pursuant to Legal Requirements; and/or
- G. The Subcontractor or Subconsultant becomes bankrupt or insolvent.

The Contractor shall submit any request to substitute a Subcontractor or Subconsultant or any request for subcontracted Work to be performed by any Person other than the approved Subcontractor of Subconsultant to the Department by no later than 10 Days prior to the date of

the proposed substitution together with a written statement setting for the reasons for the proposed substitution. In the event the Subcontractor or Subconsultant that is proposed to be replaced constitutes a DBE, then the Department must also consent to such substitution of the DBE Subcontractor or DBE Subconsultant. The Contractor shall submit a termination or replacement form consistent with the requirements in Exhibit L (Disadvantaged Business Enterprise (DBE) Performance Plan and Good Faith Efforts) prior to the change occurring and obtain the Department's consent before taking any action.

8.6 Subcontracts for Professional Services and Preconstruction Work

Engagement and selection of Subcontractors or Subconsultants performing Professional Services, Planning Work or Preconstruction Work, other than Subcontractors or Subconsultants that employ any of the Key Personnel, shall be coordinated with and approved by the Department. Prior to the award of any such Subcontract, the Department may require the Contractor to solicit qualifications and proposals from multiple firms for Professional Services, Planning Work, Pre-Construction Work or other work required.

Subject to the Department's approval and the requirements of Section 1.6 (Federal Requirements), the Contractor shall negotiate price and terms for each Professional Services, Planning and Pre-construction Work Subcontract that conform to standard industry practice for work of similar scope and complexity.

8.7 Affiliate Subcontracts

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

1. The Contractor shall execute a written Subcontract with the Affiliate;
2. The Subcontract shall comply with all applicable provisions of Section 1.6 (Federal Requirements), be consistent with the Contract Documents and the Standard of Care, and be in form and substance similar to Subcontracts being used by the Contractor for similar Work with unaffiliated Subcontractors;
3. The Subcontract shall set forth the scope of Work and all pricing, terms, and conditions;
4. The pricing, scheduling, and other terms and conditions of the Subcontract shall be no less favorable to the Contractor (and in turn, the Department) than those that the Contractor could reasonably obtain in an arm's length, competitive transaction with an unaffiliated Subcontractor. The Contractor shall bear the burden of proving to the Department that the same are no less favorable to the Contractor;
5. No Affiliate shall be engaged to perform any Work that any Contract Document indicates shall be performed by an independent or unaffiliated party; and
6. No Affiliate shall be engaged to perform any Work that would be inconsistent with the requirements of the Contract Documents or the Standard of Care.

Before entering into a written Subcontract, supplement, or amendment with an Affiliate, the Contractor shall submit a true and complete copy of the proposed Subcontract to the

Department for Approval with a cover memorandum orienting the Department to all pricing terms. The Department will have 20 Business Days after receipt to deliver its comments to the Contractor.

The Contractor shall make no payments to Affiliates for Work in advance of performance thereof, except for reasonable mobilization payments or other payments consistent with arm's length, competitive transactions of similar scope. Advance payments in violation of this provision shall be excluded from the calculation of termination compensation under Section 21 (Termination for Convenience).

8.8 Subcontractor Bidding and Selection Plan for Construction Work

The Contractor shall prepare the Subcontractor Bidding and Selection Plan for Construction Work in a form reasonably acceptable to the Department.

8.9 Required Subcontract Terms

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

1. Each Subcontract of any tier shall include terms substantially similar to the terms in this PDBC to the extent that such terms are relevant to such Subcontract. "Terms substantially similar" in all instances shall include:
 - a. Grants of Intellectual Property Rights;
 - b. Access constraints and requirements pertaining to the Project Site;
 - c. Maintenance of books and records;
 - d. Joinder to, obligation to offer evidence in, Dispute Resolution Procedures, if necessary, in the Department's sole judgment, to resolve a Dispute;
 - e. Compliance with all Federal Requirements, including the attachment of FHWA Form 1273 in the exact form as provided in Exhibit N (Contract Provisions for Federal Aid Construction Contracts); and
 - f. Non-discrimination provisions as required by Section 9.3.8 (Incorporation of Provisions).
2. Each Subcontract of any tier shall include a provision that states that the Subcontractor is not a third-party beneficiary to the PDBC.
3. Each Construction Phase Subcontract of any tier shall:
 - a. Prohibit retainage in excess of 10% of the amount of payment under the Subcontract, if no separate performance and/or payment security is provided by the lower-tier Subcontractor;

- b. Prohibit retainage entirely under the Subcontract, if separate performance and/or payment security is provided by the lower-tier Subcontractor;
 - c. Provide that amounts withheld as retainage, if allowed, from Subcontractors shall be returned within 30 Days after the Work required under the Subcontract is satisfactorily completed; and
 - d. Provide that delay or postponement of payment under the Subcontract may only be effected after the Contractor or higher-tier Subcontractor, as applicable, has established good cause and that the delay or postponement is in accordance with the Contractor's or higher-tier Subcontractor's, as applicable, rights under the Subcontract.
4. Each Subcontract of any tier shall include payment (including "prompt payment") and other terms in compliance with this PDBC and applicable Laws.
 5. Each Subcontract of any tier shall include language acknowledging the timing of payments from the Department to the Contractor hereunder and the process set forth herein for the submission and review of invoices or requests for payment, as applicable.
 6. Each Subcontract of any tier shall expressly include a covenant to require the Subcontractor to participate, at the Contractor's request, in meetings between the Contractor and the Department concerning matters pertaining to such Subcontractor, its work, or the coordination of its work with other Subcontractors and contractors to the Department.
 7. Each Subcontract of any tier shall expressly require the Subcontractor to stop Work on the date and to the extent specified in a Notice of Termination in accordance with Section 21 (Termination for Convenience).
 8. Each Subcontract of any tier shall expressly permit assignment to the Department of all Contractor rights under the Subcontract in the event of termination pursuant to Section 21.
 9. Each Subcontract shall provide that the Department is a third-party beneficiary of the Subcontract and shall have the right to enforce all terms of the Subcontract for its own benefit.
 10. Each Subcontract shall provide that all guarantees, indemnities, professional responsibility, and warranties, express and implied, shall inure to the benefit of the Department as well as the Contractor.
 11. Each Subcontract shall provide for the use of appropriate alternative Dispute Resolution mechanisms to resolve payment disputes.
 12. Each Subcontract of any tier shall expressly provide that any purported amendment with respect to any of the foregoing matters without the prior written consent of the Department will be null and void.

8.10 Prompt Payment

In accordance with ORC 4113.61, the Contractor covenants and agrees to make payment to each Subcontractor, Subconsultant and Supplier within 10 Days after Contractor's receipt of payment from the Department for Work performed or Materials delivered or incorporated into

the Project, provided that the Estimate prepared by the Contractor and approved by the Department includes Work performed or Materials delivered or incorporated into the Project by the Subcontractor, Subconsultant or Supplier.

Further, each Subcontractor, Subconsultant and Supplier shall covenant and agree in their corresponding Subcontract or supplier agreement to make payment to each lower tier subcontracting or subconsultant entity or lower tier supplying entity within 10 Days after Subcontractor's, Subconsultant's or Supplier's receipt of payment from the Contractor for Work performed or Materials delivered or incorporated into the Project, provided that the Estimate prepared by the lower tier subcontracting or subconsulting entity or lower tier supplier entity was incorporated and relied upon by the Subcontractor, Subconsultant or Supplier in its Estimate to the Contractor for Work performed or Materials delivered or incorporated into the Project. The Contractor hereby acknowledges and agrees that it shall be prohibited from holding retainage from Subcontractors, Subconsultants or Suppliers that can provide a Surety Bond. For unbonded Subcontractors, Subconsultants and Suppliers, the Contractor shall promptly release any retainage held, as set forth in any Subcontract or supplier agreement, 30 Days after the Work has met satisfactory completion.

For the purposes of this section, "satisfactory completion" of the Construction Work will be interpreted as occurring when the applicable Subcontractor has completed all physical work and submitted any necessary documentation required by the Contract Documents and the Department and "satisfactory completion" of all other Work will be interpreted as occurring when the applicable Subcontractor or Subconsultant has completed all Work or the applicable Supplier has delivered all Materials and, in each case, submitted all necessary documentation required by the Contract Documents and the Department. No Subcontract provision shall permit the Contractor to delay any Subcontractor's Subconsultant's or Consultant retainage payments until the Project's final payment.

The Contractor further covenants and agrees to require all Subcontractors, Subconsultants and Suppliers to incorporate the foregoing contractual obligations in each of their respective lower tier contracts.

If the Department determines that any Contractor, Subcontractor, Subconsultant or Supplier subject to this provision fails to comply with the foregoing 10-Day payment requirement, then the offending party shall pay, in addition to the payment due, interest in the amount of 18 percent per annum of the payment due, beginning on the eleventh Day following the receipt of payment from the Department and ending on the date of full payment of the payment due plus interest.

Repeated failures to pay Subcontractors, Subconsultants or Suppliers timely pursuant to this subsection will result in a finding by the Department that the Contractor is in breach of PDBC and subject to all legal consequences that such a finding entails. Further, repeated failures to pay timely pursuant to this subsection will result in a lower evaluation score for the Contractor and those Subcontractors, Subconsultants and Suppliers who are subject to evaluation by the Department.

To demonstrate its compliance with Ohio's prompt payment statute and related provisions, Contractor hereby covenants and agrees to comply with the reporting requirements set forth in Exhibit Q (Prompt Payment - ODOT Let Construction Projects).

8.11 General Responsibility for Work by Others

1. The retention of Subcontractors by the Contractor will not relieve the Contractor of its responsibilities under the Contract Documents or for the quality of the Work, materials, or services provided by Subcontractors.
2. The Contractor shall supervise and be fully responsible for the acts and omissions of any Contractor-Related Entity in connection with the Work, the Site, or the Project, as though the Contractor directly employed all such individuals.

9 LABOR REQUIREMENTS

9.1 Introduction

The Contractor shall comply with the following Exhibits:

- Exhibit L (Disadvantaged Business Enterprise (DBE) Performance Plan and Good Faith Efforts).
- Exhibit M (Disadvantaged Business Enterprise (DBE) Trucking; DBE Materials and Supplies Vendors (MSVs)).
- Exhibit O (Notice of Requirement of Affirmative Action to Ensure Equal Employment Opportunity and Workforce Diversity Requirements on all ODOT Administered Federally Funded Projects).
- Exhibit P (On-The-Job Training Program).

9.2 Labor Laws to be Observed

The Contractor, under Title VI of the Civil Rights Act and related statutes, agrees that in the hiring of employees for the performance of Work under this PDBC or any Subcontract hereunder, the Contractor, consultant, Subconsultant, Subcontractor, nor any person acting on behalf of the Contractor shall, by reasons of race, religion, color, sex, national origin, disability or age, discriminate against any citizen of the United States in the employment of labor or workers, who are qualified and available to perform the Work to which the employment relates.

The Contractor, Subcontractor, consultant, Subconsultant, nor any person on their behalf shall, in any manner, discriminate against or intimidate any employee hired for the performance of Work under this PDBC on account of race, religion, color, sex, national origin, disability or age.

The Contractor shall comply with OAC-4123:1-3, entitled "Specific Safety Requirements of the Industrial Commission of Ohio Relating to Construction," as amended, and with the Federal Occupational Safety and Health Act of 1970 and Code of Federal Regulations, Title 29, Chapter XVII, Part 1926 and as amended for work in Ohio.

The Contractor shall comply with Federal, State, and local laws, rules, and regulations that prohibit unlawful employment practices including that of discrimination because of race, religion, color, sex, national origin, disability or age and that define actions required for Affirmative Action and Disadvantaged Business Enterprise (DBE) programs.

9.3 Non-Discrimination Regulations

During the performance of the Work, the Contractor, its assignees and successors in interest, agrees as follows:

9.3.1 Compliance with Regulations

The Contractor shall comply with the Acts and Regulations relative to Non-discrimination in Federally-assisted programs of the U.S. Department of Transportation, Federal Highway Administration (FHWA), as they may be amended from time to time, which are herein incorporated by reference and made a part of this PDBC.

9.3.2 Non-discrimination

The Contractor, with regard to the Work, will not discriminate on the grounds of race, color, national origin, sex, age, disability, low-income status, or limited English proficiency in the selection and retention of Subcontractors / Subconsultants, including procurements of Materials and leases of Equipment. The Contractor will not participate directly or indirectly in the discrimination prohibited by the Acts and the Regulations as set forth in Section 9.3.6 (Pertinent Non-discrimination Authorities), including employment practices when the contract covers any activity, project, or program set forth in Appendix B of 49 CFR Part 21.

9.3.3 Solicitations of Subconsultants, including procurement of Materials and Equipment

In all solicitations, either by competitive bidding, or negotiation made by the Contractor for Work to be performed under a Subcontract, including procurements of Materials, or leases of Equipment, each potential Subcontractor / Subconsultant or supplier shall be notified by the Contractor of the Contractor's obligations under this contract and the Acts and the Regulations relative to nondiscrimination on the grounds of race, color, national origin, sex, age, disability, low-income status, or limited English proficiency.

9.3.4 Information and Reports

The Contractor shall provide all information and reports required by the Acts, the Regulations, and directives issued pursuant thereto, and shall permit access to its books, records, accounts, other sources of information, and its facilities as may be determined by the Department or FHWA to be pertinent to ascertain compliance with such Acts, Regulations, and instructions. Where any information required of a Contractor is in the exclusive possession of another who fails or refuses to furnish this information, the Contractor will so certify to the Department or FHWA, as appropriate, and will set forth what efforts it has made to obtain the information.

9.3.5 Sanctions for Noncompliance

In the event of a Contractor's noncompliance with the Nondiscrimination provisions of this contract, the Department will impose such contract sanctions as it or FHWA may determine to be appropriate, including, but not limited to:

- A. Withholding payments to the Contractor under the PDBC until the Contractor complies; and/or
- B. Cancelling, terminating, or suspending the PDBC, in whole or in part.

9.3.6 Pertinent Non-Discrimination Authorities

During the performance of the Work, the Contractor, for itself, its assignees, and successors in interest (hereinafter referred to as the "contractor," which includes consultants) agrees to comply with the following non-discrimination statutes and authorities; including but not limited to:

- A. Title VI of the Civil Rights Act of 1964 (42 U.S.C. § 2000d et seq., 78 stat. 252) (prohibits discrimination on the basis of race, color, national origin); and 49 CFR Part 21.

- B. The Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970 (42 U.S.C. § 4601) (prohibits unfair treatment of persons displaced or whose property has been acquired because of Federal or Federal-Aid programs and projects).
- C. Federal-Aid Highway Act of 1973 (23 U.S.C. § 324 et seq.) (prohibits discrimination on the basis of sex).
- D. Section 504 of the Rehabilitation Act of 1973 (29 U.S.C. § 794 et seq.), as amended (prohibits discrimination on the basis of disability) and 49 CFR Part 27.
- E. The Age Discrimination Act of 1975, as amended (42 U.S.C. § 6101 et seq.) (prohibits discrimination on the basis of age).
- F. Airport and Airway Improvement Act of 1982 (49 U.S.C. § 471, Section 47123), as amended (prohibits discrimination based on race, creed, color, national origin, or sex).
- G. The Civil Rights Restoration Act of 1987 (PL 100-209) (broadened the scope, coverage, and applicability of Title VI of the Civil Rights Act of 1964, the Age Discrimination Act of 1975, and Section 504 of the Rehabilitation Act of 1973, by expanding the definition of the terms “programs or activities” to include all of the programs or activities of Federal-Aid recipients, sub-recipients, and contractors, whether such programs or activities are Federally funded or not).
- H. Titles II and III of the Americans with Disabilities Act (42 U.S.C. §§ 12131-12189), as implemented by Department of Transportation regulations at 49 CFR parts 37 and 38 (prohibits discrimination on the basis of disability in the operation of public entities, public and private transportation systems, places of public accommodation, and certain testing entities).
- I. The Federal Aviation Administration’s Non-Discrimination Statute (49 U.S.C. § 47123) (prohibits discrimination on the basis of race, color, national origin, and sex).
- J. Executive Order 12898, Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations (ensures non-discrimination against minority populations by discouraging programs, policies, and activities with disproportionately high and adverse human health or environmental effects on minority and low-income populations).
- K. Executive Order 13166, Improving Access to Services for People with Limited English Proficiency, and resulting agency guidance, national origin discrimination includes discrimination because of limited English proficiency (LEP). To ensure compliance with Title VI, you must take reasonable steps to ensure that LEP persons have meaningful access to your programs (70 Fed. Reg. at 74087 to 74100).
- L. Title VIII of the Civil Rights Act of 1968 (Fair Housing Act), as amended (prohibits discrimination in the sale, rental, and financing of dwellings on the basis of race, color, religion, sex, national origin, disability, or familial status (presence of child under the age of 18 and pregnant women)).
- M. Title IX of the Education Amendments Act of 1972, as amended (20 U.S.C. 1681 et seq.) (prohibits discrimination on the basis of sex in education programs or activities).
- N. Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA 38 U.S.C. 4301-4335) (prohibits discrimination on the basis of present, past or future military service).

- O. Genetic Information Nondiscrimination Act (GINA) (29 CFR Part 1635, 42 U.S.C. 2000ff).

9.3.7 49 CFR Part 26.13(b)

The Contractor agrees not to discriminate on the basis of race, color, national origin, or sex in the performance of this contract. The Contractor agrees to carry out applicable requirements of 49 CFR Part 26 in the award and administration of DOT-assisted contracts. The Contractor understands that failure to carry out these requirements is a material breach of this PDBC, which may result in the termination of this PDBC or such other remedy as the Department deems appropriate, which may include, but is not limited to: a) Withholding monthly progress payments; b) Assessing sanctions including any of the following:

- A. Liquidated damages; and/or
- B. Disqualifying the Contractor from future bidding as non-responsible; and/or
- C. Contract termination; and/or
- D. Other remedies available by law including administrative suspension (debarred from pursuing additional contracts).

9.3.8 Incorporation of Provisions

The Contractor shall include the provisions of Section 9.3.1 (Compliance with Regulations) through Section 9.3.7 (49 CFR Part 26.13(b)) above in every Subcontract, including procurements of Materials and leases of Equipment, unless exempt by the Acts, the Regulations, and directives issued pursuant thereto. The Contractor shall take action with respect to any subcontract or procurement as the Department or FHWA may direct as a means of enforcing such provisions including sanctions for noncompliance. Provided, that if the Contractor becomes involved in, or is threatened with litigation by a Subconsultant, or supplier because of such direction, the Contractor may request the Department to enter into any litigation to protect the interests of the Department. In addition, the Contractor may request the United States to enter into the litigation to protect the interests of the United States.

10 AUTHORIZED REPRESENTATIVES AND KEY PERSONNEL

10.1 Authorized Representatives

10.1.1 Department Authorized Representatives

The authority and responsibility of each Department Authorized Representative will be provided by the Department to the Contractor in a Notice delivered to the Contractor or in any Notice to Proceed.

The Department Authorized Representatives, and the authority and responsibilities of the Department Authorized Representatives, may from time to time be changed by Notice to the Contractor from the Department.

Nothing in this PDBC shall be construed to bind the Department for acts of any Department employee or any other Person that exceed the authority delegated to them under this PDBC or in any other written delegation.

10.1.2 Contractor's Representative

At all times during the Term, the Contractor shall designate a Contractor's Representative with full authority to represent and act for the Contractor. The Contractor shall designate its initial Contractor's Representative prior to issuance of the Sub-Phase 1A NTP.

The Contractor's Representative shall act for the Contractor in all matters concerning the Work and, subject to all requirements of this Contract, shall have the following authority and obligations:

- A. Ability to organize the Work and the Work of the Subcontractors/Subconsultants, to complete the Work in accordance with this PDBC; and
- B. Ability to delegate defined authority to other Contractor personnel (who upon such delegation also become Contractor's Representatives, as provided in this Contract, to the extent specified), subject to Notice to, and acceptance by the Department, which acceptance can be withheld for any reason or no reason at all.

10.2 Character of Workers, Methods and Equipment

The Contractor shall be required to provide personnel with sufficient skills and experience to perform all assigned tasks. In ensuring that all personnel have sufficient skills and experience, the PDBC shall ensure and at no time allow any Prohibited Person to act or perform in any ownership, leadership, managerial, or other similar position that could influence the operations of an entity doing business with the Department.

If the Department gives written notification that specific Contractor's, Consultant's, Subconsultants', or Subcontractors' personnel are improperly performing the Work, intemperate, disorderly, or creating a hostile work environment, the Contractor shall be required to remove the identified personnel from the Project, and the Contractor shall be obligated to not allow removed personnel to return to the Project without the Department's approval. If the Contractor fails to remove the identified personnel, then the Department shall have the right, in its sole discretion, to suspend the Work that is affected by the identified personnel by delivering Notice

in accordance with Section 20 (Suspension of Work). If the Department suspends the Work under the previous clause, the suspension shall in no way, relieve the Contractor of its obligations contained in the Contract Documents or entitle the Contractor to a Change Order in accordance with Section 12 (Contract Changes). In the event that the Contractor disagrees with the Department's decision that a Contractor's, Consultant's, Subconsultants', or Subcontractors' personnel should be removed, the Contractor shall follow the dispute resolution provisions in Section 18 (Partnering and Dispute Resolution).

The contractor shall be required to use Equipment of sufficient size and mechanical condition to complete the Project by the Substantial Completion Deadline. In addition, the Contractor shall ensure that the Equipment does not harm the Roadway, adjacent property, other highways, workers, or the public.

The Contractor shall determine the design methodologies, construction methods or Equipment necessary to complete the Work according to the Contract Documents.

10.2.1 Suspension of Work Due to Character of Workers

Subject to Section 20 (Suspension of Work), the Department may suspend the Work by Notice under this subsection for the following reasons:

- A. The Contractor does not furnish sufficient skilled and experienced personnel to complete the Project by the Substantial Completion Deadline.
- B. The Contractor does not remove personnel from the Project as directed in writing by the Department.

In the event that the Department suspends work under this Section 10.2.1 (Suspension of Work Due to Character of Workers), the Contractor shall comply with Section 20.3 (Contractor Responsibilities during Suspension).

10.3 Design and Engineering Personnel

For licensing, certifications and accreditations required for Key Personnel, refer to Section 24.1 (Maintenance of Professional Qualifications; Performance by Qualified Personnel).

10.4 Key Personnel

The Contractor shall retain, employ and use the Key Personnel along with other individuals specifically named/identified in Exhibit D (Key Personnel) to fill the Key Personnel positions. The Contractor shall not change or substitute any such individuals except due to retirement, death, disability incapacity, or voluntary or involuntary termination of employment, or as otherwise approved by the Department as described below. Department approval shall not be unreasonably withheld, delayed or conditioned if the proposed substitute individual possesses skill, knowledge and professional experience in the relevant fields that is equal to or greater than the skill, knowledge and professional experience of the person being replaced.

The Key Personnel shall receive instructions from the Department and Department Authorized Representatives. The Key Personnel shall promptly execute the Department's orders or directions, promptly perform Work as required, and promptly supply the required Materials, Equipment, tools, labor, and incidentals.

The Contractor shall notify the Department of any proposed replacement for any Key Personnel position. The Department shall have the right to review the qualifications and character of each individual to be appointed to each position and to approve or disapprove use of such individual in such position before the proposed replacement begins work on the Project. The Department shall have the right to contact owners and/or sponsors of projects on which the proposed individual has previously worked to verify work experience and positions held. The Contractor shall, upon the Department's request, provide contact information to facilitate this verification.

The Contractor shall ensure and maintain the availability of the proposed replacement.

10.5 Representations Regarding Key Personnel

The Contractor acknowledges and agrees that the award of this PDBC by the Department to the Contractor was based, in large part, on the qualifications and experience of the personnel listed in Exhibit D (Key Personnel), 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 connection with the Project. Key Personnel shall commit the amount of time to their applicable roles as agreed to in the Contract Documents. The Contractor shall document such commitment to the Department's satisfaction upon the Department's request.

11 CONTRACTOR'S COMPENSATION

11.1 Cost Principles and Limitations for Phase 1

11.1.1 Cost Principles and Limitations

This shall define process for the compensation of Phase 1.

Other actual and documented costs for the Phase 1 Work will be compensated at actual cost.

11.1.1.1 Non-FAR (Contractor) Phase 1 compensation

The Contractor's compensation for Professional Services undertaken in the performance of the Phase 1 Work shall be computed by the wages and fringe benefits currently in effect for each hour the Work is performed by all labor employed in the Phase 1 Work. The Department will pay an additional 38 percent markup on these wages and Fringe benefits. "Fringe benefits" are the actual costs paid to, or on behalf of, workmen by reason of health and welfare benefits, pension fund benefits, or other benefits, when such amounts are required by prevailing wage laws or by a collective bargaining agreement or other employment contracts generally applicable to the classes of labor employed on the Project.

The Department will pay the actual itemized cost, without markup, of the following payroll taxes and legally required insurances:

- a. Social Security Tax.
- b. Medicare Tax.
- c. Ohio Workers' Compensation Premiums.
- d. State and Federal Unemployment Insurance.

Provide itemized statements in addition to the documentation requirements for all labor including the name, classification, date, daily hours, total hours, rate, and amount. If any person is paid more than the one rate, a separate listing shall be made for that person for each rate paid. Provide itemized statements for Ohio Workers' Compensation insurance premiums, all applicable insurance premiums, State and Federal Unemployment Insurance contributions, and Social Security Tax and fees or dues required by a collective bargaining agreement. Express each of these items of cost as a percentage of payroll, except fees or dues, which shall be expressed as a cost per hour.

Instead of itemizing the cost of Social Security Tax, Ohio Workers' Compensation, and State and Federal Unemployment Insurance, the Contractor may elect to receive as compensation for these payroll taxes and premiums, an amount equal to 22 percent of the paid wages. If the Contractor pays fringes directly to the worker in lieu of paying into a fringe benefit program, then the Department will treat these fringe payments as paid wages when calculating the allowed 22 percent compensation.

The Department will pay, without markup, the actual itemized cost of fees and dues paid to labor unions or to business associations when they are based on payroll hours and required by a collective bargaining agreement.

The Department will pay the prevailing wage and fringe rates that apply to the Project for the classifications required for Extra Work. The Contractor must provide payroll records for pay

rates higher than the prevailing wages and establish that the higher than prevailing rates are paid for original Contract Work.

The Department will pay actual costs for subsistence and travel allowances when such payments are required by the collective bargaining agreement or other employment contracts applicable to the classes of labor employed on the Project. The Department will not pay a percent markup on these costs.

11.1.1.2 Professional Services for FAR Participants (Designers) Phase 1 Compensation

Labor Costs will include costs for Professional Services undertaken in the performance of the Phase ~~2~~¹ Work by personnel and entities that meet the definition of FAR Participants shall be the actual direct labor rates on file with the Department multiplied by the number of hours actually worked (the "Direct Labor") plus the Direct Labor multiplied by the Multiplier Rate on file with the Department for FAR Participants plus an 11% fixed fee. The 11% fixed fee utilized a weighted average overhead rate is calculated as follows:

Fixed Fee Calculation = [Direct Labor + Direct Labor(Weighted Avg O/H Rate)] x (11%)

The weighted overhead rate shall be 157.79%

11.2 Compensation for the Sub-Phase 1A Work

The Contractor shall complete the Sub-Phase 1A Work under the compensation arrangement described in Section 11.1 (Cost Principles and Limitations for Phase 1). Total compensation may not exceed the Maximum Sub-Phase 1A Prime Compensation set forth in Exhibit B (Contract Particulars), subject to any Change Order.

The Contractor shall monitor the Sub-Phase 1A expenditures with reference to the Maximum Sub-Phase 1A Prime Compensation and track progress of all Sub-Phase 1A Work. Any proposed changes to the Maximum Sub-Phase 1A Prime Compensation shall be reviewed by the Department, and if agreed to, processed in accordance with Section 12 (Contract Changes).

11.3 Compensation for the Sub-Phase 1B Work

The Contractor shall complete the Sub-Phase 1B Work under the compensation arrangement described in Section 11.1 (Cost Principles and Limitations for Phase 1). Total compensation may not exceed the Maximum Sub-Phase 1B Prime Compensation set forth in Exhibit B (Contract Particulars), subject to any Change Order.

The Contractor shall monitor the Sub-Phase 1B expenditures with reference to the Maximum Sub-Phase 1B Prime Compensation and track progress of all Sub-Phase 1B Work. Any proposed changes to the Maximum Sub-Phase 1B Prime Compensation shall be reviewed by the Department, and if agreed to, processed in accordance with Section 12 (Contract Changes).

11.4 Phase 1 Invoices and Payments

During the Contractor's performance of the Phase 1 Work, the Contractor shall submit bi-monthly invoices for payment on (approximately) the first (1st) Day and the fifteenth (15th) Day of each month (each a "Processing Date"), after which the Department will approve payments to the Contractor (the "Period Costs"). In the event the Period Costs are not approved on the

corresponding Processing Date, then the Period Costs shall be approved as soon as practicable after all discrepancies are resolved. All direct costs, as applicable to the form of compensation, shall be properly supported by time records and/or copies of receipts or other acceptable evidence of expenses. Actual costs shall be determined in conformance with this PDBC, applicable provisions of the Department's policies and directives, the FHWA's Federal-Aid Policy Guide, and the cost principles set forth in FAR Part 31, as further discussed and clarified in the AASHTO Uniform Audit & Accounting Guide, or other reasonably agreed to and approved procedures that comply with the Department's contracting obligations under state and federal law.

The Department may make DBE specific work item payments if, in the Department's judgement, DBEs performed Work within the invoiced period. DBE work item payments may be made by the Department regardless of DBE invoice payment requests made by the Contractor and the requirements of Section 8.10 (Prompt Payment) shall apply.

The Department will return to Contractor any invoices that are incomplete and/or incorrect in any material respect for correction and resubmittal.

11.5 Reserved

11.6 Compensation for Phase 2 Work

11.6.1 Unilateral Authority to Pay

The Department has unilateral authority to pay the Contractor sums the Department determines to be due to the Contractor for Work performed on the Project. This includes the unilateral processing of Change Orders in accordance with Section 12 (Contract Changes), if necessary, to create line items, unit rates and/or quantities to make these payments. This unilateral authority to pay by the Department does not preclude or limit the rights of the Department and the Contractor to negotiate and agree to the amounts to be paid to the Contractor.

11.6.2 Scope of Payment

Payment of the applicable portion of the Contract Price is full compensation for all resources necessary to complete the associated Work Package and maintain the Work. The Contractor shall assume liability for risk, loss, damage, or expense resulting from the Work. The Contract Price and Contract Time shall only be changed by written Change Order or as determined by the Department in writing in accordance with this PDBC and the other Contract Documents. The total amount payable to the Contractor by the Department for the performance of the Phase 2 Change Order shall not exceed the Contract Price, as adjusted for any approved Change Orders.

11.6.3 Payment for Materials

The Department will pay, up to 75 percent of the applicable Contract Item, for the invoiced cost of the delivered and approved Materials before they are incorporated in the Work, if the approved Materials are delivered, accepted, and properly stored on the Project Site or stored in storage places in the vicinity of the Project that are acceptable to the Department. The Department shall have the sole, exclusive right to reasonably determine if Materials have been stored in storage places in the vicinity of the Project.

The Department will pay for the cost of approved Materials before they are incorporated in the Work when requested by the Contractor, if the Department determines that it is not practical to deliver the Material to the Project Site and determines that storage off the Project Site is appropriate. Any payment for Materials manufactured for the Project and stored off the Project Site shall be conditioned upon compliance by the Contractor with procedures satisfactory to the Department to establish the Department's title to such Materials or otherwise protect the Department's interest, and shall include applicable insurance, storage, and transportation to the Project Site. The Contractor shall also comply with the following specific requirements:

- i. Title to such Materials shall be vested in the Department, as evidenced by documentation satisfactory in form and substance to the Department, including, without limitation, recorded financing statements, UCC filings and UCC searches.
- ii. The Contractor shall submit to the Department a written list identifying each location where materials are stored off the Project Site and the value of Materials at each location.
- iii. The consent of any surety shall be obtained to the extent required prior to payment for any Materials stored off the Project Site.
- iv. Representatives of the Department shall have the right to make inspections of the storage areas at any time.
- v. Such Materials shall be (1) protected from diversion, destruction, theft, and damage to the satisfaction of the Department, (2) specifically marked for use on the Project, and (3) segregated from other Materials at the storage facility.

The Contractor shall reimburse the Department for any loss or damage to such unincorporated materials or equipment not covered by insurance.

The storage of Materials off-site of the Project Site applies primarily for bulky Materials that are durable in nature and represent a significant portion of the Project cost as determined by the Department, such as aggregates, steel, and precast concrete.

The Department will pay for un-fabricated structural steel if the following requirements are met, in addition to the specific requirements (i-v) above:

- A. The Contractor has provided the Department an itemized invoice from the steel mill for the steel for which reimbursement is requested. For Ohio steel also supply the ODOT Office of Materials Management a copy of the itemized invoice.
- B. Project structural steel design plans are complete with no forthcoming revisions. Provide Contractor accepted shop drawings per ODOT C&MS 501.04 (Shop Drawings). Special consideration will be given to critical path steel structures to allow for structural steel plates to be ordered from mill plate order submittals that will be prepared prior to fully approved shop drawings for the given steel structure. The Contractor will bare all material modification costs as a result of design modifications between ordering the material and final shop drawing approval.
- C. Contractor accepted certified test data for all steel in question along with mill shipping notices have been received by the Department. In Ohio the accepted certified test data per ODOT C&MS 501.06 (Test Reports) shall be received by Office of Materials Management.

- D. The steel is properly stored to allow inspection by the Department. It shall also be properly set apart from other Material and identified as belonging to the Department.
- E. The Contractor provides the Department a written statement that in accordance with the requirements of Section 6 (Control of Materials), the Contractor is responsible for the steel that has been paid for until the actual steel is erected and accepted in the field.

Payment shall only be authorized after all the documentation listed above has been received by the Department and the steel has been inspected by the Department and its Office of Materials Management or its authorized representative to verify that all steel listed in the itemized invoice has been received by the fabricator and properly stored. The amount to be paid shall be equivalent to the itemized invoice from the steel mill but shall not exceed 50% of the Contract Item price for the structural steel.

The Department will not pay delivered Materials on small warehouse items or for plant Materials.

11.7 Mobilization

11.7.1 Description

Mobilization consists of the preparatory Work and operations including, but not limited to, those necessary for the movement of personnel, Equipment, supplies, and incidentals to the Project Site; for the establishment of all field offices, buildings, and other facilities necessary for Work on the Project; for all other Work and operations that must be performed or costs incurred before beginning the Work on the other Contract Items; and for demobilization.

11.7.1.1 Limitation

The aggregate amount for mobilization shall not exceed the percentage of the applicable Contract Price as further described under Exhibit G (Opinion of Probable Cost (OPC) and Pricing Process) Part B.

The Contractor shall bill for Equipment and tools included in Mobilization at the approved rates incorporated into the Price Proposal.

11.7.1.2 Basis of Payment

The Department will make partial payments according to Section 11.12 (Administration of Estimates and Payments) and as modified by the following schedule:

Cost for Mobilization will be established according to Exhibit G (Opinion of Probable Cost (OPC) and Pricing Process) Part B including the actual estimated Mobilization costs attributed to the elements of Work. These costs will be included in the CPM Activities for which the Mobilization costs are required.

11.8 Additional Terms and Conditions to Payment

The Department will return to Contractor any invoices that are incomplete and/or incorrect in any material respect for correction and resubmittal.

Payment for Work and Materials shall not, in any way, prevent later rejection if Nonconforming Work is discovered, nor shall payment constitute acceptance under Section 5.14 (Completion Deadlines and Acceptance).

The Department is entitled to withhold payment for any portion of an item in any invoice that is deficient in Material approval.

The Department will not pay the adjusted final invoice until the Contractor remedies all Nonconforming Work and accepted Work damaged by the Contractor's operations.

Interest will be paid in accordance with ORC 126.30 (Interest on Late Payments for Goods and Services) when warranted.

Pay adjustments shall be based on the required adjustment computation method or procedure as defined by the applicable specification or contract provision.

Pay adjustments associated with price fluctuation will be made according to the mechanism shown in Exhibit W (Price Fluctuation Clauses), or as addressed in the Risk Register.

11.9 Pay Adjustment for Unit Price Items

For pay adjustments based on a unit price or unit/cost, the Contractor shall provide a unit price in the SOV developed in accordance with Exhibit G (Opinion of Probable Cost (OPC) and Pricing Process). If unit prices are used as the basis for any portion of the Contract Price, those unit prices shall be used as the unit price/cost component when calculating the applicable pay adjustment. For each unit priced item, the pay adjustment shall be calculated as the difference between the unit price used as the basis for the Contract Price and the computed adjustment to that amount multiplied by the applicable number of units.

11.10 Phase 2 Payment Deductions

11.10.1 Withholdings

Progress payments of the Contract Price will be subject to certain withholding and set-off rights of the Department, including the right to deduct amounts due and owing from the Contractor to the Department under the PDBC.

11.10.2 Reserved

11.10.3 Reserved

11.10.4 Incentive and Disincentive Provisions

With respect to any Price Proposal appropriate incentives and/or disincentives may be set by the Parties upon their mutual agreement dependent upon the achievement by the Contractor of the Milestone Deadlines.

Additionally, with respect to any Price Proposal that is maintained as a GMP Price Proposal, the above established incentives/disincentives will not be considered when calculating the sharing of the GMP Savings. The GMP Savings will be established in accordance with the terms and conditions of the Change Order pertaining to the approved GMP Price Proposal.

11.11 Compensation Structure

During the negotiation pertaining to the Phase 2 Work, the Contractor shall proceed with preparing an initial Price Proposal in accordance with Section 11.11.1 (Initial Price Proposals) below and Parts B and C of Exhibit G (Opinion of Probable Cost (OPC) and Pricing Process).

