

---

# PART 4

## General Conditions of Contract Between Department and Design-Builder

---

### Table of Contents

Article 1: General .....	2
Article 2: Design-Builder’s Services and Responsibilities.....	12
Article 3: Department’s Services and Responsibilities .....	23
Article 4: Hazardous Environmental Conditions and Differing Site Conditions .....	25
Article 5: Insurance .....	30
Article 6: Payment.....	36
Article 7: Indemnification .....	40
Article 8: Time .....	43
Article 9: Changes to the Contract Price and Time .....	45
Article 10: Contract Adjustments and Disputes .....	48
Article 11: Stop Work and Termination for Cause.....	50
Article 12: Miscellaneous.....	53

---

**Article 1**  
**General**

**1.1 Mutual Obligations**

**1.1.1** Department and Design-Builder commit at all times to cooperate fully with each other, and proceed on the basis of trust and good faith, to permit each party to realize the benefits afforded under the Contract Documents.

**1.2 Basic Definitions**

**1.2.1** For the purposes of the Contract Documents, the following words and terms shall have the meanings specified below (other words and abbreviations that have well-known technical or trade meanings are used in the Contract Documents in accordance with such recognized meanings), provided, however, that capitalized terms defined in other Contract Documents, including but not limited to the Agreement, shall have the meanings specified in such document.

*Act* is defined in the first (1<sup>st</sup>) recital to the Agreement.

*Affiliate* means, when used to indicate a relationship with a specified Person, a Person that: (a) directly or indirectly, through one or more intermediaries, has a ten percent (10%) or more voting or economic interest in such specified Person or (b) controls, is controlled by or is under common control with such specified Person, and a Person is deemed to be controlled by another Person, if controlled in any manner whatsoever that results in control in fact by that other Person (or that other Person and any Person or Persons with whom that other Person is acting jointly or in concert), whether directly or indirectly and whether through share ownership, a trust, a contract or otherwise.

*Agreement* refers to the executed Comprehensive Agreement between Department and Design-Builder.

*Agreement Date* is the date that the Agreement is executed by both parties.

*Aggregate Liability Cap* is defined in Section 11.3.1 of the Agreement.

*As-Built Drawings* means [●].

*ATC(s)* mean those Alternative Technical Concepts identified in **Exhibit 4** to the Agreement.

*Business Day(s)*, whether capitalized or not, means any day(s) other than a Saturday, Sunday, Commonwealth of Virginia holiday, or a day when the New York Stock Exchange or banks are authorized or required to close in New York, New York or Richmond, Virginia.

*Casualty Cost* means the estimated cost of repairs, alterations, restorations, replacement and rebuilding of all or any part of the Project damaged or destroyed prior to Final Acceptance by fire or other casualty of any kind or nature.

---

*Compensation Event* is defined in Section 9.2.1 of the General Conditions of Contract.

*Construction Manager* means [●].

*Contract Documents* refer to those documents identified in Article 2 of the Agreement.

*Contractor* shall mean Design-Builder.

*Contract Price* is defined in Section 6.1 of the Agreement.

*Contract Times* is defined in Section 5.4 of the Agreement.

*Corrective Work* means any repair, correction, replacement or rectification of any Defect.

*CTB* means the Commonwealth Transportation Board.

*Day* or *Days*, whether capitalized or not, shall mean calendar days unless otherwise specifically noted in the Contract Documents.

*DBE Performance Improvement Plan* is the plan submitted by Design-Builder and approved by Department pursuant to Section 1.5.2 of **Exhibit 23** to the Agreement.

*DBE/SWaM Plan* means the plan developed by Design-Builder that defines Design-Builder's approach for meeting the DBE and SWaM participation goals for the Project, as described in more detail in the Technical Requirements.

*Defect* means any defect in any of the Work attributable to:

- (a) Work that does not conform to the requirements of the Contract Documents;
- (b) defective design;
- (b) defective workmanship or defective materials, plant, or machinery used in such construction having regard for Good Industry Practice and appropriate industry standards and codes of practice current at the date of construction;
- (c) the use of materials in the Work that (whether defective or not defective in themselves) prove to be defective in the use to which they are put; or
- (d) defective installation.

*Delay Event* is defined in Section 8.2.1 of the General Conditions of Contract.

*Department* means the Virginia Department of Transportation.

*Department's Project Criteria* are developed by or for Department to describe Department's program requirements and objectives for the Project, including use, space, price, time, site and expandability requirements, as well as submittal requirements and other

---

requirements governing Design-Builder's performance of the Work. Department's Project Criteria are included in the Request for Proposals and may include conceptual documents, design criteria, performance requirements and other project-specific technical materials and requirements.

*Department's Representative* is defined in Section 9.1.2 of the Agreement.

*Department's Senior Representative* is defined in Section 9.1.1 of the Agreement.

*Depository* means [●].

*Design-Builder* means [●].

[*Design-Builder Members* means [●]].

*Design-Builder's Representative* is defined in Section 9.2.2 of the Agreement.

*Design-Builder's Senior Representative* is defined in Section 9.2.1 of the Agreement.

*Design Consultant* is a qualified, licensed design professional, eligible to provide professional engineering and/or land surveying services in the Commonwealth of Virginia, who is not an employee of Design-Builder, but is retained by Design-Builder, or employed or retained by anyone under contract with Design-Builder or Subcontractor, to furnish design services required under the Contract Documents.

*Design Manager* means [●].

*Disadvantaged Business Enterprise* or *DBE* means a business certified as a Disadvantaged Business Enterprise in accordance with 49 CFR Part 26 and Department's DBE program.

*Differing Roadway and Bridge Improvements Site Conditions* means, with respect to any Site on which the Roadway and Bridge Improvements are being constructed:

(a) actual subsurface or latent physical conditions at such Site that differ materially from those indicated in the Contract Documents; or

(b) unknown physical conditions at such Site, of an unusual nature, which differ materially from those ordinarily encountered and generally recognized as inherent in work of the character required pursuant to the Agreement.

The term "Differing Roadway and Bridge Improvement Site Conditions" excludes (i) conditions of which Design-Builder had actual or constructive knowledge as of the Agreement Date, (ii) conditions that should have been discovered through reasonable investigation of such Site performed in accordance with Section 4.2 of the General Conditions of Contract, and (iii)

---

conditions (excluding man-made conditions) that come into existence on or after the Agreement Date.

[*Differing Tunnel Improvements Site Conditions* means, with respect to any Site on which the Tunnel Improvements are being constructed:

(a) actual subsurface or latent physical condition at such Site that differs materially from the conditions described in either the Geotechnical Baseline Report or Geotechnical Data Report; or

(b) unknown physical conditions at such Site, of an unusual nature, which differ materially from those ordinarily encountered and generally recognized as inherent in work of the character required pursuant to the Agreement,

that in either case, as of the Agreement Date, were neither:

(i) known to Design-Builder; nor

(ii) reasonably capable of being identified by an appropriately qualified and experienced contractor or engineer exercising due care and skill and Good Industry Practice, including through review and analysis of the Geotechnical Baseline Report and Geotechnical Data Report.]<sup>1</sup>

[*Differing Tunnel Improvements Site Conditions* means, during dredging operations, the discovery of man-made subsurface structures within the alignment of the Tunnel Improvements that, as of the Agreement Date, was neither:

(b) known to Design-Builder; nor

(b) reasonably capable of being identified by an appropriately qualified and experienced contractor or engineer exercising due care and skill and Good Industry Practice.]<sup>2</sup>

*Division I Amendments* means the Division I Amendments set out in **Exhibit 3** to the Agreement.

*Early Completion Date* is defined in Section 5.3.1 of the Agreement.

*Early Work* shall mean the Work described **Exhibit 5** to the Agreement.

*Escrow Agreement* means the Escrow Agreement dated as of [●] among Design-Builder, Department and SunTrust Bank, which will be in substantially the form attached as **Exhibit 23**,

---

<sup>1</sup> **Note to Offerors:** To be included if Tunnel Improvements are constructed using the bored tunnel construction method.

<sup>2</sup> **Note to Offerors:** To be included if Tunnel Improvements are constructed using the immersed tube tunnel construction method.

---

as such agreement may be amended or supplemented from time to time in accordance with its terms.

*Escrow Proposal Documents* is defined in Section 12.9.1 of the General Conditions of Contract.

*Engineer* shall mean the Department's Chief Engineer, who acts directly or through his duly authorized representative, the representative acts within the scope of the particular duties assigned to him or the authority given to him.

*Finding of Public Interest* is defined in in the ninth (9<sup>th</sup>) recital to the Agreement.

*Final Acceptance* is achieved when Design-Builder receives written notice from Department under Section 6.6 of the General Conditions of Contract that the Design-Builder has achieved Final Completion.

*Final Completion* means that all Work has been completed in accordance with the Contract Documents, including but not limited to completion of all punch list items, and obtaining Final Acceptance by the Department.

*Final Completion Date* is defined in Section 5.2.1 of the Agreement.

*Final Completion Deadline* is defined in Section 5.2.1 of the Agreement.

*FHWA* means the Federal Highway Administration.

*Force Majeure Event* means the occurrence of any of the following events after the Agreement Date that directly causes either Department or Design-Builder to be unable to comply with all or a material part of its obligations under the Agreement:

- (a) war (including civil war and revolution), invasion, armed conflict, violent act of foreign enemy, military or armed blockade, or military or armed takeover of the Project, in each case occurring within the Commonwealth;
- (b) any act of terrorism or sabotage that causes direct physical damage to or otherwise directly causes interruption to construction of the Project;
- (c) nuclear explosion or contamination, in each case causing direct physical damage to the Project or radioactive contamination of the Site;
- (d) riot and civil commotion on or in the immediate vicinity of the Site;
- (e) flood (in excess of the base flood as described in the Technical Requirements), earthquake that causes ground acceleration in excess of AASHTO bridge design standards for the Site, tornado, and named windstorm, in each case that causes direct physical damage to the Project; or

(f) fire or explosion not attributable to a Design-Builder or a Subcontractor that directly impacts a material element of the physical improvements to the Project or that materially impacts performance of the Work.

*GAAP* means Generally Accepted Accounting Principles in the United States as in effect from time to time.

*General Conditions of Contract (or General Conditions)* means the General Conditions of Contract set out in **Exhibit 1** to the Agreement.

*General Notice* is defined in Section 2.2.3 of the General Conditions of Contract.

[*Geotechnical Baseline Report* means the report set out in **Exhibit 21** to the Agreement.]<sup>3</sup>

[*Geotechnical Data Report* means the report set out in **Exhibit 22** to the Agreement.]<sup>4</sup>

*Geotechnical Manager* means [●].

*Good Faith Efforts* means the adequate demonstrated effort required by Design-Builder to achieve the DBE participation goal and SWaM participation goal for the Project.

*Good Industry Practice* means the degree of skill and judgment prevailing on the Agreement Date that is expected to be exercised by prudent, skilled and experienced contractors and design professionals on similar projects in State (or, with respect to the Tunnel Improvements, similar projects on a global basis), taking into consideration safety, operational requirements, level of service and lifecycle costs.

*Governmental Approval* means any authorization, consent, approval, license, lease, ruling, permit, certification, exemption, or registration by or with any Governmental Unit.

*Governmental Unit* means any national, state or local government, any political subdivision thereof, or any governmental, quasi-governmental, judicial, public or statutory instrumentality, administrative agency, authority, body or other entity having jurisdiction over the performance of the Work, the Project or the Parties; provided, however, that the term “Governmental Unit” shall not be construed to include Department.

*Guarantee* is defined in Section 10.3 of the Agreement.

*Guarantors* means [●].

---

<sup>3</sup> **Note to Offerors:** To be included if Tunnel Improvements are constructed using the bored tunnel construction method.

<sup>4</sup> **Note to Offerors:** To be included if Tunnel Improvements are constructed using the bored tunnel construction method.

---

*Hazardous Environmental Condition* means the presence at the Site of Hazardous Materials in such quantities or circumstances that may present a substantial danger to Persons or property exposed thereto on connection with the Work.

*Hazardous Materials* are any materials, wastes, substances and chemicals deemed to be hazardous under applicable Legal Requirements, or the handling, storage, remediation, or disposal of which are regulated by applicable Legal Requirements, including Hazardous Waste.

*Hazardous Waste* means a waste that is: (a) listed as a hazardous waste in 40 CFR Section 261.31 to 261.33; or (b) exhibits one of the following characteristics: ignitability, corrosivity, reactivity or toxicity, or is otherwise defined as a hazardous waste by the Legal Requirements.

*HRTAC* means the Hampton Roads Transportation Accountability Commission.

*HRTAC Parties* means, collectively, (i) HRTAC and (ii) the trustee with respect to any bonds issued by HRTAC to fund the Project.

*Instructions for Offerors* means Part 1 of the RFP.

*Interim Milestone(s)* is completion and delivery date(s) for parts of the Work specified by the Contract Documents.

*Interim Milestone Dates* is defined in Section 5.2.2 of the Agreement.

*Key Personnel* is defined in Section 2.1.5 of the General Conditions of Contract.

*Known Pre-Existing Hazardous Materials* means Hazardous Materials identified in the Technical Requirements.

*Lane Closure* means, in respect of any traffic lane, that all or part of any traffic lane is closed or blocked, or the use thereof is otherwise precluded for any reason.

*Lane Closure Liquidated Damages* is defined in Section 11.2.2.1 of the Agreement.

*Lead Mechanical Engineer* means [●].

*Lead Tunnel Engineer* means [●].

*Legal Requirements* are all applicable federal, state and local laws, codes, ordinances, rules, regulations, orders and decrees of any Governmental Unit.

*Limited Notice to Proceed* or *LNTP* is defined in Section 5.1.1 of the Agreement.

*Liquid Performance Security* is defined in Section 10.2.2.3 of the Agreement.

---

*Long Stop Deadline* means the date that is twelve (12) months following the Final Completion Deadline, as such date may be adjusted in accordance with the Agreement.

*NEPA Document* means [●].

*No Excuses Incentive Payment* is defined in Section 5.3.1 of the Agreement.

*Non-Permitted Lane Closure* means a Lane Closure that occurs outside the time period(s) when Lane Closures are permitted in accordance with Section [●] of the Technical Requirements.

*Notice to Proceed or NTP* is defined in Section 5.1.2 of the Agreement.

*Payment Bond* is defined in Section 10.2.2.2 of the Agreement.

*Performance Bond* is defined in Section 10.2.2.1 of the Agreement.

*Performance Security* means, collectively, the Performance Bond, the Payment Bond, the Liquid Performance Security and the Guarantees.

*Person* means any individual (including the heirs, beneficiaries, executors, legal representatives or administrators thereof), corporation, partnership, joint venture, trust, limited liability company, limited partnership, joint stock company, unincorporated association or other entity or a Governmental Unit.

*Pre-Existing Hazardous Materials* means Known Pre-Existing Hazardous Materials and Unknown Pre-Existing Hazardous Materials.

*Project* means the development, design, and construction of the improvements described in Article 1 of the Agreement.

*Project Executive* means [●].

*Project Manager* means [●].

*Proposal* or *Design-Builder's Proposal* means the proposal submitted by Design-Builder pursuant to the RFP and set out in **Exhibit 4** to the Agreement.

*QA Manager* (QAM) is Design-Builder's designee who shall be from an independent firm that has no involvement in construction operations for the Project, and shall be responsible for the quality assurance (QA) inspection and testing of all materials used and Work performed on the Project, to include monitoring of the Design-Builder's quality control (QC) program. The QAM will ensure that all work and materials, testing, and sampling are performed in conformance with the contract requirements, and the Released for Construction Plans. This individual shall be a registered, licensed, Professional Engineer in the Commonwealth of Virginia.

---

*QA/QC Plan* is a plan that details how Design-Builder will provide quality assurance (QA) and quality control (QC) for both the design and construction elements of the project, obtain samples for Design-Builder quality control testing, perform tests for Design-Builder quality control, provide inspection, and exercise management control (e.g. quality assurance testing) to ensure the work conforms to the Contract Documents.

