

**REQUEST FOR PROPOSALS**

to Design and Build the

**Safer Drive 65 Project**

through a

**PUBLIC-PRIVATE AGREEMENT (DESIGN-BUILD DELIVERY)]**

**a Project of the**

**INDIANA DEPARTMENT OF TRANSPORTATION**

**ISSUED JULY 19, 2024**

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## PUBLIC-PRIVATE AGREEMENT (DESIGN-BUILD DELIVERY)

### Safer Drive 65 Project

This Public-Private Agreement (Design-Build Delivery) (“DBA”) is entered into and effective as of [●], 2025 by and between the Indiana Department of Transportation, an agency of the State of Indiana (“INDOT”), and [●], a [●] (“Design-Build Contractor”), with reference to the definitions contained in Exhibit 1 (*Abbreviations and Definitions*) hereto and the following facts:

A. The State desires to facilitate private sector investment and participation in the development of the Project via a public-private agreement, and has enacted IC § 8-15.7, as amended (the “Act”), to accomplish that purpose.

B. The Act grants INDOT (among other things) the authority to enter into agreements with private entities to design and construct roadway projects.

C. Pursuant to the provisions of the Act, INDOT issued a Request for Qualifications on May 8, 2024, as amended.

D. INDOT received two responsive statements of qualifications submittals on or before June 17, 2024, and subsequently short-listed two responsive proposers.

E. On July 19, 2024, INDOT issued to the short-listed proposers a Request for Proposals to Design and Construct the Safer Drive 65 Project through a Public-Private Agreement (Design-Build Delivery) (as amended, the “RFP”).

F. On or before January 10, 2025, INDOT received responses to the RFP, including Design-Build Contractor’s Proposal.

G. After completion of the evaluation of the proposals of the submitting short-listed proposers, in accordance with IC § 8-15.7-4-2, INDOT preliminarily selected Design-Build Contractor’s Proposal as the one which provided the best value to the public and is in the best interest of the State and the public, and preliminarily selected Design-Build Contractor as the “Apparent Best Value Proposer,” as defined under, and all in accordance with, the RFP.

H. As required by the Act, INDOT held a public hearing on the preliminary selection of Design-Build Contractor as the Apparent Best Value Proposer and the terms of the proposed DBA.

I. On [\_\_\_], 202[\_\_\_][NTD: insert date], after the public hearing, INDOT determined that Design-Build Contractor as Apparent Best Value Proposer should be designated as “operator” for the Project (as defined in IC § 8-15.7-2-11) and the “Design-Build Contractor” hereunder, and INDOT authorized INDOT’ staff to negotiate, execute and deliver this DBA.

J. On [\_\_\_], 202[\_\_\_][NTD: insert date], Design-Build Contractor’s governing body authorized Design-Build Contractor to negotiate, execute and deliver this DBA.

K. INDOT submitted its determination that Design-Build Contractor be designated as the operator for the Project to the Governor of the State and the Governor of the State has accepted the determination of INDOT after review of such determination. On [\_\_\_\_], 202[\_\_\_\_][**NTD: insert date**], the Governor of the State designated Design-Build Contractor as the operator for the Project and Design-Build Contractor hereunder and notice thereof was published on [\_\_\_\_], 202[\_\_\_\_][**NTD: insert date (must be no less than 15 days before execution)**], in accordance with the Act.

L. This DBA and the other DBA Documents collectively constitute a “public-private agreement” as contemplated under the Act, and are entered into in accordance with the provisions of the RFP.

NOW, THEREFORE, in consideration of the sums to be paid by INDOT to Design-Build Contractor, the foregoing premises and the covenants and agreements set forth herein, and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged by each Party, the Parties hereby agree as follows:

## **SECTION 1 COMPONENTS; INTERPRETATION OF DBA DOCUMENTS**

### **1.1 Certain Definitions**

Unless the context otherwise requires, capitalized terms and acronyms used in the DBA Documents have the meanings given in Exhibit 1.

### **1.2 DBA Documents**

The term “DBA Documents” shall mean the documents listed in Section 1.3 (Order of Precedence).

### **1.3 Order of Precedence**

1.3.1 Each of the DBA Documents is an essential part of the DBA, and a requirement occurring in one is as binding as though occurring in all. The DBA Documents are intended to be complementary and to describe and provide for a complete agreement. In the event of any conflict among the DBA Documents, the order of precedence shall be as set forth below.

- (a) For design and other non-Construction Work:
  - (i) Change Orders and DBA amendments;
  - (ii) This DBA, including exhibits, except for Design-Build Contractor’s Proposal Commitments, as set forth in Attachment 1 to Exhibit 7 (Approved Deviations via the ATC Process), which have a lower order of precedence as noted below;

- (iii) Design-Build Contractor’s approved Deviations pursuant to the ATC process (as set forth in Attachment 2 to Exhibit 7 (Design-Build Contractor’s Proposal Commitments));
  - (iv) Technical Provisions including all attachments to the Technical Provisions, except the Project Standards listed in TP Table 18-1 (Standards and References) have a lower order of precedence as noted below;
  - (v) Unique Special Provisions approved by INDOT;
  - (vi) Recurring Special Provisions;
  - (vii) Standard Specifications;
  - (viii) Standard Drawings;
  - (ix) Design-Build Contractor’s Proposal Commitments (as set forth in Attachment 1 to Exhibit 7 (Approved Deviations via the ATC Process));
  - (x) Design-Build Contractor’s Proposal (other than the Proposal Commitments set forth in Attachment 1 to Exhibit 7 (Approved Deviations via the ATC Process)), to the extent compliant with the DBA Documents and excluding any qualifications, assumptions, conditions and disclaimers therein; and
  - (xi) Any other Project Standards listed in TP Table 18-1 (Standards and References) to the Technical Provisions not otherwise listed above.
- (b) For construction-related standards, specifications and requirements, the same order of precedence set forth in Section 1.3.1(a) (Order of Precedence) shall apply, except that the Released for Construction Documents shall also be considered DBA Documents and shall be added immediately following the Proposal Commitments in the order of precedence; provided, however, that (i) the Unique Special Provisions shall have precedence over Plans, and Plans shall have precedence over “Recurring Special Provisions,” which, in turn, shall have precedence over Standard Specifications, (ii) no conflict shall be deemed to exist between the Released for Construction Documents and the other DBA Documents with respect to requirements of the Released for Construction Documents that INDOT determines are more beneficial than the requirements of the other DBA Documents; and (iii) any Deviations contained in the Released for Construction Documents shall have priority over conflicting requirements of other DBA Documents (excluding those of the DBA Documents listed in Section 1.3.1(a)(i) (Order of Precedence) and Section 1.3.1(a)(ii) (Order of Precedence)), in the context of construction, only to the extent that the conflicts are specifically identified to INDOT by Design-Build Contractor, and such Deviations are approved in writing by INDOT.

1.3.2 Notwithstanding the order of precedence among DBA Documents set forth in Section 1.3.1 (Order of Precedence) if and to the extent that Exhibit 7 (Design-Build Contractor's Proposal Commitments and Approved Deviations via the ATC Process) expressly specifies that it is intended to supersede specific provisions of the DBA Documents that are listed higher in the order of precedence, Exhibit 7 (Design-Build Contractor's Proposal Commitments and Approved Deviations via the ATC Process) shall control over the specified provisions. .

1.3.3 If portions of the Reference Information Documents are referenced in the DBA Documents for the purpose of defining requirements of the DBA Documents, then only to the extent expressly so referenced, the Reference Information Documents shall be deemed incorporated in the DBA Documents, with the referenced aspects having the same order of priority as the DBA Document in which the reference occurs.

1.3.4 Additional details and more stringent requirements contained in a lower priority DBA Document will control except to the extent they irreconcilably conflict with the requirements of the DBA Document with the higher precedence, as determined by INDOT, in its good faith discretion.

1.3.5 Notwithstanding the order of precedence among DBA Documents set forth in this Section 1.3 (Order of Precedence), unless otherwise directed by INDOT, in its sole discretion, if a DBA Document contains differing provisions on the same subject matter than another DBA Document, the provisions that establish the higher standard, quantum, quality, manner or method of performing the Work or use more stringent standards will prevail. Further, in the event of a conflict among any standards, criteria, requirements, conditions, procedures, specifications or other provisions applicable to the Project established by reference to a described manual or publication within a DBA Document or set of DBA Documents, the standard, criterion, requirement, condition, procedure, specification or other provision that use more stringent standards or better performance will apply, unless INDOT, in its sole discretion, approves otherwise in writing. If either Party becomes aware of any such conflict, it shall promptly provide Notice of the conflict to the other Party. INDOT shall issue a written determination respecting which of the conflicting items is to apply promptly after it becomes aware of any such conflict.

#### **1.4 Interpretation of DBA Documents**

In the DBA Documents, where appropriate: words in the singular number include the plural number and vice versa; references to a Section is a reference to the Section in the DBA Documents in which the reference appears; references to time is to prevailing Eastern Time; the meaning of “or” will be that of the inclusive “or,” that is meaning one, some, or all of a number of possibilities; references to any Governmental Rule include all provisions consolidating, amending, extending, or replacing the Governmental Rule; unless otherwise indicated, references to Codes are to the codified laws of the State; the words “including,” “includes” and “include” shall be deemed to be followed by the words “without limitation”; unless otherwise indicated, references to sections, appendices or schedules are to this DBA; words such as “herein,” “hereof” and “hereunder” shall refer to the entire document in which they are contained and not to any particular provision or section; words not otherwise defined which have well-known technical or construction industry

meanings, are used in accordance with such recognized meanings; references to Persons include their respective permitted successors and assigns and, in the case of Governmental Entities, Persons succeeding to their respective functions, responsibilities and capacities, and in the case of Persons other than Governmental Entities, such Persons' legal representatives, trustees, executors, and administrators, including any Person taking party by way of novation; reference to a right includes any benefit, remedy, discretion, authority, or power associated with such right; reference to an agreement, document, standard, principle, or other instrument includes a reference to that agreement, document, standard, principle, or instrument as amended, supplemented, amended and restated, substituted, novated, or assigned (except where otherwise stated); reference to "\$" is to the United States Dollar; except as otherwise expressly provided, the term "may," when used in the context of a power or right exercisable by INDOT or any designee thereof means the power to exercise that right or power in its sole discretion with no obligation to any DB-Related Entity to do so. "May," when used in all other contexts, indicates permission by INDOT for Design-Build Contractor to do (or refrain from doing) an action. Words of any gender used herein shall include each other gender where appropriate. The use of the word "remedy" or any form of it in the DBA Documents means that the event to be remedied must be cured or its effects overcome. If DBA Documents require calculation of an amount payable to a Party, there must be no double counting in calculating that amount such that the Party would receive more than the amount owed or payable. Unless otherwise specified, lists contained in the DBA Documents defining the Project or the Work shall not be deemed all-inclusive. Design-Build Contractor acknowledges and agrees that it had the opportunity and obligation, prior to the Proposal Date, to review the terms and conditions of the DBA Documents (including those Reference Information Documents that are referenced in the DBA Documents and, pursuant to Section 1.3.3 (Order of Precedence), are considered DBA Documents) and to bring to the attention of INDOT any conflicts, errors, inconsistencies or ambiguities contained therein. Design-Build Contractor further acknowledges and agrees that it has independently reviewed the DBA Documents with legal counsel, and that it has the requisite experience and sophistication to understand, interpret and agree to the particular language of the provisions of the DBA Documents. Accordingly, in the event of an ambiguity in or Dispute regarding the interpretation of the DBA Documents, the DBA Documents shall not be interpreted or construed against the Party that prepared them, and instead other rules of interpretation and construction shall be used. INDOT's interim or final answers to the questions posed during the Proposal process for the DBA Documents shall in no event be deemed part of the DBA Documents and shall not be relevant in interpreting the DBA Documents except and solely to the extent as they may clarify provisions otherwise considered ambiguous by INDOT. On plans, Working Drawings, and standard plans, calculated dimensions shall take precedence over scaled dimensions.

## **1.5 Referenced Standards and Specifications**

1.5.1 Except as otherwise specified in the DBA Documents or otherwise directed by INDOT, material and workmanship specified by the number, symbol or title of any standard established by reference to a described publication affecting any portion of the Project shall comply with the latest edition or revision thereof and amendments and supplements thereto in effect on the Setting Date.

1.5.2 In interpreting Project Standards, the following apply:

- (a) References to the project owner shall mean INDOT, unless INDOT determines, in the specific context, that it should mean INDOT.
- (b) References to “plan(s)” shall mean the Released for Construction Documents.
- (c) Cross-references to measurement and payment provisions contained in the Project Standard shall be deemed to refer to the measurement and payment provisions contained in the DBA Documents.

## **1.6 Explanations; Omissions and Misdescriptions**

Design-Build Contractor shall not take advantage of or benefit from any apparent or actual Error in the DBA Documents. Should it appear that the Work to be done or any matter relative thereto is not sufficiently detailed or explained in the DBA Documents, Design-Build Contractor shall request in writing such further written explanations from INDOT as may be necessary and shall comply with the explanation provided. Design-Build Contractor shall promptly provide to INDOT Notice of all Errors which it may discover in the DBA Documents, and shall obtain specific instructions in writing from INDOT regarding any such Error before proceeding with the Work affected thereby, it being understood that correction of Errors shall not itself be the basis for any Claim hereunder. The fact that the DBA Documents omit or misdescribe any details of any Work which are necessary to carry out the Project, or which are customarily performed, shall not relieve Design-Build Contractor from performing such omitted Work or misdescribed details of the Work, and they shall be performed as if fully and correctly set forth and described in the DBA Documents, without entitlement to a Relief Event or a Compensation Event except as specifically allowed under this DBA.

## **1.7 Computation of Periods**

References to “days” contained in the DBA Documents shall mean calendar days unless otherwise specified; provided that (a) if the date to perform any act or give any Notice specified in the DBA Documents (including the last date for performance or provision of Notice “within” a specified time period) falls on a non-Business Day, such act or Notice may be timely performed on the next succeeding day which is a Business Day, (b) Holidays are not “calendar days” (except in the case of assessment of Liquidated Damages hereunder); and (c) the date of delivery of a Submittal will be considered to be the date of the email notification during the regular business hours of 8 am to 5 pm to the required INDOT personnel. Notwithstanding the foregoing, requirements contained in the DBA Documents relating to actions to be taken in the event of an emergency, requirements contained in Section 6.3.1 (*Notification to INDOT*), and other requirements for which it is clear that performance is intended to occur on a non-Business Day, shall be required to be performed as specified, even though the date in question may fall on a non-Business Day.

## 1.8 Standard for Approvals

In all cases where approvals, consents, determinations, acceptance, decisions or other action are required to be provided or made by INDOT under the DBA Documents, including with respect to Submittals, such approvals, consents, determinations, acceptance, decisions or other actions shall not be withheld unreasonably except in cases where a different standard (such as sole discretion) is specified. If the approval, consent, determination, acceptance, decision or other action is subject to the good faith discretion of INDOT, then such approval, consent, determination, acceptance, decision or other action shall be binding, unless it is finally determined through the Dispute Resolution Procedures that such approval, consent, determination, acceptance, decision or other action (including a failure to act which constitutes a disapproval) or matter was arbitrary or capricious. In cases where sole discretion is specified, the decision shall not be subject to the Dispute Resolution Procedures or other legal challenge.

## 1.9 Reference Information Documents

1.9.1 INDOT has provided and disclosed the Reference Information Documents to Design-Build Contractor, including a reference design.

1.9.2 Design-Build Contractor acknowledges and agrees that (a) the Reference Information Documents may include interpretations, extrapolations, analyses, and recommendations concerning data, design solutions, technical issues and solutions and constructions means and methods; (b) such interpretations, extrapolations, analyses and recommendations are preliminary in nature and, in many cases, are obsolete; (c) such interpretations, extrapolations, analyses and recommendations are not intended to express the views or preferences of INDOT or any other Governmental Entity or represent any statement of approval or acceptance thereof by INDOT or any other Governmental Entity; (d) such interpretations, extrapolations, analyses, and recommendations are not intended to form the basis of Design-Build Contractor's design solutions, technical solutions or construction means and methods; (e) except as expressly provided in Section 1.3.3 (Order of Precedence), Design-Build Contractor is not entitled to rely on such interpretations, extrapolations, analyses and recommendations and the use or consideration thereof by Design-Build Contractor is at the sole risk of Design-Build Contractor and without representation or warranty by, or recourse to, INDOT or any other Governmental Entity, and (f) any reliance by or on behalf of Design-Build Contractor on such interpretations, extrapolations, analyses and recommendations and the use or consideration thereof shall not be the basis of any Relief Event, Compensation Event, or Claim.

1.9.3 Except as expressly provided in Section 1.3.3 (Order of Precedence): (a) the Reference Information Documents are not mandatory or binding on Design-Build Contractor, (b) Design-Build Contractor is not entitled to rely on the Reference Information Documents as presenting a feasible, complete, accurate, viable or desirable technical, design, engineering, construction, operations or maintenance solution or other direction, means or methods for complying with the requirements of the DBA Documents, Governmental Approvals or Governmental Rules; (c) use by Design-Build Contractor of any element, aspect or portion of the Reference Information Documents shall be at the sole risk of Design-Build Contractor, and (d) use

by or on behalf of Design-Build Contractor of any element, aspect or portion of the Reference Information Documents shall not be the basis of any Relief Event, Compensation Event, or Claim.

1.9.4 Except to the extent that INDOT has specifically agreed herein that Design-Build Contractor shall be entitled to a Relief Event or a Compensation Event with respect to such matter, Design-Build Contractor understands and agrees that INDOT shall not be responsible or liable in any respect for any Losses whatsoever suffered by any DB-Related Entity by reason of any use of any information contained in the Reference Information Documents not part of the DBA Documents, or any action or forbearance in reliance thereon. Design-Build Contractor further acknowledges and agrees that (a) if and to the extent Design-Build Contractor or anyone on Design-Build Contractor's behalf uses any of said information in any way, such use is made on the basis that Design-Build Contractor, not INDOT, has approved and is responsible for said information, and (b) Design-Build Contractor is capable of conducting and obligated hereunder to conduct any and all studies, analyses, and investigations as it deems advisable to verify or supplement said information, and that any use of said information is entirely at Design-Build Contractor's own risk and at its own discretion.

1.9.5 Subject to Design-Build Contractor's right to schedule or monetary relief available hereunder as set forth in Section 15 (*Relief Events; Compensation Events*), INDOT shall not be responsible or liable in any respect for any Claims or Losses whatsoever suffered or incurred by any DB-Related Entity by reason of any use of information contained in, or any action or forbearance in reliance on, the Reference Information Documents.

1.9.6 Notwithstanding the foregoing in this Section 1.9 (*Reference Information Documents*), INDOT may rely on the disclosure of information within the Reference Information Documents as a basis to establish whether Design-Build Contractor acted in accordance with Good Industry Practice, and Design-Build Contractor acknowledges and agrees that it is on constructive notice of conditions, Utilities, structures, interpretations, extrapolations, analyses, and recommendations located therein.

1.9.7 SUBJECT TO SECTION 1.3.3 (*ORDER OF PRECEDENCE*) AND EXCEPT AS OTHERWISE PROVIDED IN THIS DBA, INDOT DOES NOT REPRESENT OR WARRANT, AND HEREBY DISCLAIMS, THAT THE INFORMATION CONTAINED IN THE REFERENCE INFORMATION DOCUMENTS IS EITHER COMPLETE OR ACCURATE OR SUITABLE FOR USE OR THAT SUCH INFORMATION IS IN CONFORMITY WITH THE REQUIREMENTS OF INDOT-PROVIDED APPROVALS, OTHER DBA DOCUMENTS, GOVERNMENTAL APPROVALS, OR GOVERNMENTAL RULES. INDOT DOES NOT REPRESENT OR WARRANT THE ACCURACY OR COMPLETENESS OF ANY ITEMIZED LIST SET FORTH IN THE TECHNICAL PROVISIONS. EXCEPT AS EXPRESSLY PROVIDED IN SECTION 1.9.3 (*REFERENCE INFORMATION DOCUMENTS*); DESIGN-BUILD CONTRACTOR SHALL HAVE NO RECOURSE TO INDOT FOR ANY CLAIM ARISING OUT OF OR RELATING TO ANY DB-RELATED ENTITY'S RELIANCE ON THE REFERENCE INFORMATION DOCUMENTS, OR ANY INFORMATION CONTAINED THEREIN.



## **1.10 Incorporation of Deviations Approved via the ATC Process**

1.10.1 If the Deviations identified in Attachment 2 to Exhibit 7 (Design-Build Contractor's Proposal Commitments) (the "ATCs") incorporated into the DBA Documents require Other Approvals, additional Environmental Approvals, other Governmental Approvals, analysis, or assessment prior to implementation, then Design-Build Contractor shall (a) be solely responsible for the cost and schedule impact of any related review, analysis, assessment, approvals, permits and findings; (b) be solely responsible for the risk that any approvals, permits or findings are not granted, issued, approved or obtained or timely granted, issued, approved or obtained; and (c) not be entitled to any Relief Event or Compensation Event as a result of any delay or cost associated with the environmental review, analysis, approvals, permits or findings related to such ATC, including the inability to obtain such approvals, permits or findings.