11.11.1 Initial Price Proposals

The Contractor will initially establish a Guaranteed Maximum Price (GMP) for the Work comprising all of Phase 2. The amount of the GMP will be established in accordance with Parts B and C of Exhibit G (Opinion of Probable Cost (OPC) and Pricing Process) and shall incorporate the terms and conditions outlined under Sections 11.11.2 (GMP Price Proposal—Contractor’s Risk Contingency Reduction and Department’s Risk Contingency) through 11.11.4 (GMP Price Proposal—Shared Savings). Payment procedures under any approved GMP Price Proposal shall be developed in accordance with Sections 11.12.1-11.12.3 below. As provided in Exhibit G, the Contractor shall be responsible for, and shall pay without reimbursement from the Department, all cost of Work in excess of the GMP, as may be adjusted in accordance with Section 12 (Contract Changes) and Section 13 (Time Extension to the Completion Deadlines and Payment for Excusable Delays) of this PDBC.

11.11.2 GMP Price Proposal—Contractor’s Risk Contingency Reduction and Department’s Risk Contingency

The Contractor’s Risk Contingency will be established under each initial GMP Price Proposal based upon the allocation of values to those Risk Register Events for which the Contractor has assumed financial responsibility under the then-current Risk Register. Upon the occurrence of a Risk Register Event for which the Contractor has assumed financial responsibility, the Contractor shall give notice to the Department of the occurrence of such Risk Register Event and thereafter the amounts attributable to such Risk Register Event will be (i) allocated to the applicable costs of the Work, (ii) incorporated into an updated Schedule of Values and (iii) invoiced in payment applications for the duration of the Risk Register Event. Subject to the availability of funds held under Contractor’s Risk Contingency, the Contractor shall have exclusive use and control of the Contractor’s Risk Contingency such that Contractor’s use of the Contractor’s Risk Contingency shall not be limited by the value assigned to a particular Risk Register Event. It is understood that the costs attributed to any Contractor’s Risk Contingency will be accrued and spent as they occur and will be captured during the GMP cost actualization that will occur at least annually per Section 11.12.1 (GMP Price Proposal – Progress Payments).

The Contractor shall manage the Contractor’s Risk Contingency through Completion of the Contract upon which any remaining balance in the Contractor’s Risk Contingency will be allocated between the Contractor and the Department in accordance with the following paragraph.

Upon Completion of the Contract if there is a remaining balance in the Contractor’s Risk Contingency, then 50% of any remaining balance shall be disbursed to the Contractor (the “Contractor’s Risk Contingency Incentive”) and 50% of any remaining balance shall be retained by the Department; provided that in no event shall the sum of the Contractor’s Risk Contingency Incentive and the Contractor’s share of any GMP savings (together, “Contractor’s Incentive Threshold”) exceed \$50,000. For avoidance of doubt, all amounts in excess of the Contractor’s Incentive Threshold will be retained at a rate of 100% by the Department. Any disbursement of

the Contractor's Risk Contingency Incentive shall be calculated and paid as part of the Final Payment. The Contractor shall not be entitled to the Contractor's Risk Contingency Incentive if the Department terminates this PDBC.

In addition to the establishment of the Contractor's Risk Contingency, the Department may elect to establish a Department's Risk Contingency within the GMP Price Proposal. In the event the Department elects to establish a Department's Risk Contingency, and the Department determines that one or more Risk Register Events allocated to the Department will require the Contractor to assist the Department with the administration of the corresponding Risk Register Events, then the terms and conditions of Contractor's administration of the corresponding Risk Register Event(s), including the allocation of any Department's Risk Contingency savings, will be negotiated in conjunction with the Phase 2 Change Order (or the applicable Change Order issued subsequent to the Phase 2 Change Order).

As an alternative to establishing a Department's Risk Contingency within a GMP Price Proposal, the Department may elect to establish a separate Department's Risk Contingency which will not be incorporated within a GMP Price Proposal

11.11.3 GMP Price Proposal—Phase 2 Mark-up

In accordance with any approved GMP Price Proposal, the Contractor shall be paid the Phase 2 Mark-Up set forth in Exhibit B (Contract Particulars) in conjunction with the corresponding Change Order as allowed by Exhibit G (Opinion of Probable Cost (OPC) and Pricing Process). In the event of a Change Order approving costs in excess of the GMP, the Contractor shall be entitled to incorporate the Phase 2 Mark-Up in an amount equal to the product of the Phase 2 Mark-Up percentage multiplied by the cost of the Work as allowed by Exhibit G (Opinion of Probable Cost (OPC) and Pricing Process) under the corresponding Change Order.

11.11.4 GMP Price Proposal—Shared Savings

If at Completion of the Contract there are GMP savings (exclusive of remaining Contractor's Risk Contingency and, if applicable, Department's Risk Contingency), then the GMP savings shall be allocated between the Contractor and the Department at a rate of 50% to the Contractor and 50% to the Department; provided however, the sum of Contractor's Risk Contingency Incentive and Contractor's portion of any GMP savings shall not exceed the Contractor's Incentive Threshold. Any GMP savings shall be calculated and paid as part of the Final Payment.

11.12 Administration of Phase 2 Invoices and Payments.

11.12.1 GMP Price Proposal – Progress Payments

With respect to any approved GMP Price Proposal, the Contractor shall submit bi-monthly applications for payment on the first Day and fifteenth Day of each month for payment of the applicable portion of the Contract Price.

In conjunction with the Department's approval of any GMP Price Proposal, the Department and the Contractor will develop an agreed upon methodology to determine estimated progress payments. Such methodology shall be based upon either a Schedule of Values or other such method as agreed upon by the Parties. The terms and conditions of any approved GMP Price Proposal shall further provide for the reconciliation of estimated payments with actual costs

incurred at a minimum on an annual basis including access to all Project related accounting records on an Open Book Basis to permit the Department to validate actual cost data together with such additional terms as may be reasonably required to reconcile any estimated payments made in excess of the applicable portion of the GMP.

11.12.2 GMP Price Proposal – Contents of Applications for Payment

In conjunction with the Department’s approval of any GMP Price Proposal, the Department will develop with Contractor input, a form of payment application and the required contents of such application.

11.12.3 GMP Price Proposal—Administration of Contractor’s Risk Contingency

After the occurrence of an event triggering a Risk Register Event and the inclusion of the amounts attributable to such Risk Register Event on an updated SOV, upon the Department’s approval of the pay applications submitted during the occurrence of such Risk Register Event, the Contractor may expend funds from the Contractor’s Risk Contingency to pay for costs attributable to the corresponding Risk Register Event during the duration of such Risk Register Event. Contractor Risk Contingency Items which do not have defined triggering events are to be included in the Schedule of Values and will be compensated over the duration of the item.

Whenever any use of the Contractor’s Risk Contingency relates to costs attributable to Risk Events that could potentially be covered by Contractor’s insurance, Contractor shall pursue such insurance claims and reimburse the Department from any proceeds derived therefrom.

12 CONTRACT CHANGES

12.1 Applicability of Section 12 Change Order Process

The following information, obligations, and duties set forth in this Section 12 shall apply only for Construction Work.

This PDBC sets forth additional Change Orders for alternative purposes. Any Change Order performed for one of the following purposes has its own requirements, procedures, duties, and/or obligations contained within one of the following sections of the PDBC.

1. For any Change Order executed for the purpose of modifying the Sub-Phase 1A Project Scope, the Change Order shall be performed and executed in accordance with Section 2.3.2 (Sub-Phase 1A: Proof of Concept).
2. For any Change Order executed for the purpose of progressing the PDBC from Sub-Phase 1A to Sub-Phase 1B, the Change Order shall be executed in accordance with Section 2.3.2.1 (Sub-Phase 1B: Proposal).
3. For any Change Order executed for the purpose of modifying the Sub-Phase 1B Project Scope, the Change Order shall be executed in accordance with Section 2.3.3 (Sub-Phase 1B: Project Development).
4. For any Change Order executed for the purpose of progressing the PDBC from Sub-Phase 1B to Phase 2, the Change Order shall be performed and executed in accordance with Section 2.3.3.2 (Phase 2 Proposal) and Section 2.4.1 (Phase 2 Change Order).
5. To the extent the Department has established a Department Risk Contingency, for any Change Order executed for the purpose of making a draw on the Department Risk Contingency after the occurrence of an event warranting such action.

12.2 Changes in the Work

At any time, and without invalidating this PDBC or releasing the surety, the Department reserves the right to make, in writing, changes, revisions, or alterations in the Work when necessary to complete the Project satisfactorily. The Contractor shall perform the Work as revised by the Department.

If the Contractor believes that the Department directed changes, revisions, or alterations in the Work are material in kind or nature from the Work indicated by the Contract Documents, the Contractor may request a Change Order prior to performing the specified Work. The Department will evaluate and determine if the request is warranted and, at its discretion, process a Contract adjustment by Change Order as described below.

All changes in the Work shall be requested and authorized before commencing such changes pursuant to the PDBC changes process set forth in this Article 12.

12.3 Modifications to the PDBC

This PDBC may be amended or modified only by a Change Order which upon execution by both the Department and Contractor shall become part of the Contract Documents.

12.4 Change Orders

A Change Order is a written instrument signed by the Department and the Contractor stating their agreement upon all of the following:

- (1) A change in the Work;
- (2) The amount of the adjustment, if any, in the Contract Price; and
- (3) The extent of the adjustment, if any, in the Contract Time.

The Change Order document shall be prepared by the Department after the evaluation and approval of a validly submitted RCO, and executed by the Contractor. Once executed by the Contractor, the Change Order will be submitted to the Department to execute and approve. Upon approval and execution by the Department, the Change Order shall become a part of the Contract Documents.

Methods used in determining adjustments to the Contract Price shall include those listed in Section 12.8 (Changes and Extra Work Price Determination) and Exhibit I (Delay Costs). Adjustments to the Contract Time, if any, shall be determined as set forth in Section 13 (Time Extension to the Completion Deadlines and Payment for Excusable Delays) and Exhibit T (Critical Path Method Progress Schedule). The Contractor shall submit RCOs requesting changes in Contract Time separately and individually from RCOs requesting a modification in Contract Price. RCOs requesting a change in the Contract Time and Contract Price stemming from the same issue, should be considered as companions to one another and referenced as such in the RCOs. The Department reserves the right to not approve and/or not consider any RCO that is requesting both an adjustment to the Contract Time and Contract Price in the same RCO. As set forth in Section 13 and in Exhibit T, in order to warrant an increase in the Contract Time, the Contractor must demonstrate (i) that the Work affected by the change is on the Critical Path of the Project Schedule and (ii) materially adversely impacts the Completion Dates as determined in accordance with Exhibit T.

The Contractor must provide the Department with a Notice of Potential Change Order (“NPCO”), in accordance with Section 12.4.1 (Notice of Potential Change Order) and, if warranted a Request for Change Order (“RCO”) upon becoming aware of any item of Work the Contractor considers Extra Work as defined in Exhibit A (Acronyms and Definitions) or for any other item the Contractor believes warrants a Change Order affecting either: the Contract Price or the Contract Time. Any RCO that is not subject to the EDR procedure outlined in Section 13 (Time Extension to the Completion Deadlines and Payment for Excusable Delays) shall be submitted within seven (7) Days of the Department’s Change Event Notice. Any RCO that is subject to the EDR procedures outlined in Section 13 must be submitted within seven (7) Days of the Department’s Notice, as set forth in Section 13.4.3 (Department Notice). Contractor’s failure to deliver any RCO to the Department within seven (7) Days of the date of the Department’s Change Event Notice or Department Notice, as applicable, shall be deemed a waiver by the Contractor of any claim for a change in the Contract Price or the Contract Time requested under the corresponding NPCO.

The Contractor’s Submission of the RCO shall be considered an absolute condition precedent to the issuance of a Change Order as a result of any item of Work the Contractor considers

Extra Work as defined in Exhibit A (Acronyms and Definitions) or for any other item the Contractor believes warrants a Change Order impacting either: the Contract Price or the Contract Time.

The notice(s) in Section 12.4.1 (Notice of Potential Change Order) shall satisfy the initial notice requirements as set forth in Section 18.2 for the Dispute Resolution procedures.

Notwithstanding, the Department and the Contractor agree that neither party shall pursue the Dispute Resolution procedures in Section 18.2 (Dispute Resolution) until the Contractor has either (i) received the Department's written notice with respect to its decision pertaining to any RCO or EDR pursuant to Section 12 (Contract Changes) and Section 13 (Time Extension to the Completion Deadlines and Payment for Excusable Delays), (ii) the Contractor has received the Department's decision after successfully mitigating or resolving an event as required under Section 12.4.1.1 (Department Mitigation / Resolution Before Written Notice), and/or (iii) the Contractor fails to execute a Change Order prepared by the Department or expressly rejects a proposed Change Order. In no event shall the Dispute Resolution Procedures begin before one of the events, (i)-(iii) has occurred.

12.4.1 Notice of Potential Change Order ("NPCO")

As a precondition to submitting any RCO, unless the RCO is the result of the process set forth in Section 12.4.4 (Procedure for Department Initiated RCOs), the Contractor must submit a NPCO to the Department in accordance with this Section 12.4.1. The NPCO process consists of the following steps:

1. the Contractor, shall provide immediate oral notification to the Department containing sufficient details for the Department to identify the circumstance(s) or event(s) requiring mitigation or resolution that may result in a change to the Contract Documents and/or Work.
2. if after two (2) Working Days following the Department's receipt of the Contractor's oral notification in under (1) above, the Department has not mitigated or resolved such circumstance(s) or event(s) identified by the Contractor, the Contractor shall provide written notice to the Department containing a sufficient description of the circumstance(s) or event(s) and a preliminary projection of the potential impacts.

The oral and written notices made under this Section 12.4.1, shall also constitute the notices required under Section 18.2 (Dispute Resolution).

12.4.1.1 Department Mitigation/Resolution Before Written Notice

Upon receipt of the Contractor's oral notice in accordance with this Section 12.4.1, the Department will attempt to mitigate and/or resolve the circumstance(s) or event(s) described in such oral notice, unless the underlying event causing the Contractor to issue the NPCO is a change in the Contract Time and/or Contract Price due to a Weather event, in which instance the Contractor shall comply with the procedures outlined in Section 15 (Weather).

In the event that the Department is able to resolve the circumstance(s) or event(s) before the receipt of Contractor's written notice, the Department will notify the Contractor of said resolution in the Department's Change Event Notice and in such may instruct the Contractor to do any or all of the following that may apply:

1. submit a RCO pursuant to Sections 12.4 (Change Orders) if the resolution and/or mitigation by the Department requires a modification in the Contract Price that is not caused by Delay Costs;
2. submit an EDR pursuant to Section 13.4 (Procedure for Requesting Delay Costs and Completion Deadlines Alterations) requesting a modification to the Contract Time, alone, in accordance with Section 13.4.1 (Excusable Delay Request); or
3. submit an EDR pursuant to Section 13.4 requesting a modification to the Contract Time and a modification in the Contract Price that is caused by Delay Costs, in accordance with Section 13.4.1.

In the event that the Department has determined that the conditions or events which are the subject of the NCPO do not warrant the issuance of a Change Order, the Contractor may elect to proceed with the Dispute Resolution Procedures pursuant to Section 18.2 (Dispute Resolution). The notices transmitted pursuant to Section 12.4.1 (Notice of Potential Change Order) shall satisfy the notice requirements necessary to initiate the Dispute Resolution Process set forth in Section 18.2 (Dispute Resolution). The Department may, in its sole discretion, issue a Construction Change Directive in accordance with Section 12.5 (Construction Change Directive).

12.4.1.2 Department Unable to Mitigate/Resolve Change Event

In the event that the Department cannot resolve the circumstance(s) or event(s) that are the subject of a NPCO within two (2) business Days of the Contractor's oral notice provided in accordance with Section 12.4.1, 1 (Notice of Potential Change Order) and the Contractor proceeds to issue a written notice in accordance with Section 12.4.1, 2, unless the underlying event causing the Contractor to issue the NPCO is a change in the Contract Time due to weather, in which case the Department shall instruct the Contractor to comply with the procedures outlined in Section 15 (Weather), the Department shall analyze the notice and monitor the corresponding circumstance(s) or event(s) giving rise to such notice. Following the Department's analysis of the circumstance(s) or event(s), the Department shall issue the Department's Change Event Notice to notify the Contractor:

1. that Department agrees that a change in the Contract Price may have occurred, in which case, the Contractor shall prepare an RCO in accordance with this Section 12.4 and Section 12.4.2 (RCO Contents); or
2. the Department has: (a) determined that time is of the essence and (b) there is not ample time to determine if a change in Contract Price or increase in Contract Time has occurred and/or is warranted, in which case the Department shall proceed under Section 12.5 (Construction Change Directive) and issues a Construction Change Directive; or
3. the Department has determined that the circumstance(s) or event(s) may have resulted in the need for: (a) a change in the Contract Time with no change in Contract Price or (b) a change in the Contract Time with a change in the Contract Price due to delay costs, regardless of whether or not the circumstance(s) or event(s) have resulted in a change in the Contract Price, not caused by delay cost, in which case, the Contractor shall submit an Excusable Delay Request in accordance with Section 13.4.1 (Excusable Delay Request); and/or
4. The Department has determined that there has not been a change in the scope of the Work that warrants a Change Order, in which case, the Contractor may elect to

proceed with the Dispute Resolution Procedures pursuant to Section 18.2 (Dispute Resolution), which the notices in Section 12.4.1 (Notice of Potential Change Order (“NPCO”)) shall satisfy the notice requirements of Section 18.2 (Dispute Resolution).

12.4.1.3 Change Event Mitigation Plan

The Department may require the Contractor to submit a mitigation action plan at any time after the Contractor’s oral notice has been provided in accordance with Section 12.4.1, 1 (Notice of Potential Change Order). The Contractor shall submit such mitigation action plan pertaining to the conditions or events that are the subject of a NPCO. The Contractor’s mitigation plan shall include the following unless instructed otherwise by the Department:

1. Include full details of the actions that the Contractor proposes to take to avoid, mitigate, or minimize the consequences of the event and a description of how those proposed actions will mitigate and/or minimize the effects of the event;
2. Describe any additional resources, labor, Materials, plant, or Equipment as applicable, that the Contractor proposes to dedicate to perform each of the proposed actions to avoid, mitigate, or minimize the consequences of the event, which costs must be estimated and included in the mitigation plan and may be included in any RCO requesting a change in the Contract Price due to direct costs or EDR for a change in the Contract Price if the event is a Category 2 Event;
3. State the time within which the Contractor will implement each of the actions described in the proposed mitigation plan; and
4. Include any additional information reasonably requested by the Department.

The Contractor shall submit any mitigation action plan within seven (7) days of such request, unless otherwise agreed to by the Department. Upon the submission of a mitigation action plan to the Department, in accordance with this Section 12.4.1.3 (Change Event Mitigation Plan), the Department may reject in whole or in part the mitigation action plan. In the event the Department does reject in whole or part of the mitigation action plan, the Contractor shall amend and resubmit the mitigation action plan (or the part rejected) to the Department within seven (7) Days of receiving notice of the Department’s rejection of the mitigation action plan.

If the Department accepts in whole or in part a submitted mitigation action plan, in accordance with this Section 12.4.1.3, then the Contractor shall act in accordance with the accepted mitigation plan (or the accepted part of the mitigation action plan, as applicable) in order to mitigate the effects of the event. In addition, all actions taken by the Contractor to mitigate the effects of the event and the progress of those actions shall be documented by the Contractor.

In the event that the Department has not responded to a submitted mitigation action plan (or a part of it), in accordance with this Section 12.4.1.3, within seven (7) Days of receipt, the mitigation action plan (or part of it) shall be deemed accepted by the Department, and the Contractor should act in accordance with Contractor’s proposed Change Event Mitigation Plan.

12.4.2 RCO Contents

At minimum, an RCO shall include, as applicable:

1. the scope of work which describes in detail all additional or changed (or both) activities to be authorized by a subsequent Change Order;

2. an initial cost estimate by utilizing the information and formulas specified in Section 12.8 (Changes and Extra Work Price Determination), Exhibit H (Force Account Provisions), and Exhibit I (Delay Costs), as may be applicable, to calculate any potential cost changes or the Detailed Cost Analysis submitted in conjunction with an EDR request as described in Section 13.4.1.1 (Detailed Cost Analysis), if applicable;
3. an impact analysis to all Baseline Schedules affected, indicating in such analysis all activities affected by the change, with activity numbers, durations, predecessor and successor activities, resources, and cost, and a narrative report, if the RCO pertains to changes in Contract Time or Contract Price caused by delay costs, which shall only be applicable for an RCO as a result of the EDR process in Section 13.4 (Procedure for Requesting Delay Costs and Completion Deadlines Alterations);
4. the approximate number of Days that the delay to the Critical Path of the affected Baseline Schedule(s) was adversely impacted utilizing Exhibit T (Critical Path Method Progress Schedule) and Section 13.4.2 (Department Decision), if the RCO pertains to changes in Contract Time or Contract Price caused by delay costs, which shall only be applicable for an RCO as a result of the EDR process in Section 13.4 (Procedure for Requesting Delay Costs and Completion Deadlines Alterations); and/or
5. any other supporting documentation that may be helpful or requested by the Department.

12.4.3 Department Receipt and Procedure for RCOs

Upon the receipt of any RCO that has been submitted in accordance with Section 12 (Contract Changes) and/or Section 13 (Time Extension To The Completion Deadlines and Payment For Excusable Delay), except for an RCO as a result of Section 12.4.4 (Procedure for Department Initiated RCOs), the Department shall have seven (7) Days to consider and review the RCO. This duration may be extended if during this time the Department requires additional information/clarification from the Contractor. On the seventh (7th) Day after the submittal of the RCO or the requested additional information/clarification, the Department shall notify the Contractor of the Department's acceptance or rejection of the RCO.

If the Department notifies the Contractor that the Department has rejected the RCO, the Department must include a description of the basis as to its rejection. If the Contractor decides to revise the RCO to address the basis of rejection, a new RCO will need to be submitted in accordance with Section 12 (Contract Changes) and/or Section 13 (Time Extension To The Completion Deadlines and Payment For Excusable Delay). Further, upon receipt of the notice of the rejection of the RCO, the Contractor may elect to proceed with the Dispute Resolution Procedures pursuant to Section 18.2 (Dispute Resolution) The notices transmitted pursuant to Section 12.4.1 (Notice of Potential Change Order) shall satisfy the notice requirements of Section 18.2. The Department may issue a Construction Change Directive in accordance with Section 12.5 (Construction Change Directive).

The Contractor's signature on a Change Order shall constitute a full, final, and complete waiver and settlement of any and all claims, demands, and causes of action that Contractor has, or may have in the future, arising out of or relating to the Change Order and the occurrences, acts, omissions, or events upon which the Change Order is based. No "reservation of rights" or other attempt by Contractor to preserve, notwithstanding Contractor's signature on the Change Order, present or future claims arising out of or relating to the Change Order (or arising out of or relating to the cumulative effect of the Change Order in combination with other change orders)

shall be effective unless Owner and Contractor shall both agree, to the specific terms, conditions, scope, and duration of such reservation of rights.

12.4.4 Procedure for Department Initiated RCOs

The Department may issue an RCO pursuant to the procedures set forth in Sections 12.4.4.1 (Consultation Meeting) through Section 12.4.4.3 (Contractor RCO).

12.4.4.1 Consultation Meeting

The Department shall give notice to the Contractor of its desire to initiate an RCO. Within seven (7) Days after the Contractor's receipt of the Department's notice to initiate an RCO, the Department and the Contractor shall consult to define the proposed scope of the change, including rough order of magnitude of cost and time impacts, if any, relating to the Work that is the subject of the RCO.

12.4.4.2 Preparation of Estimate

Within seven (7) Days after the consultation meeting referenced in Section 12.4.4.1 (Consultation Meeting) above, the Department shall notify the Contractor whether the Department desires the Contractor to prepare the RCO that would account for costs of the Work in the proposed scope and the impacts on the Critical Path of any of the Baseline Schedules, as applicable, or keep the existing Baseline Schedules and reflect reasonable acceleration costs, which will be determined in accordance with Section 12.8.4 (Directed Acceleration) at a later date, needed to meet the existing Completion Deadlines.

12.4.4.3 Contractor RCO

If requested by the Department, the Contractor shall prepare and submit to the Department for approval, an RCO within fourteen (14) Days after the receipt of the Department's request to Contractor to prepare an RCO. Such Contractor prepared RCO shall comply with all requirements as set forth in Section 12.4 (Change Orders) and shall include all requests made by the Department. The Contractor shall bear the costs of developing the RCO, including subsequent modifications requested by the Department.

12.4.4.4 Disagreement Regarding Additional Time and/or Cost

If the Department and Contractor disagree as to whether the change justifies an adjustment in the Contract Price or Contract Time, or the amount of such adjustment regarding Contract Time or Contract Price, the Department may, in its sole discretion, issue a Construction Change Directive in accordance with Section 12.5 (Construction Change Directive). During the performance of the Work pertaining to a Construction Change Directive, the Contractor may elect to concurrently proceed with the Dispute Resolution Procedures set forth under Section 18.2 (Dispute Resolution).

12.4.5 Items Not Eligible for Change Orders

The Contractor acknowledges and agrees that the basis for an increase in the Contract Price or Contract Time for any Completion Deadlines is limited to the conditions and events set forth in Section 12 (Contract Changes) and Section 13 (Time Extension to the Completion Deadlines

and Payment for Excusable Delays). Notwithstanding anything to the contrary set forth herein, the Contractor shall have exclusive responsibility for:

1. Errors, omissions, inconsistencies, inaccuracies, deficiencies or other defects in the Design Documents prepared by the Contractor (including errors, omissions, inconsistencies, inaccuracies, deficiencies or other defects traceable to errors, omissions, inconsistencies, inaccuracies, deficiencies or other defects in the Design Documents);
2. Any design changes required by the Department as part of the process of making the Design Documents consistent with the requirements of the Contract Documents;
3. Defective or incorrect schedules of Work or changes in the planned sequence of performance of the Work (except to the extent that changes in the planned sequence of performance of the Work arise from causes which otherwise give rise to a right to a Change Order);
4. Action or inaction of a Subcontractor (unless arising from causes which otherwise give rise to a right to a Change Order);
5. Failure to integrate work of another contractor with the Contractor's Work which has been incorporated into the PDBC via Change Order;
6. Untimely delivery, unavailability or defectiveness of material, equipment or products specified by the Contract Documents unless otherwise applicable pursuant to Section 13.2.1, D (Category 1 Events – Excusable, Non-Compensable Delays);
7. Costs covered by insurance proceeds received by or on behalf of the Contractor;
8. Correction of Nonconforming Work and review and acceptance thereof by the Department;
9. Failure by the Contractor to comply with Contract Documents requirements;
10. Escalation in labor, equipment, or materials prices in accordance with and as described in Exhibit W (Price Fluctuation Clauses); and
11. Any situations which, while not within one of the categories delineated above, were or should have been reasonably anticipated by the Contractor based on the Contract Documents or the nature of the Work.

The Contractor hereby assumes responsibility for all such matters and acknowledges and agrees that assumption by the Contractor of responsibility for such costs and delays, and the consequences and costs resulting therefrom, is reasonable under the circumstances of the PDBC and that whatever contingencies the Contractor included in the Contract Price or Project Schedule constitute sufficient consideration for its acceptance and assumption of Contractor's risks and responsibilities as set forth herein.

Notwithstanding Section 12.4.5 (Items Not Eligible for Change Orders), Risk Register Events identified on the Risk Register by the Parties as either Department Risks or risks utilizing Provisional Sums, pursuant to Section 2.6.1.1 (Risk Register) may be eligible for a Change Order in accordance with Section 2.6.1.1.

12.4.6 No Release or Waiver

12.4.6.1 Extension of Time for Performance

No extension of time granted hereunder with respect to the Contract Time shall release the Contractor's Surety from its obligations set forth in the Surety's Bond. The Department shall not be deemed to have waived any rights under this PDBC as the result of any grant of an extension of any Completion Deadlines, any acceptance of performance of any part of the Work completed after a Completion Deadline, or the making of any payments to the Contractor after the Completion Deadline.

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

No course of conduct or dealings between the parties, nor express or implied acceptance of alterations or additions to the Work, and no claim that the Department has been unjustly enriched shall be the basis for any claim, request for additional compensation, or extension of a Completion Deadline. Further, the Contractor shall undertake, at its risk, work included in any order or other authorization issued by a Person in excess of that Person's authority as provided herein or included in any verbal request. The Contractor shall be deemed to have performed such work as a volunteer and at its sole cost. In addition, the Department may require the Contractor to remove or otherwise revise any such work, if not in compliance with the Contract Documents, at the Contractor's sole cost.

Contractor shall remove or otherwise revise any Work, if not in compliance with the Contract Documents, at the Contractor's sole cost and expense.

12.5 Construction Change Directive

A Construction Change Directive will be primarily utilized by the Department where the completion of Work is of the essence to maintain the Project Schedule and the impact of such changes needed to complete the Work are not yet fully known or agreed upon between the Department and the Contractor preventing the processing and approval of a Change Order. In such event where time is of the essence, the Department may issue a Construction Change Directive that shall include (i) a description of the scope of work to be performed pursuant to the Construction Change Directive and (ii) the Department's estimate of the work impacted. The Construction Change Directive may or may not impact the Contract Price or Contract Time. In the event that a Construction Change Directive is issued by the Department, the Contractor shall be required to track the performance of the work to be performed under the Construction Change Directive pursuant to the force account procedures set forth in [Section 12.8.2](#) (Force Account) until the impacts of the Construction Change Directive are known and the procedures and process outlined in [Section 12.8.1](#) (Negotiated Prices) occur.

12.5.1 Effective Execution of Construction Change Directive

The Contractor shall execute the Construction Change Directive upon receipt. An executed Construction Change Directive by the Contractor confirms the Contractor's acceptance and agreement with the scope of the Work to be performed and the methodology in which the Work and associated costs shall be tracked.

12.5.2 Operation Under Executed Construction Change Directive

Once a Construction Change Directive has been executed by the Contractor, the Contractor will proceed in accordance with the scope of the Work described in the Construction Change Directive. As soon as practicable after the execution of the Construction Change Directive, the Department and the Contractor shall utilize commercially reasonable efforts to agree upon a change in the Contract Price and/or a change in Completion Dates, as applicable.

If the Department and Contractor reach an agreement regarding (1) a change in Contract Price, if any, and/or (2) a change in Completion Dates, if any, the Contractor shall proceed to submit an RCO in accordance with Section 12.4 (Change Orders) and Section 12.4.2 (RCO Contents) and/or an EDR in accordance with Section 13.4.1 (Excusable Delay Request); provided however, if the Department and Contractor cannot reach an agreement regarding: a change in Contract Price or Contract Time then the Contractor may elect to proceed with the Dispute Resolution Procedures set forth under Section 18.2 (Dispute Resolution).

Notwithstanding anything to the contrary contained herein, any failure by the Contractor to perform the work specified under a Construction Change Directive shall constitute a Contractor Default under this PDBC.

12.6 Disputes Regarding Change Order(s)/Construction Change Directive(s)

If the Contractor and the Department cannot come to an agreement regarding amount of adjustment to the Contract Price, and/or an adjustment to the Contract Time, pursuant to the Change Order process outlined in this Section 12 and/or Section 13 (Time Extension to the Completion Deadlines and Payment for Excusable Delays), the Contractor or Department may elect to proceed with the Dispute Resolution Procedures outlined in Section 18.2 (Dispute Resolution). In the event the Department and Contractor cannot reach an agreement regarding a change in Contract Price, whether in response to a Construction Change Directive, as part of a Claim or Dispute, or otherwise, the Contractor shall be required to track the performance of the work to be performed pursuant to the force account procedures set forth in Section 12.8.2 (Force Account)."

12.7 Revisions to Contract Document

12.7.1 Differing Site Conditions

12.7.1.1 General Obligation of Notice by Contractor and Department Investigation

Upon the Contractor's discovery of the following Differing Site Conditions set forth in this Section 12.7.1 (Differing Site Conditions), the Contractor shall notify the Department of such condition in accordance with Section 12.4.1 (Notice of Potential Change Order). Any change in the Contract Time and/or Contract Price shall occur as a result of the procedures and processes stated in Section 12 (Contract Changes) and/or Section 13 (Time Extension To The Completion Deadlines And Payment For Excusable Delays).

Upon receipt of the Contractor's notice, the Department will investigate the claimed potential Differing Site Conditions. The Department will determine if Differing Site Conditions have been encountered and notify the Contractor of the Department's determination.

12.7.1.2 Procedure for Requesting Contract Price/Completion Deadline Alterations

The Contractor recognizes and accepts, as provided in Section 12.7.1.5 (Department Provided Information for Reference and Information Only), that geotechnical and environmental information provided by the Department may, only upon the Department's written concurrence in accordance with Section 12.7.1.5 (Department-Provided Information for Reference and Information Only), be incorporated into the Design Documents and Construction Documents to supplement subsurface information that the Contractor obtains through Site investigations conducted during Phase 1. As provided in Section 12.7.1 (Differing Site Conditions), Contractor requests pertaining to differing site conditions will be considered by the Department in the event the Contractor encounters latent physical condition changes that materially differ from the subsurface conditions identified in those RIDs that the Department has agreed to have incorporated into the Design Documents and the Construction Documents and/or the additional subsurface information available to the Contractor from the Phase 1 Site investigations. The Contractor shall consider any portion of the site or excavation to be unclassified by the Department. The Contractor assumes all risk of unknown or unforeseen subsurface site conditions except as specifically provided in Section 12.7.1.3 (General Differing Site Conditions) and Section 12.7.1.4 (Unique Differing Site Conditions) and acknowledges the potential for normal geologic and/or groundwater variances throughout the Project, which variances may not constitute the basis for a request pertaining to unknown or unforeseen subsurface site conditions. Except for those RIDs to be incorporated into the Design Documents and Construction Documents based upon the Department's written concurrence, the Department expressly disclaims any representations or warranties regarding geotechnical and environmental information provided by the Department.

Notwithstanding anything to the contrary contained herein, the Contractor hereby acknowledges and agrees that the publicly accessible archived geotechnical data and the published geologic literature pertaining to the area encompassing the Project Limits indicate a variable groundwater presence and elevation throughout the Project Limits. Based upon the foregoing known subsurface conditions within the Project Limits, the Contractor covenants and agrees to develop the Design Documents and the Construction Documents to account for the presence of groundwater within the Project Limits at varying elevations and rates, including with respect to the performance of any excavation (open cut, foundation, drilled pier, or otherwise). For avoidance of doubt, the Department shall not consider the variable groundwater elevations and rates described herein to constitute a basis for a request pertaining to unknown or unforeseen site conditions.

"Differing Site Conditions" are described in Section 12.7.1.3 and Section 12.7.1.4. A request for alteration to the Contract Price/Completion Deadlines due to a Differing Site Condition as provided in this Section 12.7.1 (Differing Site Conditions) shall be made according to the following procedure:

1. The Department and Contractor shall comply with Section 12.7.1.1 (General Obligation of Notice by Contractor and Department Investigation);
2. in the event that the Department determines that the Differing Site Condition (s) exists and the Contractor believes that an adjustment in the Contract Price, due to an increase in direct costs, the Contractor shall submit an RCO in accordance with Section 12.4 (Change Orders) meeting the requirements listed therein; and/or
3. in the event that the Department determines that the Differing Site Condition (s) exists and the Contractor believes that it may be entitled to an adjusted Completion Deadline due to delays caused by the Differing Site Condition and/or additional compensation due to Delay Costs arising from the Differing Site Condition, the Contractor may submit an Excusable Delay Request in accordance with Section 13.4.1 (Excusable Delay Request).

12.7.1.3 General Differing Site Conditions

The following are defined General Differing Site Conditions:

- A. Subsurface or latent physical conditions at the site differing materially from those indicated in the RIDs or within the information obtained during Phase 1 or reasonably inferred therefrom and are not reasonably discoverable from an investigation and analysis of the site by the Contractor meeting its Standard of Care obligations for such an investigation and analysis, as set forth in the Contract Documents;
- B. Unknown physical conditions of an unusual nature differing materially from those ordinarily encountered and generally recognized as inherent in the Work provided for in the Contract Documents, are encountered at the site;
- C. Unknown physical conditions which are rare for the Project area and type of Project; and
- D. Unknown physical conditions which are not reasonably evident during the design by inspection, or investigations which were performed during the design, or reasonably should have been performed by the Contractor fulfilling its Standard of Care obligations as set forth in the Contract Documents during or before the final design process.

12.7.1.4 Unique Differing Site Conditions

The following are Unique Differing Site Conditions:

12.7.1.4.1 Differing Geotechnical/Hydrological Subsurface Conditions

The Contractor shall be entitled to an adjustment in the Contract Time and/or Contract Price relating to subsurface geologic conditions, including bedrock, soils, or other natural conditions, only if all of the following conditions precedent exist:

- A. The subsurface conditions are materially different from conditions generally recognized as inherent in the nature of the Work in the area of the site of the Work and such conditions adversely impact Contract Price or Contract Time to complete the Work within the Completion Deadlines as set forth in the Contract Documents;
- B. The subsurface conditions were not reasonably discoverable by the Contractor from (i) an analysis of the Department approved site investigation plan developed during

Phase 1 of the Project, (ii) a reasonable investigation of the site during Phase 2, or (iii) an analysis of the site during Phase 1, Phase 2, including subsurface conditions, by the Contractor in fulfilling its obligations pursuant to the Standard of Care under the Contract Documents hereunder prior to submittal of the Contract Price Proposal; and

- C. The subsurface conditions were actually unknown to the Contractor and the Contractor -Related Entities.

12.7.1.4.2 Historic and Archaeological Materials

If the Contractor discovers any object of potential archaeological, paleontological, or other historic interest, all Work that could disturb said object shall immediately cease and shall not be resumed until an investigation of the object and related deposits have been completed and removal of articles of interest has been accomplished. Should such a deposit be discovered, the Contractor shall notify the Department immediately upon Contractor's discovery.

The Contractor shall be entitled to submit an RCO for an adjustment to the Contract Price and/or an EDR for an adjustment to the Contract Time relating to differing site conditions due to historic and archaeological materials only if all of the following conditions exist:

- A. The locations of the subsurface conditions were not described in any documents containing indications of subsurface conditions or site conditions provided to the Contractor;
- B. The subsurface conditions were not reasonably discoverable by the Contractor from (i) an analysis of the Department approved site investigation plan developed during Phase 1 of the Project, (ii) a reasonable investigation of the site during Phase 2, or (iii) an analysis of the site during Phase 1, Phase 2, including subsurface conditions, by the Contractor in fulfilling its obligations pursuant to the Standard of Care under the Contract Documents hereunder prior to submittal of the Contract Price Proposal; and
- C. The subsurface conditions were actually unknown to the Contractor and the Contractor-Related Entities and such conditions adversely impact the Cost or time to complete the Work as set forth in the Contract Documents.