*Reference Information* means the information related to the Project listed in **Exhibit 25** to the Agreement.

*Released for Construction Plans* means [●].

*Remedial Action Plan* means the plan developed by Design-Builder with respect to Hazardous Materials encountered by Design-Builder.

*Remedial Actions* means the management, treatment, handling, storage, monitoring, removal, transport or disposal measures carried out by Design-Builder with respect to Hazardous Materials in accordance with Section 4.1.1.2 of the General Conditions of Contract.

*Request for Proposals* (RFP) is defined in the eleventh (11<sup>th</sup>) recital to the Agreement.

*Request for Qualifications* (RFQ) is defined in the ninth (9<sup>th</sup>) recital to the Agreement.

*Responsible Charge Engineer* means [●].

*Restoration Funds* is defined in Section 5.6.1.3 of the General Conditions of Contract.

*RFP Documents* refer to those documents identified in the Instructions for Offerors.

*Roadway and Bridge Improvements* means [●].

*Roadway and Bridge Improvements Scope Issues* is defined in Section 2.2.1 of the General Conditions of Contract.

*Safety Manager* means [●].

*Separate Contractor* means a contractor retained by Department other than Design-Builder to perform work or to provide services or materials in connection with the Project.

*Site* is the land or premises on which the Project is located.

*Small, Women-Owned, and Minority Business* or *SWaM* means the State program to support small, women-owned and minority groups in doing business with the State.

*Standard Drawings* are the applicable drawings in the Virginia Department of Transportation *Road and Bridge Standards* in effect as of the Agreement Date.

---

*Standard Specifications* are the Virginia Department of Transportation *Road and Bridge Specifications* in effect as of the Agreement Date.

*State* means the Commonwealth of Virginia.

*State Highway* means any highway designated a State Highway pursuant to Title 33.2 of the Code of Virginia.

*State Indemnatee* means and includes Department, the Commissioner, the Commonwealth Transportation Board, the State and all elected representatives, appointed officials, commissioners, officers, members, employees, authorized agents and authorized representatives of any of them.

*Steering Committee* is defined in the second (2<sup>nd</sup>) recital to the Agreement.

*Subcontract* means any and all agreements between Design-Builder and its Design Consultants, Subcontractors and other agreements between Design Consultants or Subcontractors and their respective Sub-subcontractors (and/or any other lower tier subcontractors), it being the intent that all this term encompasses all agreements deriving directly or indirectly from Design-Builder, in connection with the performance of the Work.

*Subcontractor* is any Person or entity retained by Design-Builder as an independent contractor to perform a portion of the Work and shall include materialmen and suppliers, but shall not be deemed to include Design Consultants.

*Sub-Subcontractor* is any Person or entity retained by a Subcontractor as an independent contractor to perform any portion of a Subcontractor's Work and shall include materialmen and suppliers, but shall not be deemed to include Design Consultants.

*Successful Offeror* is defined in the twelfth (12<sup>th</sup>) recital to the Agreement.

*SWaM Performance Improvement Plan* is the plan submitted by Design-Builder and approved by Department pursuant to Section 2.3.2 of **Exhibit 23** to the Agreement.

*Technical Requirements* means the Technical Requirements set out in **Exhibit 2** to the Agreement.

*Third-Party Claim* means any claim asserted against a State Indemnatee by any Person who is not a party to the Agreement or an Affiliate of such party.

*Tunnel Construction Manager* means [●].

*Tunnel Improvements* means [●].

*Unknown Pre-Existing Hazardous Materials* means any Hazardous Materials present on the Site prior to the Agreement Date which are not Known Pre-Existing Hazardous Materials.

---

*Work* is comprised of all Design-Builder’s design, construction and other services required by the Contract Documents, including procuring and furnishing all materials, equipment, services and labor reasonably inferable from the Contract Documents.

*Work Breakdown Structure* (WBS) is a hierarchically-structured grouping of project elements that organizes and defines the total scope of the Project. Each descending level is an increasingly detailed definition of a project component. Project components may be products (a product-oriented WBS) or tasks (a task-oriented WBS).

*Work Order* is defined in Section 9.1.1 of the General Conditions of Contract.

*Work Package* is a deliverable at the lowest level of the WBS, and may be divided into activities and used to identify and control work flows in the organization.

## **Article 2** **Design-Builder’s Services and Responsibilities**

### **2.1 General**

**2.1.1** Design-Builder’s Representative shall be reasonably available to Department and shall have the necessary expertise and experience required to supervise the Work. Design-Builder’s Representative shall communicate regularly with Department and shall be vested with the authority to act on behalf of Design-Builder.

**2.1.2** Design-Builder will attend a kick-off meeting with Department to discuss issues affecting the administration of the Work and to implement the necessary procedures, including those relating to submittals and payment, to facilitate the ability of the parties to perform their obligations under the Contract Documents. Department will notify Design-Builder of the time and location of the kick-off meeting. All Design-Builder’s Key Personnel shall participate in this kick-off meeting.

**2.1.3** Design-Builder shall provide Department with the Preliminary Schedule, Baseline Schedule, Schedule Updates, Schedule Revisions, monthly reports and Final As-Built Schedule set forth in Section 11.1 of the Agreement.

**2.1.4** Design-Builder shall, at its sole cost and expense, perform all services associated with the acquisition of any other properties that are necessary, or that Design-Builder deems necessary, to enable Design-Builder to perform the Work. Design-Builder will not be responsible for the right-of-way acquisition cost. The term “right-of-way acquisition cost” means the actual purchase price to a landowner for right of way, including fees, any and all easements, and miscellaneous fees associated with closing as part of the Project.

**2.1.5** Design-Builder shall provide management for the Work in accordance with the organization chart set forth in the Proposal. Design-Builder acknowledges the importance of its “Key Personnel”. “Key Personnel” shall include Design-Builder’s Representative, Project Executive, Project Manager, Construction Manager, Quality Assurance Manager, Safety

---

Manager, Environmental Manager, Responsible Charge Engineer, Design Manager, Geotechnical Manager, Tunnel Construction Manager, Lead Tunnel Engineer, Lead Mechanical Engineer and any other positions specifically identified in the RFQ, RFP and/or the Proposal as “Key Personnel” (collectively, “**Key Personnel**”). Job duties and responsibilities of Key Personnel shall not be delegated to others for the duration of the Contract. Design-Builder shall not change or substitute any Key Personnel except due to voluntary or involuntary termination of employment, retirement, death, disability, or incapacity. None of the Key Personnel may be withdrawn from the Project without prior written approval of Department, with it being understood and agreed that Design-Builder will provide Department with at least thirty (30) days written notice of any request to withdraw any Key Personnel. Department will have the right to review the qualifications of each individual to be appointed to a Key Personnel position and to approve or disapprove use of such individual in such position prior to the commencement of any Work by such individual. Design-Builder shall remove or replace, or have removed or replaced, any personnel performing the Work if Department has a reasonable objection to such Person.

**2.1.6** If Design-Builder wishes to deviate from the right-of-way limits shown on the RFP Conceptual Plans included in the Technical Requirements, such deviations will be subject to Department’s prior written approval. It will be the responsibility of Design-Builder to coordinate directly with the affected property owners to acquire such right-of-way. Design-Builder shall be responsible for assuming all risks associated with exceeding such right-of-way limits, including any public hearings and any NEPA Document re-evaluation that may be required, and no modifications to the Contract Price or Contract Time(s) will be granted or considered.

**2.1.7** Design-Builder shall submit its QA/QC Plan to VDOT for review and approval at the kick-off meeting referenced in Section 2.1.2 above. At the kick-off meeting, Design-Builder’s Design Manager and QA Manager shall provide a presentation of the QA/QC Plan (which shall comply with the Technical Requirements) for design and construction, using project-related scenarios

**2.1.8** Design-Builder shall coordinate and lead all monthly progress meetings. During such meetings, progress during the prior month shall be reviewed. Design-Builder shall collect information from Design Consultants and any key Subcontractors responsible for work completed during the specified duration and work scheduled during the upcoming reporting duration. The monthly meetings shall be attended by all Key Personnel, as well as any other individuals that Department may require. Meetings will occur monthly beginning the month after Design-Builder’s receipt of the LNTP. Design-Builder shall be responsible for preparing, maintaining and distributing minutes of the meetings to all attendees for review. The meeting minutes shall be provided to Department within two (2) days of the monthly progress meeting.

**2.1.9** Design-Builder shall perform the Work in accordance with: (a) the Contract Documents; (b) applicable Legal Requirements and Governmental Approvals; and (c) Good Industry Practice. Notwithstanding the above, if any of (a), (b) or (c) in the preceding sentence conflict, Design-Builder shall be obligated to perform the Work in accordance with the more stringent standard.

**2.1.10** If the Contract Documents incorporate any approved ATCs and Design-Builder, for

whatever reason: (a) does not comply with one or more Department conditions of pre-approval for the ATC; (b) fails or is unable to implement the approved ATC for any reason, including but not limited to the determination during the design approval process that the ATC fails to comply with the Contract Documents; (c) does not obtain required third-party approval for the ATC; or (d) elects, for any reason, not to implement the approved ATC, then Design-Builder shall: (1) provide written notice thereof to Department; and (2) comply with the requirements in the Contract Documents that would have applied in the absence of such ATC. Such compliance shall be without any increase in the Contract Price or extension to the Contract Time(s). For the avoidance of doubt, Design-Builder shall not be entitled to any increase in the Contract Price or extension of the Contract Time(s) as a result of any delay, inability or cost associated with the acquisition of any property that may be required to implement any ATC.

## **2.2 Scope Validation and Identification of Roadway and Bridge Improvement Scope Issues**

**2.2.1 Scope Validation Period.** The term “**Scope Validation Period**” is the period of time that begins on Design-Builder’s receipt of the LNTP and extends for one hundred eighty (180) days from such date of receipt. During the Scope Validation Period, Design-Builder shall thoroughly (i) review and compare all of the then-existing Contract Documents, including without limitation the RFP Documents and the Proposal and (ii) investigate the actual conditions at the Site and any other areas necessary for the completion of the Work. Design-Builder shall undertake the activities described in clauses (i) and (ii) to verify and validate Design-Builder’s proposed design concept for the Roadway and Bridge Improvements and identify any defects, errors, or inconsistencies in the RFP Documents that affect Design-Builder’s ability to complete its proposed design concept for the Roadway and Bridge Improvements within the Contract Price and/or Contract Time(s) (collectively referred to as “**Roadway and Bridge Improvements Scope Issues**”). The term “Roadway and Bridge Improvements Scope Issues” shall not be deemed to include items that Design-Builder should have reasonably discovered prior to the Agreement Date.

**2.2.2 Scope Validation Period for Non-Accessible Areas of the Site.** The Parties recognize that Design-Builder may be unable to conduct the additional investigations contemplated by Section 4.2.2 below because it will not have access to certain areas of the Site within the Scope Validation Period set forth in Section 2.2.1 above. Design-Builder shall notify Department at the meeting set forth in Section 2.1.2 of the General Conditions of Contract of all such non-accessible areas and the dates upon which such areas are expected to become accessible. If Department agrees that such areas are non-accessible, then, for the limited purpose of determining Roadway and Bridge Improvements Scope Issues that directly arise from geotechnical evaluations for such areas, the term “**Scope Validation Period**” shall be deemed to be the thirty (30) day period after the date the specified area becomes accessible for purposes of conducting the geotechnical evaluation. If Department does not agree that such areas are non-accessible, then the Scope Validation Period shall not be extended.

**2.2.3 Submission Requirements for Scope Issues.** If Design-Builder intends to seek relief for a Roadway and Bridge Improvements Scope Issue, it shall promptly, but in no event later than the expiration of the Scope Validation Period, provide Department in writing with a notice

---

(“**General Notice**”) of the existence of such Roadway and Bridge Improvements Scope Issue, which General Notice shall generally explain the basis for such Roadway and Bridge Improvements Scope Issue. Within twenty-one (21) days of the General Notice, Design-Builder shall provide Department with documentation that specifically explains its support for the Roadway and Bridge Improvements Scope Issue (“**Supporting Documentation**”). The Supporting Documentation shall include, among other things: (a) the assumptions that Design-Builder made during the preparation of its proposal that form the basis for its allegation, along with documentation verifying that it made such assumptions in developing its proposal; (b) an explanation of the defect, error or inconsistency in the RFP Documents that Design-Builder could not have reasonably identified prior to the Agreement Date; and (c) the specific impact that the alleged Roadway and Bridge Improvements Scope Issue has had on Design-Builder’s price and time to perform the Work. For the avoidance of doubt: (1) Design-Builder shall not be entitled to raise in its Supporting Documentation any Roadway and Bridge Improvements Scope Issues that were not previously addressed in a General Notice; and (2) Design-Builder shall have no right to seek any relief for any Roadway and Bridge Improvements Scope Issues that have not been specifically identified in a General Notice provided to Department during the Scope Validation Period.

**2.2.4 Resolution of Scope Issues.** Within a reasonable time after Department’s receipt of the Supporting Documentation described in the Section 2.2.3 above, the Parties shall meet and confer to discuss the resolution of such Roadway and Bridge Improvements Scope Issues. If Department agrees that Design-Builder has identified a valid Roadway and Bridge Improvements Scope Issue that materially impacts Design-Builder’s price or time to perform the Work, a Work Order shall be issued in accordance with Article 9 of the General Conditions of Contract. If Department disagrees that Design-Builder has identified a valid Roadway and Bridge Improvements Scope Issue that materially impacts Design-Builder’s price or time to perform the Work, then Design-Builder’s recourse shall be as set forth in Article 10 of the General Conditions of Contract. Notwithstanding anything to the contrary in the Contract Documents or as a matter of law, Design-Builder shall have the burden of proving that the alleged Roadway and Bridge Improvements Scope Issue could not have been reasonably identified prior to the Agreement Date and that such Roadway and Bridge Improvements Scope Issue materially impacts its price or time to perform the Work.

**2.2.5 Design-Builder’s Assumption of Risk of Roadway and Bridge Improvements Scope Issues.** The Parties acknowledge that the purpose of the Scope Validation Period is to enable Design-Builder to identify those Roadway and Bridge Improvements Scope Issues that could not reasonably be identified prior to the Agreement Date. By executing the Agreement, Design-Builder acknowledges that the Scope Validation Period is a reasonable time to enable Design-Builder to identify Roadway and Bridge Improvements Scope Issues that will materially impact Design-Builder’s price or time to perform the Roadway and Bridge Improvements. After the expiration of the Scope Validation Period, with the sole exception of those Roadway and Bridge Improvements Scope Issues made the subject of a General Notice during the Scope Validation Period and subject to valid requests for Work Orders in accordance with Section 2.2.3 above, the Parties agree as follows:

.1 Design-Builder shall assume and accept all risks, costs, and responsibilities of any Roadway and Bridge Improvements Scope Issue arising from or relating to the Contract Documents, including but not limited to conflicts within or between the RFP Documents and Proposal;

.2 Design-Builder shall be deemed to have expressly warranted that the Contract Documents existing as of the end of the Scope Validation Period are sufficient to enable Design-Builder to complete the design and construction of the Roadway and Bridge Improvements without any increase in the Contract Price or extension to the Contract Time(s);

.3 Department expressly disclaims any responsibility for, and Design-Builder expressly waives its right to seek any increase in the Contract Price or extension to the Contract Time(s) for, any Roadway and Bridge Improvements Scope Issue associated with any of the Contract Documents, including but not limited to the RFP Documents; and

.4 The purpose of the Scope Validation Period is limited to providing Design-Builder with an opportunity to identify Roadway and Bridge Improvements Scope Issues that will materially impact Design-Builder's price or time to perform the Roadway and Bridge Improvements. The Scope Validation Period does not apply to the Tunnel Improvements.