1.10.2 If the DBA Documents incorporate any approved ATCs and: (a) Design-Build Contractor does not comply or is unable to comply with one or more conditions of INDOT of pre-approval for the ATC (including the obligation to obtain any Other Approvals, required additional Environmental Approvals, other Governmental Approvals, or analysis or assessment), (b) Design-Build Contractor is unable to obtain a third-party approval required for the ATC, or (c) the ATC otherwise proves to be infeasible, then Design-Build Contractor shall comply with the DBA Document requirements that would have been applicable but for the ATC, without any increase in the Contract Price, extension of any Completion Deadline or any other Change Order. In such case and depending upon the circumstances (including if Design-Build Contractor fails to use all reasonable efforts to implement the ATC or obtain any Other Approvals, required Environmental Approvals, or other Governmental Approvals), INDOT may also be entitled to (i) a reduction in the Contract Price in an amount equal to the estimated value of the ATC in the Schedule of Values and Cost and Pricing Data, as reasonably determined by INDOT, but which in no event shall be less than cost (plus mark-up and profit) of the ATC as reflected in the Schedule of Values and Cost and Pricing Data, and (ii) a reduction in the time allowed to achieve Substantial Completion in an amount equal to the estimated schedule savings as a result of the ATC not being implemented, as reasonably determined by INDOT.

1.10.3 ATCs contained in proposals submitted by unsuccessful proposers may, in the sole discretion of INDOT, be presented to Design-Build Contractor as a Change Notice in accordance with Section 14.2.2 (Change Notice).

## **SECTION 2 OBLIGATIONS OF DESIGN-BUILD CONTRACTOR; REPRESENTATIONS, WARRANTIES AND COVENANTS; DESIGN REQUIREMENTS**

### **2.1 Performance Requirements; Project Management Plan**

#### **2.1.1 Performance Requirements**

2.1.1.1 The Work shall include the design and construction of the Project, complying with the requirements of the DBA Documents, except as otherwise approved in writing by INDOT, in its sole discretion. All materials, services and efforts necessary to

achieve Substantial Completion and Final Acceptance on or before the applicable Completion Deadline shall be Design-Build Contractor's sole responsibility, except as otherwise specifically provided in the DBA Documents. Design-Build Contractor shall plan, schedule, and execute all aspects of the Work and shall coordinate its activities with all Persons who are directly or indirectly impacted by the Work. Subject to the terms of Section 14 (*Changes in the Work*) and Section 15 (*Relief Events; Compensation Events*), the costs of all Work, including all such materials, services and efforts are included in the Contract Price.

2.1.1.2 Design-Build Contractor shall develop the Project Management Plan and its component parts, plans and other documentation in accordance with the requirements set forth in the DBA Documents, including Section 22.2.1 (*Punch List*) and TP Section 1.5.3 (Project Management Plan), Governmental Approvals, Governmental Rules and Good Industry Practice. The Project Management Plan shall include all the parts and other documentation identified in the Technical Provisions.

2.1.1.3 Design-Build Contractor shall submit to INDOT, for approval in its good faith discretion, in accordance with the procedures described in Section 3 (*Information Supplied to Design-Build Contractor; Submittals, Design Requirements and Disclaimer; Role of FHWA; Governmental Approvals*) and the time line set forth in TP Section 1.2.3 (Project Management Plan) and TP Section 1.2.2.1 (Project Baseline Schedule), each component part, plan and other documentation of the Project Management Plan, including the Project Baseline Schedule. Design-Build Contractor shall submit to INDOT, for approval in its good faith discretion, (a) any proposed changes or additions to or revisions of any such component part, plan or other documentation in accordance with the procedures and time lines set forth in TP Section 1.2.3.6 (Revisions to PMP) and (b) any updates or revisions to the Project Schedule in accordance with TP Section 1.2.2.4 (Revisions).

2.1.1.4 Except as authorized by this DBA, Design-Build Contractor shall not commence or permit the commencement of any aspect of the Work before the relevant component parts, plans and other documentation of the Project Management Plan applicable to such Work have been submitted to and approved by INDOT in accordance with the procedures described in this Section 2.1 (*Performance Requirements; Project Management Plan*), Section 3 (*Information Supplied to Design-Build Contractor; Submittals, Design Requirements and Disclaimer; Role of FHWA; Governmental Approvals*) and the time line set forth in TP Table 1-3 (Deliverables). If any part, plan or other documentation of the Project Management Plan refers to, relies on or incorporates any manual, plan, procedure or like document, then all such referenced or incorporated materials shall be submitted to INDOT for approval in its good faith discretion at the time that the relevant part, plan or other documentation of the Project Management Plan or change, addition or revision to the Project Management Plan is submitted to INDOT.

2.1.1.5 Design-Build Contractor shall undertake all aspects of quality assurance and quality control in accordance with the approved Project Management Plan, the DBA Documents, Governmental Approvals, Governmental Rules, Good Industry Practice, and FHWA oversight requirements.

2.1.1.6 Design-Build Contractor shall cause each of its Subcontractors at every level to comply with the applicable requirements of the approved Project Management Plan.

## 2.1.2 Performance Standards

2.1.2.1 Design-Build Contractor shall furnish all aspects of the Work and shall construct the Project as designed, free from defects and in accordance with: (a) Good Industry Practice, (b) the requirements, terms and conditions set forth in the DBA Documents, (c) the Project Baseline Schedule, (d) all Governmental Rules, (e) the requirements, terms and conditions set forth in all Governmental Approvals, (f) the approved Project Management Plan and all component plans prepared or to be prepared thereunder, and (g) the Construction Documents, in each case taking into account the MOT Limits and the Planned ROW Limits and other constraints affecting the Project; provided, however, that Design-Build Contractor shall not bear responsibility for correcting material latent defects in portions of the existing facilities which are not included in any manner as part of the Work.

2.1.2.2 The Project design and construction shall be subject to certification pursuant to the procedure contained in the approved Project Management Plan.

2.1.2.3 Design-Build Contractor acknowledges that, prior to the Effective Date, it had the opportunity to identify any provisions of the DBA Documents, including the Technical Provisions, that are erroneous or create a potentially incorrect or unsafe condition, and the opportunity and duty to provide to INDOT Notice of such fact and of the changes to the provision that Design-Build Contractor believed were the minimum necessary to render it correct and safe. If it is reasonable or necessary to adopt changes to the DBA Documents, including the Technical Provisions, after the Effective Date to make the provisions correct and safe, such changes shall not be grounds for any adjustment to the Contract Price, Completion Deadline or other Claim, unless: (a) Design-Build Contractor neither knew nor had reason to know prior to the Effective Date that the provision was erroneous or created a potentially unsafe condition or (b) Design-Build Contractor knew of and reported to INDOT the erroneous or potentially unsafe provision prior to the Effective Date and INDOT did not adopt reasonable and necessary changes. If Design-Build Contractor commences or continues any Work affected by such a change after the need for the change was discovered or suspected, or should have been discovered or suspected through the exercise of reasonable care, Design-Build Contractor shall bear any additional costs and schedule delay associated with redoing the Work already performed. Inconsistent or conflicting provisions of the DBA Documents shall not be treated as erroneous provisions under this Section 2.1.2.3 (Performance Standards), but instead shall be governed by Section 1.3 (Order of Precedence).

## 2.1.3 Deviations; Design Exceptions.

2.1.3.1 Subject to Section 2.1.3.2 (Deviations; Design Exceptions), Design-Build Contractor may apply for INDOT approval of Deviations from applicable technical requirements of the DBA Documents (e.g., those of the DBA Documents listed in Section 1.3.1(a)(iii) (Order of Precedence) to Section 1.3.1(a)(ix) (Order of Precedence),

inclusive, and Section 1.3.1(a)(xi) (Order of Precedence)). All applications shall be in writing. Where Design-Build Contractor requests a Deviation as part of the submittal of a component plan of the Project Management Plan, including the Project Baseline Schedule and any updates thereto, Design-Build Contractor shall specifically identify and label the proposed Deviation. INDOT shall consider requested Deviations in its sole discretion, but has no obligation to approve any such application. Design-Build Contractor acknowledges that FHWA also has approval rights with respect to design exceptions. INDOT may also require Design-Build Contractor to submit the proposed Deviation as a Design-Build Contractor Change Request. No Deviation shall be deemed approved or be effective unless and until stated in a writing signed by INDOT's Authorized Representative. INDOT's affirmative written approval of a component plan of the Project Management Plan shall constitute: (a) approval of the Deviations expressly identified and labeled as Deviations therein, unless INDOT takes exception to any such Deviation and (b) disapproval of any Deviations not expressly identified and labeled as Deviations therein. INDOT's lack of issuance of approval of a written Deviation within 14 days after Design-Build Contractor applies therefor in writing shall be deemed a disapproval of such application. For purposes of clarity, any change that would amend the DBA Documents other than those listed in the first sentence of this Section 2.1.3.1 (Deviations; Design Exceptions) will not be considered a Deviation and may only be implemented through the Change Request process under Section 14.5.3 (Design-Build Contractor-Initiated Change Order) (solely for "no cost"/"zero sum" changes that also do not affect the Project Baseline Schedule) or (for all other changes) through an amendment to the DBA Documents under Section 26.1 (Amendments).

2.1.3.2 Design-Build Contractor may use the approved Design Exceptions in TP Section 5.3.3 (INDOT-Provided Design Exceptions) without requesting a new Deviation or obtaining approval of the Design Exception, unless the Design Exception or its use is modified by Design-Build Contractor's design. In such event, Design-Build Contractor shall request a Deviation and follow the processes for Deviations and Design Exceptions set forth in TP Section 3.6 (Design Exceptions) and where:

- (a) The justification under which the Design Exception, as approved by INDOT and FHWA, has, in the determination of INDOT and FHWA, in their respective sole discretion, been changed or otherwise modified as a result of Design-Build Contractor's design or utilization of the Design Exception;
- (b) The basis upon which the Design Exception was approved by INDOT and FHWA has, in the determination of INDOT and FHWA, in their respective sole discretion, been changed or otherwise modified as a result of Design-Build Contractor's design or utilization of the Design Exception;
- (c) The submittal by or on behalf of INDOT upon which the Design Exception was approved by INDOT and FHWA is, in the determination of INDOT and FHWA, in their respective sole discretion, no longer accurate or no longer reflects the Project design and impacts as a result of Design-Build Contractor's design or utilization of the Design Exception; or

- (d) Design-Build Contractor's utilization of the Design Exception differs in any way from that which was expressly approved by INDOT and FHWA (including as it relates to the location, length, station position or impact of the Design Exception), unless INDOT and FHWA, in their respective sole discretion, determine such difference is not material, and Design-Build Contractor may utilize such Design Exception in the express manner indicated in Design-Build Contractor's design.

2.1.3.3 Design-Build Contractor shall be solely responsible for specifically and expressly identifying to INDOT and FHWA (both in writing and in plan sheets) any eliminations, changes, improvements, differences or deviations in Design-Build Contractor's proposed use of any Design Exception approved by INDOT and FHWA and listed in TP Section 5.3.3 (INDOT-Provided Design Exceptions).

2.1.3.4 Should Design-Build Contractor utilize any Design Exceptions listed in TP Section 5.3.3 (INDOT-Provided Design Exceptions), Design-Build Contractor shall assume sole responsibility therefor, including the responsibility for any Errors set forth therein, and INDOT shall not have any responsibility or liability arising out of such Design Exceptions or Design-Build Contractor's use thereof, including delays in seeking or obtaining Design Exceptions.

2.1.3.5 If Design-Build Contractor requests a Deviation that is a Design Exception, but not a Design Exception listed in TP Section 5.3.3 (INDOT-Provided Design Exceptions), then Design-Build Contractor shall follow the processes for design exceptions set forth in TP Section 3.6 (Design Exceptions). Design-Build Contractor shall be responsible for securing all Design Exceptions required for the Project other than that listed in TP Section 5.3.3 (INDOT-Provided Design Exceptions) (which existing INDOT-provided Design Exception may be used as set forth in this Section 2.1.2 (Performance Standards) and the Technical Provisions) and acknowledges that the Design Exception listed in TP Section 5.3.3 (INDOT-Provided Design Exceptions) represent a non-exhaustive list.

2.1.3.6 References in the Technical Provisions to manuals or other publications governing the Work shall mean the most recent editions in effect on the Setting Date, unless expressly provided otherwise. Any changes to the Technical Provisions related to the Work shall be subject to the Change Order process for an INDOT-Directed Change in accordance with Section 14 (Changes in the Work).

#### 2.1.4 **Performance as Directed**

At all times during the term hereof, including during the course of, and notwithstanding the existence of, any Dispute, Design-Build Contractor shall perform as directed by INDOT in a diligent manner and without delay, shall abide by any decision or order by INDOT, and shall comply with all applicable provisions of the DBA Documents. If a Dispute arises regarding such performance or direction, the Dispute shall be resolved in accordance with Section 21 (Partnering and Dispute Resolution).

## 2.2 General Obligations of Design-Build Contractor

Design-Build Contractor, in addition to performing all other requirements of the DBA Documents, shall:

2.2.1 Furnish all design and other services, provide all materials, equipment, and labor and undertake all efforts necessary or appropriate (excluding only those materials, services and efforts which the DBA Documents specify will be undertaken by INDOT or other Persons) (a) to design and construct the Project and maintain it during construction in accordance with the requirements of the DBA Documents, the Project Baseline Schedule, all Governmental Rules, all Governmental Approvals, applicable Utility Agreements, the approved Project Management Plan and all component plans prepared or to be prepared thereunder, the approved Design-Build Contractor's Safety Plan, the approved Construction Documents and all other applicable safety, environmental and other requirements, taking into account the MOT Limits and the Planned ROW Limits, and other constraints affecting the Project, so as to achieve Substantial Completion and Final Acceptance by the applicable Completion Deadlines, and (b) otherwise to do everything required by and in accordance with the DBA Documents.

2.2.2 At all times provide a Project Manager approved by INDOT who (a) will have full responsibility for the prosecution of the Work, (b) will act as agent and be a single point of contact in all matters on behalf of Design-Build Contractor, (c) will be present (or its approved designee will be present) at the Site at all times that Work is performed, and (d) will be available to execute instructions and directions from INDOT or its Authorized Representatives.

2.2.3 Use the design firm or firms identified in the Proposal to perform the design services required by the DBA Documents (or other firms approved in writing by INDOT, which approval shall not be withheld provided that INDOT shall first have determined, in its reasonable discretion, that such firm has the demonstrated competence and professional qualifications necessary for the satisfactory performance of the required design services, and that the designated Key Personnel at such firm have sufficient experience with requirements applicable to the Project). Design-Build Contractor shall not shift Design Work from one firm to another without the prior written approval of INDOT, in its good faith discretion.

2.2.4 Obtain and pay the cost of obtaining all (a) Governmental Approvals required in connection with the Project (except for INDOT-Provided Approvals and New Approvals for which INDOT has expressly agreed to be responsible therefor under Section 7.11 (*Environmental Compliance, Mitigation and Approval Requirements*)) and (b) any Other Approval; and prior to beginning any construction activities in the field, furnish INDOT with fully executed copies of all Governmental Approvals (other than the Governmental Approvals obtained by INDOT) and all Other Approvals required for the Project.

2.2.5 Comply with all conditions imposed by and undertake all actions required by and all actions necessary to maintain in full force and effect all Governmental Approvals, including performance of all environmental mitigation measures required by the DBA Documents, and Other Approvals, except to the extent that responsibility for performance of such measures is expressly assigned to another Person in the DBA Documents.

2.2.6 Provide such assistance as is reasonably requested by INDOT in dealing with any Governmental Entity or in prosecuting and defending lawsuits in any and all matters relating to the Project. Such assistance may include providing information and reports regarding the Project as well as executing declarations and attending meetings and hearings. This provision is not intended to require Design-Build Contractor to provide legal services for the benefit of INDOT.

2.2.7 Reserved.

2.2.8 Cooperate fully with INDOT, consultants of INDOT, and Governmental Entities with jurisdiction over the Project in review and oversight of the design or construction of the Project, performing oversight and conducting inspections during the construction of the Project, and other matters relating to the Work.

2.2.9 Supervise and be responsible to INDOT for any DB-Related Entity, as though all such Persons are directly employed by Design-Build Contractor.

2.2.10 Pay all applicable federal, State and local sales, consumer, use and similar taxes, and property taxes and any other taxes, fees, charges or levies imposed by a Governmental Entity, whether direct or indirect, relating to, or incurred in connection with, the performance of the Work. INDOT is exempt from State, Federal, and local taxes and will not be responsible for any taxes levied on Design-Build Contractor as a result of the contract.

2.2.11 Mitigate delay to the Project and mitigate Losses due to delay to the extent possible, including by resequencing, reallocating, or redeploying personnel and resources to other Work, as appropriate. The foregoing shall not waive Design-Build Contractor's entitlement to additional time or compensation in accordance with Section 15 (*Relief Events; Compensation Events*) for certain events, including potential entitlement for the costs of mitigation.

2.2.12 Ensure labor harmony on the Site during all stages of the Project, including taking appropriate steps to prevent strikes, walkouts, Work stoppages, Work slowdowns, Work curtailments, cessations or interruptions of production due to labor disputes. If failure to maintain labor harmony results in delay in completion of the Project, Design-Build Contractor shall not be entitled to a time extension or increase in compensation under Section 15 (*Relief Events; Compensation Events*), unless such matter falls expressly within the scope of clause (d) of the definition of Force Majeure Event.

2.2.13 Utilize the EDMS as and when required under TP Section 1.5.4 (Electronic Document Management System) and the DBA Documents.

## **2.3 Representations, Warranties and Covenants**

Design-Build Contractor represents, warrants and covenants that:

2.3.1 During all periods necessary for the performance of the Work, Design-Build Contractor and its design and construction Subcontractor(s) will maintain all required authority,

license status, professional ability, skills, and capacity to perform the Work, and shall perform them in accordance with the requirements contained in the DBA Documents.

2.3.2 Design-Build Contractor has evaluated the constraints affecting design and construction of the Project, including the MOT Limits, Planned ROW Limits, conditions of INDOT-Provided Approvals, and has reasonable grounds for believing and does believe that the Project can be designed and built within such constraints.

2.3.3 Design-Build Contractor has evaluated the feasibility of performing the Work within the time and for the amount herein, accounting for constraints affecting the Project and has reasonable grounds for believing and does believe that such performance (including achievement of Substantial Completion and Final Acceptance by the applicable Completion Deadline, for the Contract Price) is feasible and practicable.

2.3.4 As of the Effective Date, based upon its Reasonable Investigation, Design-Build Contractor has evaluated the constraints affecting design and construction of the Project, including the MOT Limits and the Planned ROW Limits, the status of environmental review and the environmental commitments described in the DBA Documents, including those identified in TP Section 14 (Environmental), INDOT-Provided Approvals obtained prior to the Setting Date, the surface and subsurface conditions discoverable through such Reasonable Investigation, and applicable Governmental Rules, and Design-Build Contractor has reasonable grounds for believing and does believe that the Project can be designed and built within such constraints. Design-Build Contractor, in accordance with Good Industry Practice, conducted a Reasonable Investigation prior to the Setting Date, and as a result of such Reasonable Investigation, Design-Build Contractor is familiar with and accepts the physical requirements of the Work, subject to INDOT's obligations regarding Hazardous Materials under Section 7.10 (Hazardous Materials Management) and Design-Build Contractor's rights to seek relief under Section 15 (Relief Events; Compensation Events). Design-Build Contractor further acknowledges and agrees that changes in conditions at the Site may occur after the date hereof, and that Design-Build Contractor shall not be entitled to any Relief Event or Compensation Event in connection therewith except as expressly provided for under this DBA. Before commencing any Work on a particular aspect of the Project, Design-Build Contractor shall verify all governing dimensions at the Site, and shall examine all adjoining work which may have an impact on such Work. Design-Build Contractor shall ensure that the Design Documents and Construction Documents accurately depict all governing and adjoining dimensions and conditions.

2.3.5 In addition, as of the Effective Date, based upon its Reasonable Investigation, Design-Build Contractor has satisfied itself as to the character of the Site, including quality and quantity of surface and surface materials or obstacles to be encountered at the Site (including the presence of Utilities, Hazardous Materials, Contaminated Groundwater, Recognized Environmental Conditions, archaeological, paleontological, biological, cultural, and other protected resources or artifacts, and threatened or endangered species at or affecting the Site or surrounding locations), subject to INDOT's obligations regarding Hazardous Materials under Section 7.10 (Hazardous Materials Management) and Design-Build Contractor's rights to seek relief under Section 15 (Relief Events; Compensation Events).



2.3.6 Design-Build Contractor has familiarized itself with the requirements of any and all applicable Governmental Rules and the conditions of any required Governmental Approvals prior to entering into this DBA. Except as expressly provided for under Section 14 (Changes in the Work) and Section 15 (Relief Events; Compensation Events), Design-Build Contractor shall, and shall cause its Subcontractors to, comply with the foregoing at its sole cost and without any increase in Contract Price or extension of any Completion Deadline on account of such compliance. Design-Build Contractor has no reason to believe that any Other Approval or Governmental Approval required to be obtained by Design-Build Contractor will not be granted in due course in a timely fashion and thereafter remain in effect so as to enable the Work to proceed in accordance with the DBA Documents.