12.7.1.5 Department-Provided Information for Reference and Information Only

The Department is not the designer of the Project and has no knowledge of the Contractor's anticipated use concerning any site information and its importance or lack thereof in the Contractor's design and construction approach. The Contractor shall not be entitled to rely upon the accuracy of such information, and such information shall not serve as the basis for any claim by the Contractor. The Contractor, by submitting its proposal, expressly acknowledges its acceptance of this disclaimer, and shall present no claim for differing site conditions based upon a reliance upon such information regarding site conditions. Notwithstanding the foregoing, so long as the Contractor has complied with the obligations and requirements set forth in Section 3.5.1 (Review of RIDs and Project Site), such RID information may be relied upon by the Contractor in the performance of the Work to the extent that any RID information is explicitly referenced in and/or incorporated into the Phase 2 Change Order and approved by the Department, in which case the Contractor can rely on such RID information only to the extent expressly agreed upon as set forth in the Phase 2 Change Order.

12.7.2 Significant Change in the Character of the Work

The Department reserves the right to make, in writing, at any time during the Work, such changes in quantities and such alterations in the Work as are necessary to satisfactorily complete the Project. Such changes in quantities and alterations shall not invalidate the PDBC nor release the surety, and the Contractor agrees to perform the Work as altered.

If the alterations or changes in quantities significantly change the character of the Work under the PDBC, whether such alterations or changes are in themselves significant changes to the character of the Work or by affecting other Work cause such other Work to become significantly different in character, an adjustment, excluding anticipated profit, will be made to the PDBC pursuant to the process set forth in Section 12.7.2.1 (Procedure for Requesting Contract Price/Completion Deadlines Alterations).

If the alterations or changes in quantities do not significantly change the character of the Work to be performed under the contract, the altered Work will be paid for as provided elsewhere in the contract.

The term "Significant Change" shall be construed to apply only to the following circumstances:

- A. When the character of the Work as altered differs materially in kind or nature from that involved or included in the original proposed construction; or
- B. When the product of the quantity in excess of the estimated quantity of a contract item and the unit price is increased in excess of 125 percent or decreased below 75 percent of the original Contract quantity. Any allowance for an increase in quantity shall apply only to that portion in excess of 125 percent of original contract item quantity, or in case of a decrease below 75 percent, to the actual amount of work performed.

12.7.2.1 Procedure for Requesting Contract Price/Completion Deadlines Alterations

A request for alteration to the Contract Price/Completion Deadlines due to a Significant Change in the character of work as provided in this Section 12.7.2 (Significant Change in the Character of the Work) shall be made by the Contractor notifying the Department of the significant change in the character of work set forth in this Section 12.7.2 in accordance with Section 12.4.1 (Notice of Potential Change Order). Any change in the Contract Price or Contract Time shall occur as a result of the procedures and processes stated in Section 12 (Contract Changes) and/or Section 13 (Time Extension To The Completion Deadlines And Payment For Excusable Delays). Any change in the Contract Price or Contract Time shall occur as a result of the procedures and processes stated in Section 12 and/or Section 13 and;

1. Upon receipt of the Contractor's notice, the Department shall investigate the claimed significant change in the character of work and the Department shall determine whether there has been a significant change in the character of work;
2. If the Department determines a material change in the character of the work did occur, then the Department shall notify the Contractor of the Department's determination;
3. In the event that the Department determines that a significant change in the character of work occurred and the Contractor believes that an adjustment in the Contract Price,

due to an increase in direct costs, the Contractor shall submit an RCO in accordance with Section 12.4 (Change Orders) meeting the requirements listed therein; and/or

4. In the event that the Department determines that a significant change in the character of work occurred and the Contractor believes that it may be entitled to an adjusted Completion Deadline due to delays caused by the significant change in the character of work and/or additional compensation due to Delay Costs arising from the significant change in the character of work, the Contractor shall submit an Excusable Delay Request in accordance with Section 13.4.1 (Excusable Delay Request).

In the event that the Department and Contractor do not agree on the adjustment in the Contract Price or Contract Time pursuant to Section 12.7.2.1 (Procedure for Requesting Contract Price/Completion Deadlines Alterations) and subsequently Section 12 and/or Section 13, the Department and/or the Contractor may elect to proceed with the dispute resolutions procedures in accordance with Section 18.2 (Dispute Resolution).

12.7.3 Unreasonable Suspension of Work

If the performance of all or any portion of the Work is suspended or delayed by the Department in writing for an unreasonable period of time (not originally anticipated, customary, or inherent to the construction industry) and the Contractor believes that such suspension adversely impacted the Contract Price or Contract Time such that the Project Schedule and Completion Deadlines are impacted, Contractor shall notify the Department as specified in Section 12.4.1 (Notice of Potential Change Order).

12.7.3.1 Procedure for Requesting Contract Price/Completion Deadlines Alterations

A request for alteration to the Contract Price/Completion Deadlines due to an unreasonable suspension in work as provided in this Section 12.7.3 shall be made according to the following procedure. Upon the occurrence of an unreasonable suspension in work, the Contractor shall notify the Department of the unreasonable suspension in work set forth in this Section 12.7.3 in accordance with Section 12.4.1 (Notice of Potential Change Order). Any change in the Contract Price or Contract Time shall occur as a result of the procedures and processes stated in Section 12 (Contract Changes) and/or Section 13 (Time Extension To The Completion Deadlines And Payment For Excusable Delays).

1. After receipt of the Contractor's notice, the Department shall investigate the claimed unreasonable suspension in work, and the Department shall determine whether there has been an unreasonable suspension in work, which shall require the Department to agree that the cost or time required for the performance of the Work has increased as a result of such suspension and the suspension was caused by conditions beyond the control of and not the fault of the Contractor, its suppliers, Subconsultant, or Subcontractors at any approved tier, and not caused by Weather;
2. If the Department determines an unreasonable suspension of work did occur, then the Department shall notify the Contractor of the Department's determination;
3. In the event that the Department determines that an unreasonable suspension in work occurred and the Contractor believes that an adjustment in the Contract Price, due to an increase in direct costs, the Contractor shall submit an RCO in accordance with Section 12.4 (Change Orders) meeting the requirements listed therein; and/or

4. In the event that the Department determines that an unreasonable suspension of work occurred and the Contractor believes that it may be entitled to an adjusted Completion Deadline due to delays caused by the unreasonable suspension in work and/or additional compensation due to Delay Costs arising from the unreasonable suspension of work, the Contractor shall submit an Excusable Delay Request in accordance with Section 13.4.1 (Excusable Delay Request).

In the event that the Department and Contractor do not agree on the adjustment in the Contract Price or Contract Time pursuant to Section 12.7.3.1 (Procedure for Requesting Contract Price/Completion Deadlines Alterations) and subsequently Section 12 and/or Section 13, the Department and/or the Contractor may elect to proceed with the dispute resolutions procedures in accordance with Section 18.2 (Dispute Resolution).

12.8 Changes and Extra Work Price Determination

12.8.1 Negotiated Prices

12.8.1.1 Negotiated Prices Computation Methods

Negotiated prices for changes and Extra Work shall be comparable to prices that would have resulted from a competitively bid contract. The Department and Contractor will negotiate: a) agreed unit prices, or b) Lump Sum prices with respect to the Extra Work using one or more of the following methods:

1. Original Contract prices for similar work but adjusted for:
 - a. Increased or decreased Material costs specified in Section 3 (Materials) of Exhibit H (Force Account Provisions).
 - b. Increased or decreased Labor costs specified in Section 2 (Labor) of Exhibit H.
 - c. Increased or decreased Equipment costs specified in Section 4 (Construction Equipment) of Exhibit H.
 - d. These costs and adjustments in prices shall not be subject to inflation or administrative markup by the Contractor where changes and Extra Work are undertaken in whole or in part by Subcontractors.
2. State-wide average unit price awarded for the item or items as listed in the Department's annual "Summary of Contracts Awarded." These prices may be adjusted for inflation using factors issued by the Office of Construction Administration. No markup for Subcontractor work is allowed.
3. Average price awarded on three different projects of similar work and quantity. These prices may be adjusted for inflation using factors issued by the Office of Construction Administration. No markup for Subcontractor work is allowed.
4. Prices computed by the Department's Office of Estimating.
5. Cost analysis of labor, Material, Equipment, and markups as allowed in Exhibit H.
6. The pricing process in accordance with Exhibit G (Opinion of Probable Cost (OPC) and Pricing Process).

7. For the cost of compensable delays as defined in Section 13.2.2 (Category 2 – Excusable, Compensable Delays), prepare a cost analysis as allowed and specified by Exhibit I (Delay Costs).

12.8.1.2 Contractor Justification for Negotiated Prices

The Contractor shall provide proposed pricing and cost justification for changes or Extra Work within three Working Days after the Department's request. The Department will respond within 3 Working Days after receipt of the Contractor's proposal. The Department and the Contractor can mutually agree to extend these time limits.

If the Department negotiates with the Contractor but does not agree on a price adjustment, the Department may direct the Contractor to perform all or part of the revised Work under Exhibit H (Force Account Provisions).

12.8.2 Force Account

The Department may direct the Contractor to perform revised Work or Extra Work under force account provisions. In the event that the Department instructs the Contractor to perform under force account provisions, the Contractor must submit a written proposal and estimated costs for the Work, including the planned Equipment, Materials, Labor, and a work schedule. The Contractor should Refer to Exhibit H (Force Account Provisions) for detailed processes, procedures and eligibility for compensation for force account Work.

When submitting the written proposal and estimated costs for revised Work or Extra Work performed under force account provisions, the Contractor shall not be permitted to apply the Phase 2 Markup, to such estimated costs as mark-up for such revised Work or Extra Work shall be determined in accordance with Exhibit H.

12.8.3 Changes in Materials

If Department directed Changes in Material specifications result in increased cost to the Contractor, the costs shall be compensated by lump sum adjustment to the reference number. The lump sum adjustment shall be equal to the invoice supported Material cost. These costs shall not be eligible for the Contractor to apply its standard mark up for profit and overhead.

If Department directed Changes in Material result in cost savings due to a specification change, such cost savings shall be credited to the Project by a lump sum adjustment to the reference including a 15 percent markup if the originally specified Material has not been ordered. If the Material had been ordered before the Contractor was informed of the change, the savings markup allowed is 2.5 percent, in order to exclude profit on the original bid price and pay only for incurred overhead.

12.8.4 Directed Acceleration

The Department may order the Contractor to accelerate the Work to avoid delay costs or to complete the Project early. The Department and the Contractor will negotiate acceleration costs. If the Contractor requests a time extension, then the Department may require Contractor to provide two several alternative requests for Change Order in accordance with Section 12.4 (Change Orders), one that provides for a time extension, and any one that provides for any

permitted additional costs, and/or another that shows all acceleration costs associated with meeting the non-extended Completion Deadlines, as well as any permitted additional costs.

12.8.5 Recovery Schedules

In the event that a Monthly Progress Update Schedule shows that the Opening Deadline, Interim Completion Deadline, Substantial Completion Deadline, or Completion of the Contract Deadline more than 14 Days behind schedule, or at the Department's request after it becomes apparent that the Work cannot be completed by the contractual Completion Deadline(s) the Contractor, the Contractor shall submit a proposed recovery schedule.

Such recovery schedule shall be created by the Contractor in accordance with Section 1.9, B (Recovery Schedule Preparation) and Section 1.9, C (Submission Requirements) of Exhibit T (Critical Path Method Progress Schedule) and shall be evaluated in accordance with Section 1.9, D (Recovery Schedule Review) of Exhibit T.

In any event, the Contractor shall provide additional labor, Equipment, and/or Materials, work additional shifts, and/or expedite procurement to complete the Work within the Completion Deadlines at no additional cost to the Department.

12.8.6 Inefficiency

The Department will compensate the Contractor for inefficiency or loss of productivity resulting from Change Orders pursuant to Section 12.4 (Change Orders), Changes and Extra Work resulting from Section 12.8 (Changes and Extra Work Price Determination), and revisions to this PDBC occurring under Section 12.7 (Revisions to the Contract Documents).

12.8.6.1 Inefficiency Calculation

The Department shall use the Measured Mile analysis comparing the productivity of Work impacted by a change to the productivity of similar work performed under un-impacted conditions to prove and quantify the inefficiency. This analysis relies on such data that shall be jointly tracked by the parties. This Measured Mile analysis shall be submitted in conjunction with any RCO as additional information.

The Department shall use the following calculation for the Measured Mile analysis:

Additional Crew Hours = (Unit Productivity Unimpacted Period - Unit Productivity Impacted Period)/Unit Productivity Unimpacted Period x (Number of Units During Impacted Period/Unit Productivity Impacted Period).

12.8.6.2 Inefficiency Notice

If the Contractor believes that it is suffering from inefficiency or loss of productivity from events specified in Section 12.8.6 (Inefficiency), the Contractor shall Provide notice as per Section 12.4.1 (Notice of Potential Change Order).

12.8.7 Unrecoverable Costs

The Contractor is not entitled to additional compensation for costs not specifically allowed or provided for in Section 12.8 (Changes and Extra Work Price Determination) including, but not limited to, the following:

1. Loss of anticipated profit;
2. Consequential damages, including loss of bonding capacity, loss of bidding opportunities, insolvency, and the effects of force account work on other projects, or business interruption;
3. Indirect costs; and
4. Attorney's fees, claim preparation expenses, and the costs of litigation.

13 TIME EXTENSION TO THE COMPLETION DEADLINES AND PAYMENT FOR EXCUSABLE DELAYS

13.1 Time Extensions to Completion Deadlines

The Contractor shall only be entitled to extension of the Completion Deadlines and the Department will only extend the Completion Deadlines if an “Excusable Delay”, as specified in Section 13.2.1 (Category 1 Events – Excusable, Non-Compensable Delays) or Section 13.2.2 (Category 2 Events – Excusable, Compensable Delays), delays Work on the Critical Path shown on the accepted Baseline Schedule and impacts the Completion Deadlines. Any extension of the Completion Deadlines or increase in Contract Price due to Delay Costs will be executed by a Change Order in accordance with Section 12.4 (Change Order). Any change in the Contract Price due to delay costs will require a change in the Contract Time as a condition precedent.

13.2 Categories of Excusable Delays Events

Excusable Delays are classified into two subcategories, each of which are excusable for events that directly impact the Critical Path of the Baseline Schedule that adversely impacts the Completion Deadlines.

13.2.1 Category 1 Events - Excusable, Non-Compensable Delays

Category 1 Events are events that cause delays that are excusable but non-compensable and that are not the Department’s fault or responsibility. The Department will not grant additional compensation or adjustment in the Contract Price for Category 1 Events as set forth herein.

The following are defined as Category 1 Events:

- A. Delays due to:
 - a. Floods;
 - b. Lightning strikes;
 - c. Tornadoes (classified as EF-2 or greater on the Enhanced Fujita Scale by the National Weather Service);
 - d. Earthquakes (classified as EF-2 or greater on the Enhanced Fujita Scale by the National Weather Service); or
 - e. Other cataclysmic phenomena of nature.
- B. Delays due to fire.
- C. Delays due to weather as specified in Section 15 (Weather).
- D. Extraordinary delays in material deliveries the Contractor or its Suppliers cannot reasonably foresee or reasonably avoid or mitigate resulting from freight embargoes, government acts, or area-wide material shortages as determined by the Department.
- E. Delays due to the Contractor’s, Subcontractor’s, or Supplier’s insolvency or mismanagement are not excusable.

- F. Delays due to local, state, or federally mandated quarantine restriction occurring within the Site.
- G. Delays due to civil disturbances.
- H. Delays from epidemics and pandemics excluding any delays caused or associated with COVID-19.
- I. Delays from labor strikes that are beyond the Contractor's, Subcontractor's, or a Supplier's power to settle and are not caused by improper acts or omissions of the Contractor, Subcontractor, or a Supplier.
- J. Added quantities directed by the Department that delay an activity on the Critical Path.
- K. All other delays not the Department's fault or responsibility, including but not limited to a Force Majeure event as described in Section 14 (Force Majeure Events).

Notwithstanding the foregoing, Category 1 Events, as described above in this Section, may be Risk Register Events identified on the Risk Register by the Parties as either Department Risks or risks utilizing Provisional Sums, pursuant to Section 2.6.1.1 (Risk Register) and may be eligible for a Change Order in accordance with Section 2.6.1.1.

13.2.2 Category 2 Events – Excusable, Compensable Delays

Category 2 Events are events that cause delays in the completion of Work on the Critical Path that adversely impact the Completion Deadlines that are excusable and compensable that are: (i) not the Contractor's fault or responsibility, (ii) the Department's fault or responsibility or (iii) otherwise determined by judicial proceeding to be the Department's sole responsibility or are the fault and responsibility of a Government Entity and are listed in this Section 13.2.2, 1-9 below. Any event that is not listed in such sections shall be considered for all purposes, a Category 1 Event. The Department will extend the Completion Deadlines with respect to a Category 2 Event if the procedure specified in Section 13.4 (Procedure for Requesting Delay Costs and Completion Deadlines Alteration) is met. The following are defined as Category 2 Events.

1. Delays due to revised Work as specified in Section 12.7.1 (Differing Site Conditions), Section 12.7.2 (Significant Change in the Character of Work), or Extra Work.
2. Delays due to interference or failure by Utility owners to relocate or adjust facilities as specified in Section 7 (Utilities and Railroads) within the Project Limits.
3. Delays due to railroad interference within the Project Limits or failure by a railroad to adhere to the requirements of a Railroad Agreement as specified in Section 7.
4. Delays due to a Department-ordered suspension as specified in Section 12.7.3 (Unreasonable Suspension of Work).
5. Delays due to the failure by the Department to furnish the Project ROW in accordance with the schedule for parcel availability included in the Phase 2 Change Order or Work Package as specified in Section 5.8 (Furnishing Right-of-Way).
6. Delays due to the discovery within or adjacent to the Project Site of Unknown Regulated Materials.
7. Delays due to the discovery within or adjacent to the Project Site of a Threatened or Endangered Species.

8. Delays due to acts of the government or a political subdivision other than the Department.
9. Delays due to the neglect of the Department or its failure to act in a timely manner, including but not limited to, delays caused by the Department's failure to timely pay an undisputed payment resulting in Contractor suspension, as described in Section 19.2.1 (Contractor's Right to Stop Work If Undisputed Payment is Not Made).

Compensation for excusable, compensable delays will be determined by the Department according to Exhibit I (Delay Costs).

13.3 Limitations on Excusable Delays

None of the events described in Section 13.2 (Categories of Excusable Delay Events) shall be deemed an Excusable Delay to the extent that performance of the Work would have been suspended, delayed, or interrupted by any other cause, including the negligence, reckless or willful misconduct, act or omission, or breach or violation of applicable Law, Governmental Approval, or contract (including any Contract Document) by the Contractor or any Contractor-Related Entity on any part of the Project.

With respect to Category 1 Events where the Contractor is excused from performance for a period of time and/or afforded additional time for performance, delays are measured as direct delays to the Critical Path on the affected Baseline Schedule that impacts the Completion Deadlines as determined in accordance with Section 13 (Time Extension to the Completion Deadlines and Payment for Excusable Delays) and Exhibit I (Critical Path Method Progress Schedule).

With respect to Category 2 Events for which the Contractor is excused from performance for a period of time and/or afforded additional time for performance and granted an increase in Contract Price, the amount of the additional compensation shall be based upon the Detailed Cost Analysis set forth in Section 13.4.1.1 (Detailed Cost Analysis).

Without limiting the Contractor's general duty of mitigation, Excusable Delay Events shall be limited to the extent that the adverse effects of the Excusable Delay Events could have been avoided by the exercise of caution, due diligence, or reasonable efforts by the Contractor or any Contractor-Related Entity acting in accordance with the Standard of Care in all circumstances to the extent possible. Furthermore, the mitigation of any delay, whether caused by the Department, Contractor, third-party or an intervening event, is a shared obligation of the Contractor pursuant to the Contract Documents. Contractor's mitigation efforts include, but are not limited to, re-sequencing work activities, redesigning efforts, acceleration, and continuation of work through an otherwise planned shutdown period. The Contractor and Department must address and develop potential mitigation efforts in a timely manner.

If the Contractor seeks relief for any costs that are covered by insurance required to be placed under this Contract, then the Contractor shall only be entitled to seek adjustments to the Baseline Project Schedule and not to any increase in the Contract Price; provided, however, that nothing in this Section 13.3 (Limitations on Excusable Delays) shall be construed to preclude the Contractor's recourse to any insurance policy or coverages.

13.4 Procedure for Requesting Delay Costs and Completion Deadlines Alterations

13.4.1 Excusable Delay Request

The Contractor shall provide written notification, and such written notice shall be accompanied by supporting analysis, including a time analysis in accordance with Exhibit T (Critical Path Method Progress Schedule), and documentation related to the occurrence of an Excusable Delay Event (the “Excusable Delay Request”), to the Department within fourteen (14) Days following the Department’s issuance of the Department Change Event Notice giving rise to the EDR, or in the event of a delay caused by weather within fourteen (14) days of the Department’s confirmation of the Contractor’s eligibility for a change in the Contract Time in accordance with Exhibit T, and such notice shall be accompanied by supporting analysis, including a time analysis in accordance with Exhibit T, and documentation related to the occurrence of an Excusable Delay Event, (the “Excusable Delay Request”). In the event the Contractor contends believes that the Excusable Delay Event is a Category 2 Event under Section 13.2.2 (Category 2 Events – Excusable Compensable Delays), the Contractor shall submit a detailed cost analysis of the requested additional compensation (the “Detailed Cost Analysis”) as a part of the Excusable Delay Request for applicable delay costs outlined in Exhibit I (Delay Costs). The Excusable Delay Request shall only be considered by the Department provided the Contractor initiated the performed all required actions as requires as set forth under in Section 12.4.1 (Notice of Potential Change Order) and its subsections. If the notice(s) required under Section 12.4.1 are not properly completed and submitted to the Department, the Department is under no obligation to consider any Excusable Delay Request. The Department may, but is not obligated to, consider any EDR submitted outside of the fourteen (14) Day timeframes listed above.

13.4.1.1 Detailed Cost Analysis

The Contractor’s Detailed Cost Analysis submitted with the Excusable Delay Request shall set forth: (1) an initial estimate by the Contractor utilizing the information and formulas to calculate Delay Costs as specified in Exhibit I (Delay Costs) caused by the Excusable Delay Event, if any, (2) a reasonably detailed description of the Excusable Delay Event including all relevant circumstances, (3) a time impact analysis in accordance with Exhibit T (Critical Path Method Progress Schedule) determining the number of Days of delay to the Critical Path of the affected Baseline Schedule, and (4) such supporting documents and other information that may be reasonably necessary for the Department to accurately and effectively consider the Excusable Delay Request.

13.4.2 Department Decision

The Department will evaluate the Contractor’s Excusable Delay Request and Detailed Cost Analysis, if any, and shall determine if a change in Contract Time, if any, and/or change in Contract Price, if any, is warranted (the “Department’s Decision”). The Department will measure all time extensions in calendar days. Time Extensions shall be calculated as defined in Exhibit T (Critical Path Method Progress Schedule).

Any compensation that the Contractor may be entitled to will be calculated in accordance with Exhibit I (Delay Costs).

13.4.2.1 Department Standards and Requirements

When rendering the Department's Decision, the Department reserves the right to rely on the following Department standards and requirements when determining if the Contractor is entitled to a time extension or increased compensation.

1. The Department will not grant an extension of time for delays incurred from December 1 to April 30 for Construction Work unless the Contractor's Baseline Schedule depicts Work on the Critical Path occurring during this period.
2. The Contractor's plea that insufficient time was specified is not a valid reason for an extension of time.
3. The Department will relieve the Contractor from associated liquidated damages, as specified in Section 13.7.1.1 (Liquidated Damages), if the Department extends the Completion Deadlines under this Section 13.4 (Procedure for Requesting Delay Costs and Completion Deadlines Alterations).

13.4.3 Department Notice

After the Department conducts its analysis in Section 13.4.2 (Department Decision) the Department shall inform the Contractor within fourteen (14) Days of the Department's Decision in writing (the "Department Notice"). In the event that the Department determines that the Excusable Delay Event should result in an extension to the Completion Deadlines for the entire Project and/or the Completion Deadlines for an individual Work Package or an increase in the Contract Price, the Department Notice shall instruct the Contractor to submit an RCO requesting a change to the Contract Time and, if applicable, an RCO requesting a change in Contract Price, as a result of delay costs. The Contractor must then submit any RCO recommended in the Department Notice within seven (7) Days of receipt of the Department Notice, in order to process any adjustment(s) based upon the Excusable Delay Event. Any adjustment to any Completion Deadlines as a result of an Excusable Delay Change Order, shall then have the same standing and effect as though it was the original Completion Deadlines. The Contractor RCO required by this section shall meet all requirements of Section 12.4 (Change Orders). To the extent required, the Contractor shall be able to repackage and/or organize the Department's Notice and/or Department's Decision and the Contractor's EDR to meet the requirements of Section 12.4.

If the Contractor fails to deliver the RCO specified in Section 12.4 above within such seven (7) Days of the required period set forth herein, the Contractor shall have irrevocably and forever waived and released any claim or right to relief for the adverse effect attributable to the Excusable Delay Event occurring before the date of actual delivery of an Excusable Delay Request.

In the event the Department has determined that the Excusable Delay Event does not warrant a Change Order, the Contractor may elect to proceed with the Dispute Resolution Procedures pursuant to Section 18.2 (Dispute Resolution), in which case the notices in Section 12.4.1 (Notice of Potential Change Order) shall satisfy the notice requirements of Section 18.2. The Department may proceed to issue a Construction Change Directive in accordance with Section 12.5 (Construction Change Directive).

13.5 Non-Excusable Delays

Unless listed in Section 13.2.1 (Category 1 Events – Excusable, Non-Compensable Delays) or Section 13.2.2 (Category 2 Events – Excusable, Compensable Delays), all other causes of delay shall be considered non-excusable delays and shall be non-compensable.

13.6 Concurrent Delays

Concurrent delays are separate delays to the Critical Path that occur simultaneously. When a non-compensable delay is concurrent with a compensable delay, the overlapping portion of the delays is considered non-compensable. The Contractor shall be entitled to additional time provided that such event adversely impacted the Completion of the Work on the Critical Path as set forth in the Baseline Schedule and directly impacted the Completion Deadlines. In such event, the Contractor may be entitled to extension of the Completion Deadlines but not to additional compensation.

13.7 Failure to Complete On Time

If the Contractor fails to complete the Work by the Completion Deadlines, then the Department, has the option, subject to its discretion, to either permit the Contractor to continue working on the Project or exercise such rights and remedies as set forth in the Contract Documents.

13.7.1 Contractor Continued Work

If the Department is satisfied that the Contractor is making reasonable progress and deems it in the best interest of the public, the Department may allow the Contractor to continue in control of the Work, prosecute the Work, at such times, with such forces, and in such locations as the Department requests. The Department shall inform the Contractor of its decision to allow the Contractor to continue with the Work by written notice within three (3) Days after the expiration of the applicable Completion Deadlines. Within seven (7) Days of the receipt of the Department's decision to allow the Contractor to continue the Work, the Contractor shall provide and deliver a written plan for the completion of the Work (the "Continued Work Plan") to the Department.

In the event the Department permits the Contractor to continue the Work beyond the Completion Deadlines, the Department will pay the Contractor for all Work performed on the Project less any Liquidated Damages as described in Section 13.7.1.1 (Liquidated Damages).

The Department's decision to permit the Contractor to continue and complete the Work or any part of the Work after the Completion Deadlines, or after extensions to the Completion Deadlines, will in no way operate as a waiver on the part of the Department of any of its rights and remedies under the PDBC.

13.7.1.1 Liquidated Damages

The Contractor understands and agrees that if the Contractor fails to complete the Work by the Completion Deadlines, then the Department will sustain damages as a result of the untimely completion.

The Contractor further acknowledges and agrees that the damages sustained by the Department in the event that Contractor fails to complete the Work by the Completion Deadlines

are and will be impracticable or extremely difficult to ascertain, due to the circumstances existing as of the date of execution and delivery of this PDBC. Thus, damages arising out of the failure by the Contractor to complete the Work by the Completion Deadlines may arise from or include:

- (i) substantial losses and damages to the Department;
- (ii) Contractor's safety violations;
- (iii) failure to implement and monitor environmental mitigation requirements;
- (iv) unreasonable inconvenience to the public and impacts to private property resulting in claims against Department;
- (v) increased costs for PDBC administration due to the lengthened time span of the Work; and
- (vi) delays and increased costs to Department's Contractors resulting in claims to Department.

The Contractor understands and agrees that (1) if it fails to timely complete the Work by the Completion Deadlines in accordance with this PDBC, the Department will suffer damages, (2) that it is and will be impracticable or extremely difficult to ascertain the actual damages that Department will sustain in the event of and by the reason of such untimely performance of the Work, and (3) the Department has stipulated the amount payable as liquidated damages as stated in Exhibit B (Contract Particulars – Liquidated Damages for Phase 2 Work) (the “Liquidated Damages”). The amount of Liquidated Damages set out in Exhibit B (Contract Particulars – Liquidated Damages for Phase 2 Work) represents a good faith estimate as to the actual potential damages that the Department would incur as a result of the untimely completion of the Work by the Completion Deadlines.

The Liquidated Damages payable under this Section 13.7.1.1 will be payable for each Day the Completion Date exceeds the Substantial Completion Deadline, subject to Section 13.7 (Failure to Complete on Time).

The Department may deduct the sum of Liquidated Damages from any progress payments due to the Contractor for the performance of the Work as a result of these losses and damages as liquidated damages. In the event that the progress payments due to the Contractor are insufficient, the Contractor or its Surety shall pay to Department any deficiency.

The Contractor understands and agrees that any Liquidated Damages imposed on the Contractor are not a penalty and that such sums are reasonable under the circumstances existing as of the date of execution and delivery of this PDBC. The Contractor further acknowledges and agrees that Liquidated Damages may be owing even though no Contractor Default, as specified in Section 19.1.1 (Breach by the Contractor), has occurred.

The accrual of Liquidated Damages will terminate upon the Department's notification to the Contractor of Substantial Completion of the Work.

The fact that the Department has agreed to accept the Liquidated Damages as compensation for its damages associated with the Contractor not completing the Work by the Completion Deadline shall not excuse the Contractor from liability for any other breach of the Contract Documents, including any failure of the Work to conform to applicable requirements set forth in the Contract Documents. Further, the assessment of Liquidated Damages shall not preclude the Department

from exercising its other rights and remedies with respect to the delay including those set forth in Section 19.1.3 (Rights of the Department) for a Default, or elsewhere in this PDBC. The Department will adjust the Completion Deadlines or other contractually mandated dates for delays specified in Section 13.2.1 (Category 1 Events – Excusable, Non-Compensable Delays) and Section 13.2.2 (Category 2 Events – Excusable, Compensable Delays).

13.7.1.2 Petition to Suspend Liquidated Damages

In the sole event where the Project is available for use as intended by the PDBC and the Work remaining will not adversely impact traffic, where the closing of a shoulder shall not be considered an impact on traffic, the Contractor may submit a petition to the Department to suspend the assessment of liquidated damages for a stated period of time.

The Contractor must submit the petition to suspend the assessment of liquidated damages in writing within thirty (30) Days of the assessment of the liquidated damages. This request to suspend the assessment of liquidated damages must be made subsequent to the delivery of the Continued Work Plan. The request must also include at a minimum, the Work left to be completed, the reason(s) the Work is incomplete or on hold, as well as, methods, resources and timelines for pursuing the same. This request must also explain in detail how the Contractor intends to diligently pursue the completion of the Work in order to be accepted by the Department.

13.7.1.3 Department Analysis of Contractor Petition

The Department shall have the right, subject to its discretion, which may be exercised for any reason or no reason whatsoever, to accept the petition. Once accepted, and provided both of the following criteria of this Section 13.7.1.3 (Department Analysis of Contractor Petition) clauses 1 and 2 are met, the Department may suspend the assessment of liquidated damages. The criteria are:

1. The Contractor is diligently pursuing the remaining Work, as specified in the petition.
2. Necessary items are completed and operational to provide an appropriate level of safety to the traveling public. These items include but are not limited to: signs, pavement markings, guardrail, attenuators, signals and RPM's.

14 FORCE MAJEURE EVENTS

A “Force Majeure” event means the following events or circumstances, but only (i) to the extent such event or circumstance is beyond the reasonable control of Contractor, (ii) to the extent Contractor shall have taken all reasonable precaution to prevent and minimize the effect of such delays by reason of such event or circumstance if such event or circumstance was actually known in advance to Contractor, and (iii) to the extent such event or circumstance is not caused by the fault or negligence of Contractor or any of its employees, agents or contractors: (a) acts of God, including floods, hurricanes, tornadoes, earthquakes, and landslides; (b) fires or other casualties; (c) governmental moratorium; (d) acts of a public enemy, civil commotions, riots, insurrections, acts of war, blockades, terrorism, effects of nuclear radiation, or national or international calamities; (e) sabotage; and (f) epidemics and pandemics excluding any delays or effects caused or associated with COVID-19.

If the Contractor asserts Force Majeure as an excuse for failure to perform its obligations, then the Contractor must establish that it initiated reasonable and prudent actions to minimize the delay or damages caused by the foreseeable events flowing from the Force Majeure event, substantially fulfilled all non-excused obligations, and that the Department was timely notified of the likelihood or actual occurrence of the Force Majeure event.

In the event of a Force Majeure event, the Contractor shall be entitled only to an extension of the Contract Time associated with the Force Majeure event and not to any adjustment of the Contract Price, as Force Majeure events are classified as Category 1 Events as described in Section 13.2.1 (Category 1 Events – Excusable Non-Compensable Delays). Section 13 (Time Extension to the Completion Deadlines and Payment for Excusable Delays) sets forth the terms and conditions applicable to Contractor’s request for an extension of Contract Time associated with a Force Majeure event.

The Contractor shall not be entitled to an adjustment in Contract Price or Contract Time for delays associated with a Force Majeure event within the control of the Contractor. Delays attributable to and within the control of a Subcontractor or Supplier shall be deemed to be delays within the control of the Contractor.

Notwithstanding the foregoing, the lack of financial resources or any other financial condition affecting Contractor shall not constitute a Force Majeure Event.

15 WEATHER

The Contractor shall not be entitled to an extension of time or additional compensation and the Department will not allow any extension of time for weather or resulting conditions beyond those specifically set forth herein in this Section 15 (Weather).

A Weather Day is “a Workday during which weather or seasonal conditions reduced production by more than 50 percent on items of work on the Critical Path.”

If the Contractor believes that it has suffered from Weather Days in excess of the Table T-1 (Weather and Seasonal Conditions Table) of Exhibit T (Critical Path Method Progress Schedule), resulting in a need for a potential change in the Contract Time, then the Contractor shall provide notice, in accordance with Section 12.4.1 (Notice of Potential Change Order), to the Department of the potential need for a change in the Contract Time as a result of weather. After providing written notice in accordance with Section 12.4.1, the Contractor shall perform an analysis to determine the schedule impacts due to weather per Exhibit T. The Contractor shall then proceed with the procedures outlined in Exhibit T and submit the necessary schedules in accordance with Section 1.8, C (Submissions Requirements) of Exhibit T.

The Department will then review the timely submissions by the Contractor required by Section 1.8, C of Exhibit T in accordance with Section 1.8, D (Weather Delay Schedule Review) of Exhibit T.

In the event that the Department determines and confirms the Contractor is eligible for a change to the Contract Time, in accordance with Exhibit T, then the Contractor shall submit an Excusable Delay Request (EDR) and comply with the procedures outlined in Section 13 (Time Extension to the Completion Deadlines and Payment for Excusable Delays).

In the event that the Department disputes the Contractor’s eligibility for a change in the Contract Time, the Contractor may then elect to proceed with Dispute Resolution Procedures set forth under Section 18.2 (Dispute Resolution).

The Department will not consider weekends and holidays as lost Workdays unless the Contractor normally works those days as set forth in the Baseline Schedule or unless the Department directs the Contractor to work those days.

Delays to the Completion Deadlines for Design Work attributable to Weather or seasonal conditions shall not be considered as permitted.

16 INDEMNITY

16.1 Indemnifications by Contractor

16.1.1 General Provisions

The Contractor shall release, defend, indemnify and hold harmless the State of Ohio, the Department, the Department's consultants, the Department's attorneys, and all their respective officers, agents, and employees, their successors and assigns, and their respective board members, council members, officers, directors, agents and employees (collectively referred to as the "Indemnified Parties") from and against any and all claims, causes of action, suits, judgments, investigations, legal or administrative proceedings, and losses incurred in connection with the enforcement of this indemnity, arising out of, relating to or resulting from the following, (each an "Indemnified Claim") only to the extent that the damages of the Indemnified Claim were caused by the Contractor:

- (1) The breach or alleged breach of any of the Contract Documents by any Contractor-Related entity; and/or
- (2) The failure or alleged failure by any Contractor-Related Entity to comply with the governmental approvals, any applicable environmental laws or other governmental rules (including governmental rules regarding Regulated Materials Management); and/or
- (3) Any actual or 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 Department or another Indemnified Party pursuant to the Contract; provided that this indemnity shall not apply to any infringement directly resulting from a method, process or design specifically required by the Contract Documents and by the Department's failure to comply with specific written instructions regarding use provided to the Department by the Contractor; and/or
- (4) The actual or alleged culpable act, error, omission, negligence, breach or misconduct of any Contractor-Related Entity in or associated with performance of the Work; and/or
- (5) Any and all claims, actual or alleged, by any governmental entity or taxing authority claiming taxes based on gross receipts, purchases or sales, 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; and/or
- (6) 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 and any other liability to Subcontractors for failure to pay sums due for their work or services, provided that the Department is not in default in undisputed payments owing to the Contractor with respect to such Work; and/or

- (7) Any actual or alleged spill or release or threatened spill or release of a Regulated Material (i) which was brought onto the Site by any Contractor-Related Entity, or (ii) attributable to the negligence, willful misconduct, or breach of contract, Governmental Approval or governmental rule by any Contractor-Related Entity; and/or
- (8) Any actual or alleged 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, or failure of any Contractor-Related Entity to cooperate reasonably with other contractors in accordance therewith; and/or
- (9) Any actual or alleged Contractor Related Entity's breach of or failure to perform an obligation that the Department owes to a third person, including governmental entities, under law or under any agreement between the Department and a third person, where the Department has delegated performance of the obligation to the Contractor under the Contract Documents or (ii) the acts or omissions of any Contractor-Related Entity which render the Department unable to perform or abide by an obligation that the Department owes to a third person, including governmental entities, under any agreement between the Department and a third person, where the agreement was expressly disclosed to the Contractor; and/or
- (10) Inverse condemnation, trespass, nuisance or similar taking of or harm to real property by reason of: (i) the failure of any Contractor-Related Entity to comply with the Standard of Care, requirements of the Contract Documents, Project Management Plan or governmental approvals respecting control and mitigation of construction activities and construction impacts, (ii) the intentional misconduct or negligence of any Contractor-Related Entity, or (iii) the actual physical entry onto or encroachment upon another's property by any Contractor-Related Entity.