**2.2.6 Waiver of Rights.** The failure of Design-Builder to meet the submission requirements required under Section 2.2.3 above for a Roadway and Bridge Improvements Scope Issue, including but not limited to the times for providing notice and documentation of the Roadway and Bridge Improvements Scope Issue, shall conclusively constitute a waiver of Design-Builder's rights to seek relief for such Scope Issue.

**2.2.7 Failure of Technical Proposal to Meet Requirements of the Contract Documents.** Notwithstanding anything to the contrary in this Section 2.2 or elsewhere in the Contract Documents, Department shall have no responsibility in the event Design-Builder's Proposal fails to meet the requirements of the Contract Documents, regardless of whether: (a) Department modified the RFP Documents to permit Design-Builder to implement a technical approach; (b) Department accepted Design-Builder's Proposal; or (c) any other action or inaction of Department is alleged by Design-Builder.

### **2.3 Design Professional Services**

**2.3.1** Design-Builder shall, consistent with applicable state licensing laws, provide through qualified, licensed design professionals employed by Design-Builder, or procured from qualified, independent licensed Design Consultants, the necessary design services, including architectural, engineering, surveying, and other design professional services, for the preparation of the required drawings, specifications and other design submittals to permit Design-Builder to complete the Work consistent with the Contract Documents. All design professional services shall be performed by professionals properly licensed in the Commonwealth of Virginia and who are well-versed in Department's design standards and practices.

**2.3.2** No Design Consultant is intended to be, nor shall any Design Consultant be deemed to be, a third-party beneficiary of the Agreement. Department is intended to be and shall be deemed a third-party beneficiary of all contracts between Design-Builder and any Design Consultant. In the event that the Agreement is terminated, Design-Builder shall, upon the written demand of Department, assign such contracts to Department.

**2.3.3** Design-Builder shall incorporate all obligations and understandings of the Contract Documents applicable to design services in its respective contracts with any Design Consultant, and require that such obligations be flowed down to lower-tiered Design Consultants, including the obligations relative to ownership of the Work Product set forth in Article 4 of the Agreement.

## **2.4 Design Development Services**

**2.4.1** Design-Builder shall be responsible for the professional quality, technical accuracy, timely completion and coordination of all drawings, specifications and other design submissions required to be developed by Design-Builder under the Contract Documents and shall, without additional compensation, correct or revise any errors, omissions or other deficiencies in such design submissions.

**2.4.2** Design-Builder shall, consistent with any applicable provision of the Contract Documents, provide Department with ten (10) sets of the following interim design submissions, in accordance with the Technical Requirements. The submissions should generally correspond to Department's concurrent engineering process, including but not limited to: [(i) Preliminary Field Inspection (“**PFI**”); (ii) Field Inspection and Right-of-Way (“**FI/RW**”); and (iii) additional interim design submissions that Department may require.] On or about the time of the scheduled submissions, Design-Builder and Department shall meet and confer about the submissions, with Design-Builder identifying during such meetings, among other things, the evolution of the design and any significant changes or deviations from the Contract Documents, or, if applicable, previous design submissions. Minutes of the meetings will be maintained by Design-Builder and provided to all attendees for review. Following the design review meeting, Department shall review and provide comments on the interim design submissions (except that it will specifically approve or disapprove of the FI/RW submissions) within twenty-one (21) days after receipt of the required submissions. Design-Builder shall promptly revise and modify all such submittals so as to fully reflect all comments and shall deliver to Department revised submittals for review and comment (and approval as the case may be).

**2.4.3** Design-Builder shall submit to Department Released for Construction Plans setting forth in detail drawings and specifications describing the requirements for construction and QA/QC activities associated with such Work, in full compliance with the Contract Documents and all Legal Requirements and Governmental Approvals. The Released for Construction Plans shall be consistent with the latest set of interim design submissions; as such submissions may have been modified in a design review meeting, as agreed upon in writing, and shall be submitted after Design-Builder has obtained all requisite Governmental Approvals associated with the Work contained in such documents. The parties shall have a design review meeting to discuss, and Department shall review and approve, the Released for Construction Plans in accordance with the procedures set forth Section 2.4.1 above. Design-Builder shall proceed with construction in

---

accordance with the approved Released for Construction Plans and shall submit the approved Released for Construction Plans to Department prior to commencement of Work in accordance with the Technical Requirements.

**2.4.4** Department's review, comment and/or approval of interim design submissions, ATCs and the Released for Construction Plans are for the purpose of establishing Design-Builder's compliance with the requirements of the Contract Documents and mutually establishing a conformed set of Contract Documents compatible with the requirements of the Work. Department's review, comment and/or approval of any interim or final design submission (including but not limited to ATCs and the Released for Construction Plans) shall not be deemed to transfer any liability from Design-Builder to Department.

**2.4.5** To the extent not prohibited by the Contract Documents or Legal Requirements, Design-Builder may, with the prior approval of Department, prepare design submittals and Released for Construction Plans for a portion of the Work to permit procurement and construction to proceed on that portion of the Work prior to completion of the Released for Construction Plans for the entire Work.

## **2.5 Legal Requirements**

**2.5.1** Design-Builder shall keep fully informed of and perform the Work in accordance with all Legal Requirements. Design-Builder shall provide all notices, and execute and file the documents, statements and/or affidavits applicable to the Work as required by the Legal Requirements. Design-Builder shall permit Department's examination of any records made subject to such examination by any applicable Legal Requirements.

**2.5.2** Design-Builder may request, by submission of a Work Order request, that the Contract Price and/or Contract Time(s) shall be adjusted to compensate Design-Builder for the effects of any changes in the Legal Requirements enacted after the Agreement Date, affecting the performance of the Work. Such effects may include, without limitation, revisions Design-Builder is required to make to the Released for Construction Plans because of changes in Legal Requirements. Notwithstanding anything to the contrary, the relief afforded by this Section 2.5 shall not apply to changes in any tax laws, with Design-Builder bearing the risk of such changes.

## **2.6 Governmental Approvals**

**2.6.1** Except as identified in Department's Governmental Approvals List, set forth in **Exhibit 19**, Design-Builder shall obtain and pay for all necessary Governmental Approvals required for the prosecution of the Work by any Governmental Unit. If any such Governmental Approval is required to be formally issued in the name of Department, Design-Builder shall undertake all efforts to obtain such Governmental Approvals subject to Department's reasonable cooperation with Design-Builder, including execution and delivery of appropriate applications and other documentation in forms approved by Department. Design-Builder shall deliver to Department, promptly after Design-Builder's receipt, a copy of each such Governmental Approval, with a listing of the status of all such Governmental Approvals included in the monthly reports required by Section 11.1 of the Agreement.

**2.6.2** Design-Builder shall provide reasonable assistance to Department in obtaining those Governmental Approvals that are Department's responsibility, and no construction activity will commence until: (i) all Governmental Approvals required for the relevant construction activity (including any activity that may disturb the Site) have been obtained; (ii) Department has been notified that such Governmental Approvals have been obtained; and (iii) Department has, after reviewing the validity and scope of the Governmental Approval, authorized Design-Builder to proceed.

**2.6.3** Design-Builder shall ensure that the Work conforms to the requirements and stipulations of all Governmental Approvals. Any violations of or noncompliance with any Governmental Approval, including but not limited to suspensions caused by Design-Builder violating or not being in compliance with a Governmental Approval, shall be at the sole risk of Design-Builder, and shall not be a basis for adjusting the Contract Price and/or Contract Time(s).

## **2.7 Design-Builder's Construction Phase Services**

**2.7.1** Unless otherwise provided in the Contract Documents to be the responsibility of Department or a Separate Contractor, Design-Builder shall provide through itself or Subcontractors the necessary supervision, labor, inspection, testing, start-up, material, equipment, machinery, temporary utilities and other temporary facilities to permit Design-Builder to complete construction of the Project consistent with the Contract Documents.

**2.7.2** Design-Builder shall perform all construction activities efficiently and with the requisite expertise, skill and competence to satisfy the requirements of the Contract Documents, and shall maintain or cause to be maintained all licenses required of Design-Builder or its employees in connection with the Work. Design-Builder shall at all times exercise complete and exclusive control over the means, methods, sequences and techniques of construction.

**2.7.3** Design-Builder shall employ only Subcontractors who are duly licensed and qualified to perform the Work lawfully in the Commonwealth of Virginia and consistent with the Contract Documents. Design-Builder shall not use any Subcontractor to whom Department has a reasonable objection, and shall obtain Department's written consent before making any substitutions or additions to Subcontractors previously identified to Department as being members of Design-Builder's Project team, including those who may have been identified in the Proposal.

**2.7.4** Design-Builder assumes responsibility to Department for the proper performance of the Work of Subcontractors and any acts and omissions in connection with such performance. Nothing in the Contract Documents is intended or deemed to create any legal or contractual relationship between Department and any Subcontractor or Sub-Subcontractor, including but not limited to any third-party beneficiary rights.

**2.7.5** Design-Builder shall coordinate the activities of all Subcontractors. If Department performs other work on the Project or at the Site with Separate Contractors under Department's control, Design-Builder agrees to reasonably cooperate and coordinate its activities with those of

---

such Separate Contractors so that the Project can be completed in an orderly and coordinated manner without unreasonable disruption.

**2.7.6** Design-Builder shall keep the Site reasonably free from debris, trash and construction wastes to permit Design-Builder to perform its construction services efficiently, safely and without interfering with the use of adjacent land areas. Upon Final Acceptance of the Work, or a portion of the Work, Design-Builder shall remove all debris, trash, construction wastes, materials, equipment, machinery and tools arising from the Work or applicable portions thereof to permit Department to occupy the Project or a portion of the Project for its intended use.

**2.7.7** Design-Builder shall be responsible for the security of the Site until Final Acceptance of the Work, or a portion of the Work.

## **2.8 Design-Builder's Responsibility for Project Safety<sup>5</sup>**

**2.8.1** Design-Builder recognizes the importance of performing the Work in a safe manner so as to prevent damage, injury or loss to: (i) all individuals at the Site, whether working or visiting; (ii) the Work, including materials and equipment incorporated into the Work or stored on-Site or off-Site; and (iii) all other property at the Site or adjacent thereto. Design-Builder assumes responsibility for implementing and monitoring all safety precautions and programs related to the performance of the Work. Design-Builder shall, prior to commencing construction, designate a Safety Representative with the necessary qualifications and experience to supervise the implementation and monitoring of all safety precautions and programs related to the Work. Unless otherwise required by the Contract Documents, Design-Builder's Safety Representative shall be an individual stationed at the Site who may have responsibilities on the Project in addition to safety. The Safety Representative shall make routine daily inspections of the Site and shall hold weekly safety meetings with Design-Builder's personnel, Subcontractors and others as applicable. Design-Builder shall provide minutes of each safety meeting to Department within five (5) days of such meeting.

**2.8.2** Design-Builder shall provide, for Department's review, comment and acceptance, a Health, Safety and Welfare ("**HS&W**") plan on or before the earlier of fifteen (15) days of Design-Builder's receipt of the Notice to Proceed, or twenty-one (21) days before Design-Builder intends to commence any construction-related activities at the Site. Design-Builder shall not perform any construction-related activity (including any activity that disturbs the Site) until an acceptable HS&W plan is in place.

**2.8.3** Design-Builder and Subcontractors shall comply with: (i) all Legal Requirements relating to safety; (ii) Design-Builder's HS&W plan; and (iii) any Department-specific safety requirements set forth in the Contract Documents, provided that such Department-specific requirements do not violate any applicable Legal Requirement. Design-Builder will immediately report in writing any safety-related injury, loss, damage or accident arising from the Work to Department's Representative and, to the extent mandated by Legal Requirements, to all

---

<sup>5</sup> **Note to Offerors:** Provisions remains under review by VDOT.

---

Governmental Units having jurisdiction over safety-related matters involving the Project or the Work.

**2.8.4** Department shall have the right to immediately suspend any or all Work if Design-Builder fails to comply with its obligations hereunder.

**2.8.5** Design-Builder's responsibility for safety under this Section 2.8 is not intended in any way to relieve Subcontractors and Sub-Subcontractors of their own contractual and legal obligations and responsibility for: (i) complying with all Legal Requirements, including those related to health and safety matters; and (ii) taking all necessary measures to implement and monitor all safety precautions and programs to guard against injury, losses, damages or accidents resulting from their performance of the Work.

## **2.9 Design-Builder's Warranty**

**2.9.1** Design-Builder hereby warrants to Department that:

- .1** all Work will fully comply with the Contract Documents;
- .2** all Work, including all materials and equipment furnished as part of the Work, will be free of all Defects and in conformance with the Contract Documents; and
- .3** the As-Built Drawings will be accurate and complete in all material respects, comply with the requirements of the Agreement, including the Technical Requirements and accurately reflect the condition of the Project as of Final Acceptance.

**2.9.2** Subject to Section 2.9.3 of the General Conditions to Contract, the foregoing warranties for the Work shall expire on the date that is twenty-four (24) months following the Final Completion Date; *provided* such warranties shall survive termination of the Agreement for Work that was in place prior to any termination.

**2.9.3** If and to the extent Design-Builder obtains general or limited warranties from any Subcontractor with respect to design, materials, workmanship, construction, equipment, tools, supplies, software, or services, Design-Builder also shall cause such warranty to be expressly extended to Department; *provided*, that the foregoing requirement shall not apply to standard, pre-specified manufacturer warranties of mass-marketed materials, products (including software products), equipment or supplies where the warranty cannot be extended to Department using commercially reasonable efforts. To the extent that any Subcontractor warranty would be voided by reason of Design-Builder's negligence in incorporating materials or equipment in the Work, Design-Builder shall be responsible for correcting such omission.

**2.9.4** Design-Builder's warranties are in addition to all rights and remedies available under the Agreement or Legal Requirements and shall not limit Design-Builder's responsibilities imposed by the Agreement, the Contract Documents or Legal Requirements with respect to the Work, including liability for Defects, strict liability, breach, negligence, willful misconduct or fraud.

---

## 2.10 Rectification of Defects

**2.10.1** If any Defect is discovered, including in any materials and equipment furnished as part of the Work, Department shall be entitled, in addition to any other remedies:

.1 to demand that Design-Builder undertake Corrective Work to correct, repair or replace such Defect at Design-Builder's sole cost and expense;

.2 to suspend any affected portion of the Work by delivery of a written order to Design-Builder, which order Department shall lift after Design-Builder fully cures or corrects such Defect;

.3 to rectify such Defect itself and to obtain payment of Department's costs incurred (plus twenty-five percent (25%) for supervisory and administrative personnel costs) from Design-Builder or draw on the Performance Security; *provided* that Department shall not undertake Corrective Work itself unless Department has requested, and Design-Builder has failed to undertake, such Corrective Work in accordance with Section 2.12; and/or

.4 to seek performance or payment pursuant to the Guarantees.

**2.10.2** The issuance of a suspension order pursuant to Section 2.10.1.2 shall not affect Design-Builder's rights to cure or correct any Defect giving rise to the issuance of the suspension order.

**2.10.3** The warranty with respect to any Work that is repaired or replaced shall be extended for an additional twelve (12) months from the date of such repair or replacement.

**2.11 Root Cause Analysis.** Department may, based on good cause, direct Design-Builder to perform a "root cause" analysis of any alleged Defect in the Work. If Design-Builder fails to perform such analysis as directed by Department, or if Department concludes that the "root cause" analysis is flawed, Department may elect to conduct an independent analysis of the alleged Defect, whereupon Design-Builder shall cooperate with Department and provide such information, test and product data, samples, and other data relevant to the alleged Defect as Department may request. If the "root cause" or independent analysis reveals a Defect or Defects in any part of the Work, Design-Builder shall be responsible for the costs and expenses of remedying the Defect(s), including paying the costs of the "root cause" or independent analysis. If the "root cause" or independent analysis demonstrates that there is no Defect, then Department shall bear the reasonable costs and expenses of such analyses. All remedial measures related to Defects revealed by any "root cause" or independent analysis must be approved by Department prior to implementation by Design-Builder.