2.3.7 All Work furnished by Design-Build Contractor shall be performed by or under the supervision of Persons who hold all necessary and valid licenses, registrations, certifications, permits, approvals, and qualifications to perform the Work in the State, by personnel who are careful, skilled, experienced, and competent in their respective trades or professions, who are professionally qualified to perform the Work in accordance with the DBA Documents and who shall assume professional responsibility for the accuracy and completeness of the Design Documents, Construction Documents, and other documents prepared or checked by them.

2.3.8 Design-Build Contractor shall at all times schedule and direct its Work to provide an orderly progression of the Work to achieve Substantial Completion, and Final Acceptance by the applicable Completion Deadlines and in accordance with the approved Project Baseline Schedule, including furnishing such employees, materials, facilities, and equipment and working such hours, extra shifts, overtime operations, Sundays and Holidays as may be necessary to achieve such goal, all at Design-Build Contractor's own cost except as otherwise specifically provided in Section 14 (Changes in the Work) and Section 15 (Relief Events; Compensation Events).

2.3.9 The award of the DBA Documents by INDOT to Design-Build Contractor was based, in large part, on the qualifications and experience of the Key Personnel and other personnel listed in the Proposal, Design-Build Contractor's commitment that such individuals will be available to undertake and perform the Work, and that such individuals are available for and will fulfill the roles identified for them in the Proposal in connection with the Work.

2.3.10 Design-Build Contractor is a [●], duly organized and validly existing under the laws of the [State]/[Commonwealth] of [●], with full power, right, and authority to own its properties and assets and carry on its business as now conducted or proposed to be conducted. **[NTD: To be conformed in execution version based on entity type and state of organization.]**

2.3.11 Design-Build Contractor is a duly authorized business and is valid and existing in the State, and will remain duly authorized to transact business and valid and existing in the State throughout the term of this DBA and for as long thereafter as any obligations remain outstanding under the DBA Documents. **[NTD: If Design-Build Contractor is a joint venture, identify its members and provide organizational information, qualification to do business and good standing representations regarding each member.]**

2.3.12 Each member of Design-Build Contractor is duly authorized to do business and is valid and existing in the State, and will remain in duly authorized, valid and existing throughout the term of this DBA and for as long thereafter as any obligations remain outstanding under the DBA Documents. **[NTD: To be conformed in execution version based on entity.]**

2.3.13 Design-Build Contractor has full power, right, and authority to execute and deliver this DBA and to perform all of Design-Build Contractor's obligations provided for hereunder. **[NTD: If Design-Build Contractor is a joint venture, identify its members and provide organizational information, qualification to do business and valid/existing representations regarding each member.]**

2.3.14 [Each]/[The] individual executing this DBA on behalf of Design-Build Contractor has been duly authorized to execute and deliver this DBA on behalf of Design-Build Contractor. **[NTD: To be conformed in execution version based on Design-Build Contractor's signature authority.]**

2.3.15 The execution, delivery and performance of this DBA have been duly authorized by all necessary action of Design-Build Contractor and Design-Build Contractor's members and will not result in a breach of or a default under Design-Build Contractor's organizational documents or any indenture or loan or credit agreement or other material agreement or instrument to which Design-Build Contractor or any member of Design-Build Contractor is a party or by which its properties and assets may be bound or affected.

2.3.16 This DBA constitutes the legal, valid, and binding obligation of Design-Build Contractor and, if applicable, of each member of Design-Build Contractor, in accordance with its terms, subject only to applicable bankruptcy, insolvency, and similar laws affecting the enforceability of the rights of creditors generally and the general principles of equity.

2.3.17 There is no action, suit, proceeding, investigation or litigation pending and served on Design-Build Contractor which challenges (a) Design-Build Contractor's authority to execute, deliver or perform, or the validity or enforceability of, this DBA, (b) Design-Build Contractor's assets, properties, or operations as relate to the Project, or (c) the authority of Design-Build Contractor's individual executing the DBA Documents; and Design-Build Contractor has disclosed to INDOT any pending and un-served or threatened action, suit, proceeding, investigation or litigation with respect to such matters of which Design-Build Contractor is aware or should be aware after reasonable inquiry and investigation.

2.3.18 As of the Proposal Date, Design-Build Contractor disclosed to INDOT in writing all organizational conflicts of interest of Design-Build Contractor or any other DB-Related Entities of which Design-Build Contractor had Actual Knowledge; and between the Proposal Date and execution of this DBA, Design-Build Contractor has not obtained knowledge of any additional organizational conflict of interest, and there have been no organizational changes to Design-Build Contractor or its Subcontractors identified in its Proposal which have not been approved in writing by INDOT. For this purpose, organizational conflict of interest has the meaning set forth in the Instructions to Proposers under which Design-Build Contractor submitted its Proposal.

2.3.19 Design-Build Contractor shall avoid organizational conflicts of interest. For purposes of the DBA Documents, an “organizational conflict of interest” means that because of other activities or relationships with other Persons, a Person is unable or potentially unable to render impartial assistance or advice to INDOT, or the Person’s objectivity in performing the contract work for INDOT is or might be otherwise impaired, or a Person has an unfair competitive advantage. As of the Proposal Date, to the extent Design-Build Contractor was actually aware, Design-Build Contractor provided to INDOT Notice of all organizational conflicts of interest involving Design-Build Contractor or any other DB-Related Entity. Between the Proposal Date and the Effective Date, Design-Build Contractor has not obtained knowledge of any additional organizational conflict of interest.

2.3.20 Design-Build Contractor, any member of Design-Build Contractor, and any Subcontractor engaged by Design-Build Contractor, at any tier, is not debarred, suspended, proposed for debarment, declared ineligible or voluntarily excluded by any federal or State Governmental Entity.

2.3.21 Design-Build Contractor, any member of Design-Build Contractor, any Subcontractor engaged by Design-Build Contractor, at any tier, has not, in the past three years, been convicted of or had a civil judgment rendered against it for (a) commission of fraud or a criminal offense in connection with obtaining, attempting to obtain, or performing a public (e.g., federal, state or local) transaction or public contract, (b) violation of federal or state antitrust Governmental Rules, or (c) commission of embezzlement, theft, forgery, bribery, falsification, or destruction of records, making false statements, or receiving stolen property.

2.3.22 Design-Build Contractor, any member of Design-Build Contractor, and any Subcontractor engaged by Design-Build Contractor, at any tier, is not indicted for or otherwise criminally or civilly charged by any Governmental Entity with commission of any of the offenses enumerated in Section 2.3.21 (*Representations, Warranties and Covenants*).

2.3.23 Design-Build Contractor, any member of Design-Build Contractor, and any Subcontractor engaged by Design-Build Contractor, at any tier, has not, in the past three years, had one or more public transactions (federal, state or local) terminated for cause or for default.

2.3.24 Design-Build Contractor, any member of Design-Build Contractor, and any Subcontractor engaged by Design-Build Contractor, at any tier, has not received any communication or notice (written or oral), whether from a Governmental Entity, employee, citizens group, or any other Person, that alleges that any of the foregoing is not in full compliance with all Governmental Rules and Governmental Approvals in connection with the Project and, to the knowledge of Design-Build Contractor, there are no circumstance that may prevent or interfere with full compliance in the future.

2.3.25 Design-Build Contractor has been prequalified by INDOT for the Work it is to perform and will maintain those prequalifications at all times during the Work.

2.3.26 [Each of] Design-Build Contractor [and Guarantor] (a) is not in violation of (i) any applicable United States anti-money laundering laws, including those contained in the Bank

Secrecy Act and the regulations promulgated thereunder, (ii) any applicable economic sanction laws administered by Office of Foreign Assets Control of the United States Department of the Treasury (“OFAC”) or by the United States Department of State; or (iii) any applicable United States anti-drug trafficking, anti-terrorism, or anti-corruption laws, civil or criminal; and (b) is not a Person (i) that is charged with, or has reason to believe that he, she or it is under investigation for, any violation of any such laws; (ii) that has been convicted of any violation of, has been subject to civil penalties pursuant to, or had any of its property seized or forfeited under any such laws; (iii) that is named on the list of “Special Designated Nationals or Blocked Persons” maintained by OFAC (or any successor United States government office or list), or any similar list maintained by the United States Department of State (or any successor United States government office or list); (iv) with whom any United States Person, any entity organized under the laws of the United States or its constituent states or territories, or any entity, regardless of where organized, having its principal place of business within the United States or any of its territories, is prohibited from transacting business of the type contemplated under any applicable Governmental Rule; (v) that is owned, controlled by, or affiliated with any Person identified in clauses (b)(i) through (iv) above; or (vi) that is in violation of any obligation to maintain appropriate internal controls as required by the governing laws of the jurisdiction of such Person as are necessary to ensure compliance with the economic sanctions, laundering and anticorruption laws of the United States and the jurisdiction where the Person resides, is domiciled or has its principal place of business. ***[NTD: To be conformed in execution version based on whether Design-Build Contractor is required to have a Guarantor.]***

2.3.27 Design-Build Contractor has, prior to submitting the Proposal and in accordance with Good Industry Practice, reviewed the DBA Documents and the Reference Information Documents and has brought to INDOT’ attention any Errors, conflicts and ambiguities therein.

2.3.28 [Guarantor is duly organized and validly existing under the laws of the [State]/[Commonwealth] of [●], with full power, right, and authority to own its properties and assets and carry on its business as now conducted or proposed to be conducted.][***[NTD: To be conformed in execution version based on entity type and state of organization and whether Design-Build Contractor is required to have a Guarantor.]***

2.3.29 [The Guaranty constitutes the legal, valid and binding obligation of the Guarantor, enforceable in accordance with its terms, subject only to applicable bankruptcy, insolvency and similar laws affecting the enforceability of the rights of creditors generally and the general principles of equity.][***[NTD: To be conformed in execution version based on whether Design-Build Contractor is required to have a Guarantor.]***

2.3.30 [The execution, delivery and performance of the Guaranty have been duly authorized by all necessary action of Guarantor and will not result in a breach of or a default under Guarantor’s organizational documents or any indenture or loan or credit agreement or other material agreement or instrument to which Guarantor is a party or by which its properties and assets may be bound or affected.][***[NTD: To be conformed in execution version based on whether Design-Build Contractor is required to have a Guarantor.]***

## 2.4 Survival of Representations and Warranties

The representations and warranties of Design-Build Contractor contained herein shall survive expiration or earlier termination of this DBA.

## SECTION 3 INFORMATION SUPPLIED TO DESIGN-BUILD CONTRACTOR; SUBMITTALS, DESIGN REQUIREMENTS AND DISCLAIMER; ROLE OF FHWA; GOVERNMENTAL APPROVALS

### 3.1 Information Supplied

INDOT has made available to Design-Build Contractor information that is described in the Technical Provisions and has allowed Design-Build Contractor access to the Site for purposes of inspection and testing.

### 3.2 Submittals

#### 3.2.1 General

3.2.1.1 This Section 3.2 (*Submittals*) sets forth terms and procedures that shall govern all Submittals to INDOT pursuant to the DBA Documents or Project Management Plan and component plans thereunder. In the event of any irreconcilable conflict between the provisions of this Section 3.2 (*Submittals*) and any other provisions of the DBA Documents or Project Management Plan and component plans thereunder concerning submission, review and approval procedures, this Section 3.2 (*Submittals*) shall exclusively govern and control, except to the extent that the conflicting provision expressly states that it supersedes this Section 3.2 (*Submittals*).

3.2.1.2 Whenever Design-Build Contractor provides a Governmental Entity (other than FHWA), Utility Owner, or property owners with a submittal, notice, application, or other communication relating to the Project, Design-Build Contractor shall also concurrently submit a duplicate thereof to INDOT; except that Design-Build Contractor shall provide INDOT a proposed-final submittal, notice, application, or other such communication to or with FHWA at least seven days prior to the earlier of the deadline or expected submission date. Design-Build Contractor shall also provide INDOT with copies of all correspondence or communications by or between Design-Build Contractor and Governmental Entities, Utility Owners, or property owners relating to the Project. Submittals and correspondence with FHWA shall only be made through INDOT.

3.2.1.3 All Submittals shall be submitted via EDMS in each instance in accordance with TP Section 1.2.4 (Electronic Document Management System).

#### 3.2.2 Time Periods

3.2.2.1 Except as otherwise provided in this Section 3.2.2 (*Time Periods*), whenever INDOT is entitled to review, comment on, or to affirmatively approve or accept, a

Submittal, INDOT shall have a period of 21 days to act after the date it receives an accurate and complete Submittal in conformity with the DBA Documents, together with all necessary information and documentation concerning the subject matter to enable INDOT to perform a meaningful review. If INDOT determines that a Submittal is not accurate, complete or materially compliant with the requirements of the DBA Documents, INDOT will notify Design-Build Contractor of such determination within seven days after receipt.

3.2.2.2 Notwithstanding the provisions of Section 3.2.2.1 (Time Periods), whenever INDOT is entitled to review, comment on, review and comment on, or to affirmatively approve or accept, a Submittal consisting of Design Documents or Construction Documents, INDOT shall have a period of 14 days to act after the date it receives an accurate and complete Submittal or re-submittal in conformity with the DBA Documents, together with all necessary or requested information and documentation concerning the subject matter to enable INDOT to perform a meaningful review. If INDOT determines that a Submittal of Design Documents or Construction Documents is not accurate, complete or materially compliant with the requirements of the DBA Documents, it will notify Design-Build Contractor of such determination within seven days. The Parties shall attempt to agree, acting in good faith, upon any necessary extensions of the review, comment, and approval period to accommodate particularly complex or comprehensive Submittals of Design Documents or Construction Documents; provided, however, that if the Parties are unable to agree, then INDOT may, in its reasonable discretion, notify Design-Build Contractor of the extensions that INDOT will commit to observe, but in no event shall such extensions exceed an additional 20 days after the original deadline.

3.2.2.3 If any other provision of the DBA Documents expressly provides a longer or shorter period for INDOT to act, such period shall control over the time periods set forth in Section 3.2.2.1 (Time Periods) and Section 3.2.2.2 (Time Periods).

3.2.2.4 If, at any given time, INDOT is in receipt of more than (a) 15 concurrent Submittals in the aggregate (or other number of aggregate concurrent Submittals agreed to in writing by INDOT and Design-Build Contractor) that are subject to review and comment or approval of INDOT, or (b) the maximum number of concurrent Submittals of any particular type set forth in any other provision of the DBA Documents, INDOT may extend the applicable period to act to that period in which INDOT can reasonably accommodate the Submittals under the circumstances, or such other period of extension set forth in any other provision of the DBA Documents, and no such extension shall constitute an INDOT-Caused Delay, or any other basis for a Relief Event, a Compensation Event, or a Claim. However, if, at any time, INDOT is in receipt of some Submittals subject to Section 3.2.2.1 (Time Periods) above and some Submittals subject to Section 3.2.2.2 (Time Periods) above, then the higher number of Submittals shall be used to determine whether INDOT may extend the applicable period. Submittals are deemed to be concurrent to the extent the review time periods available to INDOT under this Section 3.2.2 (Time Periods) regarding such Submittals either entirely or partially overlap. Whenever INDOT is in receipt of excess concurrent Submittals, Design-Build Contractor may provide to INDOT Notice establishing an order or priority for processing such Submittals; and INDOT shall reasonably comply with such order of priority.

3.2.2.5 All time periods for INDOT to act shall be extended by the period of any delay caused, in whole or in part, by a Design-Build Contractor Fault.

3.2.2.6 INDOT shall endeavor to reasonably accommodate a written request from Design-Build Contractor for expedited action on a specific Submittal, within the reasonable and practical limitations on availability of personnel of INDOT appropriate for acting on the types of Submittal in question; provided Design-Build Contractor sets forth in its request specific, abnormal and exigent circumstances, not caused by any DB-Related Entity (including Design-Build Contractor Fault), demonstrating the need for expedited action. Such accommodation, if undertaken, may result in extension of the time period for review, response or approval of other Submittals. This provision shall not apply, however, during any time described in Section 3.2.2.5 (Time Periods).

3.2.2.7 Whenever INDOT is entitled to affirmatively approve a Submittal or other matter under the DBA Documents, and INDOT delivers no approval, disapproval, acceptance, consent, denial, determination, decision or other action within the applicable time period under this Section 3.2.2 (Time Periods), then Design-Build Contractor may deliver to INDOT a Notice stating the date within which INDOT was to have decided or acted and delay from and after receipt of such Notice by INDOT may constitute an INDOT-Caused Delay for which Design-Build Contractor may be entitled to relief under Section 15 (Relief Events; Compensation Events).

3.2.2.8 Whenever the DBA Documents or any Governmental Approval (or in the process imposed to obtain or maintain such Governmental Approval) specify that a Governmental Entity (e.g., permitting authority or FHWA) is entitled to review, comment on, or to affirmatively approve or accept, a Submittal, then such Governmental Entity shall have the longer of the period specified (a) in the Governmental Approval (or in such process) and (b) the DBA Documents to act after the date the Governmental Entity receives an accurate and complete Submittal in conformity with the DBA Documents, the Governmental Approval (or such process), as applicable, together with all necessary information and documentation concerning the subject matter to enable the Governmental Entity to perform its review.

### **3.3 Responsibility for Design**

#### **3.3.1 Design-Build Contractor Responsibility**

Design-Build Contractor agrees that it has full risk and responsibility for the design of the Project and that Design-Build Contractor will furnish the design of the Project. Design-Build Contractor specifically acknowledges and agrees that:

- (a) Except to the extent expressly provided for in the DBA Documents, but without limiting Sections 1.9.2 (Reference Information Documents) and 1.9.3 (Reference Information Documents), Design-Build Contractor is not entitled to rely on (i) Reference Information Documents, or (ii) any other documents or information provided by or on behalf of INDOT; and

- (b) Design-Build Contractor is responsible for verifying all calculations and quantity takeoffs contained in the Technical Provisions or otherwise provided by INDOT.

### **3.3.2 Design Review Process and Compliance with Released for Construction Documents**

3.3.2.1 Design-Build Contractor, through the appropriately qualified and licensed design professionals identified in Design-Build Contractor’s Project Management Plan shall prepare designs, plans, and specifications in accordance with the DBA Documents. Design-Build Contractor shall cause Registered Professional Engineers to sign and seal all Released-for-Construction Documents.

3.3.2.2 Design-Build Contractor shall furnish the Design Documents and Construction Documents to INDOT and shall obtain approval of INDOT of any Deviations from Project Standards (including Design Exceptions) as specified in Section 2.1.3 (Deviations; Design Exceptions) and in TP Section 2.3 (Submittal and Electronic Posting Requirements). INDOT shall have the right to review and comment on all Design Documents and Construction Documents for compliance with the requirements of the DBA Documents in accordance with Section 3.2 (Submittals) and this Section 3.3.2 (Design Review Process and Compliance with Released for Construction Documents), and with TP Section 2.3 (Submittal and Electronic Posting Requirements) and TP Section 7.4 (Design Submittal Package Requirements), and shall have rights to approve certain other Submittals as set forth in the DBA Documents.

### **3.3.3 Review and Comment by INDOT**

3.3.3.1 Whenever the DBA Documents indicate that a Submittal or other matter (other than a Hold Point) is subject to review, comment, disapproval or similar action by INDOT not entailing a prior approval, including those identified as Witness Points in TP Section 2.2.1 (Witness Points), and INDOT delivers no comments, exceptions, objections, rejections or disapprovals within the applicable time period under Section 3.2.2 (Time Periods), then Design-Build Contractor may proceed thereafter at its election and risk, without prejudice to the rights of INDOT to later object or disapprove on any of the grounds set forth in Section 3.3.5.1 (Resolution of Comments and Objections from INDOT). No such failure or delay by INDOT in delivering comments, exceptions, objections, rejections or disapprovals within the applicable time period under Section 3.2.2 (Time Periods) shall constitute a Relief Event, a Compensation Event, or other basis for any Claim; provided, however, that the foregoing is not intended to waive Design-Build Contractor’s rights regarding affirmative approvals under Section 3.2.2.7 (Time Periods).

3.3.3.2 When used in the DBA Documents, the phrase “completion of the review and comment process” or similar terminology means (a) INDOT or has reviewed, provided comments, exceptions, objections, rejections or disapprovals, and all the same have been resolved, or (b) subject to Section 3.3.3.1 (Review and Comment by INDOT) the applicable time period has passed without INDOT or providing any comments, exceptions, objections, rejections or disapprovals.



### 3.3.4 Submittals Not Subject to Prior Review, Comment or Approval

Whenever the DBA Documents indicate that Design-Build Contractor is to deliver a Submittal to INDOT but express no requirement for INDOT to review, comment, disapprove, provide prior approval or take other action, then Design-Build Contractor is under no obligation to provide INDOT any period of time to review the Submittal or obtain approval of it before proceeding with further Work, and INDOT shall have the right, but is not obligated, to at any time review, comment on, take exception to, object to, reject or disapprove the Submittal in accordance with Section 3.3.5.1 (*Resolution of Comments and Objections from INDOT*). No failure or delay by INDOT in delivering comments, exceptions, objections, rejections or disapprovals with respect to the Submittal shall constitute a Relief Event, a Compensation Event, or any other basis for a Claim.