In addition to the Indemnified Parties, the Contractor will indemnify and hold harmless municipalities, counties, public utilities, any affected railroad or railway company, and any fee owner from whom a temporary Right-of-Way was acquired for the Project for any Indemnified Claim set forth in Section 16.2 (Defense and Indemnification Procedures).

16.1.2 Restrictions on Indemnities

The following restriction shall apply to the indemnities set forth in this Section 16.1:

Contractor's indemnity obligation shall not extend to any Loss, damage or cost to the extent that such Loss, damage or cost was caused by the either acts or omissions of the Department resulting in gross negligence or willful misconduct of such Indemnified Party or its agents, servants or independent contractors who are directly responsible to such Indemnified Party.

Such indemnities shall not inure to the benefit of an Indemnified Party so as to impose liability on the Contractor for the active gross negligence or willful misconduct of the Department, or to relieve the Department of liability for such active gross negligence or willful misconduct.

16.1.3 Not Limited by Workers' Compensation, Disability, or Employee Benefits Laws

In claims by an employee of the Contractor, a Subcontractor, Subconsultant, or anyone directly or indirectly employed by them or anyone for whose acts they may be liable, the indemnification

obligation under this Section 16.1 shall not be limited by a 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.

16.2 Defense and Indemnification Procedures

16.2.1 Department's Notice of Indemnified Claim

If any of the Indemnified Parties receives notice of a claim, action, suit or other matter covered under Section 16.1 (Indemnifications by Contractor) or otherwise has actual knowledge of an Indemnified Claim that it believes is within the scope of the indemnities under Section 16.1, the Department shall by writing as soon as practicable after receipt of the Indemnified Claim: (a) inform the Contractor of the Indemnified Claim, (b) send to the Contractor a copy of all written materials the Department has received asserting such Indemnified Claim and (c) notify the Contractor that should no insurer accept defense of the Indemnified Claim, the Indemnified Party will conduct its own defense unless the Contractor accepts the tender of the Indemnified Claim in accordance with Section 16.2.4 (Tender of Defense to Contractor). As soon as practicable after the Contractor receives notice of an Indemnified Claim or otherwise has actual knowledge of an Indemnified Claim, it shall tender the Indemnified Claim in writing to the insurers under all potentially applicable insurance policies. The Department and other Indemnified Parties also shall have the right to tender such Indemnified Claims to such insurers.

16.2.2 Cooperation in the Insured Defense

If the insurer under any applicable insurance policy accepts the tender of defense, of any claim, action or suit or other matter covered under Section 16.1 (Indemnifications by Contractor) or otherwise covered under such policy, the Department and the Contractor shall cooperate in the defense as required by the insurance policy.

16.2.3 Rejection of Defense By Insurer/Reservation of Rights by Insurer

If the insurer(s) under potentially applicable insurance policy(ies) refuses to provide defense of any claim, action, suit or other matter covered under Section 16.1 (Indemnifications by Contractor) or otherwise, then this Section 16.2.3 shall apply. If the insurer(s) under potentially applicable insurance policy(ies), agree to provide a defense of any claim, action, suit or other matter covered under Section 16.1 or otherwise, that the insurer(s) accept the defense subject to a "reservation of rights," Section 16.2.2 (Cooperation in the Insured Defense) shall apply until such time that the insurer(s) may subsequently deny further defense and coverage for such claim, action, suit or other matter, where upon Section 16.2.4 (Tender of Defense to Contractor) shall apply.

16.2.4 Tender of Defense to Contractor

If the defense is tendered to the Contractor, then within 30 days after receipt of the tender it shall notify the Indemnified Party whether it has tendered the matter to an insurer and (if not tendered to an insurer or if the insurer has rejected the tender) shall deliver a written notice stating that the Contractor:

- A. Accepts the tender of defense and confirms that the Indemnified Claim is subject to full indemnification hereunder without any "reservation of rights" to deny or disclaim full indemnification thereafter;

- B. Accepts the tender of defense but with a "reservation of rights" in whole or in part; or
- C. Rejects the tender of defense based on a determination that it is not required to indemnify against the Indemnified Claim under the terms of this Contract.

16.2.5 Acceptance of Tender/Control of Defense by Contractor

If the Contractor accepts the tender of defense under Section 16.2.4, A (Tender of Defense to Contractor), the Contractor shall have the right to select legal counsel for the Indemnified Party, subject to reasonable approval by the Indemnified Party, and the Contractor shall otherwise control the defense of such Indemnified Claim, including settlement, and bear the fees and costs of defending and settling such Indemnified Claim. During such defense:

- (1) The Contractor shall fully and regularly inform the Indemnified Party of the progress of the defense and of any settlement discussions; and
- (2) The Indemnified Party shall fully cooperate in said defense, provide to the Contractor all materials and access to personnel it requests as necessary for defense, preparation and trial and which or who are under the control of or reasonably available to the Indemnified Party, and maintain the confidentiality of all communications between it and the Contractor concerning such defense.

16.2.6 Control of Defense by Indemnified Party

If the Contractor responds to the tender of defense as specified in Section 16.2.4, B or Section 16.2.4, C (Tender of Defense to Contractor), the Indemnified Party shall be entitled to select its own legal counsel and otherwise control the defense of such Indemnified Claim, including settlement.

16.2.7 Control of Defense if Conflict

The Indemnified Party may assume its own defense by delivering to the Contractor written notice of such election and the reasons therefore, if the Indemnified Party, at the time it gives notice of the Indemnified Claim or at any time thereafter, reasonably determines that:

- (1) A conflict exists between it and the Contractor which prevents or potentially prevents the Contractor from presenting a full and effective defense;
- (2) The Contractor is otherwise not providing an effective defense in connection with the Indemnified Claim; or
- (3) The Contractor lacks the financial capacity to satisfy potential liability or to provide an effective defense.

16.2.8 Reimbursement of Expenses

If the Indemnified Party is entitled and elects to conduct its own defense pursuant hereto of an Indemnified Claim for which it is entitled to indemnification, the Contractor shall reimburse on a current basis all reasonable costs and expenses the Indemnified Party incurs in investigating and defending. In the event the Indemnified Party is entitled to and elects to conduct its own defense, then:

- A. In the case of a defense conducted under Section 16.2.4, A (Tender of Defense to Contractor) it shall have the right to settle or compromise the Indemnified Claim with

the Contractor 's prior written consent, which shall not be unreasonably withheld or delayed;

- B. In the case of a defense conducted under Section 16.2.4, B, it shall have the right to settle or compromise the Indemnified Claim with the Contractor 's prior written consent, which shall not be unreasonably withheld or delayed, or with approval of the court or arbitrator following reasonable notice to the Contractor and opportunity to be heard and without prejudice to the Indemnified Party's rights to be indemnified by the Contractor; and
- C. In the case of a defense conducted under Section 16.2.4, C, it shall have the right to settle or compromise the Indemnified Claim without the Contractor 's prior consent (but with prior notice to the Contractor) and without prejudice to its rights to be indemnified by the Contractor.

16.2.9 Management of Claim Involving Shared Responsibility

The Parties acknowledge that while Section 16.1 (Indemnifications by Contractor) contemplates that the Contractor will have responsibility for certain Indemnified Claims and liabilities arising out of its obligations to indemnify, defend and hold harmless, circumstances may arise in which there is no insurance coverage and in which there may be shared liability of the Parties with respect to such Indemnified Claims and liabilities. In such case, where either Party believes an Indemnified Claim or liability may entail shared responsibility and that principles of comparative negligence and indemnity are applicable, it shall confer with the other Party on management of the Indemnified Claim or liability in question. If the Parties cannot agree on an approach to representation in the matter in question, each shall arrange to represent itself and to bear its own costs in connection therewith pending the outcome of such matter. Within 30 days subsequent to the final, non-appealable resolution of the matter in question, whether by arbitration or by judicial proceedings, the Parties shall adjust the costs of defense, including reimbursement of reasonable attorneys' fees and other litigation and defense costs, in accordance with the indemnification arrangements of this Section 16.2, and consistent with the outcome of such proceedings concerning the respective liabilities of the Parties on the Indemnified Claim.

16.2.10 Additional Factors Regarding Defense of Suits

In determining responsibilities and obligations for defending suits pursuant to this Section 16.2, specific consideration shall be given to the following factors: (a) the party performing the activity in question; (b) the location of the activity and incident; (c) contractual arrangements then governing the performance of the activity; and (d) allegations of respective fault contained in the Indemnified Claim.

16.3 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 an Indemnified Party hereunder.

16.4 Contractor Held Harmless Regarding Certain Regulated Materials

Except for conditions attributable to Contractor-Generated Regulated Materials or the negligence or misconduct of the Contractor or any Component Firm, the Department shall hold

the Contractor and its Subcontractors, Subconsultants, suppliers and the officers, directors, partners, employees, agents, other consultants and Subcontractors and Subconsultants of each and any of them from and against all claims, causes of action, suits, judgments, legal or administrative proceedings, and losses incurred in connection with, arising out of, relating to or resulting from any actual or alleged spill or threatened spill or release of a Regulated Material.

ADDENDUM B-1-5-2024

17 INSURANCE REQUIREMENTS

17.1 Responsibility for Damage Claims and Liability Insurance

The Contractor shall indemnify and save harmless the State and all of its representatives, municipalities, counties, public utilities, any affected railroad or railway company, and any fee owner from whom a temporary Right-of-Way was acquired for the Project from all suits, actions, claims, damages, or costs of any character brought on account of any injuries or damages sustained by any person or property on account of any negligent act or omission by the Contractor or its subcontractors or agents in the prosecution or safeguarding of the Work.

The Contractor shall procure and maintain insurance for liability for damages imposed by law and assumed under this Contract, of the kinds and in the amounts hereinafter provided from insurance companies authorized to do business in the State by the Ohio Department of Insurance. The cost of insurance is incidental to all contract items. Before the execution of the Contract by the Director, furnish to the Department a certificate or certificates of insurance in the form satisfactory to the Department demonstrating compliance with this subsection. Provide an insurance certificate or certificates that show that the Contractor's liability and auto policies coverage are not reduced, restricted, or canceled until 30 days written notice has been given to the Department by the insurer. Mail all certificates and notices to: Administrator, Office of Contracts, Ohio Department of Transportation, 1980 West Broad Street, Columbus, Ohio 43223. Upon request, the Contractor shall furnish the Department with a certified copy of each policy, including the provisions establishing premiums.

Maintain the types and minimum limits of insurance as defined in Section 17.1 (Responsibility for Damage Claims and Liability Insurance).

17.1.1 Workers' Compensation Insurance

Comply with all provisions of the laws and rules of the Ohio Bureau of Workers' Compensation covering all operations under Contract with the Department whether performed by it or its subcontractors. In addition, if a portion of the Work is performed from a barge or ship or requires unloading material from a barge or ship on a navigable waterway of the United States, it is the responsibility of the Contractor to arrange coverage for that portion of the Work under the Longshore and Harborworkers' Compensation Act [33 USC Section 901 *et seq.*] and the Jones Act [5 USC Section 751 *et seq.*] and provide proof of coverage to the Department.

17.1.2 Commercial General Liability Insurance

The minimum limits for liability insurance are as follows:

General Aggregate Limit	\$2,000,000
Products - Completed Operations Aggregate Limit	\$2,000,000
Personal and Advertising Injury Limit	\$1,000,000
Each Occurrence Limit	\$1,000,000

Obtain the above minimum coverages through primary insurance or any combination of primary and umbrella insurance. In addition, the Department will require the General Aggregate Limit on a per project basis.

Ensure that the Commercial General Liability Insurance policy names the State of Ohio, Department of Transportation, its officers, agents, and employees as additional insureds with all rights to due notices in the manner set out above. Obtain Explosion, Collapse, and Underground (XCU) coverage at the same limits as the commercial general liability insurance policy. Submit proof of insurance, endorsements, and attachments to the Engineer prior to starting the Work.

17.1.3 Comprehensive Automobile Liability Insurance

The Comprehensive Automobile Liability policy shall cover owned, non-owned, and hired vehicles with minimum limits as follows:

Bodily Injury and Property Damage Liability Limit	
Each Occurrence	\$1,000,000

Insurance coverage in the minimum amounts set forth neither relieves the Contractor from liability in excess of such coverage, nor precludes the Department from taking such other actions as are available to it under any other provisions of this Contract or otherwise in law.

Clearly set forth all exclusions and deductible clauses in all proof of insurance submitted to the Department. The Contractor is responsible for the deductible limit of the policy and all exclusions consistent with the risks it assumes under this Contract and as imposed by law.

If the Contractor provides evidence of insurance in the form of certificates of insurance, valid for a period of time less than the period during which the Contractor is required by terms of this Contract, then the Department will accept the certificates, but the Contractor is obligated to renew its insurance policies as necessary. Provide new certificates of insurance from time to time, so that the Department is continuously in possession of evidence that the Contractor's insurance is according to the foregoing provisions.

If the Contractor fails or refuses to renew its insurance policies or the policies are canceled or terminated, or if aggregate limits have been impaired by claims so that the amount available is under the minimum aggregate required, or modified so that the insurance does not meet the requirements of Section 17.1.3 (Comprehensive Automobile Liability Insurance), the Department may refuse to make payment of any further monies due under this Contract or refuse to make payment of monies due or coming due under other contracts between the Contractor and the Department. The Department in its sole discretion may use monies retained pursuant to this subsection to renew or increase the Contractor's insurance as necessary for the periods and amounts referred to above. Alternatively, should the Contractor fail to comply with these requirements, the Department may default the Contractor and call upon the Contractor's Surety to remedy any deficiencies. During any period when the required insurance is not in effect, the Engineer may suspend performance of the Contract. If the Contract is so suspended, the Contractor is not entitled to additional compensation or an extension of time on account thereof.

Nothing in the Contract Documents and insurance requirements is intended to create in the public or any member thereof a third party beneficiary hereunder, nor is any term and condition or other provision of the Contract intended to establish a standard of care owed to the public or any member thereof.

17.1.4 Professional Liability Insurance

The DBT must secure and maintain professional liability insurance as specified in Section 17.1.5 (Practice Professional Liability Insurance), for the minimum limits indicated. Policies written on a claims-made basis shall have a retroactive date which covers the period in which the design work began. The insurance policy shall be written by an insurance company authorized to transact business in the State of Ohio and licensed by the Department of Insurance as either admitted or non-admitted insurers and shall be rated A- or better by A.M. Best at the time the contract is executed by the Director.

The DBT must immediately notify the Department in writing if it, the Designer, or any of its subconsultants fails or refuses to renew its Professional Liability Insurance, or Workers' Compensation Insurance. Furthermore, the DBT must notify the Department in writing if it's, the Designer's, or any of its subconsultants' policies are canceled, lapse, terminated or modified so that the insurance does not meet the requirements set forth here-in.

The failure to comply with any of the provisions contained here-in shall be considered a breach of contract.

17.1.5 Practice Professional Liability Insurance

The Contractor providing in-house professional services shall carry Practice Professional Liability Insurance in the amount of not less than \$1,000,000.00 per claim and \$1,000,000.00 annual aggregate to protect against claims arising from the performance of its professional services caused by the negligent acts, errors, or omissions for which the Contractor is legally liable. The coverage shall be maintained for a minimum of 3 years after substantial completion of the project as long as it is commercially available. A certificate of insurance evidencing such coverage must be submitted for the entity providing professional services prior to the execution of the Contract.

When the DBT retains the Designer and subconsultants to provide professional services, the DBT shall ensure that the Designer and subconsultants maintain Practice Professional Liability Insurance in the amount of \$1,000,000.00 per claim and \$1,000,000.00 annual aggregate for a period of 3 years after substantial completion of the project, as long as it is commercially available. A certificate of insurance evidencing such coverage must be submitted for the entity providing professional services prior to the execution of the Contract.

~~Prior to the payment of the first invoice, the DBT shall provide the Department with one copy of the required insurance policy.~~

The cost of this policy will be incidental to the Work

17.2 Reporting, Investigating, and Resolving Motorist Damage Claims.

The Contractor and the Department are required to report, investigate, and resolve motorist damage claims according to Section 5.10 (Damage to the Work and Maintenance During Construction) and Section 17.1 (Responsibility for Damage Claims and Liability Insurance) and as follows.

When a motorist reports damage to its vehicle either verbally or in writing to the Contractor, the Contractor shall within 3 days make and file a written report to the District's construction office. In the event that the Department directly receives the motorist's claim, the Department shall within 3 days send the claim report to the Contractor. In the event the Contractor has not agreed to resolve the motorist claim, the District's construction office shall forward the report to the Department's Court of Claims Coordinator in the Division of Chief Legal Counsel who, as a co-insured party, may then contact the Contractor's insurance company and request that the insurance company investigate and resolve the claim. If the Contractor or their insurance company does not resolve the claim in a timely manner, the Department may advise the motorist of the option of pursuing the claim through the Tort Claims Program with the Office of Risk Management in the Department of Administrative Services (claims other than non-injury pothole claims) or in the Ohio Court of Claims (non-injury pothole claims) in accordance with ORC 2743.15.

In the event of a claim filed against the Department with the Office of Risk Management (ORM) or a lawsuit filed against the Department in the Ohio Court of Claims by the motorist, the Department, as co-insured party, may request the Contractor's insurance company to defend this claim or lawsuit and hold the Department harmless according to Section 17.1 (Responsibility for Damage Claims and Liability Insurance).

If the ORM claim or Court of Claims lawsuit claim amount is \$10,000 or less and the Court of Claims Coordinator in the Division of Chief Legal Counsel determines that the Contractor is responsible for the claimed damages then the Department's Court of Claims Coordinator in the Division of Chief Legal Counsel may, after notifying the Contractor, determine that it would be in the best interest of the Department to settle the claim or lawsuit. Any compromise or settlement amount including court costs may be assessed to the Contractor and deducted from the project. The Engineer will notify the Contractor prior to executing the deduction. The Contractor or the Contractor's insurance company may within 14 days appeal the assessment decision of the Court of Claims Coordinator to the District Construction Engineer. The decision of the District Construction Engineer will be made within 14 days. Should the District Construction Engineer decision differ from the Court of Claims Coordinator, the District Construction Engineer will forward the decision to the District Deputy Director or Capital Program Administrator for final determination.

18 PARTNERING AND DISPUTE RESOLUTION

18.1 Partnering

The Department intends to encourage the use of an extensive partnering program among the Department, the Contractor, its Subcontractors and Subconsultants, and other stakeholders where appropriate. The partnering relationship will be structured to draw on the strengths of each organization to identify and achieve reciprocal goals. The objectives include effective and efficient Project performance with a commercially reasonable profit and completion on schedule, within budget and in accordance with the Contract Documents. The Parties covenant and agree to conduct partnering efforts in accordance with the applicable provisions of the Technical Requirements, including [Section 7.4](#) (Partnering Agreement).

18.2 Dispute Resolution

18.2.1 Intent

The provisions of this [Section 18.2](#) shall apply to all Disputes arising out of the Work.

18.2.2 Dispute Resolution Procedures

Except as otherwise provided herein, all Claims or Disputes between the Department and the Contractor relating to the Contract Documents or the Project shall follow the process outlined below in this [Section 18.2.2](#). The Contractor shall continue the Work and adhere to the updated Project Schedule during all Disputes provided that the Department performs its obligations under this [Section 18.2](#) and the Department makes payments to the Contractor in accordance with the PDBC. Subject to the foregoing, no Work, including any Work relating to the underlying Dispute, shall be delayed or postponed pending resolution of any Disputes, except as the Contractor and the Department may otherwise agree in writing.

Consideration of a Dispute and Claim in accordance with the Dispute Resolution Procedures set forth under this [Section 18.2](#) and the exhaustion of all the processes set forth herein with respect to such Dispute or Claim shall be a CONDITION PRECEDENT to the filing of action in the Ohio Court of Claims. Further provided, that the consideration of a Dispute or Claim in accordance with the Dispute Resolution Procedures pertaining to the subsequent Step shall require the exhaustion of the processes pertaining to the preceding Step.

All parties to the dispute must adhere to the Dispute Resolution and Administrative Claim process. Do not contact Department personnel who are to be involved in a Step 2 or Step 3 review until a decision has been issued by the previous tier. [Informal discussions with the DCE are permissible during the Step 1 review.](#) Department personnel involved in Step 2 or Step 3 reviews will not consider a dispute until the previous tier has properly reviewed the dispute and issued a decision.

Failure to meet any of the timeframes outlined below or to request an extension will terminate further review of the dispute and serve as a waiver of the Contractor's right to file a claim.

The timeframes for the Department to respond to a Dispute or Claim will be strictly construed and the Department's failure to respond to a Dispute or Claim within the corresponding time

periods set forth in this Section 18 shall result in the Department being responsible for those portions of the Contractor's increased costs incurred in pursuing the Dispute or Claim but only to the extent that (a) the Contractor's incremental increased costs are actually incurred and documented and directly attributable to that specific time period associated with the Department's failure to timely respond to the Dispute in accordance with the provisions of Section 18.2, and (b) the Contractor's increased costs are determined to be justified. Notwithstanding anything to the contrary contained herein, no Dispute shall be considered unless the Contractor has submitted a Notice of Potential Change Order to the Department as outlined in Section 12.4.1 (Notice of Potential Change Order) before beginning the Disputed Work.

The Dispute Resolution Procedures shall consist of the following Steps as set forth herein:

- A. STEP 1: Mitigation and On-Site Determination
- B. STEP 2: District Dispute Resolution Committee (DDRC)
- C. STEP 3: Director's Claims Board Hearing or Alternative Dispute Resolution

18.2.3 Matters Ineligible for Dispute Resolution Procedures

The Dispute Resolution Procedures set forth in this Section 18.2 shall not apply to the following (collectively, "Ineligible Claims"):

- A. Any matters that the Contract Documents expressly state are final, binding, or not subject to Dispute resolution;
- B. Any matters relating to the applicability of indemnities provided under the Contract Documents;
- C. Any Claim for injunctive relief;
- D. Any Claim against an insurance company, including any Subcontractor dispute that is covered by insurance;
- E. Any Claim arising solely in tort;
- F. Any Claim between or among the Contractor, the Department, and a third party in which the third party is a necessary or appropriate party to such Dispute (excluding Claims by Subcontractors or Suppliers that meet the requirements of Subcontractor Demands under Section 18.8 below), including any related Claims between the Parties arising therefrom;
- G. Any Claim or Dispute that is the subject of litigation in a lawsuit filed in court to which the Dispute Resolution Procedures established in this Section do not apply, including any effort to interplead a Party into such a lawsuit in order to make the Dispute Resolution Procedures established in this Section applicable;
- H. Any Claim for, or Dispute based on, remedies expressly created by statute; and
- I. Any Dispute that is actionable only against a Surety.

18.2.4 Step 1: Mitigation and On-Site Determination

The Contractor covenants and agrees that mitigation of any issue that may give rise to a Dispute, whether caused by the Department, the Contractor, third-party, or an intervening event,

is a shared legal requirement under this PDBC. Upon the identification of any issue that may give rise to a Dispute, both Parties covenant and agree to cooperate with each other to undertake mitigation efforts, including but not limited to resequencing Work activities, acceleration, differing design concepts, and submission of materials. Both Parties further covenant and agree to explore mitigation efforts in a timely manner.

Within fourteen (14) Days of receiving the Department's written notice with respect to its decision pertaining to any RCO or EDR pursuant to Section 12.4.1.2 (Department Unable to Mitigate/Resolve Change Event) and Section 13.4.3 (Excusable Delay Change Order), respectively, should the Contractor disagree with said notice, Contractor shall be obligated to deliver written notice (the "Contractor's Early Written Dispute Notice") of its intent to utilize the Dispute Resolution Procedures set forth herein. Contractor's failure to submit an Early Written Dispute Notice within such timeframe shall constitute a waiver of Contractor's rights with respect to such potential Dispute.

In conjunction with the evaluation of any Early Written Dispute Notice, the Department and Contractor shall maintain records of labor, equipment, and materials used on the Work relating to the potential Dispute or any Work made necessary by the circumstances, provided however such records shall not constitute an acknowledgement or representation on the part of the Department that it accepts responsibility for payment relating to the Dispute or the granting of any extension of time with respect to the Dispute.

Within two (2) Working Days of receiving the Contractor's Early Written Dispute Notice, the Department will meet with the Contractor to review all pertinent information and relevant provisions of this PDBC to resolve the issues giving rise to the Dispute. Within fourteen (14) Days of the aforementioned meeting, the Department will issue its written Step 1 decision. If the Step 1 decision does not resolve the corresponding Dispute to the Contractor's satisfaction, then the Contractor may elect to either (i) abandon the Dispute, (ii) elect to escalate the Dispute to Step 2, or (iii) with the Department's consent, pursue an advisory recommendation of the DRB.

18.3 District Dispute Resolution Committee (DDRC)

18.3.1 Submission of Step 2 Dispute

Within fourteen (~~7~~14) Days of receipt of the Step 1 decision, the Contractor must submit a written request for a Step 2 meeting to the District Construction Engineer (DCE) or the corresponding Dispute will be waived. Upon timely receipt of written notice that any Dispute shall be escalated, the DCE will assign the Dispute a number.

18.3.2 District Dispute Resolution Committee (DDRC) Composition

The DDRC shall be comprised of the District Deputy Director, District Construction Engineer and the

Capital Program Administrator or designees (other than the project personnel involved in the dispute). In the event a Dispute pertains to design-related issues, the DDRC may include the District Design Engineer in addition to the four primary members of the DDRC.

18.3.3 Dispute Documentation and Rebuttal

The procedure for consideration of Disputes by the DDRC shall be as follows: within fourteen (14) Days of submitting Contractor's written request for the escalation to Step 2, the Contractor shall submit three (3) complete copies and one electronic copy of the Dispute documentation to the DCE, which shall contain the following information (collectively, the "Dispute Documentation"):

- A. Identification of Project, Contractor, and if applicable Subcontractors or Subconsultants relevant to the Dispute.
- B. Identification of each item for which additional compensation and/or time is requested, along with the requested compensation/time.
- C. Detailed narrative of the disputed work or portion of the Project, including the dates of the disputed work and the date of the initial notice to the Department.
- D. References to the applicable provisions of the Contract Documents relevant to the Dispute.
- E. Supporting documentation to support any request for additional compensation.
- F. Include the dollar amount of additional compensation and length of contract time extension requested.
- G. For any Dispute pertaining to Contract time or actual or constructive acceleration provide a detailed schedule analysis that includes the updated Baseline Project Schedule immediately preceding the occurrence of the Dispute. Failure to submit the required schedule analysis will result in the denial of that portion of the Contractor's Dispute.
- H. Copies of relevant correspondence and pertinent documents.

Within fourteen (14) Days of receipt of the Contractor's Dispute Documentation, the Department will provide the Contractor and the DDRC with all documentation it intends to rely on at the DDRC meeting to rebut the Contractor's Dispute.

18.3.4 DDRC Meeting

Within fourteen (14) Days after the date that the Department submits the rebuttal information, the DDRC will conduct a Step 2 meeting with Contractor personnel who are authorized to resolve the Dispute. The DDRC will issue a written Step 2 decision to the Contractor and the Department within 14 Days of the meeting. If the Dispute is not resolved, the Contractor may either (i) abandon the Dispute, (ii) escalate the Dispute to Step 3, or (iii) Alternative Dispute Resolution (ADR).

18.4 Director's Claims Board Hearing

The Contractor may submit a written Notice of Intent to File a Claim to the Dispute Resolution Coordinator in the Division of Construction Management within fourteen (14) calendar days of receipt of the Step 2 decision. The dispute becomes a claim when the Dispute Resolution Coordinator receives the Notice of Intent to File a Claim. The Notice of Intent to File a Claim will include the Contractor's request for either: 1) a Director's Claim Board hearing on the claim or 2)

Alternative Dispute Resolution (ADR) pursuant to Section 18.5 (Alternative Dispute Resolution (ADR)).

1. Director's Claims Board Hearing. The Director's Claims Board (the "Board") will consist of the Deputy Director of the Division of Construction Management, Deputy Director of Engineering and a District Capital Program Administrator from a district not involved in the claim, or their designees. A representative from the Division of Chief Legal Counsel and Division of Opportunity, Diversity, and Inclusion may be present to observe the hearing. The Director or designee will be responsible for deciding claims.
 - a. Electronically the Claim Documentation to the Dispute Resolution Coordinator within thirty (30) calendar days of receipt of the Notice of Intent to File a Claim. This timeframe may be extended with approval of the Dispute Resolution Coordinator. In addition to the documentation submitted at Step 2:
 - i. Enhance the narrative to include sufficient description and information to enable understanding by a third party who has no knowledge of the dispute or familiarity with the project.
 - ii. Certify the claim in writing and under oath using the following certification: "I, (Name and Title of an Officer of the Contractor) certify that this claim is made in good faith, that all supporting data is accurate and complete to the best of my knowledge and belief, and that the claim amount accurately reflects the contract amendment for which (Contractor Company name) believes the Department is liable."
 - iii. Sign and date this claim certification and have the signature notarized pursuant to the laws of the State of Ohio. The date the Dispute Resolution Coordinator receives the certified claim documentation is the date of the Department's Receipt of the Certified Claim for the purpose of the calculation of interest as defined in ODOT CMS Section 108.02.G.4. The Dispute Resolution Coordinator will forward one (1) complete copy of this documentation to the District.
2. Within thirty (30) calendar days of the District's receipt of the Contractor's Claim Documentation, the District will submit six (6) complete copies of its Claim Documentation to the Dispute Resolution Coordinator. This timeframe may be extended with approval from the Dispute Resolution Coordinator. At a minimum, the District's Claim Documentation should include:
 - a. An overview of the project
 - b. A narrative of the disputed work or project circumstance at issue with sufficient description and information to enable understanding by a third-party who has no knowledge of the dispute or familiarity with the project
 - c. The dates of the disputed work and the date of early notice
 - d. References to the applicable provisions of the plans, specifications, proposal, or other contract documents. Copies of the cited provisions shall be included in the claim document
 - e. Response to each argument set forth by the Contractor
 - f. Any counterclaims, accompanied by supporting documentation, the District wishes to assert

- g. The status of the negotiations of the Claim that have occurred to-date, including the amount of any offers and counteroffers made by the parties
 - h. Copies of relevant correspondence and other pertinent documents
3. Within fourteen (14) calendar days of receipt of the District's Claim Documentation, the Dispute Resolution Coordinator will forward one (1) complete copy to the Contractor and will schedule a hearing on the dispute.

Once a hearing date has been established, both the Contractor and District shall provide the Dispute Resolution Coordinator with a list of names of persons who may be presenting information at the hearing. Unless otherwise permitted by the Board, the exchange of documentation and all disclosures specified in this step of the process shall be completed at least fourteen (14) calendar days prior to the hearing.

Upon request or at the Board's discretion, the Board may delay the hearing to allow more time for preparation and review, or to fulfill requests for more documentation. The Board will hear the entire claim on behalf of the Director. The Board may have its own technical advisors at the hearing for consultation and assistance in reviewing the claim. The Contractor and District will each be allowed adequate time to present their respective positions before the Board. The Contractor and District will also each be allowed adequate time for rebuttal, limited to the scope of the opposing party's presentation. The Board may suspend any portion of a presentation or rebuttal it deems to be argumentative, repetitive, or irrelevant to the claim. The Contractor's position will be presented by one or more of the Contractor's employees who are thoroughly knowledgeable of the claim. The Contractor may have legal counsel present during the hearing to observe or for private consultation but shall not present on behalf of the Contractor. Similarly, the District's position will be presented by one or more District representatives who are thoroughly knowledgeable of the claim.

The Board may, on its own initiative, request information in addition to that submitted for the hearing. If the Contractor fails to reasonably comply with such request, the Board may render its decision without such information.

Upon completion of the hearing and following consideration of any additional information submitted upon request, the Board will submit a written recommendation on the disposition of the claim to the Director. The Director or designee will ratify, modify, or reject the recommendation of the Board and render a decision within sixty (60) calendar days of the hearing. Within thirty (30) calendar days of receipt of the Board's decision, either accept or reject the decision in writing. In the event the Contractor fails to do so, the Board may revoke any offers of settlement contained in the decision.

The decision of the Director is the final step of the Department's Dispute Resolution Process and may not be appealed within the Department. The Director is not bound by any offers of settlement or findings of entitlement made during Steps 1 and 2 of the Dispute Resolution Process.

18.5 Alternative Dispute Resolution (ADR)

In lieu of the Director's Claim Board hearing, the parties may opt to proceed through an Alternative Dispute Resolution (ADR) Process. The parties will then choose either mediation in the manner in which those methods are practiced by the Department and allowed by law.

The Dispute Resolution Coordinator will coordinate the agreement of the parties to the ADR method, and the selection of a neutral third-party or technical expert. The fees of the neutral third-party or technical expert will be shared equally between the Department and the Contractor. The Dispute Resolution Coordinator will obtain a written agreement, signed by both parties, that establishes the ADR process. The neutral third-party or technical expert will have complete control of the claim upon execution of the ADR agreement.

Prior to any ADR meeting, certify the claim in writing and under oath using the following certification:

"I, (Name and Title of an Officer of the Contractor) certify that this claim is made in good faith, that all supporting data is accurate and complete to the best of my knowledge and belief, and that the claim amount accurately reflects the contract amendment for which (Contractor Company name) believes the Department is liable"

18.6 Limitations on Consequential Damages

Under no circumstances shall the Contractor (or any Subcontractor) be entitled to consequential damages arising out of the performance (or failure to perform) of the Department, and the Contractor releases the Department from any such liability.

Consequential damages shall be recoverable by the Department only in the following limited categories:

1. Any component of the Liquidated Damages figure provided in Exhibit B (Contract Particulars) that may be consequential in nature.
2. To the extent recoverable from insurance by the Contractor, any damage that may be deemed "consequential" but is nonetheless covered by insurance purchased by the Contractor or others on the Project, or for which this PDBC requires the Contractor to purchase insurance coverage, is not waived up to the limits of such coverage. However, any consequential damages outside the insurance coverage limits required by this PDBC are waived except as provided in this Section 18.5.

The Department does not waive consequential damages for any injuries suffered by the Department due to fraud, intentional misconduct, or criminal acts by the Contractor or entities for whom the Contractor is responsible.

The term "consequential damages" shall mean those special, indirect, or incidental damages that do not flow directly and immediately from an injurious act but that result indirectly from an action or failure to act, such as revenue losses, loss of use, cost of capital, debt service, loss of profit on related contracts, administrative costs, loss of bonding capacity, lost opportunity, claims of taxpayers, and other indirect damage. Liabilities, costs, and losses incurred by either party due to failure by the other to procure and maintain insurance policies required hereunder, as well as any amounts that this PDBC expressly states are to be reimbursed from one party to the other (including interest, late charges, fees, penalties, and similar charges), shall be considered direct damages. This provision shall apply to limit liability under actions brought under any theory of law, including actions in tort (including negligence) as well as in contract.

18.7 Statute of Limitations

The statute of limitations for any breach of this PDBC shall be consistent with Ohio statutes. This provision shall not relieve the Contractor of its obligation to timely comply with all notice provisions for claims, nor shall it alter the requirements of the Contractor to comply with Sections 18.3.1-18.3.3 or the administrative claims process in this Section 18.

18.8 Additional Requirements for Subcontractor Demands

For purposes of this Section 18.8, a “Subcontractor Demand” means any claim by a Subcontractor or Supplier of any tier against the Contractor that results directly from Work provided by any such Subcontractor under the Contract Documents. If the Contractor pursues a Claim against the Department that includes a Subcontractor Demand, the following additional conditions shall apply:

1. The Contractor shall identify clearly in all submissions pursuant to this Section 18.8 that portion of the Claim that involves a Subcontractor. Any Claim under this Section 18.8 involving Subcontractor Demands shall be considered incomplete if it is not accompanied by such analysis and the following documents and certificates.
2. The Contractor shall include, as part of its submission pursuant to this Section 18.8, a certification in a form provided by or acceptable to the Department 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 Demand asserting the factual and contractual basis of the Subcontractor Demand, justification as to entitlement, and amount of money and time sought.
3. The Contractor shall also provide written confirmation that:
 - a. The Contractor has reviewed the basis of the Subcontractor Demand and has determined that all such Subcontractor claims or demands are justified as to entitlement and amount of money and time requested, and has reviewed the adequacy of all back-up documentation;
 - b. The Subcontractor Demand has been prepared and submitted in accordance with the terms of the Contract Documents and contains all information required by the Contract Documents; and the Contractor has no reason to believe and does not believe that the factual basis for the Subcontractor Demand is falsely represented.
 - c. The Contractor shall verify that the Subcontractor has certified the Subcontractor's portion of the claim.
4. At any informal hearing on a Dispute that includes one or more Subcontractor Demands, the Contractor shall require that each Subcontractor that is involved in the Dispute make available an authorized representative with actual knowledge of the facts underlying the Subcontractor Demand to assist in presenting the Dispute and to answer questions raised by the Department's representatives. Such Subcontractor assistance shall be limited to presenting the specific facts underlying the Subcontractor Demand and the answering of questions raised by the Department and Contractor's Representative.
5. Failure of the Contractor to assert timely and completely a Subcontractor Demand as part of any Claim and 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 Department by the Contractor on account of such Subcontractor Demand.