## 2.12 Department's Right to Perform

**2.12.1** If Design-Builder refuses or fails to perform any Corrective Work to correct any Defect within fourteen (14) days after receipt of written notice from Department to commence and continue such Corrective Work with diligence and promptness, without prejudice to any other remedy Department may have, Department may, itself or through one or more third-party

---

contractors, undertake such Corrective Work on behalf of Design-Builder.

**2.12.2** Any such Corrective Work undertaken by Department (or its designee) shall not in any way diminish the Design-Builder's obligations or liabilities under the Agreement with respect to work undertaken by the Department.

**2.12.3** In the event Department exercises its rights under this Section 2.12, Department shall (at its election) deduct all of its costs incurred in connection with any such Corrective Work from any payments then or thereafter due to Design-Builder under the Agreement or by drawing on the Performance Security. If the payments then or thereafter due to Design-Builder are not sufficient to cover such amount, Design-Builder shall pay the difference to Department within thirty (30) days after Department issues an invoice for such amount together with supporting documentation.

### **2.13 DBE and SWaM Matters**

**2.13.1** Design-Builder shall comply with the requirements set forth in **Exhibit 23** of the Agreement relating to DBE and SWaM participation.

## **Article 3** **Department's Services and Responsibilities**

### **3.1 Duty to Cooperate**

**3.1.1** Department shall, throughout the performance of the Work, cooperate with Design-Builder and perform its responsibilities, obligations and services in a timely manner to facilitate Design-Builder's timely and efficient performance of the Work and so as not to delay or interfere with Design-Builder's performance of its obligations under the Contract Documents.

**3.1.2** Department shall provide timely reviews and (where required) approvals of submittals, interim design submissions and Released for Construction Plans consistent with the turnaround times set forth in Design-Builder's schedule, provided, however that, unless stated otherwise in the Contract Documents, Department shall have twenty-one (21) days after receipt of such submissions to act upon such submissions. This Section 3.1.2 shall not be construed to apply to the acquisition of Governmental Approvals by either Design-Builder or Department.

**3.1.3** Department's Representative will participate in monthly progress meetings for the duration of the Project.

### **3.2 Furnishing of Services and Information**

**3.2.1** Department has provided the Reference Information for Design-Builder to consider in developing the Proposal and for executing the Work. Design-Builder shall thoroughly review and compare all such documents during the Scope Validation Period and, to the extent that any

---

Roadway and Bridge Improvements Scope Issues arise, Department shall consider such issues in accordance with Section 2.2 of the General Conditions of Contract.

### **3.3 Reserved**

### **3.4 Department's Representative**

**3.4.1** Department's Representative shall be responsible for providing Department-supplied information and approvals in a timely manner to permit Design-Builder to fulfill its obligations under the Contract Documents. Department's Representative shall also provide Design-Builder with prompt notice if it observes any failure on the part of Design-Builder to fulfill its contractual obligations, including any errors, omissions or defects in the performance of the Work.

### **3.5 Governmental Approvals**

**3.5.1** Department shall obtain and pay for all Governmental Approvals set forth in **Exhibit 19**.

**3.5.2** Department shall provide reasonable assistance to Design-Builder in obtaining all other Governmental Approvals that are Design-Builder's responsibility.

### **3.6 Department's Separate Contractors**

**3.6.1** Department may at any time contract or approve concurrent contracts for performance of other work on, near, or within the same geographical area of the work specified in an existing contract. Design-Builder shall not impede or limit access to such work by others.

**3.6.2** When separate contracts are awarded within the limits of one project, contractors shall not hinder the work being performed by other contractors. Design-Builder and Separate Contractor(s) working on the same project shall cooperate with each other. In case of dispute, Department's Representative will be the referee, and his decision will be binding on all parties.

**3.6.3** When contracts are awarded to Separate Contractor(s) for known concurrent construction in a common area, Design-Builder and Separate Contractor(s), in conference with Department's Representative, shall establish a written joint schedule of operations. The schedule shall be based on the limitations of the individual contracts and the joining of the work of one contract with the others. The schedule shall set forth the approximate dates and sequences for the several items of work to be performed and shall ensure completion within the contract time limit. The schedule shall be submitted to Department's Representative for review and approval no later than twenty-one (21) days after the award date of the later contract and prior to the first monthly progress meeting. The schedule shall be agreeable to, signed by, and binding on each Design-Builder(s) and/or Separate Contractor(s). Department's Representative may allow modifications of the schedule when benefit to Design-Builder and/or Separate Contractor(s) and Department will result.

**3.6.4** Any modification of the schedule shall be in writing, mutually agreed to and signed by Design-Builder and Separate Contractor(s), and shall be binding on Design-Builder and Separate Contractor(s) in the same manner as the original agreement.

**3.6.5** If Design-Builder and Separate Contractor(s) fail to agree on a joint schedule of operations, they shall submit their individual schedules to Department's Representative, who will prepare a schedule that will be binding on Design-Builder and Separate Contractor(s).

**3.6.6** The joint schedule and any modification thereof shall become a part of each contract involved. The failure of Design-Builder and Separate Contractor(s) to abide by the terms of the joint schedule will be justification for declaring Design-Builder and/or Separate Contractor(s) in default of his contract.

**3.6.7** Design-Builder and each Separate Contractor shall assume all liability, financial or otherwise, in connection with his contract and shall protect and save harmless the Commonwealth from any and all damages and claims that may arise because of any inconvenience, delay, or loss he experiences as a result of the presence and operations of other Separate Contractors working in or near the work covered by his contract. Design-Builder shall also assume all responsibility for any of his work not completed because of the presence or operation of other Separate Contractors.

**3.6.8** Except for an extension of the contract time limit, Department will not be responsible for any inconvenience, delay, or loss experienced by Design-Builder or Separate Contractor as a result of his failure to gain access to the work at the time contemplated. When the failure to gain access is not due to any fault or negligence of Design-Builder or Separate Contractor, an extension of the contract time limit will be allowed on the basis of the amount of time delayed.

**3.6.9** Department will not assume any responsibility for acts, failures, or omissions of Design-Builder or Separate Contractor that delay the work of another except as provided herein.

#### **Article 4**

### **Hazardous Environmental Conditions and Differing Site Conditions**

#### **4.1 Hazardous Environmental Conditions**

##### **4.1.1 General Obligations**

**.1** Unless specifically stated to the contrary in the Technical Requirements, Design-Builder will be responsible for the management, treatment, handling, storage, monitoring, remediation, removal, transport and/or disposal of any Hazardous Environmental Conditions that are encountered on, in or under the Site.

**.2** Design-Builder shall notify Department prior to implementing any Remedial Actions contained in Design-Builder's Environmental Management Plan for Known Pre-Existing Hazardous Materials.

---

.3 If Design-Builder encounters any Unknown Pre-Existing Hazardous Materials the presence of which constitutes a Hazardous Environmental Condition, then Design-Builder will promptly notify Department and, in consultation with Department, will develop a Remedial Action Plan setting out the scope of the Remedial Actions that Design-Builder proposes to take in relation to the relevant Hazardous Environmental Condition, such actions to include, but not be limited to: (i) conducting such further investigations as may be necessary or appropriate to determine the nature and extent of the Hazardous Materials and submitting copies of such data and reports to Department for its review and approval, (ii) taking reasonable steps, including in the case of excavation, construction, reconstruction or rehabilitation, modifications and/or construction techniques, to avoid or minimize excavation or dewatering in areas with Hazardous Materials, (iii) preparing and obtaining Governmental Approvals for remedial action plans, including Department approval, (iv) carrying out the Remedial Action Plan, including, as necessary, disposal of the Hazardous Materials and (v) timely informing Department of all such actions.

.4 Before any Remedial Actions for Unknown Pre-Existing Hazardous Materials are taken that would inhibit Department's ability to ascertain the nature and extent of the Hazardous Environmental Condition, Design-Builder will afford Department the opportunity to inspect areas and locations that require Remedial Actions; *provided*, that in the case of a sudden release of any Unknown Pre-Existing Hazardous Materials, Design-Builder may take all reasonable actions necessary to stabilize and contain the release without prior notice or inspection, but will promptly notify Department of the sudden release and its location.

.5 Design-Builder will obtain all Governmental Approvals relating to all Remedial Actions. Design-Builder will be solely responsible for compliance with such Governmental Approvals and applicable Legal Requirements concerning or relating to Hazardous Materials. In carrying out Remedial Actions that are compensable by Department pursuant to Section 4.1.2 below, Design-Builder will not take any steps or actions which impair Department's potential claims for indemnity and contribution, statutory or otherwise.

.6 Unless directed otherwise by Department, Design-Builder will seek to recover costs from any available reimbursement program or from any third party responsible for generating or otherwise creating or contributing to conditions that led to the need for Remedial Action. Without limiting the preceding sentence, Design-Builder will seek pre-approval and pursue reimbursement from the Virginia Petroleum Storage Tank Fund for qualifying expenses incurred during the course of investigation, containment, management, mitigation or remediation activities on petroleum storage tank releases. The parties will cooperate with and notify each other with respect to activities undertaken pursuant to this Section 4.1.1.6.

.7 Except as provided in Section 4.1.2 below, Design-Builder will bear all costs and expenses of preparing and complying with any Remedial Action Plan, of complying with Legal Requirements and obtaining and complying with Governmental Approvals pertaining to Hazardous Materials, and otherwise of carrying out Remedial Actions.

---

#### **4.1.2 Pre-Existing Hazardous Materials**

.1 Department will reimburse, to the extent permitted by the Legal Requirements, Design-Builder for Design-Builder's costs for Remedial Actions with respect to any Unknown Pre-Existing Hazardous Materials, the presence of which constitutes a Hazardous Environmental Condition.

.2 Department will assume, to the extent permitted by the Legal Requirements, responsibility for third-party claims against Design-Builder for personal injury, damages or harm to property or business due to any Pre-Existing Hazardous Materials, the presence of which constitutes a Hazardous Environmental Condition, and all related penalties, fines and administrative or civil sanctions arising out of or related to such Pre-Existing Hazardous Materials; except to the extent Design-Builder is obliged to indemnify Department pursuant to Section 4.1.3 below.

.3 Design-Builder will provide cost estimates with respect to such Remedial Actions which may be reimbursed by Department, for Department's review and approval prior to proceeding with any such Remedial Actions, subject to Section 4.1.1.3 above.

.4 Department reserves the right to perform Remedial Actions for Unknown Pre-Existing Hazardous Materials in lieu of, and as replacement for, Design-Builder's Remedial Action obligations subject to Section 4.1.1.2 above.

#### **4.1.3 Design-Builder's Indemnification Obligations Regarding Hazardous Materials**

.1 Design-Builder will indemnify, protect, defend and hold harmless and release each State Indemnitee from and against any and all claims against State Indemnitees by a Person not party to the Agreement, including reasonable attorney's fees, expert witness fees and court costs suffered or incurred by such State Indemnitee, to the extent caused by:

(A) Hazardous Materials introduced to or brought onto the Site by Design-Builder or its Subcontractors;

(B) failure of Design-Builder or any of its Subcontractors to comply with any requirement of the Contract Documents relating to Hazardous Materials (including any failure to perform any Remedial Action required in accordance with Section 4.1.1 above) or to otherwise comply with applicable Legal Requirements and Governmental Approvals; or

(C) the exacerbation, release, spreading, migration, or toxicity of Hazardous Materials due to the negligence, omission, recklessness, or willful misconduct of Design-Builder or any of its Subcontractors.

.2 Design-Builder shall defend such claims in accordance with Article 7 below.

.3 Design-Builder's obligations under this Section 4.1.3 will not apply to claims to the extent caused by the negligence, recklessness, or willful misconduct of any State Indemnitee.

## **4.2 Inspection of Site Conditions**

**4.2.1** Design-Builder represents and warrants that it has, as of the Agreement Date, ascertained the nature and location of the Work, the character and accessibility of the Site, the existence of obstacles to construction, the availability of facilities and utilities, the location and character of existing or adjacent work or structures, the surface and subsurface conditions, and other general and local conditions (including labor) which might affect its performance of the Work or the cost thereof.

**4.2.2** Design-Builder will, after its receipt of the LNTP, undertake such testing, inspections and investigations as may be necessary to perform its obligations under the Contract Documents, including but not limited to additional geotechnical evaluations or Hazardous Materials studies. If Design-Builder intends to conduct additional geotechnical evaluations to supplement or corroborate the information contained in the RFP Documents, it shall do so during the Scope Validation Period. Any Roadway and Bridge Improvements Scope Issues that arise from such evaluations shall be treated in the manner set forth in Section 2.2 of the General Conditions of Contract. All reports or analyses generated by Design-Builder's testing, inspections and investigations, including but not limited to additional geotechnical testing, shall be furnished to Department promptly after such reports or analyses are generated.

## **4.3 Differing Site Conditions**

### **4.3.1 Differing Roadway and Bridge Improvements Site Condition**

.1 If, during construction of the Roadway and Bridge Improvements, Design-Builder encounters a Differing Roadway and Bridge Improvements Site Condition, Design-Builder will be entitled to submit a request for a Work Order for an adjustment in the Contract Price and/or Contract Time(s) to the extent Design-Builder's cost and/or time of performance are adversely impacted by the Differing Roadway and Bridge Improvements Site Condition as allowed for herein.

.2 Upon encountering an alleged Differing Roadway and Bridge Improvements Site Condition during construction of the Roadway and Bridge Improvements, Design-Builder shall provide prompt written notice to Department of such alleged condition, which notice shall not be later than fourteen (14) days after such condition has been encountered. Design-Builder shall, to the extent reasonably possible, provide such notice before the Differing Roadway and Bridge Improvements Site Condition has been substantially disturbed or altered.

.3 Design-Builder shall not be entitled to any adjustment in the Contract Price and/or Contract Time(s) due to impacts of Differing Roadway and Bridge Improvements Site Conditions encountered during construction of the Roadway and Bridge Improvements not identified during the Scope Validation Period, unless Department, in its sole discretion,

---

determines that the circumstances associated with such Differing Roadway and Bridge Improvements Site Condition justify making such adjustment.

#### **4.3.2 [Differing Tunnel Improvements Site Condition – Bored Tunnel Construction Method**

.1 If Design-Builder encounters a Differing Tunnel Improvements Site Condition, Design-Builder will be entitled to submit a request for a Work Order for an adjustment in the Contract Price and/or Contract Time(s) to the extent Design-Builder's cost and/or time of performance are adversely impacted by the Differing Tunnel Improvements Site Condition as allowed for herein.

.2 Upon encountering an alleged Differing Tunnel Improvements Site Condition, Design-Builder shall provide prompt written notice to Department of such alleged condition, including the ground conditions encountered and the measures taken to deal with the ground conditions. Design-Builder may continue tunnel excavations; *provided, however*, Design-Builder submits the following documents and information to Department on a daily basis:

- (a) photographs (paper and electronic copies) that detail the alleged Differing Tunnel Improvements Site Condition;
- (b) an electronic copy of all data generated by the tunnel boring machine during the previous twenty-four (24) hours;
- (c) samples of the excavated material in the alleged Differing Tunnel Improvements Site Condition area taken from the tunnel boring machine conveyor or spoil discharge point, in an amount equivalent to a full sandbag for each ring advanced while the alleged Differing Tunnel Improvements Site Condition exists;
- (d) Design-Builder's daily shift reports (cover a twenty-four (24) hour period of production) for each day that the alleged Differing Tunnel Improvements Site Conditions exists; and
- (e) records, face logs and detailed daily records describing the ground conditions and the impact ground conditions are having on the tunnel boring machine and Design-Builder's productivity.

.3 If Design-Builder establishes (a) that the actual ground conditions encountered qualifies as a Differing Tunnel Improvements Site Condition and (b) that such Differing Tunnel Improvements Site Condition has adversely impacted Design-Builder's costs and/or time of performance, then Design-Builder shall be entitled to submit a request for a Work Order for an adjustment in the Contract Price and/or Contract Time(s).]<sup>6</sup>

---

<sup>6</sup> **Note to Offerors:** To be included if Tunnel Improvements are constructed using the bored tunnel construction method.