### 3.3.5 Resolution of Comments and Objections from INDOT

3.3.5.1 INDOT's exception, objection, rejection or disapproval of a Submittal shall be deemed reasonable, valid, and binding if based on any of the following grounds or other grounds set forth elsewhere in the DBA Documents:

- (a) The Submittal or subject provision thereof fails to comply, or is inconsistent, with any applicable covenant, condition, requirement, standard (including Safety Standards), term or provision of the DBA Documents or Project Management Plan and component plans thereunder;
- (b) The Submittal or subject provision thereof is not to a standard equal to or better than Good Industry Practice;
- (c) Design-Build Contractor has not provided all content or information required or reasonably requested in respect of the Submittal or subject provisions thereof, provided that (i) INDOT assumes no duty, obligation or liability regarding completeness or correctness of any Submittal, including a Submittal that is to be delivered to a Governmental Entity as a proposed Governmental Approval, or in order to obtain, modify, amend, supplement, renew, extend, waive or carry out a Governmental Approval, and (ii) Design-Build Contractor shall have the subsequent opportunity to resubmit the Submittal with the required content or information;
- (d) Adoption of the Submittal or subject provision thereof, or of any proposed course of action thereunder, would result in a conflict with or violation of any Governmental Rule or Governmental Approval; or
- (e) In the case of a Submittal that is to be delivered to a Governmental Entity as a proposed Governmental Approval, or in order to obtain, modify, amend, supplement, renew, extend, waive or carry out a Governmental Approval, it proposes commitments, requirements, actions, terms or conditions that are inconsistent with the DBA Documents, the Project Management Plan (and

component plans thereunder), applicable Governmental Rules, the requirements of Good Industry Practice, or the policies of INDOT (except for policies that are incompatible with the Project's design-build contracting methodology).

3.3.5.2 Design-Build Contractor shall respond in writing to all comments, exceptions, disapprovals, and objections to a Submittal from INDOT and, except as provided below, make modifications to the Submittal as necessary to fully reflect and resolve all such comments, exceptions, disapprovals, and objections, in accordance with the review processes set forth in this Section 3.3 (Responsibility for Design). Design-Build Contractor acknowledges that INDOT may provide comments, exceptions, disapprovals, and objections which reflect concerns regarding interpretation or preferences of the commenter or which otherwise do not directly relate to grounds set forth in Section 3.3.5.1 (Resolution of Comments and Objections from INDOT). Design-Build Contractor agrees to undertake reasonable efforts to accommodate or otherwise resolve any such comments, exceptions, disapprovals, or objections through the review processes described in this Section 3.3 (Responsibility for Design). However, if the Submittal is not governed by Section 1.8 (Standard for Approvals), the foregoing shall in no way be deemed to obligate Design-Build Contractor to incorporate any comments or resolve exceptions, disapprovals or objections that (a) are not on any of the grounds set forth in Section 3.3.5.1 (Resolution of Comments and Objections from INDOT) (and not on any other grounds set forth elsewhere in the DBA Documents), (b) are otherwise not reasonable with respect to subject matter or length, and (c) would result in a significant delay to the Critical Path or significant increase in Design-Build Contractor's costs, except pursuant to an INDOT-Directed Change. If, however, Design-Build Contractor does not accommodate or otherwise resolve any comment, exception, disapproval, or objection, Design-Build Contractor shall deliver to INDOT within a reasonable time period, not to exceed 14 days after receipt of comments, exceptions, disapprovals or objections from INDOT, a written explanation as to why modifications based on such comment, exception, disapproval or objection are not required. The explanation shall include the facts, analyses, and reasons that support the conclusion.

3.3.5.3 The foregoing shall in no way be deemed to obligate Design-Build Contractor to incorporate any comments or resolve exceptions, disapprovals, and objections that would render the Submittal erroneous, defective or less than Good Industry Practice, except pursuant to an INDOT-Directed Change.

3.3.5.4 If Design-Build Contractor fails to provide to INDOT Notice within the time period set forth in Section 3.3.5.2 (Resolution of Comments and Objections from INDOT), then that failure shall constitute Design-Build Contractor's agreement to make all changes necessary to accommodate and resolve the comment or objection and full acceptance of all responsibility for such changes without a right to a Relief Event, a Compensation Event, Change Order, or other Claim, including any Claim that INDOT assume design or other liability.

3.3.5.5 After INDOT receive Design-Build Contractor's explanation as to why the modifications are not required as provided in Section 3.3.5.2 (Resolution of Comments

and Objections from INDOT), Section 3.3.5.3 (Resolution of Comments and Objections from INDOT) and Section 3.3.5.4 (Resolution of Comments and Objections from INDOT), if INDOT is not satisfied with Design-Build Contractor's explanation, the Parties shall attempt in good faith to resolve the Dispute. If they are unable to resolve the Dispute and the Submittal or other matter is not one subject to the sole discretion of INDOT under Section 1.8 (Standard for Approvals), the Dispute shall be resolved according to the Dispute Resolution Procedures; provided, however, that if INDOT elects to issue a Directive Letter pursuant to Section 14.3.1 (Issuance of Directive Letter) with respect to the matter in Dispute, Design-Build Contractor shall proceed in accordance with the Directive Letter while retaining the right to make a Claim as to the matter in Dispute.

### 3.3.5.6 Limitations on Design-Build Contractor's Right to Rely

No review, comment, objection, rejection, approval, disapproval, acceptance, release, concurrence, certification (including certificates of Substantial Completion and Final Acceptance), or oversight by or on behalf of INDOT, including review and approval of the Project Management Plan, the Project Baseline Schedule, and any other Project Schedule, and no lack thereof by INDOT, shall constitute acceptance by INDOT of such materials or Work or waiver of any legal or equitable right under the DBA Documents, Governmental Rules, or in equity. INDOT shall be entitled to remedies for unapproved Deviations, unapproved Nonconforming Work, and Design-Build Contractor Defaults and to identify additional Work which must be done to bring the Work and Project into compliance with requirements of the DBA Documents, regardless of whether previous review, comment, objection, rejection, approval, disapproval, acceptance, concurrence, certification, or oversight was conducted or given by INDOT. Design-Build Contractor at all times shall have an independent duty and obligation to fulfill the requirements of the DBA Documents. Design-Build Contractor agrees and acknowledges that any such activity or failure to conduct any such activity by INDOT:

3.3.5.6.1 Is solely for the benefit and protection of INDOT;

3.3.5.6.2 Does not relieve Design-Build Contractor of its responsibility for the selection and the competent performance of all DB-Related Entities;

3.3.5.6.3 Does not create or impose upon INDOT any duty or obligation whatsoever toward Design-Build Contractor to cause it to fulfill the requirements of the DBA Documents;

3.3.5.6.4 Shall not be deemed or construed as any kind of warranty, express or implied, by INDOT;

3.3.5.6.5 May not be relied upon by Design-Build Contractor or used as evidence in determining whether Design-Build Contractor has fulfilled the requirements of the DBA Documents;

3.3.5.6.6 Shall not be deemed or construed as any assumption of risk by INDOT as to design, construction, performance or quality of Work or materials; and

3.3.5.6.7 May not be asserted by Design-Build Contractor against INDOT as a defense, legal or equitable, to, or as a waiver of or relief from, Design-Build Contractor's obligation to fulfill the requirements of the DBA Documents.

3.3.5.6.8 Notwithstanding the foregoing, Design-Build Contractor may rely on affirmative written approvals by INDOT of Nonconforming Work and Deviations with respect to the specific items expressly listed in such affirmative written approval.

3.3.5.7 Design-Build Contractor shall not be relieved or entitled to reduction of its obligations to perform the Work in accordance with the DBA Documents, or any of its other liabilities and obligations, including its indemnity obligations, as the result of any activity identified in Section 3.3.5.6 (*Limitations on Design-Build Contractor's Right to Rely*) or failure to conduct any such activity by INDOT. Such activity by INDOT shall not relieve Design-Build Contractor from liability for, and responsibility to cure and correct, any unapproved Deviations, Nonconforming Work, or Design-Build Contractor Defaults.

3.3.5.8 To the maximum extent permitted by applicable Governmental Rules, Design-Build Contractor hereby releases and discharges INDOT from any and all duty and obligation to cause Design-Build Contractor's Work or the Project to satisfy the standards and requirements Section 3.3.5.7 (*Resolution of Comments and Objections from INDOT*) and Section 3.3.5.8 (*Resolution of Comments and Objections from INDOT*):

- (a) Design-Build Contractor shall be entitled to rely on written approvals, releases and acceptances from INDOT for the limited purpose of establishing that the approval, release or acceptance occurred, but only to the extent that Design-Build Contractor is materially prejudiced by such approval, release or acceptance, or by a subsequent decision of INDOT to rescind such approval, release or acceptance; and
- (b) Design-Build Contractor shall be entitled to rely on specific written direction from INDOT, including Deviations that INDOT approves under Section 2.1.3 (*Deviations; Design Exception*);

3.3.5.9 Design-Build Contractor shall be responsible for coordination and the timing of all design reviews by and obtaining all required design approvals from (i) Governmental Entities (other than INDOT), and (ii) Utility Owners in connection with the Work in accordance with the Technical Provisions.

3.3.5.10 Design-Build Contractor shall construct the Project in accordance with the Released-for-Construction Documents and the Construction Documents. The Released-for-Construction Documents may be changed only with written approval of INDOT.

### **3.4 Design Professional Licensing Requirements**

INDOT does not intend to contract for, pay for, or receive any Professional Services which are in violation of any professional licensing or registration laws, and by execution of this DBA. It is the intent of the Parties that Design-Build Contractor is fully responsible for furnishing the

Professional Services of the Project through Subcontracts with licensed/registered/qualified Professional Services firm(s) as provided herein. Any references in the DBA Documents to Design-Build Contractor’s responsibilities or obligations to “perform” the Professional Services portions of the Work shall be deemed to mean that Design-Build Contractor shall “furnish” the Professional Services for the Project. The terms and provisions of this Section 3.4 (*Design Professional Licensing Requirements*) shall control and supersede every other provision of all DBA Documents.

### **3.5 Role of FHWA**

3.5.1 Design-Build Contractor acknowledges that FHWA will have certain review and approval rights with respect to the Project as well as the right to provide certain oversight and technical services with respect to the Project. Design-Build Contractor shall fully cooperate with FHWA in the exercise of its duties and responsibilities in connection with the Project.

3.5.2 INDOT shall reasonably assist Design-Build Contractor with its duty to cooperate with FHWA under the DBA Documents.

### **3.6 Governmental Approvals and Other Approvals**

3.6.1 Design-Build Contractor shall obtain all Governmental Approvals other than INDOT-Provided Approvals required in connection with the Project, the Site and the Work, including any New Approvals for which Design-Build Contractor is responsible pursuant to Section 7.11 (*Environmental Compliance, Mitigation and Approval Requirements*).

3.6.2 Upon Design-Build Contractor’s receipt of any Governmental Approval for which Design-Build Contractor is responsible under the DBA Documents, Design-Build Contractor shall submit to INDOT a copy of the issued permit and related documentation.

3.6.3 If Design-Build Contractor wishes to pursue Additional Properties or any deviation from any Governmental Approvals, including INDOT-Provided Approvals, Design-Build Contractor shall first comply with, and obtain any consent, approval or waiver required pursuant to, then-existing agreements between INDOT and other Governmental Entities.

3.6.4 Upon Design-Build Contractor’s request, INDOT will reasonably cooperate with Design-Build Contractor in providing Design-Build Contractor with copies of the applicable agreements between INDOT and other Governmental Entities.

3.6.5 If any Governmental Approvals required to be obtained by Design-Build Contractor (which exclude the INDOT-Provided Approvals) must formally be issued in the name of INDOT, Design-Build Contractor shall undertake all efforts to obtain such approvals subject to the reasonable cooperation of INDOT with Design-Build Contractor, at Design-Build Contractor’s expense, including execution and delivery of appropriate applications and other documentation in form approved by INDOT. Design-Build Contractor shall assist INDOT in obtaining any Governmental Approvals which INDOT may be obligated to obtain, including providing information requested by INDOT and participating in meetings regarding such approvals. If

INDOT must act as the lead agency and directly coordinate with a Governmental Entity in connection with obtaining Governmental Approvals that are the responsibility of Design-Build Contractor, then Design-Build Contractor shall provide all necessary support to facilitate the approval, mitigation or compliance process. Such support shall include conducting necessary field investigations, surveys, and preparation of any required reports, documents, and applications.

3.6.6 Design-Build Contractor shall comply with all conditions and constraints imposed by and undertake all actions required by and all actions necessary to obtain, maintain in full force and effect, and renew all Governmental Approvals, including performance of all environmental mitigation measures required by the DBA Documents or Governmental Approvals, except to the extent that responsibility for performance of such measures is expressly assigned to INDOT in the DBA Documents. Design-Build Contractor shall bear all associated costs and schedule risks arising out of such Work. Design-Build Contractor shall also support INDOT in completing the appropriate public involvement associated with all Governmental Approvals other than INDOT-Provided Approvals, or as otherwise required under Section 7.11.2.1 (Performance of Mitigation Measures).

3.6.7 Design-Build Contractor shall obtain all Other Approvals required in connection with the Project, the Site and the Work; provided, however, that Design-Build Contractor shall not obtain any Other Approval or otherwise enter into any agreement with any Governmental Entity, Utility Owner, property owner or other third-party relating to the Project that in any way purports to obligate INDOT or states or implies that INDOT has an obligation to the third-party to carry out any installation, design, construction, maintenance, repair, operation, control, supervision, regulation or other activity after the expiration or termination of this DBA, unless INDOT otherwise approves such agreement prior to execution, in writing, and in its sole discretion. Design-Build Contractor has no power or authority to act as an agent or representative of INDOT or to enter into any such agreement with a third-party in the name or on behalf of INDOT.

3.6.8 Except as provided in Section 15 (Relief Events; Compensation Events), Design-Build Contractor shall not be entitled to any increase in the Contract Price or extension of any Completion Deadline as a result of any delay, inability or cost associated with securing (a) any Other Approval and (b) those Governmental Approvals that the DBA Documents specify are the responsibility of Design-Build Contractor.

3.6.9 For avoidance of doubt, to the extent that the INDOT-Provided Approvals must be modified or another NEPA approval must be obtained for a reason other than a Relief Event or a Compensation Event, Design-Build Contractor shall bear the risk and cost of such modification or approval, including the risk that the modification or approval may not be obtained. In connection with any modification of the INDOT-Provided Approvals or new NEPA approval, even if at the risk of Design-Build Contractor, INDOT shall retain its role under NEPA as the manager of the environmental process and Design-Build Contractor shall support INDOT in connection with the environmental process. Any language in the DBA Documents indicating that Design-Build Contractor shall obtain such modification or approval shall not be construed as affecting INDOT's role under NEPA.

### 3.7 [Reserved]

## SECTION 4 FEDERAL REQUIREMENTS; INDOT REQUIREMENTS

### 4.1 Compliance with Federal Requirements

The Work to be performed under this DBA will be financed in part with federal funds and is therefore subject to federal Governmental Rules applicable to work financed with federal funds, including the Federal Requirements set forth in Exhibit 11 (*Federal Requirements*). Design-Build Contractor shall comply and require its Subcontractors to comply with all applicable Federal Requirements. In the event of any conflict between any applicable Federal Requirements and the other requirements of the DBA Documents, the Federal Requirements shall prevail, take precedence and be in force over and against any such conflicting provisions.

The Parties understand and agree that, because the Project is subject to the Federal Requirements, and because INDOT will maintain the facility after Final Acceptance using federal aid funds, the Project must remain eligible for federal funding participation.

Further, Design-Build Contractor shall not, and shall not permit any other DB-Related Entity to, take any actions or failures to act in the course of performance of the Work that would have the effect of removing the Project from the federal aid system or making the Project ineligible for the future use of federal funds. Should INDOT receive written notice that the Project will lose its eligibility for federal funding and that INDOT will be required to reimburse FHWA as a result of the acts or omissions of any DB-Related Entity, INDOT will provide Notice to Design-Build Contractor and will reasonably attempt to solicit input from Design-Build Contractor in connection with its discussions with FHWA.

### 4.2 Reserved.

### 4.3 DBE Performance Plan and Workforce/EEO Project Plan

#### 4.3.1 General

4.3.1.1 This Project contains a DBE expenditure goal for participation of Indiana or Kentucky certified Disadvantaged Business Enterprises. This DBA and Design-Build Contractor are subject to the provisions of 49 CFR Part 26 and 23 CFR Part 230 regarding administration of the DBE and Workforce/EEO Project Plan consistent with applicable federal law. The purpose of these provisions is to ensure that DBEs shall have an equal opportunity to participate in the performance of design, supply and construction contracts for the Project. Design-Build Contractor shall comply with all applicable requirements set forth herein, including compliance with applicable federal law and regulations and the provisions in Design-Build Contractor's DBE Performance Plan and Workforce/EEO Project Plan approved by INDOT. Collectively these shall constitute the DBE Performance Requirements.

4.3.1.2 Design-Build Contractor shall include provisions to effectuate the DBE Performance Requirements in every applicable Subcontract to which it is a party (including purchase orders and task orders for Work), and shall require that they be included in all applicable Subcontracts at lower tiers (including purchase orders and task orders for Work), so that such provisions will be binding upon each applicable Subcontractor.

#### 4.3.2 DBE Participation Goals

The DBE Goal for DBE participation in the Project required under this DBA, including consultants, Subcontractors and Suppliers is [8]%. **[NTD: To be replaced when final.]** For purposes of clarity, assessment as to whether Design-Build Contractor has achieved the DBE Goal will be measured against the aggregate design, construction, and supply costs, and not separately as to each category of the design, construction and supply costs. Pursuant to the “Agreement Between the Indiana Department of Transportation and the Kentucky Transportation Cabinet Concerning Reciprocity of DBE Certifications,” dated July 12, 2019, Kentucky certified DBEs shall be eligible to work as a certified DBE Subcontractor on the Project without seeking further DBE certification. Design-Build Contractor shall demonstrate that it will make good faith efforts to meet the DBE Goals for the Project in accordance with applicable federal laws.

#### 4.3.3 DBE Performance Plan and EEO/Workforce Project Plan

4.3.3.1 Design-Build Contractor has submitted to INDOT as part of its Proposal a draft DBE Performance Plan. The proposed final DBE Performance Plan is subject to further review and comment by INDOT prior to final approval and such approval is a condition to commencement of design, per Section 4.4 (Nondiscrimination).

4.3.3.2 In preparing the final DBE Performance Plan, Design-Build Contractor shall include, to the extent known at the time of preparation:

- (a) Demonstrated ability to meet or exceed the DBE utilization goal, inclusive of how they will identify Indiana certified DBE’s who perform/provide professional services, equipment, materials and supplies; their potential scope of work; potential dollar amount; and the percentage of the total project. In addition to identifying certified DBEs, Design-Build Contractor shall provide a DBE subcontracting plan that includes, but may not be limited to: examples of sub-agreements to be utilized with certified DBEs, example of a DBE subcontracting plan procurement and utilization report; a dispute resolution process; a process for effective and timely communications with DBE Subcontractors; assistance with insurance and bonding; a process for managerial and technical performance reviews, feedback and improvement; a process for the accurate tracking of hauling dollars for DBE and non-DBE subcontractors; and an explanation of the invoice and payment process;
- (b) Estimated time frames for achieving DBE participation (i.e., in what years of the Project will DBE participation be realized);



- (c) The name of Design-Build Contractor’s “DBE Compliance Manager,” a resume and explanation regarding that individual’s qualifications for the position and description of the DBE Compliance Manager’s reporting structure and responsibilities; and
- (d) Commitment to communicate and fully cooperate with INDOT on DBE participation and compliance efforts throughout the term of this DBA.

4.3.3.3 The final DBE Performance Plan shall respond to the comments of INDOT and comply with the DBE Performance Requirements and Governmental Rules and Governmental Approvals.

4.3.3.4 Design-Build Contractor shall exercise good faith efforts to achieve the DBE Goal for the Project through implementation of Design-Build Contractor’s approved DBE Performance Plan.

4.3.3.5 Design-Build Contractor shall report payments made to DBE Subcontractors on a monthly basis. Monthly reports shall be made using the Project’s EDMS and shall identify any payments outstanding to DBE Subcontractors, track any payment issues identified by DBE Subcontractors and report the resolution of any payment issue, and confirm that the prompt payment provisions required by federal law (49 CFR 26.29) and pursuant to Section 108 of the Standard Specifications have been adhered to by Design-Build Contractor. DBE Subcontractor payments shall also be reported to INDOT as reasonably requested for any purpose and in a format to be determined by INDOT.

4.3.3.6 Design-Build Contractor shall comply with 25 IAC 5, including any Indiana Department of Administration determination as to the applicable requirements for this Project, and Section 103.01 of the Standard Specifications.

#### **4.4 Nondiscrimination**

4.4.1 Pursuant to the Indiana Civil Rights Law, specifically including IC § 22-9-1-10, and in keeping with the purposes of the Civil Rights Act of 1964, the Age Discrimination in Employment Act, and the Americans with Disabilities Act, Design-Build Contractor covenants that it shall not discriminate against any employee or applicant for employment relating to this DBA with respect to the hire, tenure, terms, conditions or privileges of employment or any matter directly or indirectly related to employment, because of the employee’s or applicant’s race, color, national origin, religion, sex, age, disability, ancestry, or status as a veteran or any other characteristic protected by federal, state or local law (“Protected Characteristics”). Design-Build Contractor certifies compliance with applicable federal Governmental Rules prohibiting discrimination based on the Protected Characteristics in the provision of services under the DBA Documents. Breach of this covenant may be regarded as a material breach of this DBA.