6. The Contractor shall require in all Subcontracts that all Subcontractors and Suppliers of any tier:
 - a. Agree to submit Subcontractor Demands to the Contractor in a proper form and in sufficient time to allow processing by the Contractor in accordance with this Section 18.8;
 - b. Agree to be bound by the terms of this Section 18.8 to the extent applicable to Subcontractor Demands;
 - c. Agree that, to the extent a Subcontractor Demand is involved, completion of all steps required under this Section 18.8 shall be a condition precedent to pursuit by the Subcontractor of any other remedies permitted by Law; and
 - d. Agree that the existence of the Dispute Resolution Procedures for Disputes involving Subcontractor Demands shall not be deemed to create any claim, right, or cause of action by any Subcontractor or Supplier against the Department.

Notwithstanding the foregoing, this Section 18.8 shall not apply to the following:

- a. Any Subcontractor claim between Subcontractors and the Contractor that is not actionable by the Contractor against the Department;
- b. Any Subcontractor Demand or claim based on remedies expressly created by statute;
- c. Any Subcontractor Demand that is covered by insurance; or
- d. Any Subcontractor claim that is actionable only against a Surety.

18.9 Cooperation

The Parties hereby covenant and agree to diligently cooperate with one another and to perform such acts as may be necessary to obtain a prompt and expeditious resolution of any Claim or Dispute.

18.10 Participation in Other Proceedings

The Contractor agrees that, at the Department's request, the Contractor will allow itself to be joined as a participant in any arbitration, court, or other legal proceeding that involves the Department and any other third-party participant as relates to the Project. This provision is for the benefit of the Department and not for the benefit of the Contractor or any other Person.

18.11 Waiver of Non-Monetary Relief

Except as to relief otherwise provided for in this PDBC, to the maximum extent permitted under applicable Law, the Contractor shall have no right to seek, shall not seek, and irrevocably waives and relinquishes any right to, non-monetary relief against the State and any of its respective employees, officers, directors, commissioners and officeholders, agents, representatives, consultants, attorneys, successors, and permitted assigns.

19 BREACH AND DEFAULT

19.1 Breach and Contractor Default

19.1.1 Breach by the Contractor

The Contractor shall be in breach under this PDBC upon the occurrence of any one or more of the following events or conditions (each a “Contractor Breach”):

- (1) The Contractor fails to promptly begin the Work under the Contract Documents following issuance of a Notice to Proceed authorizing such Work;
- (2) The Contractor fails to perform the Work with sufficient resources to ensure the prompt completion thereof;
- (3) The Contractor fails to perform the Work in accordance with the Contract Documents, refuses to remove and replace rejected Materials or Nonconforming Work, or fails to remove and replace workers as directed by the Department;
- (4) The Contractor discontinues or suspends the prosecution of the Work (exclusive of Work stoppage due to (i) termination by the Department, (ii) compliance with stoppage requirements due to Regulated Materials, (iii) a Force Majeure Event; (iv) suspension by the Department, or (v) nonpayment by the Department not related to a breach by the Contractor);
- (5) The Contractor fails to resume performance of Work which has been suspended or stopped, within a reasonable time after receipt of notice from the Department to do so or (if applicable) after cessation of the event preventing performance;
- (6) The Contractor materially fails to timely observe or perform or cause to be observed or performed any other material covenant, agreement, warranty, obligation, term or condition required to be observed or performed by the Contractor under the Contract Documents; provided that such actions shall not be considered a Contractor Default if they are the direct result of the Department's breach of its obligation to make payments to the Contractor;
- (7) The Contractor fails to obtain, provide and maintain in full force and effect any insurance or Bonds (including the Payment Bond and Performance Bond) as and when required under this PDBC for the benefit of the Department or other relevant parties, or fails to comply with any requirement of this PDBC pertaining to the amount, terms or coverage of the same;
- (8) The Contractor makes or attempts to make or suffers a voluntary or involuntary assignment or transfer of the Contract Documents or any right or interest therein;
- (9) Subject to the Department paying the Contractor pursuant to Section 11 (Contractor's Compensation), the Contractor fails, absent a valid Dispute, to make payment when due for labor, Equipment or Materials in accordance with its agreements with Subcontractors, Subconsultants and/or Suppliers and applicable Law, fails to comply with any law or governmental approvals; or fails reasonably to comply with the instructions of the Department consistent with the Contract Documents;
- (10) The Contractor fails to discharge or obtain a stay within 10 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 or the filing of an appeal with respect to such judgment or order shall be deemed an effective stay);

- (11) The Contractor does not comply with public safety and public convenience requirements of this PDBC or fails to correct any safety hazards promptly;
- (12) The Contractor or any Major Participant in which the Contractor holds an ownership interest 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;
- (13) Insolvency, receivership, reorganization or bankruptcy proceedings shall have been commenced by or against the Contractor or any Major Participant in which the Contractor holds an ownership interest and not dismissed within 60 Days;
- (14) Any representation or warranty made by the Contractor in the Contract Documents or in any certificate, schedule, instrument or other document delivered as part of the Proposal or pursuant to the Contract Documents shall have been false or materially misleading when made or becomes inaccurate in any material respect during the Contract Term; or
- (15) The Contractor is a party to fraud in any way relating to the Project.

19.1.2 Right to Cure

The Department shall notify the Contractor and the Sureties of any event constituting a Contractor Breach under this PDBC. Upon receipt of the notice of any Contractor Breach the Contractor shall have ten (10) Days from receiving the Department's Initial Notice to send confirmation that the Contractor will cure the corresponding Contractor Breach within thirty (30) Days of the date of such confirmation notice; provided however, upon a showing of good cause by the Contractor that such cure will require more than thirty (30) Days, the Department may elect, in its ~~sole and~~ reasonable discretion, to extend such cure period for additional time; provided further that, if the Department determines that a condition caused by a Contractor Breach poses an immediate and imminent danger to public health or safety, the Department may, without prior notice and without awaiting the expiration of any cure period, rectify the condition at the Contractor's sole cost and expense. The Department's good faith determination of the existence of such danger shall be deemed conclusive in the absence of clear and convincing evidence to the contrary. Provided that the Department is not in material default of its obligations as set forth in Section 19.2 (Department Defaults), which such default, the Department has not commenced to cure as set forth in Section 19.2, then the failure of the Contractor to cure the Contractor Breach in accordance with this Section shall empower the Department to declare a Contractor Default and pursue any or all of the remedies set forth under Section 19.1.3 below.

19.1.3 Rights of the Department

Upon the Department's declaration of a Contractor Default in accordance with Section 19.1.2 (Right to Cure) herein, then, in addition to all other rights and remedies provided by law or equity or available under this PDBC or otherwise, including the rights to recover liquidated damages and to seek recourse against the Payment Bond and Performance Bond, and/or other performance security, the Department shall have the following rights and remedies, without

further notice, and without prejudice to any of its other rights or remedies and without waiving or releasing the Contractor or Sureties from any of their respective obligations, and the Contractor shall have the following obligations (as applicable):

- (1) The Department may order the Contractor to suspend or discontinue the Work or any portion of the Work;
- (2) The Department may terminate this PDBC or a portion thereof;
- (3) If and as directed by the Department in writing, the Contractor shall withdraw from the Project Site; and shall remove such Materials, Equipment, tools and instruments used by, and any debris or waste materials generated by, any Component Firm entity in the performance of the Work;
- (4) The Contractor shall deliver or cause to be delivered to the Department exclusive possession of the Project Site and any or all of the Contractor's facilities located on the Project Site as well as any or all Design Documents, Construction Documents and all other completed or partially completed drawings (including plans, elevations, sections, details and diagrams), specifications, records, information, schedules, samples, shop drawings and other documents, that the Department deems necessary for completion of the Work;
- (5) If the Department requests the Contractor to assign to the Department specific Subcontracts, the Contractor shall execute such documents as may be required to confirm the assignment of those Subcontracts to the Department and shall terminate, at its cost, all other Subcontracts;
- (6) The Department may deduct from any amounts payable by the Department to the Contractor such amounts payable by the Contractor to the Department, including Liquidated Damages or other damages payable to the Department under the Contract Documents;
- (7) The Department shall have the right, but not the obligation, to pay such amount and/or perform such act as may then be required;
- (8) The Department, without incurring any liability to the Contractor, shall have the rights (i) to take the performance of all or a portion of the Work from the Contractor and enter into an agreement with another entity for the completion of such Work; or (ii) to use such other methods, as in the opinion of the Department, will be required for the completion of the Project;
- (9) If the Department exercises any right to perform any obligations of the Contractor, in the exercise of such right the Department may, but is not obligated to, among other things: (i) perform or attempt to perform, or cause to be performed, such work; (ii) spend such sums as the Department deems necessary and reasonable to employ and pay such architects, engineers, consultants and contractors and obtain Materials and Equipment as may be required for the purpose of completing such work; (iii) execute all applications, certificates and other documents as may be required for completing the work; (iv) modify or terminate any contractual arrangements; (v) take any and all other actions which it may in its sole and reasonable discretion consider necessary to complete the Work; and (vi) prosecute and defend any action or proceeding incident to the Work; and/or

- (10) The Department shall also have the right, but not the obligation, to require the Contractor to comply with the obligations in Section 21.2 (Contractor Responsibilities Upon Termination).

19.1.4 Opportunity for Sureties to Complete Work after Contractor Default

19.1.4.1 Rights of Sureties Prior to Department's Termination of PDBC

Prior to the Department's termination of this PDBC in whole or in part after a Contractor Default, the Department shall deliver written notice of such Contractor Default to the Surety or Sureties holding the Performance Bond (or, the Lead Surety on behalf of such Sureties). After receiving the foregoing notice from the Department, the Surety or Sureties (or, the Lead Surety on behalf of such Sureties) may elect within ten (10) Days of receiving the Department's notice to notify its or their intention to enter upon the Project Site and complete the remaining Work under this PDBC. In the event the Surety or Sureties give the Department notice of their election to proceed, then, subject to an extension given by the Department for good cause, the Surety or Sureties shall be permitted thirty (30) Days from the date of the Department's receipt of such election to enter upon the Project Site and commence the remaining Work under this PDBC. If the Surety or Sureties (or the Lead Surety on behalf of such Sureties) elects or elect to undertake the Work in accordance with the PDBC then the Department shall perform its PDBC obligations, including but not limited to any and all payment obligations under this PDBC, in favor of Surety or Sureties in place and instead of Contractor.

19.1.4.2 Proposal of Surety or Sureties Use of Defaulting Contractor

The Surety or Sureties holding the Performance Bond (or the Lead Surety on behalf of such Sureties) shall have the option, in the Surety's or Sureties' reasonable discretion, subject to the review and approval of the Department, which approval shall not be unreasonable withheld or delayed, to utilize the defaulting Contractor and/or by and through any or all of the Contractor's Joint Venture constituent entities, their parents, subsidiaries, or affiliates, and/or by and through any or all of the Major Participants and Component Firms (the "Defaulting Contractor") to complete the remaining Work under this PDBC in accordance with Section 19.1.4.1 above. At the time of the Surety's or Sureties' determination to use determination to use the Defaulting Contractor to complete the remaining Work the following factors, in addition to the interests of the Department and other related considerations, shall be considered in determining the reasonableness of the Surety's or Sureties' utilization of the Defaulting Contractor: (a) the underlying basis for the Contractor Breach that led to the Contractor Default; (b) the Defaulting Contractor's overall performance of the Work through the date of the Defaulting Contractor's Contractor Default; (c) the Defaulting Contractor's record in achieving completion of the Work in accordance with the Project Schedule; (d) the Defaulting Contractor's Organization and Key Personnel being proposed to complete the Work; (e) the Defaulting Contractor's management of the Work in compliance with the requirements set forth in the Contract Documents; (f) the Defaulting Contractor's ability to complete the remaining Work in a timely and expeditious manner in accordance with the Contract Documents; (g) the Defaulting Contractor's working relationship with its Subcontractors, of all tiers, and Suppliers; (h) the Department's assessment of the Contractor's competence and qualifications to complete the remaining Work in accordance with the Contract Documents in the best interests of the Department and the Project; and (i) the Contractor's prequalification in the appropriate State for the scope of the remaining Work to be completed.

19.1.4.3 Department's Performance After Election of Sureties to Perform Remaining Work

If the Surety or Sureties holding the Performance Bond (or the Lead Surety on behalf of such Sureties) elect to undertake the Work in accordance with this PDBC, then, subject to the performance of all of the material obligations of the Contractor under this PDBC, the Department shall perform its PDBC obligations, including but not limited to any and all payment obligations under this PDBC, in favor of the Surety or Sureties in place and instead of Contractor; provided however, if the Surety or Sureties elect to undertake the remaining Work under accordance with this PDBC and then fail or refuse to so complete such remaining Work, any additional costs reasonably incurred by the Department as a result of such failure or refusal shall be computed by the Department and become the liability of such Surety or Sureties, which is not limited by the amount of the Performance Bond; provided further, that if the Surety fails to pay such amount, the Department shall certify to the attorney general, who shall proceed to collect such additional costs from the Surety or Sureties and the amount so collected shall be paid into the State treasury to the credit of the fund from which the excess cost was originally paid.

19.1.4.4 Re-Procurement of Remaining work

If the Surety or Sureties holding the Performance Bond elect not to proceed with performing the remaining Work, either by notifying the Department of such non-election or not providing notice within the ten (10) day period, or if after making an election to complete the remaining Work under this PDBC, the Surety or Sureties (a) do not carry such remaining Work forward with reasonable progress, or (b) improperly perform, abandon or fail to complete the remaining Work covered by this PDBC, then the Department may proceed with procuring other parties to perform the remaining Work covered by this PDBC in accordance with the requirements applicable to the original bids, or proceeding with any other remedy or course of action available to the Department under this PDBC.

19.1.5 Liability of Contractor and Surety/Occurrence of a Contractor Breach

If a Contractor Breach has occurred and the Contractor has not cured such Contractor Breach within the corresponding timeframes set forth herein, and the Department has declared a Contractor Default in accordance with Section 19.1.3 (Rights of the Department) herein, then the Contractor shall be liable to the Department in accordance with the terms and conditions of the PDBC, and the Sureties shall be jointly and severally liable to the Department in accordance with the terms and conditions of the Performance Bond for all costs reasonably incurred by the Department or any party acting on the Department's behalf in completing the Work or having the Work completed by another entity (including any re-procurement costs and, throw away costs for unused portions of the completed Work), provided that under no circumstances, except as otherwise considered by ORC 5525.17, shall the liability of the Sureties exceed the penal sum of the Performance Bond, which shall remain the absolute limit of the liability of Surety. Notwithstanding anything to the contrary in the PDBC, the penal sum of the Performance and Payment Bonds shall not be increased under any circumstances without the written consent of the Contractor and its Sureties in the form of an executed Rider to the Bonds.

Upon the occurrence of a Contractor Default, subject to Department's obligations to Surety under Section 19.1.4 (Opportunity for Sureties to Complete Work after Contractor Default) herein, including but not limited to Department's obligations to make payment to Surety, the

Department shall be entitled to withhold all or any portion of further payments to the Contractor until such time as the Department is able to determine how much (if any) remains owing to the Contractor after all sums due and owing to Sureties pursuant to Section 19.1.4 herein have been paid. For the avoidance of doubt, the foregoing solely addresses the priority of payment by the Department. Promptly upon such determination, the Department shall notify the Contractor in writing of the amount, if any, that the Contractor shall pay the Department or that the Department shall pay the Contractor with respect thereto. All costs and charges incurred by the Department, including attorneys', accountants' and expert witness fees and costs, together with the cost of completing the Work under the Contract Documents, will be deducted from any moneys due or which may become due to the Contractor. If such expense exceeds the sum which would have been payable to the Contractor under the PDBC, then the Contractor and the Sureties if, Sureties did not elect to perform pursuant to Section 19.1.4 herein, shall be liable and shall pay to the Department the amount of such excess.

Notwithstanding anything in this Section 19 to the contrary, in the event there are multiple Sureties holding an interest in the Performance Bond, then such Sureties may elect to designate one Surety as the "Lead Surety" under the terms of the Performance Bond, after which the Department shall be entitled to (i) send any notices required hereunder or under applicable Law to such Lead Surety in lieu of the other sureties, (ii) rely on the responses or lack of responses of such Lead Surety in response to any Department notice pertaining to a Contractor Breach, and (iii) accept the actions and commitments of such Lead Surety pursuant to Section 19.1.4 herein as being made on behalf of all other Sureties. For avoidance of doubt, the designation of any Surety as "Lead Surety" shall not reduce the joint and several obligations of any other Surety holding an interest in the Performance Bond to perform in accordance with the terms and conditions of the Performance Bond or this PDBC, provided further, that the Performance Bond's designation of a "Lead Surety" shall constitute a waiver of any non-Lead Surety's rights to receive any notices from the Department.

19.1.6 Assurance of Future Performance

It is recognized that if a Contractor Breach under Section 19.1.1 (Breach by the Contractor) clauses 12 or 13 occurs, such event could impair or frustrate the Contractor's performance of the Work. Accordingly, upon the occurrence of any such event, the Department is entitled to request the Contractor, or its successor in interest, to provide adequate assurance of future performance in accordance with the terms and conditions hereof. The Contractor shall comply with such request within fifteen (15) Days of the Department's delivery of the request. In the case that the Contractor does not comply with the Department's request, the Department may terminate the PDBC in accordance with Section 21 (Termination for Convenience). Pending receipt of adequate assurance of performance and actual performance in accordance therewith, the Department shall be entitled to proceed with the Work with its own forces or with other contractors on a time and material or other appropriate basis, the cost of which will be credited against and deducted from the Department's payment obligations hereunder. The foregoing shall be in addition to all other rights and remedies provided by law or equity and such rights and remedies as are otherwise available under the PDBC, the Payment Bond and the Performance Bond.

19.1.7 Alternative to Terminating the Contract and Completing the Work

In lieu of the provisions of this Section 19 for terminating this PDBC and completing the Work, the Department may pay the Contractor for the parts already done according to the provisions of the Contract Documents and may treat the parts remaining undone as if they had never been

included or contemplated by this PDBC. No claim under this provision will be allowed by the Contractor for prospective profits on, or any other compensation relating to, Work uncompleted by the Contractor.

19.1.8 Termination Deemed to Constitute a Termination for Convenience

If this PDBC is terminated for grounds which are later determined not to justify a termination for Contractor Default, such termination shall be deemed to constitute a termination for convenience pursuant to Section 21 (Termination for Convenience).

19.1.9 Damages Resulting From Contractor's Breach or Failure to Perform

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

19.1.10 Cumulative Remedies

The exercise or beginning of the exercise by the Department of any one or more rights or remedies under this Section 19 shall not preclude the simultaneous or later exercise by the Department of any or all other rights or remedies, each of which shall be cumulative.

19.1.11 Continued Liability of Contractor and Surety

The Contractor and Surety holding the Performance Bond shall not be relieved of liability for continuing Liquidated Damages on account of an Event of Default by the Contractor hereunder or by the Department's declaration of a Contractor Default, or by actions taken by the Department under this Section 19.

19.2 Department Defaults

19.2.1 Contractor's Right to Stop Work If Undisputed Payment Is Not Made

The Contractor shall have the right to stop Work if the Department fails to make an undisputed payment due under this PDBC within 30 Days after receipt of notice of nonpayment. Any such Work stoppage shall be considered a suspension. The Contractor shall not have the right to terminate this PDBC for default as the result of any failure by the Department to make an undisputed payment due hereunder, but the Contractor shall have the right to declare a termination for convenience under Section 21 (Termination for Convenience) upon meeting the requirements of Section 21.

19.2.2 Notice and Opportunity to Cure Other Types of Department Breaches

In the event of any breach of this PDBC by the Department other than a failure to make payments to the Contractor, the Contractor shall deliver written notice describing the breach and providing the Department with 30 Days to cure any such breach from the date it receives the corresponding notice; provided that if such breach is capable of cure but by its nature cannot be cured within 30 Days, the Department shall have a reasonable period of time as may be reasonably necessary under the circumstances to cure the breach so long as the Department

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 (as the same may be extended) expires without the Department's cure of the breach.

20 SUSPENSION OF WORK

20.1 Department Suspension for Convenience

The Department may, at any time and for any reason, by written notice, direct the Contractor to suspend all or any part of the Work required under the Contract Documents for the period of time that the Department deems appropriate for the convenience of the Department.

In the event that any Department ordered suspension of Work is not due to a breach of Contractor's obligations under this PDBC and Contractor asserts that it is otherwise entitled to (i) reimbursement of its direct costs incurred as a result of the Department ordered suspension of Work and/or (ii) an extension of Contract Time as a result of any Department ordered suspension of Work, then the Contractor may, pursuant to Section 12.4.1 (Notice of Potential Change Order), submit one or more NPCOs to the Department for consideration. Thereafter, provided the Department elects to advance any NPCO and approve an RCO or an EDR, any change in the Contract Price and/or Contract Time due to any Department ordered suspension of Work shall be finalized in accordance with the procedures in Section 12 (Contract Changes) and/or Section 13 (Time Extension to the Completion Deadlines and Payment for Excusable Delays).

20.2 Department Suspension for Cause

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

- (1) Correct conditions unsafe for the Project personnel or general public;
- (2) Comply with any Governmental Approval, Law, or otherwise carry out the requirements of the PDBC;
- (3) Carry out orders of the Department; or
- (4) Comply with the NEPA Documents and other environmental requirements or requirements for developing and implementing the Mine Grouting and Overburden Execution Plan.

20.3 Contractor Responsibilities during Suspension

The Contractor shall promptly comply with any written suspension order under this Section 20. The Contractor shall promptly recommence the Work upon receipt of written notice from the Department directing the Contractor to resume Work. During periods that Work is suspended, the Contractor shall continue to be responsible for the Work and shall prevent damage or injury to the Project and other facilities in the Project vicinity, provide for drainage, obtain and maintain compliance with all Governmental Approvals, maintain all Contractor-provided insurance and bonds and erect necessary temporary structures, signs or other facilities required to maintain the Project and other facilities in the Project vicinity. During any suspension period, unless otherwise directed by the Department, the Contractor shall continue to be responsible for traffic control in accordance with Section 19 (Traffic Control) of Exhibit E (Technical Requirements) and for maintenance during construction in accordance with Section 5.11.1 (Maintenance During Construction). If only part of the Work is suspended, for the Work not suspended, the Contractor shall be entitled to payment for the costs allocated thereto as set forth in the cost and resource loaded schedule per Exhibit T (Critical Path Method Progress Schedule).

20.4 Contractor Suspension of Work

The Contractor will have the right to suspend performance of the Work only in the event that:

- (1) The Department fails to make any undisputed payment by its due date in accordance with the Contract;
- (2) The Contractor provides written notice of such non-payment and the Department fails to make such payment within 30 Days following receipt of the Contractor's notice;
- (3) The Contractor provides subsequent written notice that it will suspend performance of the Work unless such payment is made within 30 Days following such subsequent notice; and
- (4) The Department fails to make such payment within 30 Days following receipt of such subsequent notice from the Contractor.

Such right will not be available to the Contractor if there is a good faith Dispute concerning the Contractor's entitlement to the payment under the Contract.

21 TERMINATION FOR CONVENIENCE

21.1 Notice of Termination

The Department may terminate, at any time, the PDBC and the performance of the Work by the Contractor for its own convenience if the Department determines, in its sole discretion, that a termination is in the best public, State, or national interest. The Department shall notify the Contractor of its decision to terminate by delivering to the Contractor a written Notice of Termination specifying the extent of termination, its effective date and any remaining Work necessary to place the Project in an acceptable condition, as determined by the Department in its sole discretion. Termination of the PDBC shall not relieve any Surety of its obligation for any claims arising out of the Work performed. Termination may occur before or after Work has begun.

21.2 Contractor Responsibilities Upon Termination

After receipt of a Notice of Termination, and except as otherwise directed by the Department, the Contractor shall immediately proceed as follows, regardless of any delay in determining or adjusting amounts due under this Section 21:

- (1) Stop Work as specified in the notice.
- (2) Communicate to all affected Subcontractors and Subconsultants such notice of termination and that their Subcontracts are not to be further performed unless otherwise authorized in writing by the Department.
- (3) Place no further subcontracts or orders for materials, services, or facilities, except as necessary to complete the continued portion of the Work, if any, or for mitigation of damages.
- (4) Terminate all Subcontracts to the extent that they relate to the Work terminated.
- (5) Assign to the Department in the manner, at the times, and as and to the extent directed by the Department, all of the right, title, and interest of the Contractor under the Subcontracts so terminated, in which case the Department will have the right, in its sole discretion, to accept performance, settle, or pay any claims arising out of the termination of such Subcontract.
- (6) Settle all outstanding liabilities and claims arising out of such termination of Subcontracts, with the approval or ratification of the Department, to the extent it may be required, which approval or ratification shall be final.
- (7) Provide the Department with an inventory list of all materials previously produced, purchased, or ordered from Suppliers for use in the Work and not yet used in the Work, including its storage location, as well as any documentation or other property required to be delivered hereunder, which is either in the process of development or previously completed but not yet delivered to the Department, and such other information as the Department may request; and transfer title and deliver to the Department, in the manner, at the times, and as and to the extent, if any, directed by the Department of:
 - a. Fabricated or unfabricated parts, the Work in process, completed Work, supplies, and other material produced or acquired for the Work terminated; and

- b. The Design Documents and all other completed or partially completed drawings (including plans, elevations, sections, details, and diagrams), specifications, records, samples, information, and other property that would have been required to be furnished to the Department if the Work had been completed.
- (8) Complete performance, in accordance with the Contract Documents, of all Work not terminated.
 - (9) Take all action that may be reasonably necessary, or that the Department may direct, for the safety, protection, and preservation of:
 - a. The public, including public and private vehicular movement;
 - b. The Work; and
 - c. The Equipment, machinery, Materials, and property related to the Contract Documents that is in the possession of the Contractor and in which the Department has or may acquire an interest.
 - (10) As authorized by the Department in writing, use its best efforts to sell, in a manner at the times, to the extent, and at the price or prices directed or authorized by the Department, any property types referred to in Section 21.2(7); provided however, that the Contractor:
 - a. Is not required to extend credit to any purchaser; and
 - b. May acquire the property under the conditions prescribed and at prices approved by the Department.
 - (11) The proceeds of any transfer or disposition will be applied to reduce any payments to be made by the Department under the Contract Documents or paid in any other manner directed by the Department.
 - (12) If requested by the Department, withdraw from the portions of the Project Site designated by the Department and remove such materials, equipment, tools and instruments used by, and any debris or waste generated by, the Contractor and any Subcontractor in the performance of the Work as the Department may direct.
 - (13) Assign and transfer to the Department all of the Contractor's right, title and interest in and to the following: (a) all Design Documents, completed or partially completed drawings (including plans, elevations, sections, details and diagrams), specifications, designs, design documents, surveys, and other documents and information pertaining to the design or construction of the terminated Work; (b) all samples, borings, boring logs, geotechnical data and similar data and information relating to the terminated Work; (c) all books, records, reports, test reports, studies and other documents of a similar nature relating to the terminated Work; and (d) all other work product used or owned by the Contractor or any Contractor-Related Entity relating to the terminated Work.
 - (14) Take other actions directed by the Department.

21.3 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:

- (1) The Contractor's responsibility for damage to materials for which partial payment has been made shall end when the Department certifies that those materials have been stored in the manner and at the locations directed by the Department.
- (2) The Contractor's responsibility for damage to materials purchased by the Department subsequent to the Notice of Termination shall end when title and delivery of those materials has been taken by the Department.

Immediately after the Department determines that the Contractor has completed the Work directed to be completed in accordance with the Notice of 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 Department, further handling of such materials shall be the responsibility of the Department.

21.4 Negotiated Termination Settlement

21.4.1 Settlement Proposal

After receipt of a Notice of Termination, the Contractor shall submit a final termination settlement proposal to the Department in the form and with the certification prescribed by the Department. The Contractor shall submit the proposal promptly, but no later than 90 Days from the effective date of termination, unless the Contractor has requested a time extension in writing within such 90-Day period and the Department has agreed in writing to allow such an extension. The Department will 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 Department may determine, on the basis of information available to it, the amount, if any, due to the Contractor because of the termination, and shall pay the Contractor the amount so determined.

21.4.2 Negotiated Settlement Amount

The Contractor and the Department may agree, as provided in [Section 21.3](#) (Responsibility After Notice of Termination) upon the whole or any part of the amount or amounts to be paid to the Contractor by reason of termination of Work pursuant to this [Section 21](#). Such negotiated settlement may include a reasonable allowance for profit solely on Work that has been completed as of the termination date and subsequently accepted by the Department but not an amount for lost, anticipated or unearned profit or other costs disallowed in [Section 21.5.2](#) (Maximum Compensation). 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 cost of the Work not terminated. Upon determination of the settlement amount, the PDBC will be amended accordingly, and the Contractor will be paid the agreed amount. If parties are unable to reach a settlement on all termination costs, compensation for those costs not agreed upon will be determined in accordance with [Section 21.5](#) (Determination of Termination Amount if Negotiations Fail). Unless otherwise agreed to by the parties as a part of a negotiated settlement, the Department's execution and delivery of any settlement 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 Department's rights under the Payment and Performance Bonds and payment as to such completed or non-terminated Work.

21.5 Determination of Termination Amount if Negotiations Fail

If the Contractor and the Department fail to agree, as provided in Section 21.4 (Negotiated Termination Settlement) upon the amount to be paid to the Contractor in whole or in part by reason of the termination of Work pursuant to this Section, the amount payable (exclusive of interest charges) shall be determined by the Department in accordance with the following, but without duplication of any amounts agreed upon in accordance with Section 21.4 (Negotiated Termination Settlement):

21.5.1 Payment Amount

Subject to the limitations in Section 21.5.2 (Maximum Compensation), the Department 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 Department:

- (1) The Contractor's actual reasonable out-of-pocket cost (without profit, and including Equipment costs only to the extent permitted by Section 11 (Contractor's Compensation)) for all Work performed, including mobilization, demobilization, and work done to secure the Project for termination, including reasonable overhead and accounting for any refunds payable with respect to insurance premiums, deposits, or similar items, as established to the Department's satisfaction. In determining the reasonable cost, deductions will be made for the cost of materials to be retained by the Contractor, amounts realized by the sale of materials and for other appropriate credits. Deductions will also be made for the cost of damaged materials. When, in the opinion of the Department, the cost of an item of Work is excessively high due to costs incurred to remedy or 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.
- (2) As profit on the actual out-of-pocket cost permitted in (1) above, a sum determined by the Department to be fair and reasonable; provided, however, that if it appears that the Contractor would have sustained a loss on the entire PDBC had it been completed, no profit shall be included or allowed under this Section 21.5, and an appropriate adjustment shall be made by reducing the amount of the settlement to reflect the indicated rate of loss.
- (3) The cost of settling and paying claims arising out of the termination of Work under Subcontracts as provided in Section 21.2 (Contractor Responsibilities Upon Termination), exclusive of the amounts paid or payable on account of supplies or materials delivered or services furnished by the Subcontractor prior to the effective date of the Notice of Termination under the Contract, which amounts shall be included in the cost on account of which payment is made under clause (1) above.
- (4) The reasonable out-of-pocket cost (including reasonable overhead) of the preservation and protection of property incurred pursuant to Section 21.2 (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 Department or otherwise disposed of as directed by the Department, 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.

21.5.2 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 21.5.1 (Payment Amount)) plus its settlement costs, and that items such as lost, anticipated or unearned profit, unabsorbed overhead, opportunity costs or consequential or other damages shall not be recoverable by the Contractor for itself or for its Subcontractors on account of the termination of the PDBC. However, the total amount to be paid to the Contractor, exclusive of costs described in Sections 21.5.1 (3) and (4), may not exceed the total Contract Price less the amount of payments previously made and less the cost of the Work not terminated. Furthermore, if any refund is payable with respect to Project-specific insurance or bond premiums, deposits, or similar items which were previously passed through to the Department by the Contractor, such refund shall be paid directly to the Department or otherwise credited to the Department.

21.5.3 Excluded Items

Except for normal spoilage, and except to the extent that the Department will have otherwise expressly assumed the risk of loss, there will be excluded from the amounts payable to the Contractor under Section 21.5.1 (Payment Amount), the fair value, as determined by the Department, of Equipment, machinery, Materials and property which is destroyed, lost, stolen or damaged so as to become undeliverable to the Department, or to a buyer pursuant to Section 21.2 (Contractor Responsibilities Upon Termination). 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.

21.6 Payment of Termination Amount

Upon determination of the amount of the termination payment, the PDBC shall be amended via Change Order to reflect the agreed termination payment, and the Contractor shall be paid the agreed amount.

21.7 Reduction in Amount of Claim

The amount otherwise due the Contractor under this Section 21 shall be reduced by:

- (1) All unliquidated payments for Work or materials not yet performed on or supplied to the Project at the time of the payment, excluding payments made to or on behalf of the Contractor applicable to the terminated portion of the PDBC;
- (2) The amount of any claim which the Department may have against any Contractor-Related Entity in connection with the PDBC;
- (3) 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 21, and not otherwise recovered by or credited to the Department;

- (4) Amounts that the Department reasonably deems advisable to retain to cover any existing or threatened claims, Liens, and stop notices relating to the Project, including claims by Third-Parties;
- (5) The cost of repairing, replacing or otherwise correcting any Nonconforming Work; and
- (6) Any amounts due or payable by the Contractor to the Department.

21.8 Partial Payments

The Department may, from time to time, under such terms and conditions as it may prescribe and in its sole discretion, make partial payments on account against costs incurred by the Contractor in connection with the terminated portion of the PDBC, whenever, in the opinion of the Department, the aggregate of such payments shall be within the amount to which the Contractor will be entitled under this Section 21. If the total of such payments is in excess of the amount finally agreed or determined to be due under this Section 21, such excess shall be payable by the Contractor to the Department upon demand, together with interest at a rate equal to the average rate at the time being received from the investment of state funds, as determined by the State Treasurer, for the period from the date such excess payment is received by Contractor to the date on which such excess is repaid to the Department.

21.9 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 Department in accordance with this Section 21 and shall require Subcontractors to insert the same provision in each Subcontract at all tiers.

21.10 Limitation on Payments to Subcontractor

For the purposes of Sections 21.4.2 (Negotiated Settlement Amount) and 21.5 (Determination of Termination Amount if Negotiations Fail), upon termination under Section 21.2 (Contractor's Responsibilities Upon Termination) 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 lost, anticipated or unearned profit, unabsorbed overhead, opportunity costs or consequential or other damages on account of the termination.

21.11 No Unearned Profit or Consequential Damages

Under no circumstances shall the Contractor be entitled to lost, anticipated or unearned profit, unabsorbed overhead, opportunity costs or consequential or other damages as a result of a termination under this Section 21. The payment to the Contractor determined in accordance with this Section 21 constitutes the Contractor's sole and exclusive remedy for a termination under this Section 21.

21.12 No Waiver

Anything contained in the PDBC to the contrary notwithstanding, a termination under this Section 21 shall not waive any right or claim to damages, which the Department may have, and the Department may pursue any cause of action, which it may have at law or in equity or under the PDBC.

21.13 Dispute Resolution

The failure of the parties to agree on amounts due under this Section 21 shall be a Dispute to be resolved in accordance with Section 18 (Partnering and Dispute Resolution).

21.14 Allowability of Costs

All costs claimed by the Contractor under this Section 21 shall, at a minimum, be allowable, allocable and reasonable in accordance with the cost principles and procedures of 48 CFR Part 31.

21.15 Suspension of Work

In the event of any suspension of all or part of the Work by the Department, after issuance of NTP, for more than 180 consecutive days, the Contractor shall have the right to consider the PDBC to have been terminated or partially terminated by the Department for convenience under this Section 21. The Contractor shall notify the Department of such election by delivering to the Department a written notice of termination (or partial termination) due to such suspension specifying its effective date. Upon delivery by the Contractor to the Department of a notice of termination due to suspension, the provisions of this Section 21 shall apply.

21.16 Partial Termination

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

If the Department exercises any termination right after the execution of the Phase 2 Change Order, the Department will have the right in its discretion to require continued performance of the applicable Phase 2 Work and terminate only the remaining Phase 1 Work and any other Phase 2 Work. In such event, the PDBC will remain in full force and effect only with respect to the Phase 2 Work that is not terminated by the Department, and the Contract Price established in the Phase 2 Change Order will continue to apply to such Phase 2 Work.

22 PROJECT WARRANTIES

22.1 Contractor Project Warranties

The Contractor hereby represents and warrants to the Department that subject to the provisions of the Contract Documents that:

1. All design and technical services for the Work furnished pursuant to the Contract Documents shall conform to professional standards identified in the Contract Documents and all professional principles and the Standard of Care applicable to the design and scope of the Work, to the extent that such principles are not more restrictive than the professional standards specifically identified in the Contract Documents;
2. 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;
3. Goods, materials, and equipment furnished under the Contract Documents shall be of the quality specified or, if not specified, of good quality and, except if not otherwise expressly set forth in the Contract Documents, when installed, shall be new;
4. The Work shall meet all requirements of the Contract Documents;
5. The specifications and/or drawings selected or prepared for use during construction are suitable for their intended use;
6. Any work that does not meet the standards referenced in (1) through (5) above is Nonconforming Work;
7. The Project will be free from defects (whether latent or patent) in workmanship and materials furnished or installed by the Contractor;
8. All material and equipment incorporated into the Work will be new and free from any and all claims, liens, and security interest of any third parties;
9. The Work will be fully and finally completed in accordance with the terms of the Contract Documents at a cost not to exceed the Contract Price;
10. The Contractor possesses expertise in the administration, construction, management and superintendence of projects of the type, nature, and general locality of the Project, and will perform the Work with the care, skill and diligence of such a contractor;
11. The Contractor and, to the best of Contractor's actual knowledge, its Subcontractors are financially solvent, able to pay debts as they mature, and the financial statements and information furnished to the Department by Contractor present fairly the Contractor's and, if applicable, to the best of Contractor's actual knowledge, its Subcontractors' respective financial conditions, and they are possessed of sufficient working capital to complete the Contract;
12. The Contractor is able to furnish the plant, tools, labor, materials, and equipment necessary to complete the Work; and
13. The Contractor and its Subcontractors are qualified to perform the Work, authorized to transact business in the jurisdictions in which the Project is located, and possesses or

have obtained and shall possess all necessary licenses, permits, and approvals required to perform the Work.