---

#### **4.3.2 [Differing Tunnel Improvements Site Condition – Immersed Tube Tunnel Construction Method**

.1 If Design-Builder encounters a Differing Tunnel Improvements Site Condition, Design-Builder will be entitled to submit a request for a Work Order for an adjustment in the Contract Price and/or Contract Time(s) to the extent Design-Builder's cost and/or time of performance are adversely impacted by the Differing Tunnel Improvements Site Condition as allowed for herein.

.2 Upon encountering an alleged Differing Tunnel Improvements Site Condition, Design-Builder shall provide prompt written notice to Department of such ground condition, including the conditions encountered and the measures taken to deal with the ground conditions.

.3 If Design-Builder establishes (a) that the actual ground conditions encountered qualify as a Differing Tunnel Improvements Site Condition and (b) that such Differing Tunnel Improvements Site Condition directly and materially impacted Design-Builder's costs and/or time of performance, then Design-Builder shall be entitled to submit a request for a Work Order for an adjustment in the Contract Price and/or Contract Time(s).]<sup>7</sup>

### **Article 5** **Insurance**

#### **5.1 Insurance Policies and Coverages**

**5.1.1** Design-Builder shall procure and maintain, at its own cost and expense, the insurance coverages specified in Part 1 of **Exhibit 12**.

**5.1.2** Design-Builder shall cause each of its Subcontractors to provide and maintain, at their own cost and expense when such Subcontractors are employed by Design-Builder, the insurance coverages specified in Part 2 of **Exhibit 12**.

**5.1.3** Design-Builder and its Subcontractors shall be solely responsible for any and all deductibles or self-insured retentions that shall apply under any required, or otherwise purchased, insurances and shall have no recourse against Department for any such costs.

#### **5.2 General Insurance Requirements**

**5.2.1** The insurance policies that Design-Builder is required to maintain under this Article 5 of the General Conditions of Contract:

.1 shall delete any specific design-build or similar exclusions that could compromise coverages because of Design-Builder's use of the design-build delivery method;

---

<sup>7</sup> **Note to Offerors:** To be included if Tunnel Improvements are constructed using the immersed tube tunnel construction method.

---

**.2** except for professional liability insurance, worker’s compensation insurance and employer’s liability insurance, Department shall be named as an additional insured or loss payee, as applicable, on a primary, non-contributory basis;

**.3** shall not limit Design-Builder’s liabilities and obligations pursuant to the Agreement, including Design-Builder’s indemnification obligations;

**.4** shall be maintained with insurers that are authorized to do business in the Commonwealth and have a current policyholder’s management and financial size category rating of not less than “A-: VIII” according to A.M. Best’s Financial Strength Rating and Financial Size Category, except as otherwise approved by Department;

**.5** shall be on terms specified in the Agreement or otherwise approved by Department (such approval not to be unreasonably withheld);

**.6** shall contain coverage terms and conditions that reflect the industry standard that the commercial market will provide and support as of the date of such insurance procurement and any subsequent renewals;

**.7** without inferring a right of cancellation that would not exist in the absence of these endorsements, shall contain a term which requires the insurer to give not less than thirty (30) days’ prior notice to Department whenever the insurer gives Design-Builder a notice of cancellation or non-renewal with respect to the policy (except in the case of any non-premium payment, not less than ten (10) days’ prior notice, which the insurer shall be obligated to give to Department simultaneously with providing such notice to Design-Builder);

**.8** other than for professional liability insurance, worker’s compensation insurance, employer’s liability insurance and property and business interruption insurance, shall include cross-liability clauses allowing one insured to bring a claim against another insured party (with regard to pollution liability insurance, a cross-liability clause will be allowed as long as it does not impact an additional insured’s ability to sue another insured party and collecting under the policy);

**.9** shall be endorsed so that the insurer agrees to waive, to the extent permitted by the Legal Requirements, all rights of subrogation or action that it may have or acquire against Department or any additional insured and all or any of the Persons comprising the insured;

**.10** other than for workers compensation and employer’s liability insurance, automobile liability insurance, professional liability insurance and contractor pollution liability insurance, shall contain a provision under which the insurer agrees that the failure of one insured to observe and fulfill the terms of the policy will not prejudice the coverage of the other insureds;

**.11** shall, with regard to builder’s risk and any other first-party property insurance, have each policy endorsed to contain a standard mortgagee clause to the effect that Department and other insureds will not be prejudiced by an unintended and/or inadvertent error, omission or

---

mistaken description of the risk interest in property insured under the policies, incorrect declaration of values, failure to advise insurers of any change of risk interest or property insured or failure to comply with a statutory requirement; and

.12 shall not include defense costs within the limits of coverage or permit erosion of coverage limits by defense costs, except that defense costs may be included within the limits of coverage of professional and contractor pollution liability policies.

### **5.3 Proof of Coverage**

**5.3.1** Design-Builder shall deliver to Department true and correct copies of policies, material forms, endorsements and premium indications of each insurance policy certified by Design-Builder's insurance broker to be true and correct copies of such policies, forms, endorsements, and premium indications, as a condition to receiving the applicable notices to proceed set forth in the Agreement, and annually thereafter at least ten (10) days prior to the expiration of any policy, provide an updated, compliant certificate of insurance evidencing renewal of the required insurance coverages.

**5.3.2** Design-Builder also shall deliver to Department duplicate originals or copies of each Project-specific insurance policy and endorsements for such policies certified by Design-Builder's insurance broker to be true and correct copies of the originals no later than thirty (30) days after receiving the applicable notices to proceed set forth in the Agreement and annually thereafter no later than thirty (30) days after policy renewal or replacement, and also whenever reasonably requested by Department.

**5.3.3** Department reserves the right to request and receive copies of any and all insurance policies as required herein. Such policies shall be provided to Department within ten (10) days of such request or thirty (30) days of the renewal date, whichever is later.

### **5.4 Unavailability of Insurance**

**5.4.1** If any insurance required to be maintained pursuant to this Article 5 (including the limits, deductibles or any other terms under policies for such insurance) ceases to be available on a commercially reasonable basis, Design-Builder shall provide written notice to Department accompanied by a letter from Design-Builder's insurance advisor stating that such insurance is unavailable anywhere in the global market on a commercially reasonable basis. Such notice will be given not later than thirty (30) days prior to the scheduled date for renewal of any such policy. Except to the extent such unavailability is attributable to Design-Builder, upon receipt of such notice by Department, Design-Builder and Department shall immediately enter into good faith negotiations regarding the matters set forth in Sections 5.4.3 and 5.4.4 below.

**5.4.2** Design-Builder shall not be excused from satisfying the insurance requirements of this Article 5 merely because premiums for such insurance are higher than anticipated. To establish that the required coverages (or required terms of such coverages, including insurance policy limits) are not available on commercially reasonable terms, Design-Builder shall bear the burden of proving either that (i) the same is not available at all in the global insurance and reinsurance

---

markets or (ii) the premiums for the same have so materially increased over those previously paid for the same coverage that a reasonable and prudent risk manager for a Person seeking to insure comparable risks would conclude that such increased premiums are not justified by the risk protection afforded. For the purpose of clause (ii) of the preceding sentence, the only increases in premiums that may be considered are those caused by changes in general market conditions in the insurance industry.

**5.4.3** In the event that Design-Builder and Department cannot reach a resolution acceptable to both parties within ten (10) days, Design-Builder and Department shall make arrangements for the formation of an insurance panel consisting of Design-Builder's insurance advisor (or broker), Department or its insurance advisor (or broker), and an independent insurance expert from a nationally recognized insurance brokerage firm, chosen by Design-Builder and reasonably acceptable to Department. Such independent expert will conduct a separate review of the relevant insurance requirements of this Article 5 and the market for such insurance at the time, giving due consideration to the representations of each insurance advisor, and upon conclusion of such review will issue a written report stating whether such insurance is available or unavailable on a commercially reasonable basis. Design-Builder shall be responsible to pay the costs of such independent expert.

**5.4.4** If the insurance panel concludes that such insurance is not available on a commercially reasonable basis, the insurance panel will provide a written recommendation (which will include the amount and type of insurance which is available upon a commercially reasonable basis) not less than fifteen (15) days before the date for renewal of such insurance. Design-Builder shall, prior to the expiration of the insurance then in effect, obtain the insurance required by this Article 5 as adjusted in accordance with such recommendation.

**5.4.5** Department makes no representation that the limits of liability specified for any insurance policy to be carried pursuant to the Agreement are adequate to protect Design-Builder against its undertakings pursuant to the Agreement. No such limits of liability will preclude Department from taking any actions as are available to it under the Agreements or the Legal Requirements.

## **5.5 Failure to Obtain Insurance Coverage**

**5.5.1** If in any instance Design-Builder has not performed its obligations respecting insurance coverage set forth in the Agreement (as may be adjusted in accordance with Section 5.4 above) or is unable to enforce and collect any such insurance for failure to assert claims in accordance with the terms of the insurance policies, then for purposes of determining Design-Builder's liability and the limits thereon or determining reductions in compensation due from Department to Design-Builder on account of available insurance, Design-Builder shall be treated as if it has elected to self-insure up to the full amount of insurance coverage that would have been available had Design-Builder performed such obligations and not committed such failure.

## **5.6 Restoration; Insurance Proceeds**

**5.6.1** If all or any part of the Project is damaged or destroyed prior to Design-Builder's achievement of Final Acceptance by fire or other casualty of any kind or nature (including any

---

casualty for which insurance was not obtained or obtainable), ordinary or extraordinary, foreseen or unforeseen, Design-Builder shall:

- .1 give Department and the appropriate insurer written notice thereof promptly after Design-Builder receives actual notice of such casualty;
- .2 proceed diligently to restore the Project to its pre-casualty condition; and
- .3 account for all monies received as a result of any insurance claim and immediately provide to Department any such funds that are rightfully the property of Department due to there being an insurable interest, and, in the event the insurance proceeds exceed twenty million dollars (\$20,000,000), deposit all insurance proceeds received by Design-Builder in connection with any restoration with a Depository (such insurance proceeds, together with any interest earned thereon, the “**Restoration Funds**”) and provide detailed accounting of how such funds are utilized.

**5.6.2** If Design-Builder:

- .1 fails or neglects to commence the diligent restoration of the Project or the portion thereof so damaged or destroyed;
- .2 having so commenced such restoration, fails to diligently complete the same in accordance with the terms of the Agreement; or
- .3 prior to the completion of any such restoration, the Agreement terminates in accordance with its terms,

Department may, but shall not be required to, complete such restoration at Design-Builder’s expense and shall be entitled to be paid out of the Restoration Funds for the relevant restoration costs incurred by Department.

**5.6.3** In any case where the Agreement terminates prior to completion of the restoration, Design-Builder shall:

- .1 account to Department for all amounts spent in connection with any restoration that was undertaken;
- .2 immediately pay over or cause the Depository to pay over to Department the remainder, if any, of the Restoration Funds received by Design-Builder prior to such termination or cancellation; and
- .3 pay over or cause the Depository to pay over to Department, within five (5) Business Days after receipt thereof, any Restoration Funds received by Design-Builder or the Depository subsequent to such termination or cancellation.

Design-Builder’s obligations under this Section 5.6.3 shall survive the expiration or termination

---

of the Agreement.

**5.6.4** Subject to the satisfaction by Design-Builder of all of the terms and conditions of this Section 5.6, Design-Builder shall cause the Depository, with prior written notice to Department, to pay to Design-Builder from time to time, any Restoration Funds, but not more than the amount actually collected by the Depository upon the loss, together with any interest earned thereon, to be utilized by Design-Builder solely for the restoration, such payments to be made as follows:

.1 prior to commencing any restoration, with regard to insurance proceeds in excess of twenty million dollars (\$20,000,000), Design-Builder shall furnish to Department for its approval the estimated cost, estimated schedule, and detailed plan for the completion of the restoration, each prepared by an architect or engineer;

.2 the Restoration Funds will be paid to Design-Builder in installments as the restoration progresses, subject to Section 5.6.4.3, based upon requisitions to be submitted by Design-Builder to the Depository, with a copy to Department, showing the cost of labor and materials purchased for incorporation in the restoration, or incorporated therein since the previous requisition, or the amounts payable or paid to the any Subcontractor, as the case may be, and due and payable or paid by the Design-Builder; *provided* that if any lien is filed against the Project or any part thereof in connection with the restoration, Design-Builder shall not be entitled to receive any further installment until such lien is satisfied or discharged (by bonding or otherwise); *provided further*, that notwithstanding the foregoing, but subject to the provisions of Section 5.6.4.3, the existence of any such lien shall not preclude Design-Builder from receiving any installment of Restoration Funds so long as such lien will be discharged with funds from such installment and at the time Design-Builder receives such installment Design-Builder delivers to the Department and the Depository a release of such lien executed by the holder of such lien and in recordable form;

.3 the amount of each installment to be paid to Design-Builder shall be the aggregate amount of Casualty Costs theretofore incurred by Design-Builder minus the aggregate amount of Restoration Funds theretofore paid to Design-Builder in connection therewith; *provided* that all disbursements to Design-Builder shall be made based upon an architect's or engineer's certificate for payment in accordance with industry standards, and disbursements may be made for advance deposits for materials and Subcontractors to the extent that such disbursements are customary in the industry and that the unapplied portion of the funds held by the Depository, together with other funds available to Design-Builder for such Restoration, as certified by Design-Builder, are sufficient to complete the restoration; and

.4 except as provided in Section 5.6.2, upon completion of and payment for the restoration by Design-Builder, the Depository will pay the balance of the Restoration Funds, if any, to Design-Builder; *provided* that if the insurance proceeds are insufficient to pay for the restoration (or if there will be no insurance proceeds), Design-Builder shall nevertheless be required to make the restoration and provide any funds necessary to complete the restoration.

**5.6.5** The requirements of this Section 5.6 are for the benefit only of Department, and no Subcontractor or other Person shall have or acquire any claim against Department as a result of

---

any failure of Department actually to undertake or complete any restoration as provided in this Section 5.6 or to obtain the evidence, certifications and other documentation provided for herein.

**5.6.6** Restoration Funds deposited with a Depository shall be invested and reinvested in direct obligations of, or obligations fully guaranteed by the United States of America or any agency or instrumentality of the United States of America, which obligations are backed by the full faith and credit of the United States of America, and all interest earned on such investments will be added to the Restoration Funds.

## **Article 6** **Payment**

### **6.1 Schedule of Payments**

**6.1.1** Design-Builder shall submit to Department, for its review and approval, and as part of its submission of the Preliminary Schedule and the Baseline Schedule under Section 11.1 of the Agreement, the Earned Value Schedule indicating Design-Builder's anticipated monthly earnings schedule in accordance with **Exhibit 17**. Department reserves the right to withhold approval for all or part of Design-Builder's Applications for Payment until such time Design-Builder furnishes an approved Preliminary Schedule and subsequent Baseline Schedule.

**6.1.2** The parties agree that progress payments for Work performed prior to Department's approval of the Baseline Schedule is based on the Earned Value Schedule in the approved Preliminary Schedule.

**6.1.3** Neither the Earned Value Schedule included in Design-Builder's Baseline Schedule nor payments made under Section 6.1.2 above shall exceed the monthly payment schedule submitted with the Proposal, unless Department specifically approves this in writing.

**6.1.4** Payment for mobilization shall not be scheduled prior to the initiation of construction work. The pay item for mobilization shall be distributed between two (2) separate installments. The first installment of fifty percent (50%) of Design-Builder's total mobilization cost may be scheduled following partial mobilization and initiation of construction work. The second installment may be scheduled following completion of substantial mobilization, including erection of Design-Builder's offices and buildings, if any. Preliminary engineering items including, but not limited to, surveying, geotechnical investigations and utility coordination shall not be considered as construction work for the purpose of mobilization. Bonds and insurance premiums, and field office expenses at Project start-up will not be considered part of mobilization activities. For the avoidance of doubt, this Section 6.1.4 shall prevail over any conflicting provision of Section 513 of the Road and Bridge Specifications. In no case shall the total cost of mobilization (minus the cost of bonds and insurance premiums) exceed the amount stipulated in the table included in Section 513 of the Road and Bridge Specification.