4.4.2 INDOT is a recipient of federal funds, and therefore, where applicable, Design-Build Contractor and any contractors or subcontractors shall comply with requisite affirmative

action requirements, including reporting, pursuant to 41 CFR Chapter 60, as amended, and Section 202 of Executive Order 11246 as amended by Executive Order 13672.

4.4.3 Design-Build Contractor agrees that if Design-Build Contractor employs fifty (50) or more employees and does at least \$50,000.00 worth of business with the State and is not exempt, Design-Build Contractor will comply with the affirmative action reporting requirements of 41 CFR 60-1.7. Design-Build Contractor shall comply with Section 202 of executive order 11246, as amended, 41 CFR 60-250, and 41 CFR 60-741, as amended, which are incorporated herein by reference. Breach of this covenant may be regarded as a material breach of this DBA.

4.4.4 It is the policy of INDOT to assure full compliance with Title VI of the Civil Rights Act of 1964, the Americans with Disabilities Act and Section 504 of the Vocational Rehabilitation Act and related statutes and regulations in all programs and activities. Title VI and related statutes require that no person in the United States shall on the grounds of race, color or national origin be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving federal financial assistance. (INDOT's nondiscrimination enforcement is broader than the language of Title VI and encompasses other State and federal protections. INDOT's nondiscrimination enforcement shall include the following additional grounds: sex, sexual orientation, gender identity, ancestry, age, income status, religion, disability, limited English proficiency, or status as a veteran.)

4.4.5 During the performance of this DBA, Design-Build Contractor agrees to the following assurances under Title VI of the Civil Rights Act of 1964:

4.4.5.1 Compliance with Regulations: Design-Build Contractor shall comply with the Regulations, which are incorporated herein by reference and made a part of this DBA.

4.4.5.2 Nondiscrimination: Design-Build Contractor, with regard to the Work, shall not discriminate on the grounds of race, color, sex, sexual orientation, gender identity, national origin, religion, disability, ancestry, or status as a veteran in the selection and retention of Subcontractors or Suppliers. Design-Build Contractor shall not participate either directly or indirectly in the discrimination prohibited by Section 21.5 of the Regulations, including employment practices when the DBA covers a program set forth in Appendix B of the Regulations.

4.4.5.3 Solicitations for Subcontracts, Including Procurements of Materials and Equipment: In all solicitations either by competitive bidding or negotiation made by Design-Build Contractor for work to be performed under a Subcontract, each potential Subcontractor or Supplier shall be notified by Design-Build Contractor of Design-Build Contractor's obligations under this DBA, and the Regulations relative to nondiscrimination on the grounds of race, color, sex, sexual orientation, gender identity, national origin, religion, disability, ancestry, income status, limited English proficiency, or status as a veteran.

4.4.5.4 Information and Reports: Design-Build Contractor shall provide all information and reports required by the Regulations, or directives issued pursuant thereto, and

shall permit access to its Books and Records as well as other accounts, sources of information, and its facilities as may be determined by INDOT and FHWA to be pertinent to ascertain compliance with such Regulations, orders and instructions. Where any information required of Design-Build Contractor is in the exclusive possession of another who fails or refuses to furnish this information, Design-Build Contractor shall so certify to INDOT or FHWA as appropriate, and shall set forth what efforts it has made to obtain the information.

4.4.5.5 **Sanctions for Noncompliance:** If Design-Build Contractor is not in compliance with the nondiscrimination provisions of this DBA, then INDOT shall impose such contract sanctions as it or FHWA may determine to be appropriate, including: (a) withholding payments to Design-Build Contractor under this DBA until Design-Build Contractor complies, or (b) cancellation, termination or suspension of this DBA, in whole or in part.

4.4.6 Design-Build Contractor shall take such action with respect to any Subcontract or procurement as INDOT or FHWA may direct as a means of enforcing such provisions including sanctions for non-compliance; provided, however, that in the event Design-Build Contractor becomes involved in, or is threatened with, litigation with a Subcontractor or Supplier as a result of such direction, Design-Build Contractor may request INDOT to enter into such litigation to protect the interests of INDOT, and, in addition, Design-Build Contractor may request the United States of America to enter into such litigation to protect the interests of the United States of America.

## **4.5 Federal On-the-Job Training Participation Goal**

This DBA is subject to federal on-the-job training participation provisions as set forth in Title 23 CFR, Part 230 and FHWA Form 1273 (Exhibit 11). Design-Build Contractor will be signatory to INDOT's "On-the-Job Training Program and Partnership Agreement" and will make good faith efforts to achieve the training goal established therein (Attachment 8 to Exhibit 11 (Federal Requirements)) of this DBA). The EEO/Workforce Project Plan shall incorporate and be consistent with Attachment 8 to Exhibit 11 (Federal Requirements).

## **4.6 Prevailing Wages**

Design-Build Contractor shall pay or cause to be paid to all applicable workers employed by it or its Subcontractors to perform the Work not less than the highest prescribed prevailing rates of wages, as provided in the statutes and regulations applicable to public construction projects and public work contracts, to the extent provided in Exhibit 11 (Federal Requirements), and the Davis-Bacon Act and any other laws applicable to the Project. For purposes of clarity, (a) as between the prescriptions under the Davis-Bacon Act (if applicable), the "prevailing rate of wages" shall be, in respect of each labor category, the higher value prescribed and (b) notwithstanding any term of this DBA to the contrary, to the extent that FHWA and the U.S. Department of Labor approve project-specific wage rates for the Project, then Design-Build Contractor shall pay, and shall cause all Subcontractors to pay, such project-specific wage rates when performing or when contracting for the performance of any of Design-Build Contractor's obligations under this DBA. Design-Build Contractor shall comply and cause its Subcontractors performing Work to comply with all Governmental Rules pertaining to prevailing wages.

## **4.7 Lobbying**

The certification and disclosure of lobbying activities described in Exhibit 11 (Federal Requirements) shall be included in each Subcontract (including any lower-tier Subcontracts exceeding \$100,000). All disclosure forms, but not certifications, shall be forwarded from tier to tier until received by INDOT.

## **4.8 Americans with Disabilities Act (ADA)**

The Project and Design-Build Contractor's performance of the Work shall in all respects comply with the Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. § 12101 *et seq.*, including any amendments, as well as all applicable regulations and guidelines.

## **4.9 INDOT Requirements**

### **4.9.1 State Ethics Law**

Design-Build Contractor and its agents shall abide by all ethical requirements that apply to persons who have a business relationship with INDOT or the State, as set forth in IC § 4-2-6 *et seq.*, IC § 4-2-7 *et seq.*, the regulations promulgated thereunder and Executive Order 04-08, dated April 27, 2004. If Design-Build Contractor is not familiar with these ethical requirements, Design-Build Contractor should refer any questions to the Indiana State Ethics Commission, or visit the Indiana State Ethics Commission website at <http://www.in.gov/ethics/>. If Design-Build Contractor or its agents violate any applicable ethical standards, Design-Build Contractor may be subject to penalties under IC §§ 4-2-6, 4-2-7, 35-44-1-3, and under any other applicable Governmental Rules.

### **4.9.2 Prohibition on Political Contributions**

Design-Build Contractor and its agents shall abide by all requirements of IC § 8-15.7-16 in respect of the prohibition on political contributions by Design-Build Contractor. Neither Design-Build Contractor nor any individual who has an interest in Design-Build Contractor, may make any contribution to any candidate, or committee, during and up to and including three years following the expiration or earlier termination of this DBA as described in Section 26.6 (Term).

### **4.9.3 State Conflicts of Interest Policy**

Design-Build Contractor shall comply in all respects with the "State of Indiana – P3 Program Implementation Guidelines – Conflict of Interest Policy" set forth in Exhibit 16 (INDOT Conflict of Interest Policy).

### **4.9.4 Assignment of Antitrust Claims**

Design-Build Contractor hereby assigns to INDOT all right, title and interest in and to any claims Design-Build Contractor now has, or may acquire, under state or federal antitrust laws relating to the Work performed under this DBA.

#### 4.9.5 Drug-Free Workplace

As required by Executive Order No. 90-5 dated April 12, 1990, issued by the Governor of the State, Design-Build Contractor hereby covenants and agrees to make a good faith effort to provide and maintain a drug-free workplace. Design-Build Contractor will give written notice to INDOT within 10 days after receiving actual notice that Design-Build Contractor, or an employee of Design-Build Contractor in the State, has been convicted of a criminal drug violation occurring in the workplace. False certification or violation of this certification may result in sanctions including, but not limited to, suspension of contract payments, termination of this DBA or debarment of contracting opportunities with INDOT for up to three years. Design-Build Contractor certifies and agrees that it will provide a drug-free workplace by:

4.9.5.1 publishing and providing to all of its employees a statement notifying them that the unlawful manufacture, distribution, dispensing, possession or use of a controlled substance is prohibited in Design-Build Contractor's workplace, and specifying the actions that will be taken against employees for violations of such prohibition;

4.9.5.2 establishing a drug-free awareness program to inform its employees of (i) the dangers of drug abuse in the workplace; (ii) Design-Build Contractor's policy of maintaining a drug-free workplace; (iii) any available drug counseling, rehabilitation and employee assistance programs; and (iv) the penalties that may be imposed upon an employee for drug abuse violations occurring in the workplace;

4.9.5.3 notifying all employees in the statement required by subparagraph (a) above that as a condition of continued employment, the employee will (i) abide by the terms of the statement; and (ii) notify Design-Build Contractor of any criminal drug statute conviction for a violation occurring in the workplace no later than five days after such conviction;

4.9.5.4 notifying INDOT in writing within 10 days after receiving notice from an employee under subpart (ii) of Section 4.9.5.3 (*Drug-Free Workplace*) above, or otherwise receiving actual notice of such conviction;

4.9.5.5 within 30 days after receiving notice under subpart (ii) of Section 4.9.5.3 (*Drug-Free Workplace*) above of a conviction, imposing the following sanctions or remedial measures on any employee who is convicted of drug abuse violations occurring in the workplace: (i) taking appropriate personnel action against the employee, up to and including termination; or (ii) requiring such employee to satisfactorily participate in a drug abuse assistance or rehabilitation program approved for such purposes by a federal, state or local health, law enforcement, or other appropriate agency; and

4.9.5.6 making a good faith effort to maintain a drug-free workplace through the implementation of Section 4.9.5.1 (*Drug-Free Workplace*) through Section 4.9.5.5 (*Drug-Free Workplace*) above.

#### 4.9.6 Employment Eligibility Verification

Design-Build Contractor affirms under the penalties of perjury that it does not knowingly employ an unauthorized alien. Design-Build Contractor further agrees that:

4.9.6.1 The Design-Build Contractor shall enroll in and verify the work eligibility status of all its newly hired employees through the E-Verify program as defined in IC § 22-5-1.7-3. Design-Build Contractor is not required to participate should the E-Verify program cease to exist.

4.9.6.2 Design-Build Contractor shall not knowingly employ or contract with an unauthorized alien. Design-Build Contractor shall not retain an employee or contract with a person that Design-Build Contractor subsequently learns is an unauthorized alien.

4.9.6.3 Design-Build Contractor shall require Subcontractors to certify to Design-Build Contractor that the Subcontractor does not knowingly employ or contract with an unauthorized alien and that the Subcontractor has enrolled and is participating in the E-Verify program. Design-Build Contractor agrees to maintain this certification throughout the duration of the term of any Subcontract.

#### 4.9.7 **Non-Collusion**

To the undersigned's knowledge, neither the undersigned nor any other member, employee, representative, agent or officer of Design-Build Contractor, directly or indirectly, has entered into or been offered any sum of money or other consideration for the execution of this DBA, other than that which appears upon the face hereof. Furthermore, if the undersigned has knowledge that a State officer, employee, or special State appointee, as those terms are defined in IC § 4-2-6-1, has a financial interest in this DBA, Design-Build Contractor attests to compliance with the disclosure requirements in IC § 4-2-6-10.5.

#### 4.9.8 **Penalties, Interest, and Attorney's Fees**

Notwithstanding any other provision of this DBA, INDOT does not agree to pay any penalties, liquidated damages, interest, or attorney's fees, except as required by State law in part, IC § 5-17-5, IC § 34-54-8, and IC § 34-13-1. Notwithstanding the provisions contained in IC § 5-17-5, any liability resulting from INDOT's failure to make prompt payment shall be based solely on the amount of funding originating from INDOT and shall not be based on funding from federal or other sources.

#### 4.9.9 **No Investment in Iran**

In accordance with IC § 5-22-16.5, Design-Build Contractor represents and warrants that it is not engaged *in* investment activities in Iran.

**SECTION 5 TIME WITHIN WHICH PROJECT SHALL BE COMPLETED;  
SCHEDULE AND PROGRESS**

**5.1 Time of Essence; Notices to Proceed**

**5.1.1 Time of Essence**

As a material consideration for entering into this DBA, Design-Build Contractor hereby commits, and INDOT is relying upon Design-Build Contractor's commitment, to design and construct the Project and complete the Work in accordance with the time periods and on or before deadlines set forth in this DBA. Except where this DBA expressly provides for an extension of time, the time limitations set forth in the DBA Documents for Design-Build Contractor's performance of its covenants, conditions, and obligations are of the essence, and Design-Build Contractor waives any right at law or in equity to tender or complete performance beyond the applicable time period, or to require INDOT to accept such performance.

Authorization allowing Design-Build Contractor to proceed with Work shall be provided by INDOT's issuance of Notices to Proceed.

**5.1.2 Notice to Proceed 1**

INDOT anticipates issuing NTP1 concurrently with the execution and delivery of this DBA. Without limiting the additional conditions to commencement of certain portions of the Work under Section 5.4 (Commencement of Design) and Section 5.5 (Conditions to Commencement of Construction), issuance of NTP1 authorizes Design-Build Contractor to:

5.1.2.1 perform the portion of the Work necessary to obtain INDOT's approval of the component parts, plans and documentation of the Project Management Plan in accordance with the TP Section 1.5.3 (Project Management Plan);

5.1.2.2 support any INDOT-Provided Approval re-evaluation, amendment, or supplement, or New Approval, as may be required;

5.1.2.3 perform coordination activities with respect to Utility Adjustments that Design-Build Contractor is permitted to perform prior to NTP2, in accordance with Section 7.3 (Utility Adjustments) and TP Section 16 (Utilities);

5.1.2.4 prepare and deliver to INDOT the NTP1 Project Baseline Schedule and the NTP1 Schedule of Values; and

5.1.2.5 engage in the other activities anticipated to be performed after NTP1, including specifically satisfaction of all of the conditions to issuance of NTP2 under Section 5.1.3 (Notice to Proceed 2).

**5.1.3 Notice to Proceed 2**

Issuance of *NTP2* authorizes Design-Build Contractor to perform all other Work not authorized by *NTP1*. INDOT will issue *NTP2* within 15 Business Days after Design-Build Contractor's satisfaction of the conditions to issuance of *NTP2*. Without limiting the additional conditions to commencement of certain portions of the Work under Section 5.4 (*Commencement of Design*) and Section 5.5 (*Conditions to Commencement of Construction*), conditions to issuance of *NTP2* shall be:

- (a) *NTP1* has been issued;
- (b) receipt by INDOT of the Performance Bond and the Payment Bond, in form and from a Surety approved by INDOT, as required under Section 9 (*Performance and Payment Bonds*), and Design-Build Contractor has delivered to INDOT certified and conformed copies of the originals of each such bond, with the original of each such bond delivered to Design-Build Contractor;
- (c) [the Guaranties, if any, required under Section 9.3 ([Guaranty]) have been delivered to INDOT and are in full force and effect;]**[NTD: To be conformed in execution version based on whether Design-Build Contractor is required to have a Guarantor.]**
- (d) all required insurance has been obtained and is in full force and effect, as evidenced by insurance policies, certificates of insurance, endorsements to existing insurance policies or other evidence reasonably required by INDOT to confirm the existence of all required insurance;
- (e) Design-Build Contractor has made available the Key Personnel required, and at the place(s) (if and as required under the Technical Provisions), to be available as of the date of *NTP2*, and those Key Personnel that were required, and at the place(s), to be available as of the date of *NTP1* remain available and at such place(s), except and only to the extent approved otherwise by INDOT;
- (f) INDOT has approved, in writing, any changes in Key Personnel, in accordance with Section 8.2.1 (*Key Personnel; Character of Employees; Key Personnel Liquidated Damages*);
- (g) (i) Design-Build Contractor has received, paid all associated fees for, and (if applicable) achieved or satisfied all conditions under, all applicable Governmental Approvals and other applicable third party approvals that Design-Build Contractor is obligated to obtain and maintain prior to commencement and performance of any non-Construction Work authorized by *NTP2*, (ii) all such Governmental Approvals and third party approvals are not subject to appeal; (iii) there exists no uncured material violation of the terms and conditions of any such Governmental Approval or such third party approvals, and (iv) Design-Build Contractor has furnished to INDOT fully executed copies of all such Governmental Approvals and such third party approvals;



- (h) Design-Build Contractor has caused to be developed and delivered to INDOT, and INDOT has accepted, each in accordance with TP Section 1.5 (Project Management), the component Submittals of the Project Management Plan required as a condition to NTP2;
- (i) Without limiting Design-Build Contractor’s obligations under Section 5.3.1.2 (Project Baseline Schedule), Design-Build Contractor has submitted to INDOT, and INDOT has accepted, the Schedule of Values and the NTP2 Project Baseline Schedule, in accordance with TP Section 1.5.2 (Project Administration); and
- (j) Design-Build Contractor has provided to INDOT any other documents, materials or assurances required by the DBA Documents as a condition of NTP2.

**5.1.4 Commencement of Work Under NTP1 and NTP2**

Design-Build Contractor shall begin performance of the Work as directed in NTP1 and NTP2, as applicable, and Design-Build Contractor shall not proceed with the Work until directed by INDOT through issuance of NTP1 and NTP2, as applicable.

**5.1.5 INDOT Obligations Re: NTP1 and NTP2**

Design-Build Contractor acknowledges and agrees that (a) INDOT has no obligation to issue NTP1 or NTP2, and (b) subject to Section 17.13 (Termination for Failure to Issue NTP1; Termination for Materially Delayed NTP2), unless and until NTP1 is issued, INDOT has no liability to Design-Build Contractor under the DBA Documents. Once NTP1 is issued, Design-Build Contractor is entitled to payment for Work performed pursuant to this DBA, subject to any limitations and *constraints* set forth in the DBA Documents

**5.2 Completion Deadlines**

**5.2.1 Substantial Completion Deadline**

Design-Build Contractor shall achieve Substantial Completion by \_\_\_\_ **[●][NTD: to be inserted from Form L of Proposer’s Proposal, which will in no case be later than the “Substantial Completion Deadline” as identified in the RFP]**. Said date for achieving Substantial Completion, as it may be extended pursuant to Section 14 (Changes in the Work) and Section 15 (Relief Events; Compensation Events), is referred to herein as the “Substantial Completion Deadline.”

**5.2.2 Final Acceptance Deadline**

Design-Build Contractor shall achieve Final Acceptance no later than 150 days after the Substantial Completion Date. Such deadline, as it may be extended hereunder, is referred to herein as the “Final Acceptance Deadline.”

**5.2.3 Time Extensions**

Except to the extent a Relief Event or a Compensation Event has occurred, INDOT shall have no obligation to extend a Completion Deadline and Design-Build Contractor shall not be relieved of its obligation to comply with the Project Baseline Schedule and to achieve Substantial Completion and Final Acceptance by the applicable Completion Deadlines for any reason.

### **5.3 Scheduling of Design, Construction and Payment**

#### **5.3.1 Project Baseline Schedule**

5.3.1.1 Design-Build Contractor shall perform and complete the Work in accordance with the then-current Project Baseline Schedule.

5.3.1.2 Design-Build Contractor shall prepare and deliver to INDOT an update to the Preliminary Project Baseline Schedule and a corresponding update to the Schedule of Values within 90 days of the Effective Date (respectively, the “NTP1 Project Baseline Schedule” and the “NTP1 Schedule of Values”) within 90 days after the effective date of NTP1. The NTP1 Project Baseline Schedule shall become the then-current Project Baseline Schedule and the NTP1 Schedule of Values shall become the then-current Schedule of Values upon INDOT acceptance thereof.

5.3.1.3 Design-Build Contractor shall prepare and deliver to INDOT an update to the Project Baseline Schedule and a corresponding update to the Schedule of Values within 10 days of execution of any Directive Letter or Change Order (respectively, a “Revised Project Baseline Schedule” and a “Revised Schedule of Values”). Any Revised Project Baseline Schedule shall become the then-current Project Baseline Schedule and any Revised Schedule of Values shall become the then-current Schedule of Values upon INDOT acceptance thereof.

5.3.1.4 The Project Baseline Schedule and Schedule of Values shall be used by the Parties for planning and monitoring the progress of the Work and as the basis for determining the amount of monthly progress payments to be made to Design-Build Contractor. Design-Build Contractor shall submit to INDOT, for approval in their good faith discretion, any updates or revisions to the Project Baseline Schedule or Schedule of Values in accordance with TP Section 1.5.2 (Project Administration).

5.3.1.5 For avoidance of doubt, the Project Baseline Schedule only (and not any other Project Schedule) is relevant to measuring the duration of any delay hereunder; provided, however, that such other Project Schedules may be relevant to determining whether (a) Design-Build Contractor mitigated any such delay, and (b) with approved invoices, a portion of the Work identified on the Project Baseline Schedule was completed.