The Contractor will promptly notify the Department of the occurrence of any event or circumstances which renders the foregoing representations or warranties materially untrue. The foregoing warranties are in addition to, and not in lieu of, any and all other liability imposed upon the Contractor by law with respect to Contractor's duties, obligations and performance hereunder. The Contractor's liability hereunder shall survive the Department's final acceptance of and payment for the Work. All representations and warranties set forth in the Contract Documents shall survive the final completion of the Work or the earlier termination of the Contract. If the Department finds the materials furnished, Work performed, or the finished product are not in reasonably close conformity with the Contract Documents and have resulted in an unacceptable finished product, the affected Work or materials shall be removed and replaced or otherwise corrected by and at the expense of the Contractor in accordance with the Department's written orders. The term "reasonably close conformity" shall not be construed as waiving the Contractor's responsibility to complete the Work in accordance with the Contract Documents, plans, and specifications. For the purpose of this Section 22.1, the term "reasonably close conformity" is intended to allow the Department to use good engineering judgment in its determinations as to acceptance of Work that is not in strict conformity but will provide a finished product equal to or better than that intended by the requirements of the Contract Documents.

22.2 Obligations of Contractor

The Contractor shall promptly correct or cause to be corrected promptly any defect in the Work. The Contractor shall and does hereby assign to the Department the benefits of any warranties of all Subcontractors, materialmen and suppliers, or other third parties, but such assignment shall not relieve the Contractor of its warranty obligations to the Department under the Contract Documents. No payment made by the Department to the Contractor, nor any acceptance, use or occupancy of the Work by the Department or any other person, shall constitute acceptance of any defective Work or any Work not in compliance with the Contract Documents. Nothing contained herein shall be construed to define or limit any rights or remedies provided the Department by the Contract Documents, at law, equity, or otherwise in the event any defect in the Work occurs.

22.3 Correction of Work

Prior to Substantial Completion, in a time frame determined by the Department, the Contractor shall correct Work rejected by the Department or failing to conform to the requirements of the Contract Documents, whether or not fabricated, installed or completed. The Contractor shall bear costs of correcting such rejected Work, including additional testing and inspections and compensation for the Department made necessary thereby. If prior to the date of Substantial Completion, the Contractor, a Subcontractor, or anyone for whom either is responsible, uses or damages any portion of the Work, the Contractor shall cause such damage to be restored so that the damaged portion of the Work to "like new" condition at no expense to the Department.

If at any time after the date of Substantial Completion of the Work any of the Work is found to be not in accordance with the requirements of the Contract Documents, the Contractor shall correct it promptly after receipt of written notice from the Department to do so unless the Department

has previously given the Contractor a written acceptance of such condition. This obligation under this Section 22.3 shall survive acceptance of the Work under the PDBC and termination of the PDBC. The Department shall give such notice promptly after discovery of the condition.

The obligations under Section 22.2 (Obligations of Contractor) shall cover any repairs and replacements to any part of the Work or other property caused by the defective Work.

22.3.1 Removal of Portion Not in Accordance with Contract Documents

Subject to the provisions of Section 5.9 (Unauthorized and Nonconforming Work) the Contractor shall remove from the Project Site portions of the Work which are not in accordance with the requirements of the Contract Documents and are neither corrected by the Contractor nor accepted by the Department.

22.3.2 Failure to Correct Non-Conforming Work

Prior to Substantial Completion, if the Contractor fails to correct the Work that has been rejected by the Department or fails to conform to the requirements of the Contract Documents within the time frame determined by the Department, the Department may correct or remedy such Work. To the extent necessary to complete corrective and remedial action, the Department may: (i) exclude the Contractor from all or part of the site; (ii) take possession of all or part of the site; (iii) subject to Section 20 (Suspension of Work), suspend the Contractor's services related thereto; (iv) take possession of the Contractor's Equipment and machinery at the site; (v) incorporate in the Work material stored at the site or for which the Department has paid the Contractor but which has been stored elsewhere. The Contractor shall allow the Department, its representatives, contractors, agents, and employees such access to the site as may be necessary to exercise the rights under this paragraph. All direct and indirect costs in exercising such rights will be charged against the Contractor and a Change Order will be executed, pursuant to Section 12 (Contract Changes), incorporating the necessary revisions to the PDBC and a reduction in the GMP. The Contractor will not be allowed an extension of the Contract Time due to any delay in performance of the Work attributable to the exercise of the Department's rights under this Section.

After Substantial Completion, if the Contractor fails to correct the Work that has been rejected by the Department or fails to conform to the requirements of the Contract Documents within the time frame determined by the Department, the Department may correct or remedy such Work. All direct and indirect costs from the Contractor's failure to correct the Nonconforming Work and the Department's correction of such Work will be the sole expense of the Contractor.

22.3.3 Destroyed or Damaged Construction

The Contractor shall bear the cost of correcting destroyed or damaged construction, whether completed or partially completed, of the Department or other Contractors caused by the Contractor's correction or removal of Work which is not in accordance with the requirements of the Contract Documents.

22.3.4 No Limitation of Obligations Unless Stated in Otherwise in Contract Documents

Nothing contained in this Section 22.3 shall be construed to establish a period of limitation with respect to other obligations which the Contractor might have under the Contract Documents. The Contractor's express warranties in this Section 22.3 shall be in addition to, not in lieu of, any other warranties, guaranties, or remedies the Department may have under the Contract Documents, at law, or in equity for defective work.

23 SECURITY FOR PERFORMANCE AND WARRANTIES

23.1 Performance and Payment Bonds

As a part of the consideration and to assure the faithful performance of this PDBC in every respect, the Contractor shall provide a performance bond and a payment bond each with surety or sureties in a sum not less than One Hundred percent (100%) of the applicable Contract Price, each with a surety or sureties approved by the Department, and in the form provided in Exhibit K (Form of Payment and Performance Bonds). These bonds shall remain in effect, at a reduced penal sum in the amount of 30% of the total penal sum, at least until one year after the date when final payment becomes due, except as provided otherwise by applicable laws or regulations or as required by the Contract Documents.

When the Contractor delivers the executed PDBC to the Department, the Contractor shall also deliver to the Department such bonds as the Contractor may be required to furnish in accordance with this Section 23. Upon request, the Contractor shall also provide copies of such bonds to its subcontractors and other entities providing labor, Equipment, or Materials on the Project.

The Contractor shall deliver the foregoing Bonds to the Department according to the following schedule:

1. Concurrent with the execution of this PDBC in the amount equal to 100% of the Phase 1 Contract Price.
2. Concurrent with the execution of the Phase 2 Change Order, Bond Riders (issued on forms acceptable to the Department in its reasonable discretion) increasing the amounts of the Bonds in an amount equal to 100% of the Phase 2 Contract Price (so that the Bond amounts shall be maintained in the full amount of the Contract Price and shall secure the full scope of the Phase 1 Work and Phase 2 Work.
3. Following the Department's acceptance of the Phase 1 Work, the Contractor may request to reduce the amount secured to 100% of the Phase 2 Contract Price.

If a surety or co-surety on any bond furnished by the Contractor: (1) is declared a bankrupt; (2) is placed into receivership; (3) becomes insolvent or its right to do business is terminated in any state where any part of the Project is located; or (4) ceases to meet the requirements of the Contract Documents, the remaining sureties on the Bond shall each re-verify their financial limits with the Department of the Treasury, utilizing the same standards and processes required to be listed as an acceptable surety on a federal bond under 31 USC §§ 9304-9308 and Circular 570, evidencing to the Department the remaining sureties' respective capacities to continue to bond the Contract Price. If all of the remaining sureties are unable to provide evidence to the Department of their respective and collective capacities to continue to bond the Contract Price, the Contractor shall within 20 Days thereafter substitute another Bond issued by a surety or sureties acceptable to the Department, both the substitute Bond and the surety or sureties shall comply with the requirements of the Contract Documents.

All bonds and insurance required by the Contract Documents to be purchased and maintained by the Department or the Contractor shall be obtained from surety or insurance companies that are duly licensed or authorized in the jurisdiction in which the Project is located to issue bonds or insurance policies for the limits and coverages so required. Such surety and insurance

companies shall also meet such additional requirements and qualifications as may be provided in the Contract Documents.

If notice of any change affecting the general scope of the Work or the provisions of the Contract Documents (including, but not limited to, Contract Price or Contract Times) is required by the provisions of any bond to be given to a surety, the giving of any such notice will be the Contractor's responsibility. The amount of each applicable bond will be adjusted to reflect the effect of any such change.

23.2 Parent Company Guarantee

If the Contractor (in such capacity as Offeror) proposed in its response to the Request for Proposals an Affiliate or Principal Participant to serve as a Guarantor of the Contractor, or submitted financial information of an Affiliate or Principal Participant in its response to the Request for Proposals to demonstrate the financial qualifications of such Offeror, such Affiliate or Principal Participant must guarantee, through a separate guaranty agreement in a form reasonably acceptable to the Department, all of the Contractor's obligations under this PDBC. Each guaranty shall assure the performance of the Contractor's obligations under this PDBC and must be maintained in full force and effect so long as the Contractor has any obligations under this PDBC.

24 CONTRACTOR REPRESENTATIONS AND COVENANTS

24.1 Maintenance of Professional Qualifications; Performance By Qualified Personnel

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

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

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

24.2 Performance of the Work

The Contractor covenants and agrees to perform all Work and furnish all Materials in reasonably close conformity with the lines, grades, cross-sections, dimensions and material requirements as set forth in the applicable Contract Documents. If the Department determines the Work is not in reasonably close conformity with the Contract Documents, then such Work shall be addressed pursuant to Section 5.9 (Unauthorized and Nonconforming Work).

24.3 Compliance with Applicable Laws

The Contractor has familiarized itself with the requirements of any and all applicable Laws prior to entering into this Contract. The Contractor further covenants and agrees to stay fully informed of all Applicable Laws and all amendments to Applicable Laws that affect those engaged or employed on the Work, or that affect the conduct of the Work.

The Contractor shall comply with, and ensure that all of its Subcontractors comply with all applicable Laws, including but not limited to sub-sections A & B below:

- A. Contractor shall ensure that it and all of its Subcontractors observe and comply with all of the following that affect the conduct of Work on the Project, have jurisdiction or authority over the Work, or that affect individuals engaged or employed on the Project.

1. Ohio and Federal laws;
 2. All local laws, ordinance and regulations;
 3. All orders and decrees of authorities having jurisdiction or authority that affect those engaged or employed on the Work or that affect the conduct of the Work;
 4. Health and safety officials and regulations; and
- B. Comply with Federal, State, and local Laws, rules, and regulations that enumerate unlawful employment practices.

The Contractor has complied and shall comply with the foregoing at its sole cost and without any additional compensation or time extension on account of such compliance, regardless of whether such compliance would require additional time for performance or additional labor, Equipment or Materials not expressly provided for in the Contract Documents, except, and only to the extent, of any express entitlement to seek relief hereunder.

24.4 Governmental Approvals

The Contractor has no reason to believe that any Governmental Approval required to be obtained by the Contractor under the Contract Documents will not be granted in due course and thereafter remain in effect so as to enable the Work to proceed in accordance with the Contract Documents.

24.5 Progression of Work

The Contractor shall at all times provide for an orderly progression of the Work in accordance with the Project Schedule to thereafter achieve all Completion Deadlines, all at the Contractor's own expense as required by Section 5.10.1 (Prosecution and Progress), except as otherwise specifically provided in Section 12.4 (Change Orders).

24.6 Feasibility of the Work, Project; Reasonable Investigation

As of the Effective Date, the Contractor represents and warrants that it has evaluated the constraints affecting delivery of the Project and has reasonable grounds for believing and does believe that the Project can be designed and built within such constraints and has reasonable grounds for believing and does believe that performance of the Work is feasible and practicable.

The Phase 2 Change Order will incorporate a representation that the Contractor:

1. has evaluated the constraints affecting design and construction of the Project, as well as the terms and conditions of the NEPA Documents, and has reasonable grounds for believing and does believe that the Project can be designed and built within such constraints; and
2. has conducted a reasonable investigation and otherwise examined the Site as well as surrounding locations, and as a result of such review, inspection, examination, and other activities the Contractor is familiar with, and has satisfied itself as to, the character of the Site, and accepts the physical requirements of the Work, subject only to the Contractor's express rights and bases to seek relief under this PDBC.

24.7 Power and Authority

The Contractor has the requisite power (a) to carry on its business as now conducted or proposed, and (b) to own its properties and assets.

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

The Contractor has all requisite power to own its properties and assets and carry on its business as now conducted or proposed to be conducted.

24.8 Good Standing

The Contractor and each of the Major Participants is duly qualified to do business, and is in good standing, in the State, and will remain in good standing throughout the Term and for as long thereafter as any obligations remain outstanding under the Contract Documents.

24.9 Authorization

The execution, delivery, and performance of this PDBC 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.

24.10 Legal, Valid, and Binding Obligation

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

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

24.11 No Breach

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

24.12 No Conflicts

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

1. In conflict with or has resulted or will result in a default under or a violation of the governing instruments of the Contractor or any agreement, judgment, or decree to which the Contractor is a party or is bound; or
2. In conflict with any Applicable Laws applicable to the Contractor that are valid and in effect on the Effective Date.

24.13 No Violation of Law

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

24.14 No Suits

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

24.15 No Organizational Conflicts of Interest

The Contractor has disclosed and shall disclose to the Department in writing all Organizational Conflicts of Interest of the Contractor and its contractors and subcontractors of which the Contractor was actually aware; and the Contractor has not obtained knowledge of any additional organizational conflict of interest, and there have been no organizational changes to the Contractor or its contractors and subcontractors identified in its Proposal that have not been approved in writing by the Department.

24.16 No Debarment, Suspension Ineligibility, Exclusion

As of the Effective Date, neither the Contractor, nor its principals, contractors and subcontractors identified in the Proposal are presently debarred, suspended, proposed for debarment, declared ineligible, or voluntarily excluded from entering this PDBC by any federal agency or by any department, agency or political subdivision of the State of Ohio. For purposes of this Section 24.16, the term "principal" for purposes of this PDBC means a member, manager, officer, director, share/stockholder, partner, employee, Key Personnel, employee, or other individual person with primary management or supervisory responsibilities, or an individual person who has a critical influence on or substantive control over the operations of the Contractor.

24.17 False or Fraudulent Statements and Claims

The Contractor recognizes and acknowledges that the requirements of the Program Fraud Civil Remedies Act of 1986, as amended, 31 U.S.C. §§ 3801 *et seq.* and the USDOT regulations, "Program Fraud Civil Remedies," 49 C.F.R., Part 31, apply to contracts funded with Federal funds. Accordingly, by signing this Contract, the Contractor certifies or affirms the truthfulness

and accuracy of any statement it has made, it makes, or it may make pertaining to this 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.

The Contractor agrees to include the above clause in each subcontract financed in whole or in part with Federal assistance provided by FTA. It is further agreed that the clauses shall not be modified, except to identify the subcontractor who will be subject to the provisions.

24.18 Certification Regarding Lobbying & Solicitation

The Contractor certifies that:

- (1) No Federal appropriated funds have been paid or will be paid, by or on behalf of the Contractor, to any person for influencing or attempting to influence an officer or employee of any agency, a member of Congress, an officer or employee of Congress, or an employee of a member of Congress in connection with the awarding of any Federal contract, the making of any Federal grant, the making of any Federal loan, the entering into of any cooperative agreement, and the extension, continuation, renewal, amendment, or modification of any Federal contract, grant, loan, or cooperative agreement.
- (2) If any funds other than Federal appropriated funds have been paid or will be paid to any person for influencing or attempting to influence an officer or employee of any agency, a member of Congress, an officer or employee of Congress, or an employee of a member of Congress in connection with this Federal contract, grant, loan, or cooperative agreement, the Contractor shall complete and submit Standard Form-LLL, "Disclosure Form to Report Lobbying," in accordance with its instructions.
- (3) The Contractor shall require that the language of this certification be included in the award documents for all subawards at all tiers (including subcontracts, subgrants, and contracts under grants, loans and cooperative agreements) and that all subrecipients shall certify and disclose accordingly.

This certification is a material representation of fact upon which reliance was placed when this transaction was made or entered into. Submission of this certification is a prerequisite for making or entering into this transaction imposed by Section 1352, title 31, U.S. Code. Any person who fails to file the required certification shall be subject to a civil penalty of not less than \$10,000 and not more than \$100,000 for each such failure.

24.19 Findings for Recovery

By entering into this PDBC with the Department, the Contractor affirmatively represents to the Department that it is not subject to an unresolved Finding for Recovery under ORC 9.24, or that it has taken the appropriate remedial steps required under ORC 9.24, or otherwise qualifies under that section. The Contractor agrees that if this representation is deemed to be false, then the PDBC will be void ab initio as between the parties to the PDBC, and any funds paid by the

Department hereunder shall be immediately repaid to the Department, or the Department may immediately commence an action for recovery of said funds.

24.20 Ohio Ethics Law Requirements

The Contractor agrees that it is currently in compliance with, and will continue to adhere to, the requirements of Ohio Ethics law as provided by Section 102.03 and 102.04 of the Ohio Revised Code.

24.21 NEPA Disclosure Statement

By entering into this PDBC with the Department or accepting any subsequent assignment of Work under this PDBC, the Contractor hereby certifies that, in accordance with 40 CFR 1506.5, it is has no financial or other interest in the execution or outcome of this Project.

25 OTHER CONTRACTOR OBLIGATIONS

25.1 Maintenance of Records

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

25.2 Audit and Inspection Rights

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

25.3 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, the Department and its representatives have the right to examine all books, records, documents, and other data of the 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.

25.4 Claims Audits

All Claims filed against the Department shall be subject to audit at any time following the filing of the Claim. The audit may be performed by employees of the Department, FHWA, U.S. Comptroller General, or by an auditor under contract with any of them. No notice is required before commencing any audit within 60 Days after Completion of the Contract. Thereafter, the Department 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 Department, for the audit during normal business hours. The Contractor, Subcontractors, and their agents shall cooperate with the auditors. Failure of the Contractor, Subcontractors, or their agents to maintain and retain sufficient records to allow the auditors to verify all or a portion of the Claim or to permit the auditors access to the books and records of the Contractor, Subcontractors, or their agents shall

constitute a waiver of the Claim and shall bar any recovery there under. At a minimum, the auditors shall have available to them the following documents:

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

Full compliance by the Contractor with the provisions of this Section 25.4 is a contractual condition precedent to the Contractor's right to seek relief under this Section 25. The Contractor represents and warrants the completeness and accuracy of all information it or its agents provides in connection with this Section 25.4.

25.5 Retention of Records

The Contractor shall maintain all records and documents relating to the PDBC (including copies of all original documents delivered to the Department) at the Project Manager's office in the State, or as otherwise agreed by the Department in writing, until five years after the earlier to occur of:

- (1) The date Completion of the Contract is achieved; or
- (2) The termination date.

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

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

25.6 Public Records

The Contractor acknowledges that any Work Product the Department owns and any document the Department obtains a copy that relates to the Project may be considered public records under ORC 149.43 (the "**Public Records Act**"), and as such may be subject to public disclosure. In the event of a request for disclosure of any such information, the Department will comply with applicable law. The Department recognizes that certain Work Product that the Department owns, and certain documents that the Department obtains a copy that relate to the Project may contain information exempt from disclosure under the Public Records Act, may constitute trade secrets as defined in ORC 1333.61(D), and may include confidential information which is otherwise subject to protection from misappropriation or disclosure. The Department will keep such information confidential, provided that the Contractor comply with the following procedure (the "**ORR Procedure**"): (i) the Contractor shall independently determine, and be solely responsible for, whether any portion/entirety of any document, data, or record submitted meets an exception under Applicable Law preventing its disclosure (the "**Determination Basis**"); (ii) the Contractor shall (a) prominently mark each and every page of its document, data, or record with "Trade Secret," "Confidential," or any other Determination Basis, and (b) redact all information from any document, data, or record that has a Determination Basis (the "**Redacted Copy**"); (iii) the Contractor shall accompany any label made in accordance with (ii) with a concise statement supporting the label and determination, including Applicable Law supporting the claim (the "**Supporting Law**"); and (iv) the Contractor shall submit the Redacted Copy of any document, data, or record to the Department, while the unredacted version of any document, data, or record shall be submitted through the Escrow of Documents procedure addressed in [Section 25.7](#) (Escrow Documents). If the foregoing procedures are met by the Contractor and such labeled/redacted records become the subject of a request for public disclosure, then the Contractor herein agrees and assents that the Department shall take the following actions with regard to all or part of any subject document(s), data, or record(s): (a) endeavor to notify the Contractor of the request and respond to such request with the Redacted Copy to the requestor (the "**Department Response**") and/or (b) notify the Contractor of such request and the date by which the Department anticipates responding and will consider the determinations received from the Contractor in advance of such date, redact and/or unredact document(s), data, or record(s) in collaboration with the Contractor, and draft a response accordingly (the "**Cooperative Response**").

If the foregoing procedure is not followed by the Contractor, then the Department will release versions of any document, data, or record that the Department determines to be responsive to the request and do not violate Applicable Law, with all satisfaction and payment of such expense(s) incurred in such determination and release being the full responsibility of the Contractor.

In the event that the requestor asserts a right to any redacted information in the Department Response with regard to any complete or partial document(s), data, or record(s), the Department shall notify the Contractor of the assertion of right(s) (the “**Notice of Rights**”), and from the date the Contractor receives the Notice of Rights, the Contractor shall have the responsibility to respond to the requestor asserting that the information requested is exempt from disclosure under Applicable Law.

In the event of litigation concerning the Department’s failure to disclose any material submitted by the Contractor to the Department, the Department’s sole involvement will be as a stakeholder retaining the material until otherwise ordered by a court, and the Contractor shall be fully responsible for otherwise prosecuting or defending any action concerning the materials at its sole expense and risk and fully responsible for paying any costs, fees, including attorney’s fees, and civil penalties assessed against the Department for failing to disclose such documents in accordance with the Contractor’s directions. Under no circumstances, however, will the Department be responsible or liable to the Contractor or any other Person for the disclosure of any such labeled materials, whether the disclosure is required by law, by court order or occurs through inadvertence, mistake or negligence on the part of the Department. Nothing in this Section 25.6 shall modify or amend any requirement(s) and obligation(s) imposed on the Department by the Public Records Law or other applicable Law, and the provisions of the Public Records Law or other Laws shall control in the event of conflict between the procedures described above and the applicable law. The Contractor is advised to contact legal counsel concerning the Ohio Open Records Act and its application to the Contractor.

25.7 Escrow Documents

25.7.1 General

In conjunction with the submission of any Contract Price, the Contractor shall upload the Heavy Construction Systems Specialist (HCSS) files, or any other programs utilized to calculate prices, in their native format that were utilized to develop said Contract Price (the “Escrow Documents”). Additional types of information may also be included as Escrow Documents with the agreement of both the Department and the Contractor. All other information utilized in the generation of the Contract Price, including exports from the HCSS files (or others) with pricing data down to the bid item level, will be distributed to the Department and its representatives as part of the Open Book Pricing methodology outlined in Exhibit G and other relevant PDBC Sections and will not be considered Escrow Documents.

25.7.2 Stipulation and Acknowledgements

The Department stipulates and expressly acknowledges that the Escrow Documents constitute proprietary information. This acknowledgement is based on the Department’s expressed understanding that the information contained in the Escrow Documents is not known outside the

Contractor's business, is known only to a limited extent and by a limited number of the Contractor's employees and is safeguarded while in the Contractor's possession. The Department further acknowledges that the Escrow Documents and the information they contain are provided for the joint use of the Contractor and the Department. The Contractor agrees, as a requirement of the Contract, that the Escrow Documents, as updated from time to time, constitute all the information used in the development of the Contract Price that was not otherwise distributed through the Open Book Pricing methodology. The Contractor acknowledges that the purpose of this Section 25.7 is to develop the Contract Price through open-book negotiations and that the Contractor's prompt and transparent provision of the Escrow Documents is vital to the development of the Contract Price. The Contractor also agrees that nothing in the Escrow Documents shall change or modify the terms or conditions of the Contract Documents. Subject to Section 25.6 (Public Records), the Department further agrees to safeguard the Escrow Documents, and all information they contain, against disclosure to the fullest extent permitted by law. Ultimately, it will be the responsibility of the Contractor to demonstrate that information is proprietary in nature and to file any required Protection Requests.

25.7.3 Format and Contents

- A. The Contractor may submit Escrow Documents in their usual cost estimating format; provided that all information is clearly presented and ascertainable and submitted in accordance with the requirements of this Section 25.7. It is not the intention of this Section 25.7 to cause the Contractor extra work, but to ensure that the Escrow Documents will be adequate to enable complete understanding and proper interpretation for their intended use.
- B. The Escrow Documents will be submitted in English and clearly itemize the estimated costs of performing each item of the Project, including financing, administrative and related costs. Cost items will be separated into sub-items as required to present a detailed cost estimate and allow a detailed cost review.
- C. The Escrow Documents will include, to the extent obtained, procured or in the possession of the Contractor and to the extent not distributed to the Department and its representatives as part of the Open Book Pricing model: estimates for costs of the design professionals and consultants itemized by discipline both for development of the design, all quantity take-offs, crew size and shifts, Equipment, calculations of rates of production and progress, copies of quotes from Contractors and suppliers, and memoranda, narratives, drawings and sketches showing site or work area layouts and Equipment, add/deduct sheets, geotechnical reviews and consultant reports, all other information used by the Contractor to arrive at the estimated prices for the Project, and all information and formulae used by the Contractor in developing the Guaranteed Maximum Price or Lump Sum Amount. Estimated costs will be broken down into estimate categories for items such as direct labor, repair labor, Equipment ownership and operation, expendable materials, permanent materials and subcontract costs as appropriate. Plant and Equipment, indirect costs, bond rates and calculations, insurance costs and financing should be detailed. The Contractor's allocation of indirect costs, contingencies, and mark-up will be identified.
- D. The Escrow Documents in combination with the documents distributed based on the Open Book Pricing model will identify all costs. If detailed costs are not available to the Contractor, estimated unit costs are acceptable without a detailed cost estimate, if

labor, Equipment, Materials and subcontracts, as applicable, are specified, and provided further, that indirect costs, contingencies, and mark-up, as applicable, are allocated.

25.7.4 Submittal

- A. All Escrow Documents shall be electronically uploaded to a SharePoint site (“Escrow Site”) and the Owner will be provided the specific URL.
- B. Electronically stored Escrow Documents will be uploaded in their native digital format.

25.7.5 Updating of the Escrow Documents

In the event that there are updates (adding, deleting, revisions) to information on the Escrow Site, all users with access to the Escrow Site will receive an automated email notification informing them that an update has been made and which document has been impacted. For revisions of existing documents, an agreed to file naming convention will be utilized to clearly identify version control. Previous versions of the documents will be accessible to the approved representatives; however, the most recent version of the documents will always be the one shown first.

25.7.6 Storage

The Escrow Documents will be stored electronically on the Escrow Site. The Escrow Site must be PN40 compliant. Unless, by agreement, the information is stored in Department servers (SharePoint), the Contractor shall be solely responsible for managing the Escrow Site and the cost for storing the Escrow Documents is not reimbursable to the Contractor.

25.7.7 Examination and Copying

All Escrow Documents shall be controlled, read-only, and prohibited from download for use offline. Access to the Escrow Site will be restricted. The Contractor shall provide the Department with the names of the individuals within the organization that they have chosen to grant access to the Escrow Site, as well as the type of access they are given. Updates to this list shall be provided to the Department should changes be made. The Department will provide the Contractor with names of staff members or Department Authorized Representatives for which access shall be granted. Updates to this list will be provided to the Contractor. The Escrow Documents may be examined jointly by the Department and the Contractor at any time deemed necessary by the Department or the Contractor and for any reason. The Department may delegate review of the Escrow Documents to members of its staff or to Department Authorized Representatives, each of which shall be subject to all applicable confidentiality undertakings. Access to the Escrow Site is subject to monitoring and audit by both the Contractor and the Department.

25.7.8 Ownership

The Escrow Documents are, and will always remain, the property of the Contractor, subject to joint review by the Department, if applicable, Department Authorized Representatives and the Contractor, as provided herein and with the following exception. To the extent that any

document on the Escrow Site is a Design Document for temporary or permanent Work, it shall be the property of the Department.

25.7.9 Final Disposition and Return of Escrow Documents

The Department's access to the Escrow Site may be terminated upon the earlier to occur of (i) completion of the Work, including tender of final payment and resolution of all claims or disputes arising under the PDBC or (ii) termination of this PDBC and resolution of all claims or disputes arising pursuant to this Contract.

25.8 Coordination with Other Contractors of the Department

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

If the Department exercises its right under Section 12 (Contract Changes) to contract with other contractors to perform outstanding Work on the Project, the Contractor shall coordinate with such other contractors in good faith to facilitate completion of the Project in a timely and effective manner.

25.9 Interference by Other Contractors of the Department

If the Contractor asserts that any of the Department's other contractors have hindered or interfered with the progress or completion of the Work, the Contractor shall follow the requirements of Section 12 (Contract Changes). The Contractor shall have the right to ask the Department to resolve such dispute, provided the other contractor and its sureties have agreed to submit the dispute to the Department, and provided that such proceeding shall be conducted at no cost to the Department.

25.10 Assignment of Causes of Action

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

25.11 Payroll Records

The Contractor shall keep payroll records as specified in ORC 4115.07 or as required by Federal law.

Department Authorized Representatives may inspect the certified payroll and other payroll records. Upon completion of the Work and before receiving payment for the Final Estimate and

when required by ORC 4115.07, submit an affidavit stating that wages have been paid according to the minimum rates specified in the Contract Documents.

April 5, 2024

26 MISCELLANEOUS

26.1 Waiver

26.1.1 No Waiver of Subsequent Rights

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

26.1.2 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.

26.1.3 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.

26.2 Successors and Assigns

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

26.2.1 Reserved

26.2.2 Assignment by the Contractor; Changes of Control; Change of Organization

Without limiting Section 8 (Subcontracting Requirements), the Contractor shall not otherwise sublet, transfer, assign, or dispose of any portion of this Contract, delegate any of its duties hereunder, or suffer a voluntary or involuntary change of control, except in each case, with the Department's prior written approval, in the Department's sole discretion. Except and after any Approval only, any of the foregoing actions shall be null and void ab initio and otherwise ineffective to relieve the Contractor of its responsibility for the Work assigned or delegated.

The Contractor shall not change the legal form of its organization in a manner that adversely affects the Department's rights, protections and remedies under the Contract Documents without the prior written approval of the Department, in the Department's sole discretion.

26.3 Limitation on Liability for Non-Performance

The Contractor's aggregate liability under the PDBC with respect to damages payable to the Department arising out of the performance or unexcused non-performance of the Work, including for delay liquidated damages, will not exceed the aggregate value of the Phase 1 Work and Phase 2 Change Order.

The Department has the right to terminate the PDBC and exercise its remedies in respect of a Contractor event of default if the Contractor's liability to the Authority exceeds such limitation on liability.

Such limitation on liability applies only to damages payable by the Contractor to the Department for non-performance under the PDBC and will not apply if the Contractor abandons the Project or to any of the following:

- A. Any loss, cost or expense incurred by any Contractor team member in the performance of the PDBC or in seeking to cure or prevent any breach of the PDBC by the Contractor;
- B. Any fines or penalties levied or imposed by any Governmental Agency;
- C. Any claims, losses or penalties incurred by any Contractor team member to third parties in any legal proceedings;
- D. Any indemnity payment (resulting from third party claims) made by the Contractor to any Indemnified Party;
- E. Payment of any defense costs, including attorney's fees, to, for, or on behalf of any Indemnified Party with respect to any third-party claim;
- F. Any payments made in connection with any insurance required under the Contract, including the proceeds of such insurance and the payment of any deductible or self-insured retention; and/or
- G. Any claims, losses, penalties or settlement payments paid to the Department in connection with any tort claim by the Department against any Contractor team member based on gross negligence, willful misconduct or fraud.

26.4 Title and Risk of Loss

Title to the structures, improvements, fixtures, machinery, materials constituting the Project will pass to Department upon incorporation in the Project or payment therefor by the Department, whichever first occurs, free and clear of all liens, claims, security interest or encumbrances. Except with respect to certain uninsurable events to be specified in the Contract, the Contractor will nonetheless bear all risk of loss concerning such structures, improvements, fixtures, machinery, materials until the Substantial Completion Deadline, regardless of the extent to which the loss was insured or the availability of insurance proceeds.

26.5 Survival

The dispute resolution provisions contained in Section 18 (Partnering and Dispute Resolution), the warranties in Section 22 (Project Warranties), all of the indemnification provisions, and all other provisions, which by their inherent character should survive Contract Completion or termination of the PDBC, shall survive Contract Completion or the termination of the PDBC.

26.6 No Personal Liability

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

26.7 Reserved

26.8 Severability

If any clause, provision, Section or part of this PDBC is ruled invalid under Section 18 (Partnering and Dispute Resolution) or otherwise by a court of competent jurisdiction, then the parties shall: (i) promptly meet and negotiate a substitute for such clause, provision, Section or part, which shall, to the greatest extent legally permissible, effect the original intent of the parties, including an equitable adjustment to the applicable compensation and Completion Deadline(s) to account for any change in the Work resulting from such invalidated portion; and (ii) if necessary or desirable, apply to the court or other decision maker (as applicable) which declared such invalidity for an interpretation of the invalidated portion to guide the negotiations. The invalidity or unenforceability of any such clause, provision, Section or part shall not affect the validity or enforceability of the balance of this PDBC, which shall be construed and enforced as if this PDBC did not contain such invalid or unenforceable clause, provision, Section or part.

26.9 Governing Law

The Contract Documents shall be governed by and construed in accordance with the law of the State of Ohio. Venue for any legal action in connection with this PDBC shall lie in Columbus, Franklin County, Ohio in the Ohio Court of Claims.

26.10 Counterparts and Electronic Signatures

This instrument may be executed in two or more counterparts, each of which shall be deemed an original, but all of which together shall constitute one and the same instrument. Signatures may be made and delivered electronically.

26.11 Further Assurances

The Contractor shall promptly execute and deliver to the Department all such instruments and other documents and assurances as are reasonably requested by the Department to further evidence the obligations of the Contractor hereunder.

26.12 Headings

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

26.13 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.

26.14 Construction and Interpretation of the Contract Documents

The language in all parts of the Contract Documents shall in all cases be construed simply, as a whole and in accordance with its fair meaning and not strictly for or against any Party.

Wherever the word “including,” and variants, shall be deemed to be followed by the words “without limitation”. Unless otherwise specified, lists contained in the Contract Documents defining the Project or the Work shall not be deemed all-inclusive. “Or” means the inclusive connotation of “or” (i.e., meaning one, some, or all of a number of possibilities). “May,” when used in the context of a power or right exercisable by the Department (or either’s designee) means the power to exercise that right or power in its sole discretion, with no obligation to any Contractor-Related Entity to do so. “May,” when used in all other contexts, indicates permission by the Department for the Contractor to do (or refrain from doing) an action.

All references to time are to prevailing Eastern time. Reference to a right include any benefit, remedy, discretion, authority, or power associated with such right.

There shall be no double counting in any calculation of any amount payable by a Party, such that the receiving Party would receive more than owed or payable. All monetary amounts and obligations (including use of the symbol “\$”) are expressed and payable in U.S. dollars.

Inconsistent or conflicting provisions of the Contract Documents shall not be treated as erroneous provisions under this Section 26.14 (Construction and Interpretation of the Contract Documents), but instead shall be governed by Section 1.3 (Contract Documents Order of Precedence). The Contractor shall not take advantage of, or benefit from, any apparent or actual error in the Contract Documents, and the Contractor shall request in writing such further explanations from the Department as may be necessary to clarify any such apparent or actual error. The Contractor agrees to abide by the explanation, and correction of errors shall not in itself be the basis for any contractual relief, or other claim at law or in equity.

The fact that the Contract Documents omit or misdescribe any detail of the Work that is otherwise necessary to carry out the intent of the Contract Documents and delivery of the Project, or that are customarily performed, shall not relieve the Contractor from its obligation to perform such omitted or misdescribed details as if fully and correctly set forth in the Contract Documents, which omissions, correction of misdescriptions, or performance of those aspects customarily performed shall not in itself be the basis for contractual relief, or other claim at law or in equity.

26.15 Ownership and Copyright of Submittals

Subject to limitations for use of proprietary software, all data, sketches, charts, plans, specifications, electronic files, correspondence and other documents created or collected under the terms of the Contract Documents shall be considered “works made for hire” ~~for which the Department owns the copyright.~~ Subject to Section 25.6 (Public Records) and Section 25.7 (Escrow Documents), Design Documents shall become the Department’s property upon preparation; Construction Documents shall become Department’s property upon delivery to the Department; and other documents prepared or obtained by the Contractor in connection with the performance of its obligations under the Contract Documents, including studies, manuals, technical and other reports and the like, shall become the property of the Department upon the Contractor’s preparation or receipt thereof. Copies of all Design Documents and Construction

Documents shall be furnished to the Department upon preparation or receipt thereof by the Contractor. The Contractor shall maintain all other documents described in this Section 26.15 (Ownership and Copyright of Submittals) in accordance with the requirements of Section 25.1 (Maintenance of Records) and shall deliver copies in accordance with Section 25.7 to the Department as required by the Contract Documents or upon request if not otherwise required to be delivered, with all such documents delivered to the Department as a condition to Contract Completion.

26.16 Intellectual Property

26.16.1 Owner Intellectual Property

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

26.16.2 Obligation to Assign to Department

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

26.16.3 Creation

Design Documents shall become Owner Intellectual Property upon preparation in accordance with Section 26.15 (Ownership of Copyright Submittals). Construction Documents shall become Owner Intellectual Property upon receipt by the Department preparation in accordance with Section 26.15. All other submittals and other documents prepared or obtained by Contractor or any Contractor-Related Entity in connection with the Project shall become Owner Intellectual Property upon Contractor's or any such Contractor-Related Entity's preparation or receipt thereof.