### **6.2 Monthly Progress Payments**

---

**6.2.1** On the tenth (10th) day of each month, Design-Builder shall submit for Department's review and approval its Application for Payment requesting payment for all Work performed as of the first day of such month and coinciding with the progress reflected in the monthly Baseline Schedule update. The Application for Payment shall be accompanied by all supporting documentation required by the Contract Documents and/or established at the meeting required by Section 2.1.2 hereof. Payment shall be made in accordance with the following earned value calculation:

.1 Design-Builder shall identify each activity, and the value in dollars of such activity, in accordance with Section 6.1.1 above. Applications for Payment shall be made based on the following earned values.

.1 Design-Builder shall earn twenty percent (20%) of the value of an activity upon initiation of the respective activity.

.2 Design-Builder shall earn eighty percent (80%) of the value of an activity upon completion of the respective activity.

.2 QA/QC shall be an integral part of each activity. As part of each Application for Payment that includes completed activities, Design-Builder shall submit with the Application for Payment evidence of the QA/QC reviews, including any checklists, summary data, high-level/outline calculations or design checks, and evaluations of the work and the qualifications of the responsible personnel that completed the work, etc., that the relevant QA or QC reviewer relied on to make its determination the Work is complete and conforms to the requirements of the Contract Documents. Furthermore, the QAM shall: (a) verify that the design included in each activity has been completed in accordance with the Contract Documents; (b) certify that the construction included in each activity has been completed in accordance with the Contract Documents; and (c) certify that all required QA/QC tests, measurements, permits or other requirements have been completed and all non-conformance reports relative to the respective activity have been resolved. The QAM's certification for monthly Application of Payment for construction activities shall include the following statement: *As the QA Manager, I certify, to the best of my knowledge, information and belief based upon and to the extent of: (i) current on-site observations and field testing required to be performed; and (ii) material certifications and test reports, that each Work Package shown herein as complete has been completed in accordance with the Contract Documents, and that all required QA/QC tests, measurements, permits or other requirements have been completed and all non-conformance reports relative to a respective Work Package have been resolved except for the attached list of open issues.*

**6.2.2** The Application for Payment may request payment for equipment and materials not yet incorporated into the Project, provided that: (i) Department, in its sole discretion, agrees that it is willing to allow payment for such equipment and materials; (ii) Department is satisfied that the equipment and materials are suitably stored at either the Site or another acceptable location; (iii) the equipment and materials are protected by suitable insurance; and (iv) upon payment, Department will receive the equipment and materials free and clear of all liens and encumbrances.

---

**6.2.3** The Application for Payment shall constitute Design-Builder's representation that the Work has been performed consistent with the Contract Documents, has progressed to the point indicated in the Application for Payment, and that title to all Work will pass to Department free and clear of all claims, liens, encumbrances, and security interests upon the incorporation of the Work into the Project, or upon Design-Builder's receipt of payment, whichever occurs earlier.

### **6.3 Withholding of Payments**

**6.3.1** On or before the date established in the Agreement, Department shall pay Design-Builder all amounts properly due. If Department determines that Design-Builder is not entitled to all or part of an Application for Payment, it will notify Design-Builder in writing at least seven (7) days prior to the date payment is due. The notice shall indicate the specific amounts Department intends to withhold, the reasons and contractual basis for the withholding, and the specific measures Design-Builder must take to rectify Department's concerns. Design-Builder and Department will attempt to resolve Department's concerns prior to the date payment is due. If the parties cannot resolve such concerns, Design-Builder may pursue its rights under the Contract Documents, including those under Article 10 hereof.

**6.3.2** Notwithstanding anything to the contrary in the Contract Documents, Department shall pay Design-Builder all undisputed amounts in an Application for Payment within the times required by the Agreement.

### **6.4 Right to Stop Work and Interest**

**6.4.1** If Department wrongfully fails to pay Design-Builder any amount that becomes due, Design-Builder, in addition to all other remedies provided in the Contract Documents, may stop Work pursuant to Section 11.3 hereof. All payments due and unpaid shall bear interest at the rate set forth in the Agreement.

### **6.5 Design-Builder's Payment Obligations**

**6.5.1** Design-Builder will pay Design Consultants and Subcontractors, in accordance with its contractual obligations to such parties, all the amounts Design-Builder has received from Department on account of their work. Design-Builder will impose similar requirements on Design Consultants and Subcontractors to pay those parties with whom they have contracted. Design-Builder will indemnify and defend Department against any claims for payment and mechanic's liens as set forth in Section 7.2.1 hereof.

### **6.6 Acceptance**

**6.6.1** Until Final Acceptance of the Work by Department in accordance with the requirements of this Section, Design-Builder shall have charge and care thereof and shall take every precaution against damage to any part thereof by action of the elements or from any other cause. Design-Builder shall rebuild, repair, restore, and make good on damage to any portion of the Work occasioned by any of the foregoing causes before Final Acceptance and shall bear the expense thereof.

---

**6.6.2** Design-Builder shall notify Department when it believes the Work, or to the extent permitted in the Contract Documents, a portion of the Work, has achieved Final Completion. Within [●] ([●]) days of Department's receipt of Design-Builder's notice, along with a certification for the QA Manager that such Work has achieved Final Completion, Department and Design-Builder will jointly inspect such Work to verify that such Work has achieved Final Completion in accordance with the requirements of the Contract Documents. If Department concludes that the applicable Work has not achieved Final Completion, it will so advise Design-Builder, whereupon the preceding process will continue until Department agrees that the applicable Work has achieved Final Completion. Once the Work is determined to have achieved Final Completion, Design-Builder will be notified in writing, of the determination of Final Acceptance.

**6.6.3** Upon notification of Final Acceptance, Design-Builder will provide Department with a Final Application for Payment. Department shall make final payment by the time required in the Agreement. At the time of submission of its Final Application for Payment, Design-Builder shall provide the following information:

.1 an affidavit that there are no claims, obligations or liens outstanding or unsatisfied for labor, services, material, equipment, taxes or other items performed, furnished or incurred for or in connection with the Work which will in any way affect Department's interests;

.2 a general release executed by Design-Builder waiving, upon receipt of final payment by Design-Builder, all claims, except those claims previously made in writing to Department and remaining unsettled at the time of final payment, which claims shall be specifically listed in an attachment to the general release;

.3 consent of Design-Builder's surety to final payment;

.4 all operating manuals, warranties and other deliverables required by the Contract Documents, including the project records required by Section 11.1.9 of the Agreement; and

.5 certificates of insurance confirming that required coverages will remain in effect consistent with the requirements of the Contract Documents.

**6.6.4** Upon making final payment, Department waives all claims against Design-Builder except claims relating to: (i) Design-Builder's failure to satisfy its payment obligations, if such failure affects Department's interests; (ii) Design-Builder's failure to complete the Work consistent with the Contract Documents, including defects appearing after final payment; and (iii) the terms of any special warranties and indemnifications required by the Contract Documents.

---

## **Article 7** **Indemnification**

### **7.1 Patent and Copyright Infringement**

**7.1.1** Design-Builder shall defend any action or proceeding brought against any State Indemnitee based on any claim that the Work, or any part thereof, or the operation or use of the Work or any part thereof, constitutes infringement of any United States patent or copyright, now or hereafter issued. The State Indemnitee shall give prompt written notice to Design-Builder of any such action or proceeding and will reasonably provide authority, information and assistance in the defense of same. Design-Builder shall indemnify and hold harmless State Indemnitees from and against all damages and costs, including but not limited to attorneys' fees and expenses awarded against State Indemnitees or Design-Builder in any such action or proceeding. Design-Builder agrees to keep the State Indemnitees informed of all developments in the defense of such actions.

**7.1.2** If a State Indemnitee is enjoined from the operation or use of the Work, or any part thereof, as the result of any patent or copyright suit, claim, or proceeding, Design-Builder shall at its sole expense take reasonable steps to procure the right to operate or use the Work. If Design-Builder cannot so procure such right within a reasonable time, Design-Builder shall promptly, at Design-Builder's option and at Design-Builder's expense: (i) modify the Work so as to avoid infringement of any such patent or copyright; or (ii) replace said Work with Work that does not infringe or violate any such patent or copyright.

**7.1.3** Sections 7.1.1 and 7.1.2 above shall not be applicable to any suit, claim or proceeding based on infringement or violation of a patent or copyright: (i) relating solely to a particular process or product of a particular manufacturer specified by Department and not offered or recommended by Design-Builder to Department; or (ii) arising from modifications to the Work by Department after acceptance of the Work.

### **7.2 Payment Claim Indemnification**

**7.2.1** Providing that Department is not in breach of its contractual obligation to make payments to Design-Builder for the Work, Design-Builder shall indemnify, defend and hold harmless State Indemnitees from any claims or mechanic's liens brought against any State Indemnitee or against the Project as a result of the failure of Design-Builder, Design Consultants, Subcontractors, anyone employed directly or indirectly by any of them or anyone for whose acts any of them may be liable, to pay for any services, materials, labor, equipment, taxes or other items or obligations furnished or incurred for or in connection with the Work. Within three (3) days of receiving written notice from a State Indemnitee that such a claim or mechanic's lien has been made and/or filed, Design-Builder shall commence to take the steps necessary to resolve and/or discharge said claim or lien, including, if necessary, the furnishing of a mechanic's lien bond. If Design-Builder fails to do so, the State Indemnitee will have the right to resolve and/or discharge the claim or lien and hold Design-Builder liable for costs and expenses incurred, including attorneys' fees.

---

### **7.3 Design-Builder's General Indemnification**

**7.3.1** In addition to Design-Builder's indemnity obligations as set forth elsewhere in the Agreement, Design-Builder, to the fullest extent permitted by law, shall indemnify, hold harmless and defend State Indemnitees from and against claims, losses, damages, liabilities, including attorneys' fees and expenses, for:

.1 bodily injury, sickness or death, and property damage or destruction (other than to the Work itself) to the extent resulting from the negligent acts or omissions of Design-Builder, Design Consultants, Subcontractors, anyone employed directly or indirectly by any of them or anyone for whose acts any of them may be liable;

.2 any violation of Sections 2.5, 2.6, or 2.8 of the General Conditions of Contract by Design-Builder, Design Consultants, Subcontractors, anyone employed directly or indirectly by any of them or anyone for whose acts any of them may be liable;

.3 any actual or alleged inverse condemnation, trespass, nuisance or similar taking of or harm to real property committed or caused by Design-Builder, Design Consultants, Subcontractors, anyone employed directly or indirectly by any of them or anyone for whose acts any of them may be liable; and

.4 any actual or alleged violation of any federal or state securities or similar laws by Design-Builder, Design Consultants, Subcontractors, anyone employed directly or indirectly by any of them or anyone for whose acts any of them may be liable or Design-Builder's failure to comply with any requirement necessary to preserve the tax-exempt status of interest paid on bonds issued to finance the Project.

**7.3.2** If an employee of Design-Builder, Design Consultants, Subcontractors, anyone employed directly or indirectly by any of them or anyone for whose acts any of them may be liable, has a claim against a State Indemnitee, Design-Builder's indemnity obligation set forth in Section 7.3.1 above shall not be limited by any limitation on the amount of damages, compensation or benefits payable by or for Design-Builder, Design Consultants, Subcontractors, or other entity under any employee benefit acts, including workers' compensation or disability acts.

### **7.4 Defense and Indemnification Procedures**

**7.4.1** If Department receives notice of or otherwise has actual knowledge of a claim which it believes is within the scope of Design-Builder's indemnification under the Contract Documents, it shall by writing as soon as practicable: (i) inform Design-Builder of such claim; (ii) send to Design-Builder a copy of all written materials Department has received asserting such claim and (iii) notify Design-Builder that either: (a) the defense of such claim is being tendered to Design-Builder; or (b) Department has elected to conduct its own defense for a reason set forth below.

**7.4.2** If the insurer under any applicable insurance policy accepts tender of defense, Design-Builder and Department shall cooperate in the defense as required by the insurance policy. If no

---

defense is provided by insurers under potentially applicable insurance policies, then the following provisions shall apply.

**7.4.3** If the defense is tendered to Design-Builder, it shall within forty-five (45) days of said tender deliver to Department a written notice stating that Design-Builder: (i) accepts the tender of defense and confirms that the claim is subject to full indemnification hereunder without any “reservation of rights” to deny or disclaim full indemnification thereafter; (ii) accepts the tender of defense but with a “reservation of rights” in whole or in part; or (iii) rejects the tender of defense if it reasonably determines it is not required to indemnify against the claim under the Contract Documents. If such notice is not delivered within such forty-five (45) days, the tender of defense shall be deemed rejected.

**7.4.4** If Design-Builder accepts the tender of defense, Design-Builder shall have the right to select legal counsel for the State Indemnitees, subject to reasonable approval of the State Attorney General, and Design-Builder shall otherwise control the defense of such claim, including settlement, and bear the fees and costs of defending and settling such claim. During such defense: (i) Design-Builder shall at Design-Builder’s expense, fully and regularly inform Department of the progress of the defense and of any settlement discussions; and (ii) Department shall, at Design-Builder’s expense for all of Department’s reasonable out-of-pocket third party expenses, fully cooperate in said defense, provide to Design-Builder 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 Department and maintain the confidentiality of all communications between it and Design-Builder concerning such defense to the extent allowed by law.

**7.4.5** Department shall be entitled to select its own legal counsel and otherwise control the defense of such claim if: (i) the defense is tendered to Design-Builder and it refuses the tender of defense, or fails to accept such tender within forty-five (45) days, or reserves any right to deny or disclaim such full indemnification thereafter; or (ii) Department, at the time it gives notice of the claim or at any time thereafter, reasonably determines that: (a) a conflict exists between it and Design-Builder which prevents or potentially prevents Design-Builder from presenting a full and effective defense; (b) Design-Builder is otherwise not providing an effective defense in connection with the claim and Design-Builder lacks the financial capability to satisfy potential liability or to provide an effective defense; or (c) Design-Builder’s tendered defense is contrary to Legal Requirements. Department may assume its own defense pursuant to the above by delivering to Design-Builder written notice of such election and the reasons therefore.

**7.4.6** If Department is entitled and elects to conduct its own defense pursuant hereto, all reasonable costs and expenses it incurs in investigating and defending and claim for which it is entitled to indemnification hereunder (and any settlements or judgments resulting therefrom) shall be reimbursed by Design-Builder after completion of the proceeding.

**7.4.7** If Department is entitled to and elects to conduct its own defense, then it shall have the right to settle or compromise the claim with Design-Builder’s prior written consent, which shall not be unreasonably withheld or delayed, or with approval of the court, and with the full benefit of Design-Builder’s indemnity. Notwithstanding the foregoing, if Department elects to conduct

its own defense and it is later determined that no indemnification obligation existed as to the particular claim, Department shall pay its own costs and expenses relating thereto. In addition, if Department elects to conduct its own defense because it perceives a conflict of interest, Department shall pay its own costs and expenses relating thereto.

## **Article 8** **Time**

### **8.1 Obligation to Achieve the Contract Times**

**8.1.1** Design-Builder agrees that it will commence performance of the Work and achieve the Contract Time(s) in accordance with Article 5 of the Agreement.