#### **5.3.2 Float**

All Float contained in the Project Baseline Schedule or generated thereafter shall be considered a Project resource available to either Party or both Parties as needed to absorb delays caused by any event and achieve schedule milestones, interim completion dates or Completion

Deadlines. All Float shall be shown as such in the Project Baseline Schedule on each affected schedule path. Identification of (or failure to identify) Float on the schedule shall be examined by INDOT in determining whether to approve the Project Baseline Schedule. Once identified, Design-Build Contractor shall monitor, account for and maintain Float in accordance with critical path methodology.

### 5.3.3 Reliance by INDOT; Disclaimer

5.3.3.1 The Parties shall use the then-applicable Project Baseline Schedule to plan and monitor the progress of the Work, and as the basis to determine the amount of payments owing from INDOT to Design-Build Contractor.

5.3.3.2 INDOT has no obligation to accept a Project Baseline Schedule that sets forth Completion Deadlines that differ from those set forth in the previously-approved Project Baseline Schedule, as those durations may be extended pursuant to the DBA Documents; provided, however, that, if INDOT accepts a Project Baseline Schedule with Completion Deadlines forecasted earlier than the previously-approved Project Baseline Schedule, then the difference between the forecasted early Completion Deadline and the specified Completion Deadline shall be considered Float; provided, further, that if Design-Build Contractor plans to achieve any Completion Milestone prior to the Completion Deadline, INDOT shall not be responsible for any delays or compensation related to delays, however caused, that affect Design-Build Contractor's planned early completion.

5.3.3.3 Acceptance by INDOT of a Project Baseline Schedule shall not:

- (i) Imply acceptance by INDOT of any particular construction methods, or relieve Design-Build Contractor from its responsibility to provide sufficient materials, equipment, and labor to guarantee completion of the Project in accordance with the DBA Documents;
- (ii) Attest to the validity of assumptions, activities, relationships, sequences, resource allocations, or any other aspect of the applicable Project Baseline Schedule;
- (iii) Imply that Design-Build Contractor is entitled to any Relief Event or Compensation Event extending a Completion Deadline or adjusting the Contract Price; or
- (iv) Modify the DBA Documents.

5.3.3.4 Design-Build Contractor's failure to include in the applicable Project Baseline Schedule any element of Work required by the DBA Documents shall not relieve Design-Build Contractor of its responsibility to perform that element of Work.

5.3.3.5 For the avoidance of doubt, Project Status Schedules and Revised Project Schedules do not serve to revise or amend, nor shall be deemed to revise or amend, the

Project Baseline Schedule, and (b) SOV Updates do not serve to revise or amend, nor shall they be deemed to revise or amend, any corresponding Baseline Schedule of Values.

## 5.4 Commencement of Design

### 5.4.1 Conditions to Commencement of Design

Except to the extent expressly permitted in writing by INDOT, Design-Build Contractor shall not commence or permit commencement of Design Work until satisfaction of the following conditions:

- (a) INDOT has received Project-specific safety plans for field investigations, and INDOT has approved the Design Quality Management Plan;
- (b) INDOT has received and approved Design-Build Contractor's DBE Performance Plan and EEO/Workforce Project Plan in accordance with Section 4.3.3 (DBE Performance Plan and EEO/Workforce Project Plan), Section 4.5 (Federal On-the-Job Training Participation Goal), and Attachment 8 to Exhibit 11 (Federal Requirements), respectively;
- (c) Design-Build Contractor has certified to INDOT that Design-Build Contractor's relevant personnel, or Design-Build Contractor's Subcontractors' relevant personnel, hold all necessary or required registrations, permits or approvals and valid licenses to practice as are necessary for performance of relevant portions of the Work and as are otherwise necessary to comply with the Technical Provisions;
- (d) Design-Build Contractor has notified INDOT of the design consultant that will perform ITS-related Work as described in TP Section 10 (Intelligent Transportation System);
- (e) Design-Build Contractor has submitted and INDOT has accepted the NTP1 Project Baseline Schedule and the NTP1 Schedule of Values, respectively, pursuant to Section 5.3.1.1 (Project Baseline Schedule);
- (f) INDOT has delivered NTP2 to Design-Build Contractor (except for any Work expressly authorized under Section 5.1.2 (Notice to Proceed 1));
- (g) The Performance Bond and Payment Bond shall remain in full force and effect;
- (h) [The Guaranties, if any, remain in full force and effect;][**NTD: To be conformed in execution version based on whether Design-Build Contractor is required to have a Guarantor.**]
- (i) All required insurance is or remains in full force and effect;

- (j) Design-Build Contractor has satisfied all other conditions to commencement of design Work in the DBA Documents; and
- (k) Design-Build Contractor has provided to INDOT at least 10 days' advance Notice of the date Design-Build Contractor determines that it will satisfy all of the conditions set forth in this Section 5.4 (*Commencement of Design*) and INDOT has not objected in writing.

#### 5.4.2 Additional Obligations Relating to Commencement of Design

- (a) Within 45 days after the later of (i) achievement of all of the conditions to commencement of Design Work set forth in Section 5.4.1 (*Conditions to Commencement of Design*) and (ii) commencement of Design Work, Design-Build Contractor shall:
  - (i) Obtain approval from INDOT of all the remaining component parts, plans and documentation of the Project Management Plan, each as described in TP Section 1.5 (Project Management); and
  - (ii) Satisfy all other requirements or conditions to commencement of Design Work set forth in the Technical Provisions, including participation in environmental training as is obligated under the environmental compliance and mitigation training program as set forth in TP Section 18.3.2.2 (Environmental Compliance and Mitigation Training Program);
- (b) If Design-Build Contractor does not satisfy each of the conditions set forth in clause (a) above, INDOT may direct suspension of Design Work or cease reviewing Submittals of Design Documents, in its sole discretion (and such suspensions shall not be, nor be deemed to be, a suspension for convenience of INDOT under Section 16.1 (*Suspension for Convenience*) and shall be considered Design-Build Contractor Fault).

### 5.5 Conditions to Commencement of Construction

#### 5.5.1 Construction Work Generally

Design-Build Contractor shall not start construction (or recommence construction following any suspension) of the Project prior to occurrence of all the following events except with the prior written approval of INDOT, in its sole discretion, and Design-Build Contractor shall commence such construction promptly following occurrence of such events:

- 5.5.1.1 INDOT has delivered NTP2 to Design-Build Contractor;
- 5.5.1.2 INDOT has approved the Project Baseline Schedule;

5.5.1.3 INDOT has provided the Written Release with respect to all Hold Points that require satisfaction prior to commencement of construction in TP Section 2.2.2 (Hold Points) that are designated as requiring approval prior to commencement of construction of the Project;

5.5.1.4 INDOT has approved the Transportation Management Plan in accordance with TP Section 9.3.1 (Transportation Management Plan);

5.5.1.5 Design-Build Contractor has met all requirements of the approved Construction Quality Management Plan that are a condition to commencement of construction;

5.5.1.6 Design-Build Contractor has delivered to INDOT, and obtained all required approvals from INDOT and any other applicable Governmental Entity with respect to, the Submittals relating to the Construction Work required by the Project Management Plan and DBA Documents, in the form and content required by the Project Management Plan and DBA Documents, as applicable;

5.5.1.7 Reserved.

5.5.1.8 INDOT has reviewed and commented on all applicable Design Documents and Construction Documents, including Released-for-Construction Documents, and Design-Build Contractor has addressed and incorporated such comments in accordance with Section 3.3 (*Responsibility for Design*);

5.5.1.9 All Governmental Approvals necessary for construction of the Project (including the Environmental Determination and final, approved NEPA Documents) have been obtained and, except for INDOT-Provided Approvals, Design-Build Contractor has furnished to INDOT fully executed copies of such Governmental Approvals;

5.5.1.10 Design-Build Contractor has obtained all Other Approvals necessary for construction of the applicable portion of the Project, and Design-Build Contractor has furnished to INDOT fully executed copies of such Other Approvals;

5.5.1.11 Design-Build Contractor has performed and satisfied all conditions of Governmental Approvals necessary for construction of applicable portion of the Project which are a prerequisite to commencement of such construction;

5.5.1.12 Design-Build Contractor has identified all rights of access acceptable to INDOT, in its good faith discretion, in the MOT Limits and Project ROW necessary for commencement of construction of the Project, all necessary parties have validly executed and delivered any required possession and use agreement therefor on terms acceptable to INDOT has issued the ROW Certification for the Project ROW;

5.5.1.13 Design-Build Contractor has completed all pre-construction environmental surveys and mitigation as required by the Governmental Approvals or otherwise under the DBA Documents for construction, and Design-Build Contractor has performed all

other survey work and delivered all Notices required by the DBA Documents to be delivered prior to commencement of construction of the Project;

5.5.1.14 All representations and warranties of Design-Build Contractor set forth in Section 2.3 (*Representations, Warranties and Covenants*) shall be and remain true and correct in all material respects;

5.5.1.15 There exists no uncured breach or Event of Default for which Design-Build Contractor has received Notice from INDOT;

5.5.1.16 Each of the Performance Bond and the Payment Bond remains in full force and effect;

5.5.1.17 [The Guaranties, if any, remain in full force and effect;][NTD: **To be conformed in execution version based on whether Design-Build Contractor is required to have a Guarantor.**]

5.5.1.18 All required insurance remains in full force and effect;

5.5.1.19 Design-Build Contractor has provided to INDOT at least 10 days advance Notice of the date Design-Build Contractor determines that it will satisfy all of the conditions set forth in Section 5.4 (*Commencement of Design*) and INDOT has not objected in writing;

5.5.1.20 Design-Build Contractor has certified to INDOT that Design-Build Contractor's relevant construction personnel, or Design-Build Contractor's Subcontractors' relevant personnel, hold all necessary or required registrations, permits or approvals, and valid licenses to practice as are necessary for performance of relevant portions of the Work and as are otherwise necessary to comply with the DBA Documents;

5.5.1.21 INDOT-Provided Approvals as listed on TP Table 18-1 (INDOT-Provided Approvals) (incorporated as Exhibit 2 (*INDOT-Provided Approvals*) to this DBA) have been obtained and associated requirements have been incorporated into Project design;

5.5.1.22 The Incident Management Liaison has conducted an Incident management training session for all Key Personnel, superintendents, and lead foremen in accordance with TP Section 9.3.3.1 (Traffic Incident Management Plan); and

5.5.1.23 Design-Build Contractor has satisfied all other conditions to commencement of construction Work expressed in the DBA Documents.

As used in this Section 5.5.1 (*Construction Work Generally*), the term "construction" specifically excludes subsurface utility investigations, and geotechnical investigations incidental to Design Work, Hazardous Materials Management, mobilization, Site security and establishment of work yard(s) and storage sites.

## 5.5.2 Utility Adjustment Work

Design-Build Contractor shall not commence or permit commencement of construction of a Utility Adjustment included in the Construction Work until INDOT issues NTP2, all of the conditions set forth in Section 5.5.1 (*Construction Work Generally*) that are applicable to the Utility Adjustment (reading such provisions as if they referred to the Utility Adjustment) have been satisfied, and the following additional requirements have been satisfied:

- (a) The Utility Adjustment is covered by an executed Utility Agreement;
- (b) The review and comment process has been completed or Design-Build Contractor has obtained approval of INDOT, as applicable, for the Utility Plans covering the Utility Adjustment;
- (c) Design-Build Contractor has obtained any other required approvals for the Utility Plans covering the Utility Adjustment;
- (d) Design-Build Contractor has submitted and INDOT has approved the Utility Work Plans pursuant to TP Section 16.3 (Utility Work Plans, Agreements and Permits).

## 5.6 Recovery Schedule

5.6.1 If at any time, the Work on any Critical Path item is delayed for a period which exceeds the greater of either 30 days in the aggregate or that number of days in the aggregate equal to 10% of the days remaining until a Completion Deadline (including delays to which Design-Build Contractor may be entitled to a time extension under Section 15 (*Relief Events; Compensation Events*)), then within the earliest of (a) 10 days after Design-Build Contractor first has Actual Knowledge of such schedule delay, (b) with the next Project Status Schedule, or (c) otherwise at the request of INDOT, Design-Build Contractor shall prepare and submit to INDOT for INDOT's review and approval a Recovery Schedule demonstrating Design-Build Contractor's proposed plan to regain lost schedule progress and to achieve the original contractual milestones in accordance with this DBA, including Substantial Completion by the Substantial Completion Deadline. Design-Build Contractor's submittal shall comply with TP Section 4.6.1 (Required Logs). INDOT shall notify Design-Build Contractor within 10 days after receipt of each such Recovery Schedule whether the schedule is accepted or rejected. Within five days after any rejection of the schedule by INDOT, Design-Build Contractor will resubmit a revised Recovery Schedule incorporating the comments of INDOT. Subject to Section 5.6.2 (*Recovery Schedule*), when INDOT accepts Design-Build Contractor's Recovery Schedule, Design-Build Contractor shall, within five days after such acceptance, incorporate and fully include such schedule into the Project Baseline Schedule and deliver same to INDOT.

5.6.2 All costs and time incurred by Design-Build Contractor in preparing, implementing and achieving the Recovery Schedule shall be borne by Design-Build Contractor and shall not result in a change to the Contract Price or Completion Deadlines, except to the extent a Relief Event or a Compensation Event is expressly provided for under this DBA.



5.6.3 If Design-Build Contractor fails to provide an acceptable Recovery Schedule within 30 days after Design-Build Contractor's receipt of a Notice to do so, then INDOT may withhold 10% of each progress payment until such time as Design-Build Contractor has prepared and INDOT has approved such Recovery Schedule. If Design-Build Contractor fails to provide an acceptable Recovery Schedule within 60 days after Design-Build Contractor's receipt of a Notice to do so, then INDOT may withhold 20% of each progress payment until such time as Design-Build Contractor has prepared and INDOT has approved such Recovery Schedule. Any failure or delay in the submittal or approval of a Recovery Schedule shall constitute a waiver of any Relief Event or Compensation Event in connection with circumstance necessitating such Recovery Schedule.

## **5.7 Submission and Approval of the Project Baseline Schedule**

5.7.1 Design-Build Contractor shall develop the Project Baseline Schedule in accordance with USP Critical Path Method Schedule in TP Attachment 1-1 (USP Critical Path Method Schedule). Design-Build Contractor shall submit to INDOT, for INDOT review, comment and approval, the Project Baseline Schedule no later than the commencement of Design Work following satisfaction of the conditions under Section 5.4 (*Commencement of Design*). Design-Build Contractor shall, until approved by INDOT, resubmit successive revisions of the Project Baseline Schedule to INDOT for review, comment and approval no later than 15 days after delivery of comments by INDOT to each revision of the Project Baseline Schedule.

5.7.2 Design-Build Contractor acknowledges and agrees that: (a) if Design-Build Contractor fails to obtain approval by INDOT of the Project Baseline Schedule on or before 150 days after issuance of NTP2, INDOT may withhold up to 25% from each progress payment until INDOT approves the Project Baseline Schedule; and (b) if Design-Build Contractor fails to obtain approval by INDOT of the Project Baseline Schedule on or before 180 days after issuance of NTP2, INDOT may withhold up to 50% from each progress payment thereafter until INDOT approves the Project Baseline Schedule.

## **SECTION 6 CONTROL OF WORK**

### **6.1 Control and Coordination of Work**

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

### **6.2 Safety**

6.2.1 Design-Build Contractor shall take all reasonable precautions and, as between INDOT and Design-Build Contractor, be solely liable and responsible for the safety of, and shall provide protection to prevent Losses to, all persons on the Site or who would reasonably be expected to be affected by the Work, including individuals performing Work, employees of INDOT and their respective consultants, employees of FHWA, visitors to the Site and members

of the public who may be affected by the Work. Design-Build Contractor shall at all times comply with all safety requirements of the DBA Documents, the approved Safety Plan, and all such requirements under applicable Governmental Rules. Notwithstanding the above, Design-Build Contractor shall not be liable or responsible for the failure of any employee or consultant of INDOT, or employee of FHWA to comply with Design-Build Contractor's approved Safety Plan. During periods in which INDOT personnel are on the Site, such personnel shall comply with reasonable safety procedures and rules that have been provided by Design-Build Contractor by Notice in advance.

6.2.2 INDOT has the authority to stop any Work activity or remove any personnel that constitutes or is perceived to present a threat of imminent danger. If, in the discretion of INDOT, any conditions or activities or personnel may present an imminent danger that could result in serious injury, death or extensive property damage, the affected portion of the Work will be stopped immediately and shall not recommence until the practices or conditions are corrected to the satisfaction of INDOT. In the event the Work or any portion thereof is suspended by INDOT or any other Governmental Entity because of an unsafe condition or as a result of any unsafe behavior by any personnel of any DB-Related Entity, such suspension shall be treated in accordance with Section 16.2 (Suspension for Cause), and Design-Build Contractor shall have no right to any Relief Event or Compensation Event, including any adjustment in the Contract Price or Completion Deadline(s), in connection with such suspension.

### **6.3 Process To Be Followed Upon Discovery of Certain Site Conditions**

#### **6.3.1 Notification to INDOT**

6.3.1.1 If Design-Build Contractor becomes aware of (a) any on-Site material that Design-Build Contractor believes may contain Hazardous Materials required to be removed or treated, (b) any Type I/Type II Differing Site Conditions, or (c) any other protected resources that may affect the Work, as a condition precedent to Design-Build Contractor's right to a potential Relief Event or Compensation Event, Design-Build Contractor shall promptly (but in no event later than 24 hours after becoming aware of such item) notify INDOT thereof telephonically or by email or in person, to be followed by Notice within 24 hours thereafter. Design-Build Contractor shall immediately stop Work in and secure the area. In addition, irrespective as to whether such matter constitutes a Type I/Type II Differing Site Condition, if Design-Build Contractor encounters any actual or suspected archaeological, paleontological, biological or cultural resources or artifacts, Design-Build Contractor shall, and shall cause all DB-Related Entities to, leave (and not to remove) any such resources or artifacts in place in compliance with applicable State Governmental Rules.

6.3.1.2 Design-Build Contractor's Notice under Section 6.3.1.1 (Notification to INDOT) shall:

6.3.1.2.1 Specify whether any Hazardous Materials or Type I/Type II Differing Site Conditions (including, irrespective as to whether such matter constitutes a Type I/Type II Differing Site Condition, any archaeological, paleontological, biological, or cultural resources or artifacts) have been identified, and if the Hazardous Materials, Type I/Type II

Differing Site Conditions, or such resources or artifacts is/are located within the MOT Limits and Planned ROW Limits; and

6.3.1.2.2 Advise INDOT of any obligation to notify Governmental Entities under applicable Governmental Rules and Governmental Approvals.

6.3.1.3 INDOT will view the location within three Business Days after receipt of Notice and shall advise Design-Build Contractor at that time whether Work should be resumed or whether further investigation or other action is required. No time extension or costs will be allowed in connection with any Work stoppage in affected areas during the investigation period described in this Section 6.3.1 (*Notification to INDOT*), except that if Design-Build Contractor demonstrates that compensable Hazardous Materials or a Type I/Type II Differing Site Condition exist, the investigation period shall be considered a Relief Event.

6.3.1.4 Except for Design-Build Contractor's obligations relating to resources or artifacts described in Section 6.3.1.1 (*Notification to INDOT*), Design-Build Contractor shall not be obligated to stop Work upon discovery of any materials or conditions that the DBA Documents or Technical Provisions indicate are present in the location; provided, however, that Design-Build Contractor shall provide to INDOT prompt Notice of any such discovery. Furthermore, if any Governmental Approval specifies an additional procedure to be followed which differs from the procedure set forth herein, Design-Build Contractor shall also follow the additional procedure set forth in the Governmental Approval. Refer to Section 7.10.1 (*Procedures for Hazardous Materials Management*) for additional requirements relating to Hazardous Materials.

### 6.3.2 Further Investigation of Hazardous Materials

INDOT shall promptly conduct such further investigation as INDOT deems appropriate. INDOT shall use reasonable efforts to determine within five days after receipt of such notification whether the situation falls within the scope of Section 6.3.1.1(a), (b) or (c) (*Notification to INDOT*), and shall notify Design-Build Contractor of its determination once it is made. INDOT shall, at that time, also advise Design-Build Contractor of any action to be taken regarding the situation. If Hazardous Materials, Recognized Environmental Conditions or Contaminated Groundwater are involved, the Notice shall describe the type of remediation measures, if any, which Design-Build Contractor is to undertake with respect thereto.

### 6.3.3 Recommencement of Work

INDOT shall have the right to require Design-Build Contractor to recommence Work in the area at any time, even though an investigation may still be ongoing. Design-Build Contractor shall promptly recommence Work in the area upon receipt of notification from INDOT to do so. Upon recommencing Work, Design-Build Contractor shall follow all applicable procedures contained in the DBA Documents and all Governmental Rules with respect to such Work, consistent with INDOT's determination or preliminary determination regarding the nature of the material or condition and the basis upon which Design-Build Contractor may recommence Work.

In no event shall Design-Build Contractor be directed to recommence Work in an area of identified Hazardous Materials that creates a material risk of unsafe working conditions, as determined by INDOT, in its good faith discretion; provided, however, that INDOT shall use reasonable efforts to consult with Design-Build Contractor prior to making such determination.