26.16.4 Restricted License; Restricted Use

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

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

26.16.5 Patented Devices, Materials and Processes

Before employing any design, device, material, or process covered by letters of patent or copyright, the Contractor shall provide for its use by suitable legal agreement with the patentee or owner. The Contractor and the Surety shall indemnify and save harmless the State, any affected third party, or political subdivision from any and all claims for infringement of patented design, device, material, process, or any trademark or copyright, and shall indemnify the State for any costs, expenses, and damages that it may be obliged to pay by reason of any infringement, at any time during the prosecution or after the completion of the Work.

26.17 OBM Certification and Taxes

This PDBC is subject to ORC Section 126.07, which provides, in part, that orders under State Agreements shall not be valid and enforceable unless the Director of the Office of Budget and Management first certifies that there is a balance in the appropriation not already obligated to pay existing obligations.

The Department represents that it is exempt from all State and local taxation. As long as the Department is exempt, the Department does not agree to pay any of these taxes. The Contractor, not the Department, shall pay any taxes levied upon the Contractor's net income.

26.18 Independent Contractor

Nothing in the Contract Documents shall be construed as constituting any relationship with the Department other than that of Project owner (the Department) and independent contractor (the Contractor), nor any employer/employee relationship between the Department and the Contractor's employees. 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 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. The Contract Documents shall not be construed to create a contractual relationship of any kind between the Department and a Subcontractor or any other Person except the Contractor.

26.19 Drug-Free Work Place

Throughout the Term, the Contractor and all its Subcontractors and Subconsultants, that provide the Work, must be enrolled in and remain in good standing in the Ohio Bureau of Worker's Compensation ("OBWC") Drug-Free Safety Program ("DFSP") or a comparable program approved by the OBWC and the Department of Worker Claims Drug Free Workplace Program. [FAR Personnel must comply with the ODOT Office of Consultant Services Specifications for Consulting Services Section 2.13 – Drug-Free Workplace.](#)

In addition to being enrolled in and in good standing in an OBWC-approved DFSP or a comparable program approved by the OBWC, the Department requires each Contractor and Subcontractor that provides labor, to subject its employees who perform labor on the Project Site to random drug testing of 5 percent of its employees. The random drug testing percentage must also include the on-site supervisors of the Contractors and Subcontractors. Upon request, the Contractor and Subcontractor shall provide evidence of required testing to the Department.

Each Subcontractor shall require all lower-tier Subcontractors that provides labor on the Project Site with whom the Subcontractor is in contract for the Work to be enrolled in and be in good standing in the OBWC-approved DFSP prior to a lower-tier Subcontractor providing labor at the Site.

The Department will declare a proposal non-responsive and ineligible for award if the Contractor is not enrolled and in good standing in the Ohio Bureau of Workers' Compensation's Drug-Free Safety Program (DFSP) Discount Program or a similar program approved by the Bureau of Workers' Compensation within 8 days of the proposal opening. Furthermore, the Department will deny all requests to sublet when the Subcontractor does not comply with the provisions of this section.

Failure of the Contractor to require a Subcontractor to be enrolled in and be in good standing in the an OBWC-approved DFSP prior to the time that the Subcontractor provides labor at the Site, shall result in the Contractor being found in breach of this PDBC and that breach shall be used in the responsibility analysis of that Contractor or the Subcontractor who was not enrolled in a program for future contracts with the Department for five years after the date of the breach.

26.20 Conflicts of Interest

Prior to execution of a Change Order for any Work Package, the Contractor shall identify and evaluate potential Organizational Conflicts of Interest or develop recommended actions for known organizational conflicts of interest. The Contractor is directed to FAR 2.101, 9.504(a), OAC 4733.35-05, 23 CFR 636.116(a)(1), and 40 CFR 1506.5(c) (as amended) for guidance as to when a conflict of interest arises.

The Contractor shall not employ any person currently employed by the Department for any Phase 1 Work. The Contractor may have other contracts with other clients (e.g., utility companies, other units of government, or abutting land owners) whose interests may be in conflict with the objectives of a particular Department-initiated project. It is the Contractor's responsibility to avoid conflicts of interest in these circumstances and to disclose them as soon as they arise.

26.21 Department Property

Under this PDBC, the Department acquires title to all property to which the Contractor is entitled to reimbursement. The Contractor shall create and maintain records of all Department property accountable to the PDBC, including Department-furnished and Contractor-acquired property.

The Department retains title to all Department-furnished property or equipment. The Contractor shall notify the Department of damages and/or other discrepancies discovered upon receipt of Department-furnished property or equipment. The Contractor shall be responsible to correct damage to Department-furnished property or equipment caused by the Contractor's actions.

[signature page to follow]

IN WITNESS WHEREOF, the Parties have executed this PDBC as of the Effective Date.

STATE OF OHIO

DEPARTMENT OF TRANSPORTATION

Jack Marchbanks

Director of Transportation

Date

[CONTRACTOR]

Name

Title

Date

ADDENDUM 3-1-5-2024

EXHIBIT A: ACRONYMS AND DEFINITIONS

AAN	American Association of Nurserymen
AASHTO	American Association of State Highway and Transportation Officials
AC	Asphalt Cement (pavement), Alternating Current (traffic)
ACBFS	Air Cooled Blast Furnace Slag (aggregate)
ACFA	Actual Cost of Force Account
ACI	American Concrete Institute
ACIA	Asynchronous Communications Interface Adapter (traffic controller)
ADR	Alternative Dispute Resolution
ADT	Average Daily Traffic
ADTT	Average Daily Truck Traffic
AIC	Amps Interrupting Capacity
AISC	American Institute of Steel Construction
AISI	American Iron and Steel Institute
AMRL	AASHTO Material Reference Library
ANFO	Ammonium Nitrate and Fuel Oil
ANSI	American National Standards Institute
AOS	Apparent Opening Size (fabric)
AREA	American Railway Engineering Association
ASCE	American Society of Civil Engineers
ASD	Allowable Stress Design
ASME	American Society of Mechanical Engineers
ASTM	American Society for Testing and Materials
ATC	Alternative Technical Concept
AWG	American Wire Gauge
AWPA	American Wood Preservers' Association
AWS	American Welding Society
AWWA	American Water Works Association
BBR	Bending Beam Rheometer (asphalt binder test)
BMP	Best Management Practice (erosion)
BOF	Basic Oxygen Furnace (aggregate)
BSG	Bulk Specific Gravity
BTEX	Benzene, toluene, ethyl benzene, and xylene (a soil test)
BUSTR	Bureau of Underground Storage Tank Regulations (Division of Fire Marshal)
C&MS	Construction and Material Specifications
CAPWAP	Case Pile Wave Analysis Program
CBAE	Cut Back Asphalt Emulsion
CCRL	Cement and Concrete Reference Laboratory
CCS	Crushed Carbonate Stone
CECI	Contractors Erosion Control Inspector

CFR	Code of Federal Regulations
CIE	Commission Internationale d'Eclairage (illumination)
CM	Construction Manager
CPESC	Certified Professional in Erosion and Sediment Control
CQAE	Construction Quality Assurance Engineer
CQCE	Construction Quality Control Engineer
CRS	Cationic Rapid Set (asphalt emulsion)
CRSI	Concrete Reinforcing Steel Institute
CSS	Cationic Slow Set (asphalt emulsion)
CSXT	CSX Transportation, Inc.
CUF	Commercially Useful Function
CVN	Charpy V-notch (steel test)
CWT	Hundred Weight (100 lbs)
DB	Design-Build
DBE	Disadvantaged Business Enterprise
DBT	Design-Build Team
DCE	District Construction Engineer
DDD	District Deputy Director
DDRC	District Dispute Resolution Committee
DET	District Engineer of Tests
DGE	District Geotechnical Engineer
DLS	Data Logging System (traffic markings)
DNR	Department of Natural Resources
DRB	Dispute Resolution Board
DRC	Dry Rodded Condition (asphalt aggregate test)
DSR	Dynamic Shear Rheometer (asphalt binder test)
DZA	Deficient Zone Average (concrete test)
EAF	Electric Arc Furnace
ECFA	Estimated Cost of Force Account
EDA	Earth Disturbing Activity
EEI	Edison Electric Institute
EIA	Electronic Industries Alliance
EPA	Environmental Protection Agency
EQS	Exceptional Quality Solids (compost)
FAA	Fine Aggregate Angularity (asphalt aggregate)
FAR	Federal Accounting Regulations
FCM	Fracture Critical Member (steel test)
FEMA	Federal Emergency Management Agency
FHWA	Federal Highway Administration, Department of Transportation
FRP	Fiber Reinforced Polymer

FSS	Federal Specifications and Standards, General Services Administration
GAAP	Generally Accepted Accounting Principles
GGBFS	Ground Granulated Blast Furnace Slag
GMP	Guaranteed Maximum Price
GS	Granulated Slag
HDPE	High Density Polyethylene
HMWM	High Molecular Weight Methacrylate
ICEA	Insulated Cable Engineers Association
IEEE	Institute of Electrical and Electronic Engineers
IES	Illuminating Engineering Society
IMP	Traffic Incident Management Plan
IMSA	International Municipal Signal Association
IPCEA	Insulated Power Cable Engineers Association
IPS	International Pipe Standard
ISSA	International Slurry Seal Association
ITE	Institute of Transportation Engineers
ITO	Instructions to Offerors
ITS	Intelligent Transportation System
IZEU	Inorganic Zinc Epoxy Urethane
JMF	Job Mix Formula
JV	Joint Venture
LAM	List of Approved Materials
LED	Light Emitting Diode
LOD	Level of Development
LWT	Loaded Wheel Test (asphalt test)
MALD	Model as a Legal Document
MBF	Thousand Board Feet (wood)
MC	Medium Cure (asphalt emulsion)
MCB	Microchannel Bus (traffic controller)
MOT	Maintenance of Traffic
MOV	Metal Oxide Varistor (traffic controller)
MPI	Magnetic Particle Inspection (steel test)
MSG	Maximum Specific Gravity (asphalt)
MTD	Maximum Theoretical Density (asphalt)
N/A	Not applicable
NACE	National Association of Corrosion Engineers
NCHRP	National Cooperative Highway Research Program
NCR	Nonconformance Report
NEMA	National Electrical Manufacturers Association
NEPA	National Environmental Policy Act

NHI	National Highway Institute
NIST	National Institute of Standards and Technology
NOI	Notice of Intent
NPDES	National Pollutant Discharge Elimination System
NTP	Notice to Proceed
OAC	Ohio Administrative Code
ODOT	Ohio Department of Transportation
OEPA	Ohio Environmental Protection Agency
OH	Open Hearth (aggregate)
OHWM	Ordinary High Water Mark
OJT	On the Job Training
OMM	Office of Materials Management (the Central Office Laboratory)
OMUTCD	Ohio Manual of Uniform Traffic Control Devices
ORC	Ohio Revised Code
ORDC	Ohio Rail Development Commission
OSHA	Occupational Safety and Health Administration
OTE	Office of Traffic Engineering
OWPCA	Ohio Water Pollution Control Act
OZEU	Organic Zinc Epoxy Urethane
PAT	Project Average Thickness (concrete test)
PAV	Pressure Aging Vessel (asphalt binder test)
PB	Polybutylene (conduit)
PCC	Portland Cement Concrete
PCS	Petroleum Contaminated Soil
PDA	Pile Dynamic Analysis (steel piling)
PDB	Progressive Design-Build
PDBC	Progressive Design-Build Contract
PE	Polyethylene (conduit)
PG	Performance Grade (asphalt binder grading system)
pH	Potential of Hydrogen
PI	Public Information
PLS	Pure Live Seed
PML	Probable Maximum Loss
PVC	Polyvinyl chloride
QA	Quality Assurance
QC	Quality Control
QCFS	Quality Control Fabricator Specialist (structures)
QCP	Quality Control Program, or Plan, or Points (steel test)
QPL	Qualified Products List
RAP	Reclaimed Asphalt Pavement

RAS	Reclaimed Asphalt Shingles
RC	Rapid Cure (asphalt emulsion)
REA	Rural Electrification Act
RFC	Released for Construction
RFI	Radio Frequency Interference (traffic controller)
RFP	Request for Proposal
RH	Relative Humidity
RID	Reference Information Document(s)
RMMP	Regulated Materials Management Plan
RMS	Root Mean Square (traffic controller)
ROD	Record of Decision
ROW	Right(s)-of-Way
RPCC	Recycled Portland Cement Concrete
RPM	Raised Pavement Marker (traffic)
RS	Rapid Set (asphalt emulsion)
RTFO	Rolling Thin-Film Oven (asphalt binder test)
RUS	Rural Utilities Service
SAE	Society of Automotive Engineers
SBA	Styrene Butadiene Amine
SBR	Styrene Butadiene Rubber
SBS	Styrene Butadiene Styrene
SCD	Standard Construction Drawing
SDS	Safety Data Sheets
SF	Standard Fabricated members (structures)
SI	International System of Units (Metric)
SMA	Stone Matrix Asphalt
SPD	Surge Protection Device (traffic controller)
SPST	Single Pole / Single Throw (traffic controller)
SS	Slow Set (asphalt emulsion)
SSD	Saturated Surface Dry (aggregate)
SSPC	Society for Protective Coatings
SWPPP	Storm Water Pollution Prevention Plan
TAP	Traffic Authorized Product
TCE	Trichloroethylene
TCP	Temporary Traffic Control Plan
TMP	Traffic Management Plan
TMPTA	Tri-methylpropane Tri-acrylate (paint)
TNP	Total Neutralizing Power
TODS	Tourist-Oriented Directional Signs
TSEC	Temporary Sediment and Erosion Control

TSR	Tensile Strength Ratio (asphalt mix test)
UF	Unique Fabricated members (structures)
UL	Underwriters' Laboratories, Inc.
USACE	United States Army Corps of Engineers
USCG	United States Coast Guard
USC	United States Code
VA	Verification Acceptance
VAC	Volts Alternating Current
VCA	Volume of Coarse Aggregate (asphalt mix test)
VMA	Voids in the Mineral Aggregate
VME	VersaModule Eurocard (traffic controller)
WDT	Watchdog Timer
WEAP	Wave Equation Analysis (steel piling)
WPS	Welding Procedure Specification (steel test)
WTS	Worksite Traffic Supervisor
WZRPM	Work Zone Raised Pavement Marker (traffic)
XCU	Explosion, Collapse and Underground

AASHTO Uniform Audit & Accounting Guide means the guide published by AASHTIO that includes detailed information regarding techniques for cost allocation, application of Federal procurement regulations, and the proper treatment of operating costs incurred by organizations for engineering and design-related services performed on various Federal, State, and Local transportation projects.

Addenda/Addendum means supplemental additions, deletions, and modifications to the provisions of the RFP after the release date of the RFP up to the Proposal Due Date.

Administrative Proposal means the proposal materials submitted by an Offeror providing the information requested in ITO Section 6.7 (Administrative Proposal).

Affiliate means (i) any person, organization or firm that directly or indirectly, through one or more intermediaries, controls, is controlled by, or is under common control with the Contractor or any Principal Participant; or (ii) any organization or firm for which 10 percent or more of the interest in such organization or firm is held directly or indirectly, beneficially or of record, by (a) the Contractor; (b) any Principal Participant; or (c) any Affiliate under part (1) of this definition.

Allowance Item means Contract Items that the Department determines require an allowance based upon the Design Documents then available to the Department.

As-Built Drawings means documents that depict the final completed Project, including all changes from RFC Documents and data showing all items such as the electrical systems, drainage systems, lighting systems, underground Utilities, traffic controls, intelligent transportation system, signing placement, highway alignment and grade revisions, bridge detail changes, bridge settlement reference elevations and joint seal measurements, typical sections, cross sections, and all other relevant data.

Audit or Financial Review is a formal examination of accounting systems, cost records, and other cost presentations to verify their reasonableness, allowability, and allocability for negotiating fees and for determining costs for Federal, Department, and Local participation and reimbursement. Audits and Financial Reviews may include, but are not limited to, an evaluation of the Contractor's policies, procedures, controls, and actual performance. Objectives of Audits and Financial Reviews include the identification and evaluation of all activities that contribute to, or have an impact on, proposed or incurred costs under the PDBC. Audits and Financial Reviews may include inquiries conducted electronically (by correspondence or email) and also may involve fieldwork (the examination of financial records at the Contractor's business offices).

Authorized Representative has the meaning set forth in ITO Section 4.2 (Authorized Representatives and Offeror Registration).

Baseline Schedule has the meaning assigned in Section 1.4.1 (Interim Baseline and Baseline Schedules) of Exhibit T (Critical Path Method Progress Schedule).

Best Management Practices or BMP has the meaning set forth in *Storm Water Management for Construction Activities: Developing Pollution Prevention Plans and Best Management Practices* (EPA Document 832 R 92 005).

Betterment means any upgrade of a utility company's facility being relocated that is not attributable to the Construction Work and is made solely for the benefit of and at the election of the utility company.

Blue Book has the meaning assigned in Exhibit H (Force Account Provisions).

Bridge means a structure, including supports, erected over a depression or an obstruction, such as water, a highway, or a railway, and having a track or passageway for carrying traffic or other moving loads and having a length measured along the center of roadway of 10 feet (3.048 m) or more between undercopings of abutments or extreme limits of openings for multiple boxes.

- A. Length. The length of a bridge structure is the overall length measured along the centerline of the roadway surface.
- B. Roadway Width. The clear width measured at right angles to the longitudinal centerline of the bridge between the bottom of curbs or guard timbers or, in the case of multiple heights of curbs, between the bottoms of the lower risers. For curb widths of 1 foot (0.3 m) or less, the roadway width is measured between parapets or railings.

Buildable Unit means a unit of Work that is suitable to be packaged as a Submittal because the unit of Work is capable of being designed, reviewed, and constructed independently from other units of Work or with clearly identified controls, constraints and assumptions governing the interfaces with other units of Work. A Buildable Unit may be defined by a geographic area, by types of Work or by construction stages.

Category 1 Events means excusable, non-compensable delays as defined in Section 13.2.1 (Category 1 Events – Excusable, Non-Compensable Delays) of the PDBC.

Category 2 Events means excusable compensable delays as defined in Section 13.2.2 (Category 2 Events – Excusable, Compensable Delays) of the PDBC.

Certificate of Current Cost or Pricing Data means a certificate in the form in paragraph (a) of 48 CFR 15.406-2.

Certified Test Data means test report from a manufacturer's or an independent laboratory approved by the Department listing actual test results of samples tested for compliance with specified Department requirements. The Department will accept certified test data from manufacturers' laboratories if their products have been used satisfactorily on prior Department contracts and their test data has been confirmed. Include a statement that the test data furnished is representative of the material furnished to a Department project or to a supplier. The report is identified by number or date and identifies the Department project or supplier to which the material is shipped. Submit reports signed by a person having legal authority to act for the manufacturer or independent laboratory.

Change Order means a written order issued by the Department to the Contractor, covering changes to the terms and conditions, and/or contract quantities, within or beyond the scope of the Contract and establishing the basis of payment and time adjustments for the Work affected by the changes.

Claim means a Dispute that is not settled through Steps 1 or 2 of the Dispute Resolution Procedures. A Dispute becomes a Claim when the Contractor submits a notice to escalate to Step 3 of the Dispute Resolution Process.

Claims Documentation shall have the meaning assigned to such term under Section 18.4.9 (Procedures for Consideration of Disputes) of the PDBC.

Clean Hard Fill has the meaning assigned in CA-EW-20 (ODOT Beneficial Reuse Form).

Closure means that all or part of any traffic lanes, ramps, cross roads, shoulders or sidewalks are closed or blocked, or that the use thereof is otherwise restricted.

Commencement Date means the commencement date for the performance of the Sub-Phase 1A Work, the Sub-Phase 1B Work, or the Phase 2 Work which shall be the date described as the 'Commencement Date' in the Notice to Proceed applicable to the Work.

Completion Deadline means the date shown in the Contract Documents upon which a Milestone is scheduled to be achieved as such date may be extended in accordance with the Contract Documents.

Completion of the Contract has the meaning set forth in Section 5.14.4 (Completion of the Contract and Continuation of Contractor's Responsibilities) of the PDBC.

Completion of the Contract Date means the date of the Department's letter confirming Completion of the Contract.

Completion of the Contract Deadline means the date to be established by the Parties by which Completion of the Contract shall be achieved, which shall be a specified number of days after the Substantial Completion Date.

Component Firm means any firm that is contemplated by the Contractor to perform Work on the Project for or on behalf of the Contractor, including the Contractor, DBT, Principal Participants, Major Participants, Designers, Subcontractors and Subconsultants.

Construction and Materials Specifications (C&MS) means the Department's Construction and Materials Specifications.

Construction Documents means all shop drawings, working drawings, fabrication plans, material and hardware descriptions, specifications, construction quality control reports, construction quality assurance reports and samples developed by the Contractor and necessary or desirable for construction of the Project and/or the Utility Relocations included in the Construction Work, in accordance with the Contract Documents and the Special Provisions.

Construction Period means the period beginning on the date the Department authorizes the commencement of Construction Work per Section 5.2 (Phase 2 Preconstruction and Progress Meetings) of the PDBC and ending on the Substantial Completion Date.

Construction Work means all Work related to the construction of the Project including furnishing all Materials, goods, and Equipment and performing all construction, installation, inspection, testing, and other services required to complete the fully functional Project and the Phase 2 Work, whether temporary or permanent but excluding the Design Work.

Contingency means monetary set-asides by the Contractor for cost and time and duration set-asides by the Contractor for schedule included (or proposed to be included, as the context requires) within the Contract Price or the Project Schedule.

Consumer Price Index or CPI means the Consumer Price Index All items (BES Series ID CUUR0000SA), as published by the United States Department of Labor. Bureau of Labor Statistics, for which the base year is 1982-84 = 100, or if such publication ceases to be in

existence, a comparable index selected by the Department and approved by the Contractor, acting reasonably. If such index is revised so that the base year differs from that set forth above, the CPI shall be converted in accordance with the conversion factor published by the United States Department of Labor, Bureau of Labor Statistics. If the Bureau of Labor Statistics otherwise alters its method of calculating such index, the Parties shall mutually determine appropriate adjustments in the affected index.

Contract means the PDBC (the written agreement between the Department and the Contractor setting forth the obligations of the Parties, including, but not limited to, the performance of the Work and the basis of payment).

Contract Completion Time means the time assigned in the Baseline Schedule accepted by the Department to achieve Substantial Completion.

Contract Documents means the PDBC and its exhibits, general and detailed plans, Plan notes, Standard Construction Drawings identified in the Plans, Phase Change Orders, Change Orders, Supplemental Agreements, "Accepted" and "Accepted as Noted" Working Drawings, and (i) any other document designated by the Department as a Contract Document, prior to the submission date of the Offeror's Proposal and (ii) any other documents designated by the Department as a Contract Document and accepted by the Contractor subsequent to the submission date, all of which constitute one instrument.

Contract Item (Pay Item) means a specifically described unit of Work for which a price is provided in the Contract.

Contract Price means the amount of compensation to be paid by the Department to the Contractor for the Phase 2 Work or for a Work Package or Buildable Unit (depending on the context) as such amount may be modified pursuant to the Contract Documents.

Contract Time means the number of Workdays or Days, including authorized adjustments, allowed for completion of the Project. When a specified Completion Deadline is shown in the Contract Documents instead of the number of Workdays or Days, completion of the Project shall occur on or before that date. Specified Completion Deadline shall be completed on or before the day indicated even when that date is a Saturday, Sunday, or holiday.

Contractor means the individual, firm, corporation or joint venture, which may include the Designer if qualified under the provisions of ORC 5526.04, contracting with the Department for performance of prescribed Work, acting directly or through a duly authorized representative and qualified under the provisions of ORC 5525.02 to 5525.09 inclusive, and any amendments thereto.

Contractor Default has the meaning assigned in Section 19.1.1 (Breach by the Contractor) of the PDBC.

Contractor Generated Regulated Material means (a) Release(s) of Regulated Material attributable to the actions, omissions, negligence, willful misconduct, or breach of applicable Law or contract by the Contractor or any Affiliate, provided that the performance of Regulated Materials Management in respect of Regulated Materials by the Contractor or any Affiliate in accordance with the requirements of the PDBC shall not be a "Contractor Release of Regulated Material" (b) Release(s) of Regulated Materials arranged to be brought onto the Site or elsewhere by the Contractor or any Affiliate, regardless of cause, or (c) use, containment,

storage, management, handling, transport and disposal of any Regulated Materials by the Contractor or any Affiliate in violation of the requirements of the Contract Documents or any Applicable Law or Governmental Approval.

Contractor-Related Entity means:

- (a) the Principal Participants and Major Participants;
- (b) the Subcontractors and Subconsultants (including Suppliers);
- (c) any other Persons performing any of the Work for or on behalf of the Contractor;
- (d) in respect of any of the foregoing:
 - (i) the officers, directors and employees;
 - (ii) agents and representatives to the extent engaged in connection with the Project;
 - (iii) consultants and contractors to the extent engaged in connection with the Project;
and
 - (iv) successors and assigns,

excluding the Department, and in respect of any Utility Relocation Work, the relevant Utility Owner.

Contractor Risk is a Risk Register Event for which the Contractor is only eligible for financial relief to the extent amounts are available in the Contractor's Risk Contingency.

Contractor Submittals Listing & Schedule is defined in Section 4.7 (Contractor Submittals Listing & Schedule) of the PDBC.

Contractor's Representative means the person assigned with full authority to represent and act for the Contractor as set forth in Section 10.1.2 (Contractor's Representative) of the PDBC.

Contractor's Risk Contingency means the aggregate sum of the Risk Events for which the Contractor has assumed financial responsibility under the then-current Risk Register.

Controlling Board means the State Controlling Board as defined in ORC Chapter 127.

Corrective Action means the action taken by which the Nonconforming Work is made compliant with the Contract Documents.

Cost Accounting Standards (CAS) are issued by the Cost Accounting Standards Board (CASB), a section of the Office of Federal Procurement Policy within the U.S. Office of Management and Budget. The CASB has the exclusive authority to issue and amend cost accounting standards and interpretations designed to achieve uniformity and consistency in the cost accounting practices governing the measurement, assignment, and allocation of costs to contracts that involve Federal funds. The CAS are codified at 48 CFR Chapter 99.

Cost Accounting System means a type of accounting system that allows for the systematic and timely classification, recording, allocation, presentation, and interpretation of costs, either actual or proposed, as paid or required to be paid in the performance of the applicable portion of the Work. For each FAR Participant, the Cost Accounting System shall articulate with, and/or be integrated with, the organization's general ledger and financial management system. The use of a Cost Accounting System is required by FAR Participants, as these systems provide for the

consistent allocation of costs to cost objectives (direct and indirect activities). Cost Accounting Systems generally involve a higher level of accountability and detail than is present in simple financial accounting systems that merely track and accumulate costs by category (expense type), rather than by both categories and cost objectives. For specifics regarding the proper design and maintenance of Cost Accounting Systems, see the AASHTO Uniform Audit & Accounting Guide, Chapters 5 through 8.

Cost Model means the open and transparent model that the Contractor develops and uses with respect to the applicable portion of the Work so that estimates and assumptions are communicated to the Department, and the Department's Office of Estimating prepared in accordance with Exhibit G (Opinion of Probable Cost (OPC) and Pricing Process).

County means the designated county or counties in which the Work specified is to be done.

Critical Activities means the activities that make up the Critical Path of activities.

Critical Path means the longest path of activities in the Project Schedule that controls the time of completion of a Milestone.

Critical Path Method (CPM) means a scheduling method that utilizes the precedence diagram approach to calculate each activity's early dates, late dates and float values in order to establish the Critical Path through the activity network.

Culvert means any structure not classified as a Bridge that provides an opening under the roadway.

Day means every day shown on the calendar.

DBE Outreach Plan means the outreach and communication plan regarding DBE participation described in Exhibit O (Disadvantaged Business Enterprise Performance Plans and Good Faith Efforts) as may be amended.

DBE Performance Plan means the performance plan for achievement of DBE compliance described in Exhibit O (Disadvantaged Business Enterprise Performance Plans and Good Faith Efforts) as may be amended.

DBT Geotechnical Construction Manager means the Key Personnel of that name identified in Exhibit D (Key Personnel).

DBT Geotechnical Design Engineer means the Key Personnel of that name identified in Exhibit D (Key Personnel).

DBT Project Manager means the Key Personnel of that name identified in Exhibit D (Key Personnel).

Daily Force Account Record means the record prepared and signed by the Parties on a daily basis to record labor and Equipment used on the force account Work as further described in Exhibit H (Force Account Provisions).

Debarment Regulations means (a) Federal Executive Order no. 12549 (Feb. 18, 1986), (b) Federal Executive Order no. 12689 (Aug. 16, 1989), (c) 31 U.S.C. § 6101 note (Section 2455, Pub. L. 103-355, 108 Stat. 3327) and (d) 49 CFR Part 29 "Government wide Debarment and Suspension (Non-procurement)".

Delay Schedule has the meaning assigned in Section 1.7 (Revision and Delay Schedules) of Exhibit T (Critical Path Method Progress Schedule).

Department means the Ohio Department of Transportation and may be used interchangeably with State or ODOT. Each reference to the Department shall be deemed to include the Department's Authorized Representatives.

Department Authorized Representative means one or more individuals having specified authority under the PDBC to be provided to the Contractor in a written notice as described in Section 10.1.1 (Department Authorized Representatives) of the PDBC.

Department-Provided Approvals means each of the Governmental Approvals for the Project to be provided by the Department.

Department Release(s) of Regulated Material means the introduction in on or under the Project Right of Way of Regulated Material directly by the Department, or by its contractors, Subcontractors, Subconsultants agents or employees acting in such capacity (other than the Contractor, its Subcontractors, Subconsultants or Affiliates), excluding, however, any Regulated Materials that are Contractor-Generated Regulated Materials.

Department's Change Event Notice means a written communication by the Department sent to the Contractor after the Contractor's oral notice of a potential Change Order event as required by Section 12.4.1 (Notice of Potential Change Order (NPCO)) and either (i) before Contractor's written notice required by Section 12.4.1, or (ii) after Contractor's written notice required by Section 12.4.1, and such Notice shall include a statement disclosing the successful or unsuccessful mitigation of the event, and may, but is not required to, include a summary of the Department's mitigation efforts, instructions to the Contractor to submit a RCO and/or an EDR, the Department's decision to issue a Construction Change Directive, Department's decision that such event is not entitled to a Change Order, and a statement requiring the Contractor to submit a Change Event Mitigation Plan in accordance with Section 12.4.1.3 (Change Event Mitigation Plan).

Department's Decision means the Department's decision regarding the Contractor's request for an extension of any Completion Deadline and/or the applicable portion of the Contract Price due to Delay Costs in accordance with Section 13 (Time Extension To The Completion Deadlines And Payment For Excusable Delays) of the PDBC.

Department's Risk Contingency means any contingency established by the Department to manage the aggregate sum of Risk Events for which the Department has assumed financial responsibility under the then-current Risk Register.

Design-Build Team (DBT) means the Contractor and its Subconsultants and Subcontractors.

Design Documents means all drawings (Plans), specifications, calculations, records, reports or other documents, including shop drawings and working drawings, prepared by the Contractor, which may be used for design, manufacture, fabrication, installation, testing, examination and certification of items and which give a detailed and precise representation of the configurations and arrangements of the materials and items being constructed in connection with the Project based on the Contract Documents.

Design Work means all Phase 1 Work or Phase 2 Work related to the design, redesign, engineering, or architecture of the Project, development of all required Design Documents and applicable Construction Documents required by the PDBC.

Design and Construction Work means the Design Work and Construction Work, including those obligations of the Contractor pertaining to design and construction set forth in the Project Scope.

Designer means the individual, firm, or corporation that the Contractor designates to prepare the Design Document(s) and is otherwise charged with the Design Document(s) portions of the PDBC Contract (not necessarily including Work incorporated in the preparation of Working Drawings) who prior to such undertaking receives the written consent of the Department, provided such individual, firm or consultant must hold a Certificate of Authorization from the Ohio State Board of Registration for Professional Engineers and Surveyors and has fulfilled the Prequalification requirements under ORC 5526.04.

Detailed Cost Analysis means a detailed cost analysis performed by the Contractor in accordance with Section 13.4.1.1 (Detailed Cost Analysis) of the PDBC and submitted in conjunction with an Excusable Delay Request.

Deviation See "Standards Deviation".

Direct Cost is any labor or non-labor cost that can be traced to a specific Project, task, program, activity or contract (final cost objective). All direct labor costs allocable to design and engineering contracts (regardless of the contract type, e.g., lump sum versus actual cost) shall be properly allocated to final cost objectives, and all direct labor costs shall be included in the direct labor base, regardless of whether the costs are billable to a client.

Director means the Director of the Ohio Department of Transportation or authorized designee.

Disadvantaged Business Enterprise (DBE) has the meaning set forth in 49 CFR Part 26.

Dispute means any Claim, dispute, disagreement or controversy between the Department and the Contractor concerning their respective rights and obligations under the Contract Documents, including concerning any alleged breach or failure to perform and remedies.

Dispute Documentation shall have the meaning assigned to such term under Section 18.3.3 (Dispute Documentation and Rebuttal) of the PDBC.

Dispute Resolution Coordinator shall mean the Department official given such title by the Director.

Disputed Work means any portion of the Work that is the subject of a Dispute or Claim filed by the Contractor in accordance with the Dispute Resolution Procedures.

Dispute Resolution Procedures means the procedures for resolving disputes set forth in Article 18 of the PDBC.

Effective Date is defined in the preamble of this PDBC.

Emergency means any unforeseen event affecting the Project, whether directly or indirectly, which (a) causes or has the potential to cause disruption to the free flow of traffic on the Project

or a threat to the safety of the public, (b) is an immediate or imminent threat to the long term integrity of any part of the infrastructure of the Project, to the Environment or to property adjacent to the Project or to the Safety of the Users or the traveling public; (c) is recognized by the Ohio Department of Public Safety as an emergency; or (d) is recognized or declared by the Governor of the State, the Federal Emergency Management Administration (FEMA), the U.S. Department of Homeland Security or other Governmental Entity with authority to declare an emergency.

Engineer of Record means an individual, or individuals, employed by the Contractor or a Component Firm and properly registered as a Professional Engineer with the Ohio State Board of Registration for Professional Engineers and Surveyors, who seals the construction plans and associated documents/calculations. Also known as Designer of Record.

Engineered Drawings means a type of working drawing that requires the practice of engineering as defined in ORC 4733.01(E), as applicable. Examples of Engineered Drawings include: Excavation Bracing Plans, Demolition Plans, Erection Plans, Falsework Plans, Cofferdam Plans, Causeway Plans, Jacking and Temporary Support Plans, Plans for Heavy Equipment on Structures, and Plans for structures for Maintaining Traffic.

Environmental Commitments means the compliance measures, documentation, timing, and responsibilities described in Section 8 (Environmental) of Exhibit E (Technical Requirements) as may be amended in the Project Scope.

Environmental Compliance Specialist (ECS) means the individual retained or employed by Contractor who has the authority and responsibility for monitoring, documenting and reporting environmental compliance for the Work as more particularly described in the Project Scope.

Environmental Monitoring and Compliance Plan (EMCP) means the Contractor's plan for documenting and verifying compliance with the Environmental Commitments, prepared in accordance with the Project Scope.

Equipment means all machinery and equipment, together with the necessary supplies for upkeep and maintenance, and also tools and apparatus necessary for the proper design, construction, and acceptable completion of the Work.

Environmental Site Assessment (ESA) is a study used to determine if any Regulated Materials are present on a property or parcel. The Department uses these studies to determine the potential involvement of a Project's earth-disturbing construction activities with documented environmental releases from adjacent properties.

Escrow Agent means the banking institution or other bonded document storage facility agreed by the Parties to be responsible for the escrow of the Escrow Documents under the Escrow Agreement.

Escrow Agreement means the agreement executed and delivered by the Contractor, the Departments and the Escrow Agent pursuant to Section 25.7 (Escrow Documents) of the PDBC.

Escrow Documents has the meaning set forth in Section 25.7.1 (General) of the PDBC.

Escrow Documents Submission Date means the date on which any Escrow Documents are scheduled to be submitted by the Contractor to the Escrow Agent to be held pursuant to the Escrow Agreement.

Excess GMP means all Cost of Work in excess of any approved GMP Contract Price that is not approved in accordance with a Change Order.

Excusable Delay Request has the meaning set forth in Section 13.4.1 (Excusable Delay Request) of the PDBC.

Extra Work means an item of Work not provided for in the Contract as awarded but found essential to the satisfactory completion of the Contract within its intended scope.

FAR Participant means a Component Firm that has an indirect cost rate approved by ODOT's Office of External Audits and establishes and maintains acceptable, fully articulated Financial and Cost Accounting Systems that track, classify, and allocate costs in accordance with the requirements of FAR Part 31 and applicable Cost Accounting Standards.

FHWA refers to the Federal Highway Administration of the United States Department of Transportation.

Fabricator means the individual, firm, or corporation that fabricates structural metals or prestressed concrete members as an agent of the Contractor.

Federal Requirement means those requirements set forth in attached Exhibit N (Contract Provisions for Federal Aid Construction Projects).

Field Design Change (FDC) means design changes initiated by the Contractor to documents approved and Released for Construction (RFC) are completed under a Field Design Change (FDC). FDCs are subject to quality check or review activities.

Final Completion means the satisfaction of all requirements in Section 5.14.3.1 (Requirements for Final Completion) by the Contractor and issuance of Notice of Final Completion by the Department pursuant to Section 5.14.3.2 (Notice of Final Completion).

Final Design means, depending on the context: (a) the Final Design Documents, (b) the design concepts set forth in the Final Design Documents, or (c) the process of development of the Final Design Documents.

Final Design Documents means the complete final construction drawings, including plans, profiles, cross-sections, notes, elevations, typical sections, details and diagrams, specifications, reports, studies, calculations, electronic files, records and submittals prepared by the Contractor, necessary or related to construction and maintenance of the Project or any portion thereof and any utilities included in the Design Work or the Construction Work.

Final Engineering and Construction Phase means Phase 2.

Final Invoice means the estimate for payment prepared by the Contractor and approved by the Department, prepared in accordance with Section 11.4 (Phase 1 Estimates and Payments) of the PDBC.

Final Payment means the final payment of the Contract Price payable after Final Completion in accordance with the terms of this PDBC.

Financial Proposal means the financial proposal submitted by an Offeror providing the information requested in ITO Section 6.9 (Financial Proposal).