### **8.2 Delays to the Work**

**8.2.1 Extensions to Contract Times.** If Design-Builder is delayed in the performance of the Work due to any of the events or circumstances identified in this Section 8.2.1 (each such event, a “**Delay Event**”), Design-Builder may submit a request for a Work Order that the Contract Time(s) for performance be reasonably extended by a Work Order:

- .1** a Force Majeure Event;
- .2** any delay in obtaining any Governmental Approvals (other than any Governmental Approval set forth in **Exhibit 19**); or
- .3** any Compensation Event (as defined in Section 9.2.1) that delays Design-Builder’s performance of the Work;

*provided* that the Delay Events do not include any delay that: (i) could have been reasonably avoided by Design-Builder or any Subcontractor; (ii) is caused by the negligence or misconduct of Design-Builder or any Subcontractor; (iii) is caused by any act or omission by Design-Builder in breach of the provisions of the Agreement; (iv) arises by reason of lack or insufficiency of funds or failure to make payment of monies or provide required security on the part of Design-Builder or any Subcontractor; (v) except to the extent the same constitutes a Force Majeure Event, arises by reason of any strike, labor dispute or other labor protest involving any Person retained, employed or hired by Design-Builder or any Subcontractor or its representatives to supply materials or services for or in connection with the Project or any strike, labor dispute or labor protest caused by or attributable to any act (including any pricing or other price or method of operation) or omission of Design-Builder or a Subcontractor; or (vi) except to the extent the same constitutes a Force Majeure Event, arises by reason of any weather condition (including any flooding) whether or not such weather conditions or the severity of such weather conditions are not or have not ordinarily or customarily been encountered or experienced.

**8.2.2** As a condition precedent to Design-Builder receiving an extension of the Contract Time(s), Design-Builder shall demonstrate that: (i) notice has been given by Design-Builder as provided in the General Conditions of Contract; (ii) the delay impacts the critical path (as

reflected on the most recent monthly Baseline Schedule update) and is outside the reasonable control of Design-Builder; (iii) Design-Builder's performance would not have been concurrently delayed or interrupted by any event other than the Delay Event giving rise to Design-Builder's request for an extension of the Contract Time(s); (iv) Design-Builder, in view of all the circumstances, has exercised reasonable efforts to avoid the delay and did not cause the delay; and (v) Design-Builder has complied with the requirements of Section 8.3 below.

**8.2.3** Should Department have a reasonable belief that the Contract Time(s) will not be met for causes that do not constitute a Delay Event, Department has the right, but not the obligation, to so notify Design-Builder, and Design-Builder shall then work additional overtime, engage additional personnel and take such other measures as necessary to complete the Work within the Contract Time(s). Design-Builder shall bear all costs related to such overtime, additional personnel and other measures.

**8.2.4** Notwithstanding the right of Design-Builder to receive a time extension pursuant to this Section 8.2, Design-Builder agrees that if it encounters a Delay Event, it will, if directed by Department, develop and implement a recovery schedule and plan to improve progress and take such measures to overcome such delay.

### **8.3 Schedule Impact Analysis for Proposed Time Extensions**

**8.3.1** If Design-Builder claims that any event, including but not limited to a change in the Work, justifies an extension to the Contract Time(s), Design-Builder shall submit to Department a written Schedule Impact Analysis (SIA) in accordance with **Exhibit 17**. Upon approval by Department, the event shall be included in the next Baseline Schedule update.

**8.3.2** Activity delays shall not automatically mean that an extension of the Contract Time(s) is warranted or due Design-Builder. Design-Builder recognizes that certain events will not affect existing critical activities or cause non-critical activities to become critical, and that such events may result in only absorbing a part of the available total float that may exist within an activity chain of the network, thereby not causing any effect on the Contract Time.

**8.3.3** Float is not for the exclusive use or benefit of either Department or Design-Builder, but rather shall be used for the benefit of the overall Project. Activity splitting or float suppression techniques will not be permitted. Extension of the Contract Time(s) will be granted only to the extent the equitable time adjustments to the activity or activities affected by the event exceeds the total float of a critical activity or path and extends the Contract Time(s).

**8.3.4** Two (2) copies of each SIA shall be submitted in accordance with the following along with a written proposal for any requested time extension:

- .1** within seven (7) days after receipt of a written change order.
- .2** within ten (10) days from the beginning of any other event claimed to give rise to a delay.

.3 within the time period required for the filing of a written notice of claim pursuant to Article 10 of the General Conditions to Contract.

**8.3.5** In cases where Design-Builder does not submit a SIA within the time requirements stated above, it shall be considered a waiver of any request for an extension of the Contract Time(s).

**8.3.6** Approval or rejection of each SIA by Department shall be made within ten (10) days after receipt of each SIA, unless subsequent meetings and negotiations are necessary. Upon approval, a copy of the SIA signed by Department shall be returned to Design-Builder, and incorporated into the next Baseline Schedule update.

**8.3.7** The SIA related to a change order shall be incorporated into and attached to the applicable change order.

## Article 9 Changes to the Contract Price and Time

### 9.1 Work Orders

**9.1.1** A “**Work Order**” (change order), is a written instrument on VDOT Form C-10, issued after the Agreement Date signed by Department and Design-Builder, stating their agreement upon all of the following:

- .1 the scope of the change in the Work;
- .2 the amount of the adjustment to the Contract Price; and
- .3 the extent of the adjustment to the Contract Time(s).

**9.1.2** All changes in the Work authorized by applicable Work Order shall be performed under the applicable conditions of the Contract Documents. Department and Design-Builder shall negotiate in good faith and as expeditiously as possible the appropriate adjustments for such changes.

**9.1.3** If Department requests a proposal for a change in the Work from Design-Builder and subsequently elects not to proceed with the change, a Work Order shall be issued to reimburse Design-Builder for reasonable costs incurred for estimating services, design services and services involved in the preparation of proposed revisions to the Contract Documents.

### 9.2 Adjustment of the Contract Price.

**9.2.1** If Design-Builder’s performance of the Work is impacted due to any of the events or circumstances identified in this Section 9.2.1 (each such event, a “**Compensation Event**”), Design-Builder may submit a request for a Work Order for any appropriate adjustment of the Contract Price:

- 
- .1 any breach of a material obligation under the Agreement by Department;
  - .2 any violation of Legal Requirements by Department;
  - .3 any failure by Department to issue the NTP by [●], *provided*, Design-Builder's remedy for any such failure shall be as set forth in Section 5.1.3 of the Agreement;
  - .4 any changes in Legal Requirements enacted after the Agreement Date as described in Section 2.5.2 of the General Conditions of Contract;
  - .5 any Differing Roadway and Bridge Improvements Site Condition;
  - .6 any Differing Tunnel Improvements Site Condition;
  - .7 any material damage or interruption to, or interference with, the Work caused by any capital project carried out by any Governmental Unit or its contractors on or in the vicinity of the Site;
  - .8 any Governmental Approval set forth in **Exhibit 19** delivered by Department after the Agreement Date contains any conditions, limitations or constraints that were not referenced or highlighted by Department to Design-Builder on or prior to the Agreement Date;
  - .9 any release of Hazardous Materials into the Site at any time after the Agreement Date, but only to the extent that such release (i) constitutes a Hazardous Environmental Condition and (ii) is not attributable to Hazardous Materials introduced or brought onto the Site by Design-Builder or its Subcontractors;
  - .10 the discovery of any Unknown Pre-Existing Hazardous Materials, the presence of which constitutes a Hazardous Environmental Condition; or
  - .11 the issuance by a court having jurisdiction over the Project of any injunction or other order enjoining or estopping Design-Builder from the performance of its rights or obligations pursuant to the Agreement, in any case for more than forty-five (45) days in the aggregate;

*provided* that each of the Compensation Events does not arise by reason of: (i) the negligence or misconduct of Design-Builder or a Subcontractor or (ii) any act or omission by Design-Builder in breach of the provisions of the Agreement.

### **9.3 Contract Change Directive**

**9.3.1 A Contract Change Directive (CCD)** is a written order prepared and signed by Department, directing a change in the Work prior to agreement on an adjustment in the Contract Price and/or the Contract Time(s).

**9.3.2** Department and Design-Builder shall negotiate in good faith and as expeditiously as possible the appropriate adjustments for the Contract Change Directive. Upon reaching an agreement, the parties shall prepare and execute an appropriate Work Order reflecting the terms of the agreement.

**9.3.3** Department may issue a CCD by unilateral Work Order using VDOT Form C-10, subject further to the terms of Section 9.5.1.3.

#### **9.4 Minor Changes in the Work**

**9.4.1** Minor changes in the Work do not involve an adjustment in the Contract Price and/or Contract Time(s) and do not materially and adversely affect the Work, including the design, quality, performance and workmanship required by the Contract Documents. Design-Builder may make minor changes in the Work consistent with the intent of the Contract Documents, provided, however that Design-Builder shall promptly inform Department and the QAM, in writing, of any such changes and record such changes on the documents maintained by Design-Builder.

#### **9.5 Contract Price Adjustments**

**9.5.1** The increase or decrease in Contract Price resulting from a change in the Work shall be determined by one or more of the following methods to be determined by Department:

.1 unit prices set forth in the Agreement or as subsequently agreed to between the parties;

.2 a mutually accepted, lump sum, properly itemized and supported by sufficient substantiating data to permit evaluation by Department;

.3 costs, fees and any other markups set forth in accordance with Section 109.05 of the Division 1 Amendments; and

.4 If an increase or decrease cannot be agreed to as set forth in Sections 9.5.1.1 through 9.5.1.3 above and Department issues a Contract Change Directive, the cost of the change of the Work shall be determined by the reasonable expense and savings in the performance of the Work resulting from the change, including a reasonable overhead and profit, as may be set forth in the Agreement. If the net result of both additions and deletions to the Work is an increase in the Contract Price, overhead and profit shall be calculated on the basis of the net increase to the Contract Price. If the net result of both additions and deletions to the Work is a decrease in the Contract Price, there shall be no overhead or profit adjustment to the Contract Price. Design-Builder shall maintain a documented, itemized accounting evidencing the expenses and savings associated with such changes.

**9.5.2** If unit prices are set forth in the Contract Documents or are subsequently agreed to by the parties, but application of such unit prices will cause substantial inequity to Department or Design-Builder because of differences in the character or quantity of such unit items as originally

---

contemplated, such unit prices shall be equitably adjusted. Design-Builder shall bear the burden of proving that there is a substantial inequity in the unit rates.

## **9.6 Emergencies**

**9.6.1** In any emergency affecting the safety of Persons and/or property, Design-Builder shall act, at its discretion, to prevent threatened damage, injury or loss. Any change in the Contract Price and/or Contract Time(s) on account of emergency work shall be determined as provided in this Article 9.

## **Article 10** **Contract Adjustments and Disputes**

### **10.1 Requests for Contract Adjustments and Relief**

**10.1.1** If Design-Builder believes that it is entitled to an adjustment to the Contract Price or Contract Time(s) (including the Long Stop Deadline) or other relief for any occurrence arising out of or related to the Work or Project, including the acts or omissions of Department, it shall submit a written request to Department stating the basis for such Contract Price or Contract Time adjustment or relief. Such request shall be submitted: (a) prior to Design-Builder incurring any cost or expense, or performing any work on which the request is based; and (b) in accordance with any specific requirements contained in applicable sections of the General Conditions of Contract or, absent any specific requirement, then within a reasonable time, not to exceed twenty-one (21) days, after the time of the occurrence giving rise to the request for Contract Price or Contract Time adjustment or relief or after Design-Builder reasonably should have recognized the occurrence giving rise to the request for Contract Price or Contract Time adjustment or relief, whichever is later. Such request shall include sufficient information to advise Department of the facts and circumstances giving rise to the request for Contract Price or Contract Time adjustment or relief, the specific contractual adjustment or relief requested and the basis for Design-Builder's entitlement to the adjustment or relief.

### **10.2 Dispute Avoidance and Resolution**

**10.2.1** The parties are fully committed to working with each other throughout the Project and agree to communicate regularly with each other at all times so as to avoid or minimize disputes and disagreements. If disputes or disagreements do arise, Design-Builder and Department each commit to resolving such disputes or disagreements in an amicable, professional and expeditious manner so as to avoid unnecessary losses, delays and disruptions to the Work.

**10.2.2** Design-Builder and Department will first attempt to resolve all disputes or disagreements at the field level through best efforts and good faith negotiations between Design-Builder's Representative and Department's Representative. If the dispute or disagreement cannot be resolved through Design-Builder's Representative and Department's Representative, Design-Builder's Senior Representative and Department's Senior Representative, upon the request of either party, shall meet as soon as conveniently possible, but in no case later than forty-five (45) days after such a request is made, to attempt to resolve such dispute or disagreement. Prior to

---

any meetings between the Senior Representatives, the parties will exchange relevant information that will assist the parties in resolving the dispute or disagreement. If the Senior Representatives determine that the dispute or disagreement cannot be resolved to the mutual satisfaction of both parties, despite their best efforts, then Design-Builder's sole remedy shall be to pursue the processes set forth in VA. CODE §33.1-386 and §33.1-387.<sup>8</sup>

### **10.3 Duty to Continue Performance**

**10.3.1** Unless provided to the contrary in the Contract Documents, Design-Builder shall continue to perform the Work and Department shall continue to satisfy its payment obligations to Design-Builder, pending the final resolution of any dispute or disagreement between Design-Builder and Department.

### **10.4 CONSEQUENTIAL DAMAGES**

**10.4.1** NOTWITHSTANDING ANYTHING HEREIN TO THE CONTRARY (EXCEPT AS SET FORTH IN SECTION 10.4.2 BELOW), NEITHER DESIGN-BUILDER NOR DEPARTMENT SHALL BE LIABLE TO THE OTHER FOR ANY CONSEQUENTIAL LOSSES OR DAMAGES, WHETHER ARISING IN CONTRACT, WARRANTY, TORT (INCLUDING NEGLIGENCE), STRICT LIABILITY OR OTHERWISE, INCLUDING BUT NOT LIMITED TO LOSSES OF USE, PROFITS, BUSINESS, REPUTATION OR FINANCING.

**10.4.2** The consequential damages limitation set forth in Section 10.4.1 above shall not apply to or limit any right of recovery Department may have with respect to the following:

- .1** any losses or obligations to the extent that (a) the amount thereof is paid from the proceeds of insurance policies required to be maintained by Design-Builder under this Agreement or (b) the same would have been recovered through insurance and (i) Design-Builder failed to maintain such insurance if required to be maintained by Design-Builder under this Agreement or (ii) Design-Builder failed to comply with its obligations under, and the limitations of, such insurance policies or did not diligently pursue a relevant insurance claim;
- .2** losses that arise from any indemnity obligations of Design-Builder under the Contract Documents;
- .3** losses that arise from Design-Builder's intentional breach of this Agreement;
- .4** losses, fines, and penalties under any Legal Requirements or any costs incurred that arise out of any failure by Design-Builder to comply with any Legal Requirements, including workers' compensation, employment, or health and safety laws or regulations; or

---

<sup>8</sup> **Note to Offerors:** Section 10.2 to be revised to include a dispute resolution board if the Tunnel Improvements will be constructed using the bored tunnel construction method.

.5 any reasonable amount incurred by Department in enforcing any claim against Design-Builder under or in connection with this Agreement, including any costs, losses, fees, liabilities, expenses, or damages incurred in the enforcement of any of the performance or payment security, which is settled or finally resolved in favor of Department.

## **Article 11** **Stop Work and Termination for Cause**

### **11.1 Department's Right to Stop Work**

**11.1.1** Department may, without cause and for its convenience, order Design-Builder in writing to stop and suspend the Work. Such suspension shall not exceed sixty (60) consecutive days or aggregate more than ninety (90) days during the duration of the Project.

**11.1.2** Design-Builder is entitled to seek an adjustment of the Contract Price and/or Contract Time(s) if its cost or time to perform the Work has been adversely impacted by any suspension or stoppage of work by Department, by requesting a Work Order.

**11.1.3** In case of suspension of work, Department shall issue instructions and directions to Design-Builder as to the implementation of the suspension, which may include directing Design-Builder to develop a maintenance and transition plan. Unless specifically directed otherwise by Department, Design-Builder shall, during the suspension period, continue to have full responsibility for the Project, including but not limited to its obligations to take such precautions as may be necessary to prevent damage to the Work, comply with Governmental Approvals, and ensure public safety. Such obligations include, but are not limited to, erosion control and drainage and erection of any necessary temporary structures, signs, or other facilities.