#### **6.4 Obligation to Minimize Impacts**

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

#### **6.5 Quality Assurance, Quality Control, Oversight, Inspection and Testing**

##### **6.5.1 Rights and Responsibilities of INDOT**

6.5.1.1 INDOT will perform materials and equipment acceptance testing as described in the Project Standards. INDOT and FHWA representatives shall have the right at all times to monitor, inspect, sample, measure, attend, observe or conduct tests and investigations, and conduct any other oversight respecting any part or aspect of the Project or the Work, as set forth in the Technical Provisions to the extent necessary or advisable (as determined by each of such entities) to comply with FHWA or other applicable federal agency requirements and verify Design-Build Contractor's compliance with the DBA Documents and Project Management Plan, to include specifically performing periodic review of Design-Build Contractor's performance of quality assurance and quality control for the Project, in each case, at such times, and with respect to such matters, as INDOT determines in its sole discretion; provided, however, that INDOT shall use reasonable efforts to conduct such activities in accordance with Design-Build Contractor's reasonable safety procedures and manuals, and in a manner that does not unreasonably interfere with normal construction activity or normal operation and maintenance of the Project.

6.5.1.2 INDOT shall have the right to attend and witness any tests and verifications to be conducted pursuant to the Technical Provisions and the Project Management Plan. Design-Build Contractor shall provide to INDOT all test results and reports within five days after Design-Build Contractor receives them.

6.5.1.3 All materials and each part or detail of the Work shall also be subject to oversight, inspection and testing by INDOT, FHWA, and other Persons designated by INDOT. At all points in performance of the Work at which specific inspections or approvals by INDOT or FHWA are required by the DBA Documents or Project Management Plan, Design-Build Contractor shall not proceed beyond that point until INDOT or FHWA, as applicable, have made such inspection or approval or waived their respective rights to inspect or approve, which waiver shall be in writing. In addition, if any Utility Owner, Third Party is to accept or pay for a portion of the cost of the Work, its respective representatives have the right to oversee, inspect and test the Work. If applicable, such oversight, inspection or testing does not make such Person a party to this DBA nor will it change the rights of the Parties hereto. Design-Build Contractor hereby irrevocably consents to such oversight, inspection and

testing. Upon request from INDOT, Design-Build Contractor shall furnish information to such Persons as are designated in such request and shall permit such Persons access to the Site and all parts of the Work.

6.5.1.4 Design-Build Contractor at all times shall coordinate and cooperate, and require its Subcontractors to coordinate and fully cooperate, with INDOT and FHWA to facilitate the inspection, review, and oversight activities of INDOT and FHWA. Design-Build Contractor shall cause its representatives to be available at all reasonable times for consultation with INDOT.

6.5.1.5 Without limiting the foregoing, Design-Build Contractor shall afford INDOT and FHWA, and their respective authorized representatives: (a) safe and unrestricted access to the Project and the Site at all times, (b) safe access during normal business hours to Design-Build Contractor's Project offices and operations buildings, and (c) unrestricted access to Books and Records related to the Work, subject to Section 23.4 (Maintenance of, Access to and Audit of Records). Without limiting the foregoing, Design-Build Contractor shall deliver to INDOT upon request accurate and complete Books and Records regarding the Work, the Project, the Site, and the Utility Adjustment Work, in the format required by the Technical Provisions.

## 6.5.2 Design-Build Contractor Responsibilities

Design-Build Contractor shall perform any inspection, sampling, testing, quality control and quality assurance in accordance with Section 2.1.1.5 (Performance Requirements), and otherwise with the DBA Documents and the approved Design-Build Contractor's Quality Management Plan.

## 6.5.3 Obligation to Uncover Finished Work

Design-Build Contractor shall provide to INDOT Notice of any part of the Work which is about to be covered or otherwise hidden from view and offer a full and adequate opportunity to INDOT to inspect and test such part of the Work before it is covered. At all times before Final Acceptance, Design-Build Contractor shall remove or uncover such portions of the finished or covered Construction Work as directed by INDOT. After examination by INDOT and any other Persons designated by INDOT, Design-Build Contractor shall restore the Work to the standard required by the DBA Documents. If the Work exposed or examined is not in conformance with the requirements of the DBA Documents, then uncovering, removing, and restoring the Work and recovery of any delay to the Critical Path occasioned thereby shall be at Design-Build Contractor's cost and Design-Build Contractor shall not be entitled to any adjustment to the Contract Price or any time extension or any other relief. Furthermore, any Work done or materials used without adequate Notice to and opportunity for prior inspection by INDOT or without inspection in accordance with the DBA Documents, including failure to provide Notice of matters subject to Witness Points and Hold Points, may be ordered uncovered, removed or restored by INDOT at Design-Build Contractor's cost and without an adjustment to the Contract Price or a time extension, or any other relief, even if the Work proves acceptable and in compliance after uncovering. Except with respect to Work done or materials used as described in the foregoing

sentence, if Work exposed or examined under this Section 6.5.2 (*Design-Build Contractor Responsibilities*) is not Nonconforming Work, then any delay in the Critical Path and additional costs caused by uncovering, removing and restoring Work may be considered a Relief Event or Compensation Event (as applicable and subject to Section 15 (*Relief Events; Compensation Events*)).

## **6.6 Effect of Oversight, Spot Checks, Audits, Tests, Acceptances and Approvals**

### **6.6.1 Oversight and Acceptance**

The oversight, spot checks, audits, tests, acceptances, and approvals conducted by INDOT and others do not constitute acceptance of the materials or Work inspected or waiver of any warranty or legal or equitable right with respect thereto. INDOT may request remedies for Nonconforming Work or identify additional Work which must be done to bring the Project into compliance with the requirements of the DBA Documents, whether or not previous oversight, spot checks, inspections, verifications, audits, reviews, comments, tests, acceptances or approvals were conducted or waived by INDOT or any such Persons.

### **6.6.2 No Estoppel**

Design-Build Contractor shall not be relieved of obligations to perform the Work in accordance with the DBA Documents, or any of its indemnity obligations, as the result of oversight, spot checks, inspections, verifications, audits, reviews, comments, or tests performed by any Persons, approvals or acceptances made by any Persons, or any failure of any Person to take such action. INDOT shall not be precluded or estopped, by any measurement, estimate or certificate made either before or after Final Acceptance, or by making any payment, from showing that any such measurement, estimate or certificate is incorrectly made or untrue, or from showing the true amount and character of the Work performed and materials furnished by Design-Build Contractor, or from showing that the Work or materials do not conform in fact to the requirements of the DBA Documents. Notwithstanding any such measurement, estimate or certificate, or payment made in accordance therewith, INDOT shall not be precluded or estopped from recovering from Design-Build Contractor and its [Guarantor(s) or] ***[NTD: To be conformed in execution version based on whether Design-Build Contractor is required to have a Guarantor.]*** Surety(ies) such Losses as INDOT may sustain by reason of Design-Build Contractor's failure to comply or to have complied with the terms of the DBA Documents.

## **6.7 Nonconforming Work**

### **6.7.1 Rejection, Removal and Replacement of Work**

Nonconforming Work rejected by INDOT shall be removed and replaced so as to conform to the requirements of the DBA Documents, at Design-Build Contractor's cost and without any adjustment to the Contract Price or time extension or any other relief; and Design-Build Contractor shall promptly take all action necessary to prevent similar deficiencies from occurring in the future. The fact that INDOT may not have discovered the Nonconforming Work shall not constitute an acceptance of such Nonconforming Work. If Design-Build Contractor fails to correct any

Nonconforming Work within 10 days after receipt of Notice from INDOT requesting correction, or if such Nonconforming Work cannot be corrected within 10 days, and Design-Build Contractor fails to (a) provide to INDOT a schedule for correcting any such Nonconforming Work acceptable to INDOT within such 10 day period, (b) commence such corrective Work within such 10 day period and (c) thereafter diligently prosecute such correction in accordance with such approved schedule to completion, then INDOT may cause the Nonconforming Work to be remedied or removed and replaced and may deduct the cost of doing so (plus an administrative charge equal to 10% of the cost) from any moneys due or to become due to Design-Build Contractor or obtain reimbursement from Design-Build Contractor for such cost (plus an administrative charge equal to 10% of the cost).

## **6.7.2 Agreement to Accept Nonconforming Work**

6.7.2.1 If INDOT agrees to accept any Nonconforming Work without requiring it to be fully corrected, INDOT shall be entitled to reimbursement of a portion of the Contract Price in an amount equal to the greater of: (a) the amount deemed appropriate by INDOT to provide compensation for future impacts, maintenance or other costs relating to the Nonconforming Work, or (b) 100% of Design-Build Contractor's cost savings associated with its failure to perform the Work in accordance with the requirements of the DBA Documents. Such reimbursement shall be payable to INDOT within 10 days after Design-Build Contractor's receipt of an invoice therefor. Alternatively, INDOT may deduct the amount of such costs and expenses from any sums owed by INDOT to Design-Build Contractor pursuant to this DBA. Design-Build Contractor acknowledges and agrees that INDOT shall have sole discretion regarding acceptance or rejection of Nonconforming Work and shall act in good faith in determining the amount payable in connection therewith. Payment, reimbursement or deduction of the amounts owing to INDOT under this Section 6.7.2 (*Agreement to Accept Nonconforming Work*) shall be a condition precedent to the acceptance of the applicable Nonconforming Work.

6.7.2.2 No acceptance of any Nonconforming Work in any instance shall waive or preclude any other right of INDOT to reject other Nonconforming Work, including Nonconforming Work of the same kind as that accepted, nor waive or preclude any further exercise of any other right of INDOT or remedy available to INDOT hereunder.

## **SECTION 7 ACCESS TO SITE; UTILITY ADJUSTMENTS; ENVIRONMENTAL MITIGATION; COOPERATION WITH LOCAL AGENCIES**

### **7.1 Access to Site**

#### **7.1.1 Planned ROW Limits**

In the event of any changes in right-of-way requirements in connection with any Relief Event or Compensation Event, the Planned ROW Limits shall automatically be deemed modified to incorporate the changed requirements.

#### **7.1.2 Access to the MOT Limits, Planned ROW Limits, and Project ROW**

Design-Build Contractor shall have the right and license to enter the MOT Limits, Planned ROW Limits, and the remainder of the Project ROW (as and when set forth in the Project ROW Availability Table), in each case, subject to the provisions of the DBA Documents. Design-Build Contractor (not INDOT) shall be responsible for obtaining encroachment permits and other permits and rights of entry to gain access to areas within the jurisdiction of any Local Agency, Governmental Entity (excluding INDOT). Design-Build Contractor shall be responsible for being informed of and complying with any access restrictions that may be set forth in any documents granting access to the MOT Limits and Project ROW and such access restrictions shall not be, nor be deemed to be, failure by INDOT to “ensure access” to such parcel under this Section 7.1.2 (*Access to the MOT Limits, Planned ROW Limits, and Project ROW*).

### 7.1.3 **Additional Properties**

7.1.3.1 INDOT may also obtain access rights to certain other parcels identified by Design-Build Contractor (the “Additional Properties”), if (i) the property is intended for permanent improvements for the Project; and (ii) acquisition of the property is otherwise consistent with applicable Governmental Rules and Governmental Approvals. Acquisition of Additional Properties shall be solely at Design-Build Contractor’s expense as more particularly provided in Section 7.1.3.1 (*Additional Properties*).

7.1.3.2 If Design-Build Contractor identifies Additional Properties, Design-Build Contractor shall submit to INDOT in writing a request, including a drawing of the limits necessary for each parcel and any other information necessary for review by INDOT, to acquire the Additional Properties. The request, drawing and information are subject to approval of INDOT. INDOT will undertake and complete acquisition of Additional Properties, including undertaking eminent domain proceedings, if necessary, if and after INDOT approves Design-Build Contractor’s written request, drawing and information for the requested Additional Properties.

7.1.3.3 INDOT will not be obligated to approve a request for acquisition of any Additional Property where, in the good faith judgment of INDOT, (a) to do so would materially adversely affect the Project, Governmental Approvals or political, community or public relations, (b) acquisition is not consistent with Governmental Rules; or (c) successful timely completion of the acquisition is not likely. INDOT’s obligation to acquire any Additional Property is subject to the following conditions: (i) if requested by INDOT, Design-Build Contractor’s providing an analysis regarding alternative courses of action; (ii) agreement by INDOT that the property acquisition is in the best interest of the Project; (iii) Design-Build Contractor’s providing such evidence as INDOT may require to enable issuance of a determination of necessity; and (iv) if required, issuance of a determination of necessity by INDOT.

7.1.3.4 Within 14 days after receipt of a Notice from Design-Build Contractor identifying and requesting an Additional Property for acquisition, INDOT will state in writing to Design-Build Contractor whether INDOT regards acquisition (whether by negotiation or condemnation) of the Additional Property as potentially materially adversely



affecting the Project, Governmental Approvals or political, community or public relations, or regards successful timely acquisition as not likely. No such statement, or lack thereof, will preclude INDOT from later changing the determination based on changed political, community or public relations events or circumstances.

7.1.3.5 Design-Build Contractor shall be responsible for all costs and expenses associated with acquisition of Additional Properties by INDOT. In paying all such costs and expenses, Design-Build Contractor is not acquiring, and shall not be deemed to be acquiring, any interest in real property for Design-Build Contractor. Such costs and expenses include:

- (a) The cost of acquisition services and document preparation;
- (b) The cost of negotiations;
- (c) The cost of condemnation proceedings handled by the Attorney General of the State through master proceedings, jury trials and appeals, including attorneys' and expert witness fees, and all fees and expenses for exhibits, transcripts, photos and other documents and materials production;
- (d) The purchase prices, master awards, settlements, offers of judgment, court awards or judgments, including pre-judgment and post-judgment interest, costs, and attorney's fees, or other consideration for interests in real property for all parcels required for the Project or the Work, whether within or outside of the Project ROW;
- (e) The cost of permanent or temporary acquisition of leases, easements, rights of entry, licenses and other interests in real property, including for drainage, temporary work space, or other Project-Specific Locations, and any other convenience of Design-Build Contractor;
- (f) The cost of permitting;
- (g) Closing costs associated with parcel acquisitions in accordance with the Uniform Act, IC § 32-24-1 et seq. and policies and procedures of INDOT;
- (h) Relocation assistance payments and costs, in accordance with the Uniform Act and IC § 8-23-17-1 et seq.;
- (i) The cost for separate property survey(s) in addition to the Planned ROW Limits survey(s); and
- (j) The cost of all claims for goodwill, severance damages or inverse condemnation in connection with the acquisition of the Additional Properties.

7.1.3.1 Design-Build Contractor shall support any requests for acquisition of Additional Properties with such information as may be reasonably required by INDOT.

7.1.3.2 If INDOT incurs any such costs and expenses on Design-Build Contractor's behalf, INDOT may submit to Design-Build Contractor, not more often than monthly, invoices for such costs and expenses. Design-Build Contractor shall reimburse INDOT within 30 days after INDOT's submittal to Design-Build Contractor of each such invoice. In addition to any other remedy, INDOT shall have the right to curtail or suspend acquisition activities if Design-Build Contractor for any reason fails to pay any such invoice in full when due. INDOT will resume acquisition activities promptly after delinquent amounts are paid in full with Interest.

7.1.3.3 If INDOT approves a request for acquisition of any Additional Property, in whole or in part, INDOT will specify in its Notice of approval to Design-Build Contractor the availability date for the applicable Additional Property, not to exceed 24 months after the date of such Notice, and DBA Exhibit 17 (Project ROW Acquisition Table) shall be deemed updated, without further action of the Parties, to reflect such date as the "Project ROW Availability Date" with respect to such Additional Property.

7.1.3.4 INDOT shall obtain Additional Property by the applicable "Project ROW Availability Date" set forth in Exhibit 17 (Project ROW Acquisition Table); provided, however, that Design-Build Contractor shall otherwise solely bear the risk of any time and cost impacts to the Work related to acquisition of Additional Properties by INDOT, and provided further that if the acquisition of Additional Properties necessitates any Governmental Approvals, then Design-Build Contractor shall: (i) be solely responsible for the cost and schedule impact of any related review, analysis, assessment, approvals, permits and findings; (ii) be solely responsible for the risk that any Governmental Approvals are not (1) granted, issued, approved or obtained or (2) timely granted, issued, approved or obtained; and (iii) not be entitled to any increase in the Contract Price or extension of any Completion Deadline as a result of any delay, inability or cost associated with the Governmental Approvals related to such Additional Properties.

7.1.3.5 Design-Build Contractor shall not negotiate with any owners or occupants of any property, including Additional Properties, with respect to activities under the federal Uniform Relocation Assistance and Real Property Acquisition Policies Act, P.L. 91-646, as amended.

7.1.3.6 INDOT will not be obligated to acquire or exercise its power of eminent domain in connection with Design-Build Contractor's acquisition of any temporary right or interest for Project-Specific Locations. INDOT will not have any obligations or responsibilities with respect to the acquisition, maintenance or disposition of such temporary rights or interests; and Design-Build Contractor shall have no obligation to submit acquisition packages to INDOT for, or obtain approval by INDOT of Design-Build Contractor's acquisition of, any such temporary right or interest.

7.1.3.7 Design-Build Contractor shall not be entitled to any increase in the Contract Price or any extension of any Completion Deadline under the DBA Documents or otherwise entitled to make a Claim as a result of Site conditions associated with any Additional

Properties (including those relating to Hazardous Materials, Type I/Type II Differing Site Conditions or Utilities), or any delay, liability or cost associated with the acquisition of any Additional Properties, including Additional Properties required to implement any ATCs.

#### 7.1.4 Acquisition of Temporary Interests by Design-Build Contractor

7.1.4.1 Design-Build Contractor’s activities with respect to (a) acquisition of temporary interests in real property to be used in connection with the Work and (b) Utility Adjustment Work performed pursuant to Section 7.3 (Utility Adjustments) through Section 7.9 (Utility-Related Claims; Additional Restrictions on Relief Events and Compensation Events Relating to Utility Adjustments) shall be completed and documented in compliance with all applicable Governmental Rules, including the Uniform Act, and the rules and regulations implementing the Uniform Act. Design-Build Contractor shall provide INDOT with a ROW Certification for all Project-Specific Locations and a “utility certification,” in a form acceptable to INDOT, that such activities comply with the Uniform Act and implementing regulations as well as 23 CFR § 635.309 (b) and (c), as well as 105 IAC 13, as may be amended from time to time. INDOT reserves the right to supervise Design-Build Contractor’s activities described in this Section 7.1.4.1 (Acquisition of Temporary Interests by Design-Build Contractor) to ensure Design-Build Contractor acts in accordance with the INDOT “Real Estate Division Manual,” dated August 2018, as amended (available at: <https://www.in.gov/indot/2493.htm>) and in compliance with all applicable Governmental Rules, including the Uniform Act and the rules and regulations implementing the Uniform Act.

7.1.4.2 Design-Build Contractor, at its sole cost, shall be solely responsible for acquisition of any Project-Specific Locations or other temporary interests in property which Design-Build Contractor determines are necessary, desirable or advisable in order to complete the Project, other than Additional Properties to be acquired by INDOT under Section 7.1.3 (Additional Properties). Such temporary interests may include rights for temporary Project-specific activities in connection with the Construction Work outside the MOT Limits and Planned ROW Limits, such as Construction Work sites, temporary work areas, lay down areas, staging areas, storage areas, stockpiling areas, earth work material borrow sites, equipment parking areas, as well as any property needed for any temporary utility facilities being constructed by Design-Build Contractor. Design-Build Contractor shall pay the purchase price for all such property interests directly. If the property is within the Planned ROW Limits and is intended to be used for permanent improvements or Design-Build Contractor intends to request INDOT to acquire such parcel as an Additional Property, then Design-Build Contractor shall not negotiate with the owner(s) of such interests. INDOT will have no obligations or responsibilities with respect to the acquisition, maintenance or disposition of such temporary rights or interests or the condition of such rights or interests, and will not be obligated to use its powers of eminent domain in connection therewith. Design-Build Contractor shall comply with all applicable Governmental Approvals and Governmental Rules in acquiring and maintaining or disposing of any such property rights or interests. Design-Build Contractor shall cause the documentation of any such property interest to contain the grantor’s express acknowledgment that INDOT shall have no liability or obligations with respect thereto.

### 7.1.5 Conveyance Documents

Design-Build Contractor shall prepare all documents necessary to evidence any easements or other real property interests relating to the Project to be granted by INDOT to Utility Owners and other Persons.

### 7.1.6 Avoidance of Acquisition of Additional Properties

Design-Build Contractor shall use its best efforts to avoid the necessity to acquire Additional Properties. To the extent reasonably possible, consideration shall be given to using retaining walls or making other engineering adjustments as an alternative to acquisition of Additional Properties.