Float means the length of time along a given network path that the actual start and finish of activity(s) can be delayed without delaying the Substantial Completion Deadline.

Force Majeure Event has the meaning assigned in Section 14 (Force Majeure Events) of the PDBC.

General and Administrative (G&A) Expenses the Contractor's auditable general and administrative costs and expenses that are allocated among all of the Contractor's projects (inclusive of the Project) as further detailed under Exhibit G (Opinion of Probable Cost (OPC) and Pricing Process), Part B.

Good Faith Efforts (GFE) means efforts to achieve a DBE or goal, that by their scope, intensity, and appropriateness to the objective, can reasonably be expected to fulfill the requirements of the goal, in accordance with 49 CFR 26.53 and Appendix A to Part 26.

Governing Regulations means the governing regulations set forth in Section 7.1 (Governing Regulations) of Exhibit E (Technical Requirements) as may be amended in the Project Scope.

Government Entity means any federal, state, or local government and any political subdivision or any governmental, quasi-governmental, judicial, public, or statutory instrumentality, administrative agency, authority, body, or entity, other than ODOT.

Governmental Approval means any approval, authorization, certification, consent, decision, exemption, filing, lease, license, permit, bond requirement, registration, or ruling, issued or required by any Government Entity having subject matter jurisdiction by Applicable Law or consent of the Department, required for performance of the Phase 1 Work or the Phase 2 Work or any part of it.

Guaranteed Maximum Price or GMP means a form of pricing for Buildable Unit or the Phase 2 Work in which, in return for delivering such Work, the Contractor is eligible to be paid the actual allowable cost of properly performing such Work but may not receive more than the GMP.

Guaranteed Maximum Price (GMP) Contract Price means any Price Proposal approved as a GMP.

Guaranteed Maximum Price (GMP) Savings means the difference, if any, between the actual cost of the Work plus Phase 2 Markup under any GMP Contract Price at Completion of the Contract (or completion of the applicable Work Package), and the GMP Contract Price and Phase 2 Markup incorporated into the corresponding Change Order.

Guarantor means any party approved by the Department to provide a Guaranty securing Contractor's obligations under this PDBC.

Guaranty means any guaranty provided by a Guarantor to secure Contractor's obligations under this PDBC.

Indemnified Parties has the meaning assigned in Section 16.1 (Indemnifications by Contractor) of the PDBC.

Inspector means the Department's authorized representative assigned to make detailed inspections of Contract performance.

Instructions to Offerors (ITO) means the documents, including exhibits and forms, included in the RFP containing directions for the preparation and submittal of information by the Offerors in response to the RFP.

Intellectual Property means any and all patents, trademarks, service marks, copyright, database rights, moral rights, rights in a design, know-how, confidential information, and any and all other intellectual or industrial property rights whether or not registered or capable of registration and whether subsisting in the United States or any other part of the world, together with all or any goodwill relating or attached to such rights, which is created, brought into existence, acquired, used, or intended to be used by any Contractor-Related Entity for the purposes of carrying out the Phase 1 Work or the Phase 2 Work or otherwise for the purposes of the PDBC.

Interim Baseline Schedule has the meaning assigned in Section 1.4.1 (Interim Baseline and Baseline Schedules) of Exhibit T (Critical Path Method Progress Schedule).

Interim Schedule means the updated Interim Baseline Schedule.

Key Personnel means those individuals named and listed in Exhibit C (Proposal Commitments) as filling:

- (a) the Key Personnel positions listed in Exhibit D (Key Personnel); and
- (b) any additional Key Personnel positions not included in paragraph (a) of this definition but offered in the Proposal Commitments, and any replacements approved in accordance with Section 10.4 (Key Personnel) of the PDBC.

Laboratory means the testing laboratories under the direct management of ODOT, or specifically contracted with ODOT for management of the Project's Materials. This may include the Office of Materials Management (OMM) located at 1600 West Broad Street, Columbus, Ohio, and the ODOT District testing facilities.

Law or Laws means (a) any statute, law, code, regulation, ordinance, rule or common law, (b) any binding judgment (other than regarding a Claim or Dispute), (c) any binding judicial or administrative order or decree (other than regarding a Claim or Dispute), (d) any written directive, guideline, policy requirement or other governmental restriction (including those resulting from the initiative or referendum process, but excluding those by the Department within the scope of its administration of the Contract Documents) or (e) any similar form of decision of or determination by, or any written interpretation or administration of any of the foregoing by any Governmental Entity, in each case which is applicable to or has an impact on the Project or the Work, whether taking effect before or after the Effective Date, including any and all Ohio or federal environmental laws and regulations pertaining to the Project. "Laws," however, excludes Governmental Approvals.

Lead Surety or Lead Sureties has the meaning assigned in Section 19.1.5 (Liability of Contractor and Surety /Occurrence of a Contractor Breach).

Maintenance of Traffic (MOT) means the maintenance of traffic on existing roads and crossroads within the Project Right of Way to ensure access to all relevant properties during the Work.

Maintenance of Traffic Plan means the Contractor's plan for Maintenance of Traffic, prepared in accordance with the Project Scope and is a part of the Contractor's Traffic Management Plan.

Major Participant means any Component Firm that a Key Personnel is employed by or a Component Firm that is being used to meet a "By Project Award" Prequalification requirement for the Project.

Materials means any materials or products specified for use in the construction of the Project and its appurtenances.

Maximum Prime Compensation is the not-to-exceed limit of the Prime Compensation for the Phase 1 Work under the provisions of the PDBC.

Measured Mile means an analysis comparing the productivity of Work to prove and quantify inefficiency as further described in Section 12.8.6 (Inefficiency) of the PDBC.

Milestone means the milestone for completion of the Sub-Phase 1A Work, the milestone for completion of the Sub-Phase 1B Work, the milestone for Substantial Completion of the Work or any other milestone established in the Project Schedule as the context requires.

Milestone Date means the date upon which each Milestone actually occurs.

Milestone Deadline means the date upon which each Milestone is scheduled to be achieved in accordance with the Project Schedule as such dates may be extended in accordance with the Contract Documents.

Mobilization means the Work described in Section 11.7 (Mobilization) of the PDBC.

Monthly Progress Report means the report the Contractor must submit to the Department summarizing progress made the previous Month and including activities to be performed in the following Month and as further described in the Project Scope.

Monthly Progress Update Schedule has the meaning assigned in Section 1.4 (Interim, Phase 1, and Phase 2 Baseline Schedule Requirements) of Exhibit T (Critical Path Method Progress Schedule).

Nonconforming Work means any Design and Construction Work that does not conform to the requirements of the Contract Documents. Nonconforming Work shall include any unacceptable Materials as described in Section 6.7 (Unacceptable Materials) of the PDBC.

Notice of Design Change (NDC) means design changes initiated by the Engineer of Record (EOR) to documents approved and Released for Construction (RFC) are completed under an NDC. NDCs are subject to quality check or review activities.

Notice of Final Completion means the notice delivered to the Contractor under Section 5.14.3.2 (Notice of Final Completion) stating that final Department acceptance of the Project has occurred.

Notice of Potential Change Order (NPCO) is the potential two-step process utilized by the Contractor, as outlined in Section 12.4.1 (Notice of Potential Change Order) of the PDBC, to inform the Department of the existence of a circumstance(s) or event(s) that may require a change to the Contract Documents and/or Work.

Notice of Substantial Completion means the notice delivered to the Contractor under Section 5.14.2.3 (Notice of Substantial Completion) stating that Substantial Completion of the Project has occurred.

Notice of Termination means a notice issued by the Department to terminate the PDBC pursuant to Section 21.1 (Notice of Termination) of the PDBC.

Notice to Proceed (NTP) is a written communication from the Department to the Contractor to start any unit or element of the Phase 1 Work, Phase 2 Work. The Notice to Proceed shall establish any conditions and restraints necessary for, or incident to, the performance of the Phase 1 Work, or Phase 2 Work.

ODOT means the Ohio Department of Transportation and may be used interchangeably with “State” or “Department.”

Offeror means the entity submitting a Proposal for the Project in response to the RFP.

Open Book Basis means a method in which the Contractor provides the Department, at the Department’s request, all books, records, documents, contracts, subcontracts, purchase orders, and other data in its possession pertaining to the bidding, pricing, or performance of the PDBC, showing the Contractor’s underlying assumptions and data as to costs of the Work or services to be provided, schedule, composition of equipment spreads, equipment rates, labor rates, productivity, estimating factors, design and productivity allowance, Contingency and indirect costs, risk pricing, discount rates, interest rates, inflation and deflation rates, swap and hedge rates, insurance rates, bonding rates, letter of credit, fees, overhead, profit, and other items reasonably required by the Department to satisfy itself as to validity or reasonableness. It also includes review of the Contractor’s underlying project-specific accounting system and the Department’s ability to view the Contractor’s allocation of costs within that system.

Opinion of Probable Cost (OPC) means the Contractor-generated estimate of the Contract Price prepared in accordance with the principles set forth in Exhibit G (Opinion of Probable Cost (OPC) and Pricing Process).

Organizational Conflict of Interest has the meaning set forth in ITO Section 5.3 (Organizational Conflicts of Interest).

Original Contract Work has the meaning assigned in Exhibit H (Force Account Provisions).

Overtime Premium Wages arise from the difference between an employee’s standard hourly wage rate and the special hourly wage rate paid for time in excess of 40 hours per week.

Partnering means a collaborative process for project cooperation and communication meant to achieve effective and efficient contract performance and completion of the Project within budget, on schedule, safely and with requisite quality in accordance with the contract.

Party has the meaning assigned in the preamble of this PDBC.

Payment Bonds means the payment bonds to be delivered by the Contractor to the Department in accordance with Section 23.1 (Performance and Payment Bonds) of the PDBC.

Performance Bonds means the performance bonds to be delivered by the Contractor to the Department in accordance with Section 23.1 (Performance and Payment Bonds) of the PDBC.

PDP means ODOT's Project Development Process.

Person means any individual, firm, corporation, company, limited liability company, limited liability partnership, joint venture, voluntary association, partnership, trust or public or private organization, other legal entity, or combination of the foregoing.

Phase means either Phase 1 or Phase 2.

Phase Change Order means the Sub-Phase 1A Change Order, the Sub-Phase 1B Change Order, or the Phase 2 Change Order as the context requires.

Phase 1 or the **Preconstruction Phase** means the phase in which the Phase 1 Work is performed.

Phase 1 Baseline Schedule has the meaning assigned in Section 1.4.1 (Interim Baseline and Baseline Schedules) of Exhibit T (Critical Path Method Progress Schedule).

Phase 1 Work encompasses the Contractor's performance of all contractual requirements associated with Sub-Phase 1A (Proof-of-Concept) and Sub-Phase 1B (Project Development), including, but not limited to, the furnishing of all Equipment, supplies, and Materials required in accordance with the PDBC.

Phase 2 means the phase in which the Phase 2 Work is performed.

Phase 2 Baseline Schedule has the meaning assigned in Section 1.4.1 (Interim Baseline and Baseline Schedules) of Exhibit T (Critical Path Method Progress Schedule).

Phase 2 Change Order means the Change Order to incorporate the Phase 2 Work that may be issued by the Department as further described in Section 3.3 (Phase 2 Project Scope) of the PDBC.

Phase 2 Mark-Up means markup as further described in Exhibit B (Contract Particulars)

Phase 2 Project Scope means the Project Scope governing the Phase 2 Work which will be agreed between the Parties during Sub-Phase 1B.

Phase 2 Work means all duties and services to be furnished and provided by the Contractor as required by a Phase 2 Change Order, including the administrative, design, engineering, quality control, quality assurance, relocation, procurement, legal, professional, manufacturing, supply, installation, construction, supervision, management, testing, verification, labor, Materials, Equipment, documentation and other efforts necessary or appropriate to achieve Completion of the Contract except for those efforts which the Contract Documents specify will be performed by the Department or other Persons. In certain cases the term is also used to mean the products of the Phase 2 Work. For clarity, the Phase 2 Work does not include the Phase 1 Work.

Plans means the drawings, standard construction drawings and supplemental drawings provided by the Department or produced by the Designer or the Designer's Subconsultants, approved in accordance with the PDBC, or exact reproductions thereof, that show the location, character, dimensions, and details of the Work.

Preconstruction Phase means Phase 1.

Pre-Proposal One-on-One Meeting means the meeting(s) set forth in ITO Section 2.2 (Pre-Proposal One-on-One Meetings).

Prequalification refers to the Department's system for determining whether the Contractor and its Subcontractors and Subconsultants meet certain minimum qualification levels in accordance with ORC Chapters 5525 & 5526 and the rules and regulations governing prequalification. The Department's Prequalification requirements are set out in the applicable Consultant Prequalification Requirements and Procedures, posted on the Department's website. Work that requires prequalification may only be performed by firms that are prequalified for those services at the time of performance of the services.

Price Proposal means, as a component of each Work Package Proposal, the Contractor's written Submittal of the Project requirements together with a narrative description of the Project and proposed Work together with a detailed schedule of requested compensations.

Prime Compensation is the monetary remuneration specified for payment by the Department to the Contractor for acceptable elements of the Phase 1 Work.

Principal Participant means any of the following entities: (i) any joint venture, partner, or firm holding an interest in the Contractor if the Contractor is a joint venture, partnership or other form of unincorporated legal entity; and/or (ii) any person or firm holding (directly or indirectly) a 15% or greater interest in the Contractor if the Contractor is a corporation, limited liability company or other form of incorporated legal entity; or (iii) parent company or Affiliate of the Contractor or another Principal Participant that will provide financial support to such firm (guarantor) to meet the financial obligations of the PDBC.

Probable Maximum Loss (PML) has the meaning assigned in Section 17 (Insurance Requirements) of the PDBC.

Procurement Point of Contact (PPC) means the authorized representative of the Offeror identified as the sole representative for communication with the Department.

Procurement Process means the entire process by which the Department offers to outside parties an opportunity to undertake the Project, including the RFP, beginning with the release of the RFP and ending with the selection of the Design Build Team to design and construct the Project.

Professional Engineer means an individual licensed by the State Board to practice engineering in the State.

Professional Landscape Architect means a landscape architect registered with the Ohio Landscape Architects Board to practice landscape architecture in the State of Ohio.

Professional Services means the professional services necessary to deliver the Work, including the design of all permanent and temporary portions of the Project, the preparation of

Working Drawings or Engineered Drawings, the practice of engineering, surveying, landscape architecture, architectural services, estimating and risk assessment, assessment of environmental impacts, Right-of-Way acquisition services, supervisory and administrative personnel performing project management, superintending, preconstruction services, planning and scheduling, safety management, purchasing, accounting, IT services, other supervisory activities and the preparation of Claims.

Profile Grade means the trace of a vertical plane intersecting the top surface of the proposed wearing surface, usually along the longitudinal centerline of the roadbed. Profile grade means either elevation or gradient of such trace according to the context.

Progress Meeting means a Design Progress Meeting as defined in Section 2.2.4 (Design Progress Meeting) of Exhibit E (Technical Requirements) or other Progress Meetings as required pursuant to Section 5.2 (Phase 2 Preconstruction and Progress Meetings) of the PDBC.

Progress Schedule means the version of the Project Schedule depicting progress of the Work as described in Section 1.11 (Progress Schedule) of Exhibit T (Critical Path Method Progress Schedule).

Progressive Design-Build means a form of Design-Build contract in which a best value selection is followed by a process whereby the Parties develop the Project and Contract Price in a progressive manner.

Prohibited Person means any Person who is:

- a. Debarred, suspended, proposed for debarment with a final determination still pending, declared ineligible or voluntarily excluded (as such terms are defined in any of the Debarment Regulations) from participating in procurement or nonprocurement transactions with the United States federal government or any department, agency or instrumentality thereof pursuant to any of the Debarment Regulations;
- b. Indicted, convicted or had a civil or administrative judgment rendered against such Person for any of the offenses listed in any of the Debarment Regulations and no event has occurred and no condition exists that is likely to result in the debarment or suspension of such Person from contracting with the United States federal government or any department, agency or instrumentality thereof;
- c. Listed on the "Lists of Parties Excluded from Federal Procurement and Nonprocurement Programs" issued by the US General Services Administration;
- d. Located within, or doing business or operating from, a country or other territory subject to a general embargo administered by the United States Office of Foreign Assets Control (OFAC);
- e. Designated on the OFAC list of 'Specially Designated Nationals';
- f. Otherwise targeted under economic or financial sanctions administered by the United Nations, OFAC or any other U.S. federal economic sanctions authority or any divestment or sanctions program of the State of Ohio;
- g. A banking institution chartered or licensed in a jurisdiction against which the United States Secretary of the Treasury has imposed special measures under Section 311 of the USA PATRIOT Act (Section 311);

- h. Located within or is operating from a jurisdiction that has been designated as noncooperative with international anti-money laundering principles by the Financial Action Task Force on Money Laundering;
- i. A financial institution against which the United States Secretary of the Treasury has imposed special measures under Section 311;
- j. A “senior foreign political figure” or a prohibited “foreign shell bank” within the meaning of 31 C.F.R. Section 103.175; or
- k. Any Person with whom the Department is engaged in litigation relating to performance of contract or business practices (unless the Department has first waived (in Department’s sole discretion) by written notice to the transferring equity holder, with a copy to the Contractor, the prohibition on a transfer to such Person during the continuance of the relevant litigation).

Project is the Project, which is the subject of this PDBC and which is further described in Section 1 (General) of Exhibit E (Technical Requirements).

Project Development Phase means Sub-Phase 1B.

Project Float is the length of time between the End Project Milestone and the Contract Completion Deadline.

Project Goals means the goals and objectives set forth in ITO Section 1.3 (Project Goals).

Project Limits means points on the mainline centerline of construction where the proposed improvement, as described in the project description on the Title Sheet (excluding incidental construction), begins and ends.

Project Manager means the Department's designated representative to the Contractor.

Project Right-of-Way (ROW) means the Department-acquired temporary and permanent ROW acquired in connection by the Department as described in Section 9 (Right-of-Way) of Exhibit E (Technical Requirements), together with all additional properties acquired at the Contractor’s request in accordance with Section 10.2 (Additional Property Request Requirements) of Exhibit E (Technical Requirements) and other rights in real property acquired by or granted to the Contractor pursuant to governmental resolutions or other legislation, as such Project Right-of-Way may be adjusted from time to time in accordance with the Contract Documents. The term specifically includes all air space, surface rights and subsurface rights within the boundaries of the Project Right-of-Way.

Project Schedule means one or more, as applicable, of the logic-based Critical Path schedules (the Interim Baseline Schedule, the Baseline Schedule, the Phase 1 Baseline Schedule, the Phase 2 Baseline Schedule, the Monthly Progress Update Schedule, the Recovery Schedule, the Weather Delay Schedule, and the As-Built Schedule) for all Work leading up to and including Substantial Completion and Completion of the Contract, and for tracking the performance of such Work, as the same may be revised and updated from time to time in accordance with Exhibit T (Critical Path Method Progress Schedule).

Project Scope means the Sub-Phase 1A Project Scope, the Sub-Phase 1B Project Scope or the Phase 2 Project Scope, as the context requires. The Project Scope describes the scope of the Work and related Project Standards, criteria, conditions, procedures, specifications and

other provisions for the Project and/or the Utility Relocations, as such provisions may be changed, added to, deleted or replaced pursuant to a Change Order.

Project Site means Project Right-of-Way and any temporary rights or interests that the Contractor may acquire in connection with the Project or the Utility Relocations included in the Construction Work.

Project Standards means the standards, manuals and guidelines listed in Section 7.1 (Governing Regulations) of Exhibit E (Technical Requirements), as may be amended in the Project Scope.

Proof-of-Concept Phase means Sub-Phase 1A.

Proposal has the meaning assigned in the ITO.

Proposal Due Date means the deadline (date and time) for submission of Proposals identified in ITO Section 1.4 (Procurement Schedule).

Provisional Sum is a fixed sum allocable to a specific Risk Register Event financial responsibility which shall be shared between the Contractor and the Department. Provisional Sums may be used in instances when the actual price or quantity for such item of work is unknown at the time of agreement on Phase Change Order. Where agreed as reflected in the Risk Register, Provisional Sums may include a designation of unit pricing and the estimated number of units making up the Provisional Sums.

Quality Assurance (QA) means all planned and systematic activities implemented to provide confidence that the Work complies with the requirements of the Contract Documents.

Quality Control means all activities and techniques performed at the production level in order to meet Contract requirements.

Quality Management System Plan (QMSP) means the Contractor's plan which describes the quality program for the Design Work, the Construction Work, and how the design and construction activities performed by different entities will be coordinated to ensure consistency of quality and assurance, prepared in accordance with the Project Scope.

Railroad means, depending on the context, either the right-of-way, tracks, and systems used for rail traffic in the vicinity of the Project, or the owners and/or operators of such rail systems.

Reasonably Close Conformity means compliance with reasonable and customary manufacturing and construction tolerances where working tolerances are not specified. Where working tolerances are specified, reasonably close conformity means compliance with such working tolerances. Without detracting from the complete and absolute discretion of the Department to insist upon such tolerances as establishing reasonably close conformity, the Department may accept variations beyond such tolerances as reasonably close conformity where they will not materially affect the value or utility of the Work and the interests of the Department.

Records includes any document, device, or item, regardless of physical form or characteristic, including an electronic record as defined in Section 1306.01 of the Ohio Revised Code, created or received by the Contractor in the performance of the Phase 1 Work.

Recovery Schedule has the meaning assigned in Section 1.9 (Recovery Schedules) of Exhibit I (Critical Path Method Progress Schedule).

Reference Information Documents means documents provided by the Department for informational purposes only. The Department does not represent, warrant, or guarantee the accuracy, completeness, or fitness of the Reference Information Documents.

Registered Engineer means a Professional Engineer registered with the Ohio State Board of Registration for Professional Engineers and Surveyors to practice professional engineering in the State of Ohio.

Registered Surveyor means a surveyor registered with the Ohio State Board of Registration for Professional Engineers to practice professional surveying in the State of Ohio.

Regulated Materials means:

- a. Any substance, product, waste or other material of any nature whatsoever that is or becomes listed, regulated, or addressed pursuant to any Environmental Law;
- b. Any substance, product, waste or other material of any nature whatsoever that exceeds maximum allowable concentrations for elemental metals, organic compounds or inorganic compounds, as defined by any Environmental Law;
- c. Any substance, product, waste or other material of any nature whatsoever which may give rise to liability under clause (b) or under any statutory or common law theory based on negligence, trespass, intentional tort, nuisance or strict liability or under any reported decisions of a state or federal court;
- d. Petroleum hydrocarbons excluding petroleum hydrocarbon products contained within regularly operated motor vehicles;
- e. Asbestos or asbestos-containing materials in Structures and/or other improvements on or in the Site (other than mineral asbestos naturally occurring in the ground); and
- f. lead or lead-containing materials in Structures and/or other improvements on or in the Site.

The term "Regulated Materials" includes Hazardous Waste.

Regulated Materials Management means procedures, practices and activities to address and comply with environmental laws and environmental approvals with respect to Regulated Materials encountered, impacted, disturbed, released, caused by or occurring in connection with the Project, Right-of-Way or the Work, as well as investigation, characterization and remediation of such Regulated Materials. Regulated Materials Management may include sampling, handling, stockpiling, storing, backfilling in place, asphalt batching, recycling, dewatering, treating, cleaning up, excavating, removing, remediating, transporting and/or disposing off-site of Regulated Materials and otherwise managing Regulated Materials, whichever approach is effective, most cost-efficient and authorized under applicable Law.

Released for Construction Plans means Design Documents that have been thoroughly checked, reviewed and sealed in accordance with the Phase 2 Project Scope and adequately describe the Construction Work required.

Relocation or Relocate means, as related to Utilities, each removal, abandonment, transfer of location and/or Protection of Existing Utilities (including provision of temporary services as necessary) of any and all Utilities that is necessary or advisable in order to accommodate or permit construction of the Project.

Request for Change Order or RCO means a Contractor initiated request for a Change Order pursuant to Section 12 (Contract Changes) and/or Section 13 (Time Extension To The Completion Deadlines And Payment For Excusable Delays) of the PDBC.

Request for Proposals (RFP) Documents means the set of documents identifying the Project and the Work to be performed and Materials to be furnished in response to which a Proposal may be submitted by an Offeror. The RFP includes the Instructions to Offerors (ITO) and this PDBC Contract.

Right-of-Way means a general term denoting land, property, or interest therein, usually in a strip, acquired for or devoted to a highway.

Risk Register means a register incorporating a listing of Risk Register Events for the Project (whether or not allocated to the Department or the Contractor), assessments of those risks (including cost and schedule impacts associated with the risks), an evaluation of mitigation; and allocation of responsibility for those risks.

Risk Register Events means risks included on the then-current Risk Register and assigned to the Department or the Contractor in accordance with Section 2.6 (Risk Identification, Pricing and Assignment) of this PDBC.

Road means a general term denoting a public way for purposes of vehicular travel, including the entire area within the Right-of-Way, as defined in ORC 5501.01.

Roadway means the portion of a highway within limits of construction.

Schedule means a time-phased, resource-loaded, execution plan identifying all activities necessary to complete the Work in a logical manner in a format, which shall provide the start and completion date of each activity and the Milestones.

Schedule of Values (SOV) means a breakdown of the GMP into items of work, showing estimated quantities of Work in sufficient detail to determine testing and Material reporting requirements per Project Standards.

Service Line means (a) a Utility line, the function of which is to directly connect the improvements on an individual property to another Utility line located off such property, which other Utility line connects more than one such individual line to a larger system, or (b) any cable or conduit that supplies an active feed from a Utility Owner's facilities to activate or energize the Department's or a local agency's lighting and electrical systems, traffic control systems, communications systems and/or irrigation systems.

Signatures on Contract Documents means all signatures on Contract Documents must meet the requirements of ODOT C&MS Section 102.06.

Signed and Sealed means the signature and seal of a licensed professional engineer on a document indicating that the licensee takes professional responsibility for the work and, to the best of the licensee's knowledge and ability, the work represented in the document is accurate,

in conformance with applicable codes at the time of submission and has been prepared in conformity with normal and customary standards of practice and with a view to the safeguarding of life, health, property and public welfare. The licensed professional engineer certifies that the documents have been signed and sealed in accordance with laws, rules and regulations of the State of Ohio.

Special Provisions means additions and revisions to the Standard Specifications and Supplemental Specifications covering conditions peculiar to the Project.

Specifications means the directions, provisions, and requirements contained herein as supplemented by the Supplemental Specifications and Special Provisions.

Standard of Care means the standard of care applicable to all of the Work performed under the PDBC as defined in Section 1.7 (Standard of Care).

Standards Deviation means the Contractor requests a deviation from the Project Standards described in Section 7.1 (Governing Regulations) of Exhibit E (Technical Requirements).

State refers to the State of Ohio, as applicable, represented by the Director of Transportation or authorized designee.

Storm Water Pollution Prevention Plan or SWPPP means the Contractor's plan to address erosion and sediment control for the Project, prepared in accordance with Section 7.1 (Governing Regulations) of Exhibit E (Technical Requirements) as may be amended in the Project Scope.

Structures means Bridges, culverts, catch basins, drop inlets, retaining walls, cribbing, manholes, endwalls, buildings, sewers, service pipes, underdrains, foundation drains, and other features that may be encountered in the Work and not otherwise classed herein.

Sub-Phase 1A or Proof-of-Concept Phase has the meaning set forth in Section 2 (Progressive Design-Build Approach) of the PDBC.

Sub-Phase 1A Project Scope means the Project Scope governing the Sub-Phase 1A Work which will be agreed between the Parties as described in Section 2.3.1 (Pre-Sub-Phase 1A Work) of the PDBC.

Sub-Phase 1A Proposal has the meaning set forth in Section 2.3.1 (Pre-Sub-Phase 1A Work) of the PDBC.

Sub-Phase 1A Work means the Work to be delivered by the Contractor during Sub-Phase 1A.

Sub-Phase 1B or the Project Development Phase has the meaning set forth Section 2 (Progressive Design-Build Approach) of the PDBC.

Sub-Phase 1B Change Order means the Change Order to incorporate the Sub-Phase 1B Work that may be issued by the Department as further described in Section 2.3.2.1 (Sub-Phase 1B: Proposal) of the PDBC.

Sub-Phase 1B Project Scope means the Project Scope governing the Sub-Phase 1B Work which will be agreed between the Parties during Sub-Phase 1A.

Sub-Phase 1B Proposal has the meaning set forth in Section 2.3.2.1 (Sub-Phase 1B: Proposal) of the PDBC.

Sub-Phase 1B Proposal Due Date has the meaning set forth in Exhibit B (Contract Particulars).

Sub-Phase 1B Work means the Work to be delivered by the Contractor during Sub-Phase 1B.

Subconsultant means any person or organization to whom the Designer or Contractor has sublet or assigned any portion of its contractual obligations for the development of Design Documents. Any such Subconsultant must hold a Certificate of Authorization from the Ohio State Board of Registration for Professional Engineers and has fulfilled the Prequalification requirements under ORC 5526.04.

Subcontract means the contract between the Contractor and a Subcontractor or Subconsultant.

Subcontractor means an individual, firm, or corporation to whom the Contractor sublets part of the Phase 1 Work or Phase 2 Work, and who is qualified under ORC 5525.02 through 5525.09 inclusive.

Subcontractor Bidding and Selection Plan means the plan prepared by the Contractor and submitted to the Department for review and approval, defining the Contractor's approach to subcontracting, and selecting contractors to perform that part of the Work that will not be self-performed, that is compliant with Section 8 (Subcontracting Requirements) of the PDBC.

Submittal means all documents, data, materials, information, studies, reports, survey data, proposals, plans, drawings, computations, specifications, estimates, codes, scientific information, technological information, regulations, maps, Equipment, charts, schedules, photography, exhibits, software, software source code, and documentation prepared or developed or created or discovered for the benefit of the Department under or in connection with the Work.

Substantial Completion means satisfaction of all the conditions as set forth in Section 5.14.2 (Substantial Completion of the Work), as and when confirmed by the Department's issuance of a certificate in accordance with the procedures and within the time frame established in the PDBC.

Substantial Completion Date means the date that Substantial Completion has been achieved for the entire Project.

Substantial Completion Deadline means the date shown in the Phase 2 Change Order on which Substantial Completion is scheduled to be achieved as such date may be extended in accordance with the Contract Documents.

Substantial Completion Inspection Punch List means an itemized list of Construction Work identified during the Substantial Completion Inspection which remains to be completed, the existence, correction and completion of which will have no material or adverse effect on the normal and safe use and operation of the Project. Such Work is excluded from the substantially completed Work listed in the Notice of Substantial Completion delivered under Section 5.14.2.3

(Notice of Substantial Completion). These items will be completed pursuant to Section 5.14.2.4 (Substantial Completion Inspection Punch List).

Supplement means a list of requirements for fabrication plants, methods of test, or other miscellaneous requirements that are maintained on file by the Department.

Supplemental Agreement means a written agreement executed by the Contractor and by the Department covering necessary alterations to the PDBC.

Supplemental Specifications means detailed specifications supplemental to or superseding the Specifications.

Supplier means any Person not performing work at or on the Site which supplies machinery, Equipment, Materials, hardware, software, systems or any other appurtenance to the Project to the Contractor or any Subcontractor in connection with the performance of the Work. Persons who merely transport, pick up, deliver or carry materials, personnel, parts or Equipment or any other items or persons to or from the Site shall not be deemed to be performing Work at the Site.

Surety means the corporation, partnership, or individual, other than the Contractor, executing a bond furnished by the Contractor.

Technical Proposal means the technical proposal submitted by an Offeror providing the information requested in ITO Section 6.8 (Technical Proposal).

Technical Requirements means Exhibit E (Technical Requirements), as such Technical Requirements are revised, amended and restated and set forth in an applicable Change Order.

Term means the period identified in Section 1.5 (Term) of the PDBC.

Total Float means the amount of time that any given activity or logically connected sequence of activities shown on the Project Schedule may be delayed before it delays occurrence of either the Substantial Completion Date or the Completion of the Contract Date. Such Total Float is generally identified as the difference between the early start date and late start date or early completion date and late completion date for each of the activities shown on the Project Schedule.

Temporary Traffic Control Plan (TCP) means Contractor's phase construction plan and details all required MOT elements of the physical work zone. The MOT plans shall include all major traffic shifts, movement closures, use of temporary roadways, temporary traffic signals, modifications to all existing signage not applicable for each MOT phase and advance interstate detour construction signage, access modifications to businesses and residences, and proposed mitigation measures for traffic impacts, as described in Section 21 (Maintenance of Traffic).

User(s) means the registered owner of a vehicle traveling on the Project of any portion thereof.

Utility or utility means and includes poles, plants, lines, trenches, bridges, tunnels, pipelines, and any other system for furnishing, producing, generating, transmitting or distributing power, electricity, communications, telecommunications, water, gas, oil, petroleum products, coal or other mineral slurry, steam, heat, light, chemicals, air, sewage, drainage not connected with a highway drainage system, irrigation, or another substance. The term "utility" also includes a system for furnishing transportation of goods or persons by means of railway, tramway,

cableway, conveyor, flume, canal, tunnel, pipeline, or a similar means. The term “Utility” or “utility” excludes (a) storm water facilities providing drainage for the Project Right of Way, (b) street lights and traffic signals and (c) ITS (intelligent transportation systems) and IVHS (intelligent vehicle highway systems) facilities. The necessary appurtenances to each Utility Owner Project shall be considered part of such Utility. Without limitation, any Service Line connecting directly to a Utility shall be considered an appurtenance to that Utility, regardless of the ownership of such Service Line.

Utility Agreement or Memorandum of Understanding means the agreement prepared by the Contractor and executed by the Department with a Utility Owner as described in Section 9 (Utilities) of Exhibit E (Technical Requirements) as may be amended in the Project Scope.

Utility Owner means the owner or operator of any Utility (including both privately held and publicly held entities, cooperative Utilities, and municipalities and other governmental agencies (including, without limitation, the Department)).

Utility Owner Project means the design and construction by or at the direction of a Utility Owner (including by the Contractor) of a new Utility other than as part of a Utility Adjustment.

Utility Relocation means each relocation (temporary or permanent), abandonment, protection in place, removal (of previously abandoned Utilities as well as of newly abandoned Utilities), replacement, reinstallation, and/or modification of existing Utilities necessary to accommodate construction, operation, maintenance and/or use of the Project or the Work as described in Section 10 (Utilities) of Exhibit E (Technical Requirements). The term “Utility Relocation” shall not refer to any of the work associated with facilities owned by any Railroad. The Utility Relocation Work for each crossing of the Project Right of Way by a Utility that crosses the Project Right of Way more than once shall be considered a separate Utility Relocation. For any Utility installed longitudinally within the Project Right of Way, the Utility Relocation Work for each continuous segment of that Utility located within the Project Right of Way shall be considered a separate Utility Relocation.

Utility Relocation Work means (a) the work associated with Utility Relocation, including the coordination, design, design review, permitting, construction, inspection, maintenance of records, installation, manufacture, supply, testing inspection, adjustments (including all appurtenances), and otherwise required by the Contract Documents, including all labor, Materials, Equipment supplies, utilities and subcontracted services provided or to be provided by the Contractor and/or the Utility Owners; and (b) any reimbursement of Utility Owners that is the Contractor’s responsibility pursuant to Section 7 (Utilities and Railroads) of the PDBC.

Warranty means any warranty made by the Contractor in Section 22 (Project Warranties).

Warranty Work means Work performed by the Contractor to rectify a warranty defect.

Weather Day has the meaning set forth in Section 15 (Weather) of the PDBC.

Weather Delay Schedule has the meaning assigned in Section 1.8 (Weather Delay Schedules) of Exhibit T (Critical Path Method Progress Schedule).

Work means the entire completed design and construction of the various separately identifiable parts thereof required to be performed or furnished under the Contract Documents that comprise the Project or any portion thereof. Work includes and is the result of performing or furnishing Professional Services and construction required by the Contract Documents and

includes the Phase 1 Work and the Phase 2 Work. Work includes Utility Relocation Work and Warranty Work.

Work Breakdown Level or Level 3 means a schedule level that includes each Buildable Unit as further described in Exhibit T (Critical Path Method Progress Schedule).

Work Element Level or Level 4 means a schedule level that includes each element of the Work as further described in Exhibit T (Critical Path Method Progress).

Work Limits means the extreme limits of the Contractor's responsibility on the Project, including all temporary and incidental construction, with the exception of work zone traffic control devices required for maintenance of traffic.

Workday means a calendar day that the Contractor normally works.

Work Package means the package attached to the applicable Change Order, following acceptance by the Department of a Proposal, defining the Work and any changes to the Contract Documents necessary to define the responsibilities of the Parties. A Work Package may be the Sub-Phase 1A Work Package, the Sub-Phase 1B Work Package, or the package attached to the Phase 2 Change Order.

Work Package Proposal means a proposal prepared by the Contractor in a form approved by the Department containing the Contractor's Price Proposal, proposed scope of Work and other matters as may be directed by the Department. A Work Package Proposal may be any of the Sub-Phase 1A Proposal, the Sub-Phase 1B Proposal, or the Phase 2 Proposal as further described in Section 2 (Progressive Design Build Approach) of the PDBC.

Working Day means any day that is not a Saturday, Sunday or other day on which (a) the Department is officially closed for business, (b) banks located in New York City are required or authorized by Law or executed order to close, or (c) the New York Stock Exchange is closed.

Work Breakdown Level means a hierarchical and organizational level that breaks the Design and Construction Work into discrete elements, as described in Exhibit T (Critical Path Method Progress Schedule). Each descending WBS level represents an increasingly detailed description of elements comprising the Work with a clearly identifiable linkage between the Work Breakdown Level and Project Schedule activities.

Working Drawings means Contractor submitted Design Document drawings for Work, not otherwise defined in the Contract Documents, and requiring Department acceptance. Examples of Working Drawings include Engineered Drawings, installation plans, certified drawings, and any other supplementary plans or similar data that the Contractor is required to submit for acceptance.

Worksite Traffic Supervisor (WTS) means the staff member or members employed and identified by the Contractor that is a staff member other than the superintendent to implement the Traffic Management Plan, monitor the safety and mobility of the entire work zone, and correcting Temporary Traffic Control (TTC) deficiencies for the entire work zone.