### **11.2 Department's Right to Perform and Terminate for Cause**

**11.2.1** If Design-Builder persistently fails to do any of the following:

- .1 begin Work upon receipt of the LNTP or NTP;
- .2 provide a sufficient number of skilled workers, equipment, or supply the materials required by the Contract Documents;
- .3 comply with applicable Legal Requirements;
- .4 timely pay, without cause, Design Consultants or Subcontractors;
- .5 prosecute the Work with promptness and diligence to ensure that the Work is completed by the Contract Time(s), as such times may be adjusted;
- .6 achieve Final Acceptance by the Long Stop Deadline; or

---

**.7** perform material obligations under the Contract Documents;

then Design-Builder may be declared in default and Department, in addition to any other rights and remedies provided in the Contract Documents or by law, shall have the rights set forth in Section 11.2.2 below.

**11.2.2** If any of the conditions set forth in Section 11.2.1 above exists, Department will give written notice to Design-Builder and its surety of the condition. If, within ten (10) days after such notice, Design-Builder or its surety fails to cure, or reasonably commence to cure, such condition to the satisfaction of Department, then Department may then, or at any time thereafter, send a second written notice to Design-Builder declaring Design-Builder in default. Upon declaring Design-Builder in default, Department shall have the right, among other things, to terminate the Agreement for default.

**11.2.3** Upon terminating the Agreement for default, Department will have the right to, in addition to any other right available at law, take possession, for the purpose of completing the Work, of all materials, equipment, scaffolds, tools, appliances and other items thereon, which have been purchased or provided for the performance of the Work, all of which Design-Builder hereby transfers, assigns and sets over to Department for such purpose, and to employ any Person or Persons to complete the Work and provide all of the required labor, services, materials, equipment and other items. Design-Builder specifically agrees that it will assign all Subcontractors and Design Consultants to Department, upon Department's written demand that it do so. In the event of such termination, Design-Builder shall not be entitled to receive any further payments under the Contract Documents until Final Completion. At such time, if the unpaid balance of the Contract Price exceeds the cost and expense incurred by Department in completing the Work, such excess shall be paid by Department to Design-Builder. If Department's cost and expense of completing the Work exceeds the unpaid balance of the Contract Price, then Design-Builder shall be obligated to pay the difference to Department. Such costs and expense shall include not only the cost of completing the Work, but also losses, damages, costs and expense, including attorneys' fees and expenses, incurred by Department in connection with the procurement and defense of claims arising from Design-Builder's default, subject to the waiver of consequential damages set forth in Section 10.4 hereof.

**11.2.4** If Department improperly terminates the Agreement for cause, the termination for cause will be converted to a termination for convenience in accordance with the provisions of Article 8 of the Agreement.

**11.2.5** Department shall have the right, upon the occurrence of any of the conditions set forth in Section 11.2.1 above, and regardless of whether or not Design-Builder is declared in default and/or terminated, to communicate with Design-Builder's surety and compel such surety to cure such conditions.

---

### **11.3 Design-Builder's Right to Stop Work**

**11.3.1** Design-Builder may, in addition to any other rights afforded under the Contract Documents or at law, stop work for Department's failure to make undisputed payments properly due under Design-Builder's Application for Payment.

**11.3.2** Should the event set forth in Section 11.3.1 above occur, before exercising its rights under this section, Design-Builder shall provide Department with written notice that Design-Builder will stop work unless said event is cured within twenty-one (21) days from Department's receipt of Design-Builder's notice. If Department does not cure the problem within such twenty-one (21) day period, Design-Builder may stop work. In such case, Design-Builder shall be entitled to make a claim for adjustment to the Contract Price and Contract Time(s) (including the Long Stop Deadline) to the extent it has been adversely impacted by such stoppage.

### **11.4 Design-Builder's Right to Terminate for Cause**

**11.4.1** Design-Builder, in addition to any other rights and remedies provided in the Contract Documents or by law, may terminate the Agreement for cause for the following reasons:

.1 the Work has been stopped for one hundred twenty (120) consecutive days, or more than one hundred eighty (180) days during the duration of the Project, because of court order, any Governmental Unit having jurisdiction over the Work, or orders by Department under Section 11.1.1 of the General Conditions of Contract, provided that such stoppages are not due to the acts or omissions of Design-Builder or anyone for whose acts Design-Builder may be responsible;

.2 Department's failure to provide Design-Builder with any information, permits or approvals that are Department's responsibility under the Contract Documents which result in the Work being stopped for one hundred twenty (120) consecutive days, or more than one hundred eighty (180) days during the duration of the Project, even though Department has not ordered Design-Builder in writing to stop and suspend the Work pursuant to Section 11.1.1 of the General Conditions of Contract; and

.3 Department's failure to cure the problems set forth in Section 11.3.1 above within thirty (30) days after Design-Builder has stopped the Work.

**11.4.2** Upon the occurrence of an event set forth in Section 11.4.1 above, Design-Builder may provide written notice to Department that it intends to terminate the Agreement unless the problem cited is cured, or commenced to be cured, within ten (10) days of Department's receipt of such notice. If Department fails to cure, or reasonably commence to cure, such problem, then Design-Builder may give a second written notice to Department of its intent to terminate within an additional ten (10) day period. If Department, within such second ten (10) day period, fails to cure, or reasonably commence to cure, such problem, then Design-Builder may declare the Agreement terminated for default by providing written notice to Department of such declaration. In such case, Design-Builder shall be entitled to recover in the same manner as if Department had terminated the Agreement for its convenience under Article 8 of the Agreement.

---

## **11.5 Bankruptcy of Design-Builder**

**11.5.1** If Design-Builder institutes or has instituted against it a case under the United States Bankruptcy Code, such event may impair or frustrate Department's ability to perform its obligations under the Contract Documents. Accordingly, should such event occur:

.1 Design-Builder, its trustee or other successor, shall furnish, upon request of Department, adequate assurance of the ability of Design-Builder to perform all future material obligations under the Contract Documents, which assurances shall be provided within ten (10) days after receiving notice of the request; and

.2 Design-Builder shall file an appropriate action within the bankruptcy court to seek assumption or rejection of the Agreement within sixty (60) days of the institution of the bankruptcy filing and shall diligently prosecute such action.

If Design-Builder fails to comply with its foregoing obligations, Department shall be entitled to request the bankruptcy court to reject the Agreement, declare the Agreement terminated and pursue any other recourse available to Department under this Article 11.

**11.5.2** The rights and remedies under Section 11.5.1 above shall not be deemed to limit the ability of Department to seek any other rights and remedies provided by the Contract Documents or by law, including its ability to seek relief from any automatic stays under the United States Bankruptcy Code. It shall also not limit the ability of Department to seek recourse against Design-Builder's surety, who shall be obligated to perform notwithstanding the bankruptcy proceedings against Design-Builder.

## **Article 12** **Miscellaneous**

### **12.1 Assignment**

**12.1.1** Design-Builder shall not, without the prior written consent of Department (which consent may be withheld or denied for any reason), assign, transfer or sublet any portion or part of the Work or the obligations required by the Contract Documents.

### **12.2 Successorship**

**12.2.1** Design-Builder and Department intend that the provisions of the Contract Documents are binding upon the parties, their employees, agents, heirs, successors and assigns.

### **12.3 Governing Law**

**12.3.1** The Agreement and all Contract Documents shall be governed by the laws of the Commonwealth of Virginia, without giving effect to its conflict of law principles.

### **12.4 Severability**

**12.4.1** If any provision or any part of a provision of the Contract Documents shall be finally determined to be superseded, invalid, illegal, or otherwise unenforceable pursuant to any applicable Legal Requirements, such determination shall not impair or otherwise affect the validity, legality, or enforceability of the remaining provision or parts of the provision of the Contract Documents, which shall remain in full force and effect as if the unenforceable provision or part were deleted.

## **12.5 No Waiver**

**12.5.1** The failure of either Design-Builder or Department to insist, in any one or more instances, on the performance of any of the obligations required by the other under the Contract Documents shall not be construed as a waiver or relinquishment of such obligation or right with respect to future performance.

## **12.6 No Third-Party Beneficiary Status**

**12.6.1** Nothing under the Contract Documents shall afford any third party to the Agreement, including members of the public, third-party beneficiary status hereunder.

## **12.7 Headings**

**12.7.1** The headings used in these General Conditions of Contract, or any other Contract Document, are for ease of reference only and shall not in any way be construed to limit or alter the meaning of any provision.

## **12.8 Notice**

**12.8.1** Whenever the Contract Documents require that notice be provided to the other party, notice will be deemed to have been validly given: (i) if delivered in Person to the individual intended to receive such notice; (ii) four (4) days after being sent by registered or certified mail, postage prepaid to the address indicated in the Agreement; or (iii) if transmitted by facsimile, by the time stated in a machine generated confirmation that notice was received at the facsimile number of the intended recipient, provided, however, that the intended recipient is present to receive the facsimile and the transmittal is immediately followed by a hard copy delivered in accordance with (i) or (ii) above.

---

## 12.9 Escrow Proposal Documents

**12.9.1 General.** As a condition precedent to the effectiveness of the Agreement, Department, Design-Builder and Escrow Agent shall execute and deliver the Escrow Agreement, in the form attached to the Agreement as **Exhibit 23**, to implement the provisions of this Section 12.9 of the General Conditions of Contract, and Design-Builder shall submit to Department for Department's review and approval one copy of all documentary evidence generated with respect to the expected costs of the Work, including all assumptions made in determining such expected costs, available to Design-Builder (collectively, the "**Escrow Proposal Documents**").

### 12.9.2 Format and Contents

.1 Design-Builder may submit Escrow Proposal Documents in their usual cost estimating format; *provided*, that all information is presented clearly and is otherwise ascertainable and submitted in accordance with the requirements of this Section 12.9.2 of the General Conditions of Contract. It is not the intention of Section 12.9 of the General Conditions of Contract to cause Design-Builder extra work, but to ensure that Escrow Proposal Documents will be adequate to enable complete understanding and proper interpretation for their intended use.

.2 The Escrow Proposal Documents shall 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 shall be separated into sub-items as required to present a detailed cost estimate and allow a detailed cost review.

.3 The Escrow Proposal Documents will include: 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 subcontractors and suppliers, and memoranda, narratives, drawings and sketches showing site or work area layouts and equipment, add/deduct sheets, geotechnical reviews and consultant reports, and all other information used by Design-Builder to arrive at the estimated prices for the Project. Estimated costs shall be broken down into estimate categories for each bid 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. Design-Builder's allocation of indirect costs, contingencies, and mark-up shall be identified.

.4 All costs shall be identified. For items amounting to less than \$10,000, estimated unit costs are acceptable without a detailed cost estimate; *provided*, that labor, equipment, materials and Subcontracts, as applicable, are specified; *provided, further*, that indirect costs, contingencies, and mark-ups, as applicable, are allocated.

### 12.9.3 Submittal

.1 The Escrow Proposal Documents shall be submitted in a sealed container to Department, which containers shall be clearly marked on the outside with Design-Builder's

---

name, reference to the Project, and the words “I-64 Hampton Roads Bridge Tunnel Project Escrow Proposal Documents.”

.2 On or before the date that is fourteen (14) days after the Agreement Date, the Escrow Proposal Documents will be examined, organized and inventoried by representatives of Department, assisted by members of Design-Builder’s staff who are knowledgeable in how the Escrow Proposal Documents were prepared. This examination will be to ensure that the Escrow Proposal Documents are legible and complete. It will not include a review, and will not constitute approval, of proposed construction methods, estimating assumptions, or interpretations of any Contract Document. Such examination will not alter any condition or term of any Contract Document.

.3 Timely submission of complete Escrow Proposal Documents as of the date that is fourteen (14) days after the Agreement Date is an essential element of Design-Builder’s responsibility.

.4 To the extent the Proposal is based upon contracting any part of the Work, Design-Builder shall cause each Subcontractor whose total Subcontract price exceeds [five percent (5%)] of the Contract Price to provide similar documentation to be included with those of Design-Builder. Such documents will be opened and examined in the same manner and at the same time as the examination described above for Design-Builder.

.5 Department retains the right to require Design-Builder to submit similar documentation from any Subcontractor with whom Design-Builder enters into a Subcontract after the date hereof before such Subcontract is approved.

**12.9.4 Storage.** Design-Builder shall bear the cost for storing the Escrow Documents. The Escrow Proposal Documents will be stored at the following address:

SunTrust Bank  
919 East Main Street, 7<sup>th</sup> Floor  
Richmond, Virginia 23219  
Telephone: 804-782-7087  
Attention: Charles Henderson

**12.9.5 Examination**

.1 Subject to the terms of the Escrow Agreement, the Escrow Proposal Documents may be examined by Department and Design-Builder at any time deemed necessary by Department.

.2 Department may delegate review of the Escrow Proposal Documents to members of Department’s staff or to consultants. No other Person shall have access to the Escrow Proposal Documents.

.3 Notwithstanding the foregoing, the Escrow Proposal Documents, and information contained therein, may be used:

- 
- (a) to assist in the negotiation of Work Orders to compensation due upon termination;
  - (b) in the resolution of any claim or dispute before any entity selected to resolve disputes; and
  - (c) in any dispute resolution procedure commenced under the Agreement.

.4 Access to the Escrow Proposal Documents will take place in the presence of duly designated representatives of both Department and Design-Builder, except that, if Design-Builder refuses to be present or to cooperate in any other way in the review of documents, Department may review such documents without Design-Builder being present.

#### **12.9.6. Ownership**

.1 The Escrow Proposal Documents are, and will always remain, the property of Design-Builder, subject to joint review by Department and Design-Builder, as provided herein.

.2 Department stipulates and expressly acknowledges that the Escrow Proposal Documents constitute trade secrets. This acknowledgment is based on Department's understanding that the information contained in the Escrow Proposal Documents is not known outside Design-Builder's business, is known only to a limited extent and only by a limited number of employees of Design-Builder, is safeguarded while in Design-Builder's possession, is extremely valuable to Design-Builder and could be extremely valuable to Design-Builder's competitors by virtue of its reflecting Design-Builder's contemplated techniques of design and construction. Department further acknowledges that Design-Builder expended substantial sums of money in developing the information included in the Escrow Proposal Documents and further acknowledges that it would be difficult for a competitor to replicate the information contained therein. Department further acknowledges that the Escrow Proposal Documents and the information contained therein are made available to Department only because such action is an express prerequisite to award of the Agreement. Department further acknowledges that the Escrow Proposal Documents include a compilation of the information used in Design-Builder's business, intended to give Design-Builder an opportunity to obtain an advantage over competitors who do not know of or use the contents of the documentation.

**12.9.7 Final Disposition and Return of Escrow Proposal Documents.** The Escrow Proposal Documents will be returned to Design-Builder 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 Agreement or (ii) termination of the Agreement and resolution of all claims or disputes arising pursuant to the Agreement.

**12.10 Internal Control Systems.** Design-Builder shall have internal control systems in place that meet federal requirements for accounting. Such systems shall comply with the requirements of 48 CFR 31, “Federal Acquisition Regulations, Contract Cost Principles and Procedures,” and 23 CFR 172 “Administration of Engineering and Design Related Services Contracts.”

**12.11 Federal Immigration Reform and Control Act of 1986.** Design-Builder shall at all times comply, and cause all Subcontractors to comply, with the Federal Immigration Reform and Control Act of 1986, which prohibits employment of illegal aliens.

**12.12 Civil Rights Act.** Design-Builder and all Subcontractors with fifteen (15) or more employees shall, upon request from Department, submit a Title VI Evaluation Report (EEO-D2).

**12.13 Amendments**

**12.13.1** The Contract Documents may not be changed, altered, or amended in any way except in writing signed by a duly authorized representative of each party.

END OF GENERAL CONDITIONS OF CONTRACT