## 7.2 [Reserved.]

## 7.3 Utility Adjustments

### 7.3.1 Type 1 and Type 2 Utility Adjustments

7.3.1.1 The Project does not include Type 1 Utility Adjustments or Type 2 Utility Adjustments.

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### 7.3.2 Type 3 Utility Adjustments

7.3.2.1 Design-Build Contractor shall be responsible for preparing and negotiating any new or modified Utility Agreement with the Utility Owner for Type 3 Utility Adjustments that may be impacted by the Project. Design-Build Contractor is required to use the template for INDOT's standard utility agreement provided in TP Appendix 16-2 (Utility Work Plan and Agreement Template) and follow INDOT's Utility Accommodation Policy. Each new or modified Utility Agreement shall (i) clearly specify and distinguish the scope of Utility Adjustment Work that Design-Build Contractor is to perform, and the scope the Utility Owner is to perform; (ii) contain provisions for payments, payment terms, controlling specifications, and work description; and (iii) include specific procedures for resolving scheduling, design, construction, and payment issues arising due to errors or omissions in information the Utility Owner provides to Design-Build Contractor.

7.3.2.2 INDOT agrees to cooperate as reasonably requested by Design-Build Contractor in pursuing new or modified Utility Agreements, including attendance at negotiation sessions and review of Utility Agreements. Design-Build Contractor shall keep INDOT informed of the status of any such negotiations. Design-Build Contractor shall submit each such Utility Agreement and supplements and amendments thereto to INDOT for approval in its reasonable discretion, in accordance with the procedures described in Section 3.2 (Submittals).

7.3.2.3 Subject to the prior review and reasonable approval of INDOT and provided that such new or modified Utility Agreement complies with the requirements of the DBA Documents and does not increase INDOT's liability for the Project or to the Utility Owner, INDOT shall execute such new or modified Utility Agreement.

7.3.2.4 Design-Build Contractor shall bear the sole risk, schedule impact, cost of negotiating and entering into a new or modified Utility Agreement and cost and schedule impact of the Work arising out of such new or modified Utility Agreement other than, and except to the extent that, a Relief Event or a Compensation Event is expressly provided for under this DBA.

7.3.2.5 If a conflict occurs between the terms of a new or modified Utility Agreement or any other agreement between INDOT and a Utility Owner and those of the DBA Documents, then, unless INDOT, in its good faith discretion directs otherwise, the terms that establish the higher quality, manner or method of performing Utility Adjustment Work, establish better Good Industry Practice, or use more stringent standards shall prevail between Design-Build Contractor and INDOT; if the foregoing criteria are not relevant to the terms at issue, then the DBA Documents shall prevail, unless expressly provided otherwise in the DBA Documents.

### 7.3.3 **Avoiding Adjustments and Minimizing Costs**

7.3.3.1 Design-Build Contractor shall use its best efforts to minimize costs for which Design-Build Contractor may be entitled to additional compensation pursuant to Section 7.3 (Utility Adjustments) through Section 7.9 (Utility-Related Claims; Additional Restrictions on Relief Events and Compensation Events Relating to Utility Adjustments), to the extent practical and allowable pursuant to the DBA Documents.

7.3.3.2 Subject to Section 7.3.3.1 (Avoiding Adjustments and Minimizing Costs), Design-Build Contractor shall consider the location of Utilities and the potential impact of Utility Adjustments in developing and finalizing the design of the Project, with the goal of minimizing Utility Adjustments to the extent practical and allowable pursuant to the DBA Documents.

7.3.3.3 Design-Build Contractor shall reimburse INDOT for any costs INDOT incurs as a result of Design-Build Contractor's failure to comply with the requirements of this Section 7.3.3 (Avoiding Adjustments and Minimizing Costs).

7.3.3.4 Except to the extent multiple relocations of the same Utility may be necessitated by an INDOT-Directed Change, or otherwise approved by INDOT in its sole discretion, Design-Build Contractor shall not perform (or cause to be performed by a Utility Owner or by any DB-Related Entity) more than one relocation of any Utility.

#### 7.3.4 FHWA Utility Requirements

Unless INDOT advises Design-Build Contractor otherwise, the Project will be subject to, and Design-Build Contractor shall comply with, 23 CFR Part 645 Subparts A and B (including its requirements as to plans, specifications, estimates, charges, tracking of costs, credits, billings, records retention, and audit) and FHWA's associated policies. Utility Agreements for Utilities in or related to the Project shall incorporate by reference 23 CFR Part 645 Subparts A and B, and assign the obligations arising pertaining thereto. Design-Build Contractor shall comply (and shall require the Utility Owners to comply) with 23 CFR Part 645 Subparts A and B for any Utility Adjustment costs to be eligible for reimbursement from any other federal financing or funding. Design-Build Contractor acknowledges, however, that without regard to whether such compliance is required: (a) it is not anticipated that Design-Build Contractor will be eligible for FHWA reimbursement of any Utility Adjustment outlays other than from any federal financing or funding, if any, and (b) Design-Build Contractor will not have any share in any reimbursement from FHWA or other federal financing or funding that INDOT may receive on account of Utility Adjustments.

#### 7.3.5 Allocation of Work Responsibility

7.3.5.1 The initial allocation of responsibility for performing Utility Adjustment design, construction, or materials procurement for each Utility Adjustment as between Design-Build Contractor and the Utility Owner shall be determined in accordance with the Utility Agreement and TP Section 16 (Utilities). For purposes of this Section 7 (Access to Site; Utility Adjustments; Environmental Mitigation; Cooperation with Local Agencies) and TP Section 16 (Utilities), references to responsibility for performing Utility Adjustment design and construction include all tasks customarily associated therewith; provided, however, that Design-Build Contractor shall be responsible for all coordination with Utility Owners that is necessary in order to accomplish the Utility Adjustments in compliance with the requirements of the DBA Documents.

7.3.5.2 Design-Build Contractor is responsible for scheduling all Utility Adjustments so as to meet all applicable Completion Deadlines, without regard to whether a Utility Adjustment is performed by Design-Build Contractor or by the affected Utility Owner (or its contractors). Accordingly, under no circumstances shall any reallocation of responsibility for Utility Adjustment Work between Design-Build Contractor and a Utility Owner be considered grounds for a time extension hereunder.

7.3.5.3 No increase or decrease in the Contract Price shall be made pursuant to this Section 7.3.5 (Allocation of Work Responsibility) on account of any change in the allocation of responsibility for Incidental Utility Work, or any other matter for which the DBA Documents specify how liability, cost or risk is to be allocated between INDOT and Design-Build Contractor.

### 7.3.6 Utility Adjustment Costs

7.3.6.1 Except for Type 4 Utility Adjustments, Design-Build Contractor is responsible for all costs of the Utility Adjustment Work, including costs of acquiring Utility Easements, Replacement Utility Property Interests and costs with respect to relinquishment or acquisition of Existing Utility Property Interests, but excluding (a) costs attributable to Betterments (as between INDOT and Design-Build Contractor, for which the Utility Owner or Design-Build Contractor is responsible); and (b) any other costs for which the Utility Owner is responsible under Governmental Rules which are not paid by INDOT. Design-Build Contractor shall fulfill this responsibility either by performing the Utility Adjustment Work at its own cost, if permitted by the Utility Owner (except that any assistance provided by any DB-Related Entity to the Utility Owner in acquiring Replacement Utility Property Interests shall be provided outside of the Work), or by reimbursing the Utility Owner for the Utility Owner's performance of the Utility Adjustment Work, in accordance with Section 7.3.6.5 (Utility Adjustment Costs). Design-Build Contractor shall bear the costs due to the Utility Owner and all costs and expenses associated therewith, including the costs of Utility Owner inspections and any overtime charges incurred by the Utility Owner. Design-Build Contractor is solely responsible for collecting directly from the Utility Owner any amount due to Design-Build Contractor for Betterment costs or other costs incurred by Design-Build Contractor for which the Utility Owner is responsible, whether under Governmental Rules or otherwise. The eligibility of Utility Owner costs (both indirect and direct, including inspection and review costs) for reimbursement by Design-Build Contractor, as well as the determination of any Betterment or other costs due to Design-Build Contractor, shall be established in accordance with Governmental Rules, including rules pertaining to Existing Utility Property Interests, and the applicable Utility Agreement(s).

7.3.6.2 If for any reason Design-Build Contractor is unable to collect any amounts due to Design-Build Contractor from any Utility Owner, then as between INDOT and Design-Build Contractor, (a) INDOT shall have no liability for such amounts, (b) Design-Build Contractor shall have no right to collect such amounts from INDOT or to offset such amounts against amounts otherwise owing from Design-Build Contractor to INDOT, and (c) Design-Build Contractor shall have no right to stop Work, sue for *mandamus*, demand or plead in any court for INDOT's participation in resolution of any dispute with the Utility Owner, or seek to exercise any other remedies against INDOT on account of the Utility Owner's failure to pay.

7.3.6.3 If any Local Agency or other Governmental Entity is participating in any portion of Utility Adjustment costs, Design-Build Contractor shall coordinate with INDOT and such Local Agency regarding accounting for and approval of those costs.

7.3.6.4 Design-Build Contractor shall maintain a complete set of records for the costs of Utility Adjustment Work performed (whether incurred by Design-Build Contractor or by the Utility Owner), in a format compatible with the estimate attached to the applicable Utility Agreement and in sufficient detail for analysis. For both Utility Owner costs and Design-Build Contractor costs, the totals for each cost category shall be shown in such manner as to permit comparison with the categories stated on the estimate. Design-Build Contractor

shall also indicate in these records the source of funds (e.g., federal, non-federal, Utility Owner, etc.) used for each such Utility Adjustment under each Utility Agreement. All records with respect to Utility Adjustment Work shall comply with the record keeping and audit requirements of the DBA Documents.

7.3.6.5 INDOT shall initially pay the Utility Owner for any costs related to Utility Owner's performance of Utility Adjustment Work under this Section 7.3.6 (*Utility Adjustment Costs*), and Design-Build Contractor, on a monthly basis, shall reimburse INDOT for any costs incurred in connection with such Utility Adjustment Work. The amounts reimbursed shall be due and payable within 10 days after receipt of INDOT's invoice for such Utility Adjustment Work. INDOT, in its sole discretion, may also deduct the amount to be reimbursed from any payment due and payable to Design-Build Contractor should Design-Build Contractor fail to reimburse INDOT for such Utility Adjustment Work.

### 7.3.7 **Incidental Utility Work**

Notwithstanding any contrary provision of the DBA Documents, Design-Build Contractor shall be responsible for all Incidental Utility Work without regard to the allocation of Work responsibility otherwise established pursuant to this Section 7 (*Access to Site; Utility Adjustments; Environmental Mitigation; Cooperation with Local Agencies*). Design-Build Contractor also shall be responsible for furnishing all designs for Incidental Utility Work that Design-Build Contractor performs, unless such designs are included among that portion of the Utility Adjustment Work to be performed by the Utility Owner pursuant to the applicable Utility Agreement. Design-Build Contractor shall not be entitled to any adjustment in the Contract Price or Completion Deadlines on account of costs incurred, cost savings or delays associated with the performance of Incidental Utility Work by Design-Build Contractor or by any Utility Owner (except to the extent Design-Build Contractor is otherwise eligible for a Relief Event or a Compensation Event).

### 7.3.8 **Bonds and Insurance; Security for Utility Adjustment Costs**

7.3.8.1 All Utility Adjustment Work shall automatically be covered by the Payment Bonds and Performance Bonds described in Section 9 (*Performance and Payment Bonds*) and by the insurance described in Section 10 (*Insurance*).

7.3.8.2 Design-Build Contractor shall satisfy all requirements in Utility Agreements to provide security for reimbursement of Utility Adjustment costs to which the Utility Owner is entitled and that are the responsibility of Design-Build Contractor hereunder, in form, type, and amount and on terms provided by the Utility Agreements.

## 7.4 **Updating Utility Information; Supplemental Utility Investigation by Design-Build Contractor**

### 7.4.1 **Utility Information and Supplemental Utility Investigation**

INDOT has provided the Utility Information among the Reference Information Documents and, with respect to Main or Trunkline Utilities, in TP Section 16 (Utilities) and TP Attachment



16-1 (Statements About Existing Conditions of Utilities, Additional Right-of-Way, and Encroachments). Design-Build Contractor shall analyze the Utility Information, contact and make inquiries of Utility Owners, perform surface inspections of the MOT Limits and Project ROW and such additional inspections, including additional subsurface utility investigations, as it deems appropriate and as are required by the DBA Documents and in keeping with Good Industry Practice to verify, fully and accurately identify all Utilities (including contacting and accessing Non-Indiana 811-Mapped Utilities), address all field conditions, and validate the Utility Information. Within 90 days from the effective date of NTP1, Design-Build Contractor shall prepare and submit to INDOT for review and comment “Design-Build Contractor’s Utility Conflict Matrix,” reflecting the existence of any and all Utilities likely to be impacted by the Project.

#### **7.4.2 Claims for Inaccuracies in Utility Information; Type 4 Utility Adjustments**

7.4.2.1 If Design-Build Contractor’s Utility Conflict Matrix or Utility Work Plans (including updates to Design-Build Contractor’s Utility Conflict Matrix or Utility Work Plans to the extent allowed under Section 7.4.1 (Utility Information and Supplemental Utility Investigation)) indicate the existence of any Unidentified Utility or reveal any Misidentified Utility, in either case, likely to be impacted by the Work, Design-Build Contractor shall provide a Relief Event Notice or Compensation Event Notice in accordance with the timeframes and other provisions set forth in Section 15 (Relief Events; Compensation Events). Except for Non-Indiana 811-Mapped Utilities, if Design-Build Contractor fails to timely provide such Relief Event Notice or Compensation Event Notice as required by this Section 7.4.2 (Claims for Inaccuracies in Utility Information; Type 4 Utility Adjustments) and Section 15 (Relief Events; Compensation Events) or fails to include an impacted Utility in Design-Build Contractor’s Utility Conflict Matrix (including updates to Design-Build Contractor’s Utility Conflict Matrix to the extent allowed under Section 7.4.1 (Utility Information and Supplemental Utility Investigation)), Design-Build Contractor shall be deemed to have irrevocably waived any right to later seek or obtain a Relief Event or Compensation Event for any such Unidentified Utility or Misidentified Utility impacted by the Work, notwithstanding (a) any contrary provision of the DBA Documents, (b) knowledge on the part of INDOT, and (c) any alleged lack of prejudice to INDOT from the late Notice or late identification of the alleged inaccuracy.

7.4.2.2 Reserved.

7.4.2.3 INDOT is responsible for negotiating and entering into Utility Agreements for Type 4 Utility Adjustments and Design-Build Contractor agrees to cooperate as reasonably requested by INDOT in pursuing such Utility Agreements, including attendance at negotiation sessions and review of Utility Agreements.

#### **7.4.3 Limitations on Utility-Related Compensation/Relief**

Without limiting any other provision of this DBA, Design-Build Contractor shall not be entitled to any increase in the Contract Price pursuant to this Section 7 (Access to Site; Utility

*Adjustments; Environmental Mitigation; Cooperation with Local Agencies*) or otherwise for any of the following:

- (i) Increased costs of the Work attributable to Unidentified Utilities or Non-Indiana 811-Mapped Utilities, to the extent that the existence of the facility was known to Design-Build Contractor as of the Proposal Date or could have been inferred from a Reasonable Investigation or otherwise from the presence of other facilities, such as buildings, meters, junction boxes, manholes or identifying markers, visible during a surface inspection of the area conducted prior to the Proposal Date;
- (ii) Increased costs of the Work attributable to Misidentified Utilities, to the extent that the existence of the facility in the correct location or size, as applicable, was known to Design-Build Contractor as of the Proposal Date or could have been inferred from a Reasonable Investigation or the presence of other facilities, such as buildings, meters, junction boxes, manholes, or identifying markers, visible during a surface inspection of the area conducted prior to the Proposal Date;
- (iii) Without limiting the provisions of Section 7.4.1 (*Utility Information and Supplemental Utility Investigation*), increased costs of the Work attributable to Unidentified Utilities (other than Non-Indiana 811-Mapped Utilities) or Misidentified Utilities, to the extent that the existence of the facility did not appear on Design-Build Contractor's Utility Conflict Matrix or Utility Work Plans (including updates to Design-Build Contractor's Utility Conflict Matrix or Utility Work Plans to the extent allowed under this Section 7.3 (*Utility Adjustments*));
- (iv) Increased costs of the Work attributable to Unidentified Utilities (including Non-Indiana 811-Mapped Utilities) or Misidentified Utilities where Design-Build Contractor failed to provide timely Notice in accordance with Section 7.4.2.1 (*Claims for Inaccuracies in Utility Information; Type 4 Adjustments*);
- (v) Increased costs of the Work attributable to Unidentified Utilities, Non-Indiana 811-Mapped Utilities, or Misidentified Utilities that can be protected in place or removed rather than physically relocated;
- (vi) The costs of Design-Build Contractor's supplemental utility investigation performed in accordance with Section 7.4.1 (*Utility Information and Supplemental Utility Investigation*);
- (vii) Any additional costs incurred by Utility Owners (that are not reimbursable or payable to the Utility Owner) as a result of the Unidentified Utility or a Misidentified Utility;

- (viii) Increased costs of the Work attributable to all other Utilities that are not Unidentified Utilities, Misidentified Utilities, or Non-Indiana 811-Mapped Utilities; and
- (ix) Delay, disruption, and consequential damages, except as specifically set forth in the DBA Documents.

#### **7.4.4 Inaccuracies in Other Information Supplied by INDOT Concerning Existing Utilities**

Except as otherwise provided in this Section 7.3 (Utility Adjustments), any information with respect to Utilities (including their existence, location, ownership, occupancy rights, type, material, status, usage, or any other characteristic) provided in the Utility Information or elsewhere in the Reference Information Documents or DBA Documents is for informational purposes only, is preliminary and has not been verified, and shall not be relied upon by Design-Build Contractor. Design-Build Contractor shall verify all information with respect to Utilities included in the Utility Information or elsewhere in the Reference Information Documents or DBA Documents and shall perform its own investigations as provided in this Section 7.3 (Utility Adjustments) and in TP Section 16 (Utilities). Accordingly, there shall be no changes in the Contract Price (either up or down) and no extensions of any Completion Deadlines on account of any inaccuracies in the Reference Information Documents or DBA Documents with respect to any Utility (including its existence, location, ownership, type, material, status, usage, or any other characteristic), except to the extent a Relief Event or a Compensation Event is specifically provided for under this DBA.

#### **7.4.5 Acknowledgments and Waivers**

7.4.5.1 Except to the extent a Relief Event or a Compensation Event is expressly provided for under this DBA, the Parties specifically intend by Section 7.3 (Utility Adjustments) to delegate to Design-Build Contractor the obligation to perform all responsibilities with respect to identification of all Utilities and to allocate to Design-Build Contractor all risk of increased costs and time of the Utility Adjustment Work resulting from inaccuracies in the reputed locations of such facilities (and in any other relevant information with respect to such facilities).

7.4.5.2 Design-Build Contractor acknowledges that prior to the Proposal Date, Design-Build Contractor had ample opportunity to analyze the Utility Information provided by INDOT, to undertake a Reasonable Investigation within the MOT Limits and Planned ROW Limits, to perform such additional investigations as Design-Build Contractor deemed appropriate to verify and supplement such information, and that such investigations constituted the basis for establishing its Scope Proposal.

7.4.5.3 Design-Build Contractor acknowledges that prior to the submittal of Design-Build Contractor's Utility Conflict Matrix, Design-Build Contractor had ample opportunity to analyze the Utility Information provided by INDOT, to contact and inquire of Utility Owners, and to perform such additional investigations as Design-Build Contractor deemed appropriate to verify and supplement such information. Furthermore, Design-Build

Contractor acknowledges that it had ample opportunity to analyze the Utility Information provided by INDOT, to contact and inquire of Utility Owners, and to perform such additional investigations as Design-Build Contractor deems appropriate to verify and supplement the Utility Information in support of updates to Design-Build Contractor's Utility Conflict Matrix to the extent allowed under this Section 7.3 (*Utility Adjustments*).

7.4.5.4 Design-Build Contractor further acknowledges and agrees that the acknowledgements, waivers, and agreements set forth in Section 7.4.4 (*Inaccuracies in Other Information Supplied by INDOT Concerning Existing Utilities*) and this Section 7.4.5 (*Acknowledgements and Waivers*) extend to and include any rights that Design-Build Contractor might otherwise utilize under INDOT's Right of Way Policies and Procedures Manual.

## **7.5 Changes in Design**

7.5.1 For purposes of this Section 7.5 (*Changes in Design*), a Project design change impacting Utility Adjustments is a change in Project Plans that (a) requires Adjustment of a Utility that was not listed in the Utility Information or Design-Build Contractor's Utility Conflict Matrix; or (b) necessitates acquisition of a Utility Easement not included in the real property rights comprising the MOT Limits and Planned ROW Limits.

7.5.2 Inasmuch as Design-Build Contractor is both furnishing the design of and constructing the Project, Design-Build Contractor may have opportunities to reduce the costs of certain portions of the Work, which may increase the costs of certain other portions of the Work or of Utility Adjustment Work to be performed by Utility Owners. In considering such opportunities, Design-Build Contractor shall consider the impact of Project design changes on Utility Adjustments with the overall goal of minimizing the necessity for Utility Adjustments to the extent practical, in compliance with Section 7.3.3 (*Avoiding Adjustments and Minimizing Costs*). Except to the extent a Relief Event or a Compensation Event is expressly provided for under this DBA, the following rules shall apply with respect to Project design changes during the course of the Project which either reduce the nature or extent of or eliminate any Utility Adjustment, or result in unanticipated Utility Adjustments or an increase in the nature, extent, or costs of anticipated Utility Adjustments:

- (a) Design-Build Contractor shall not be entitled to extension of any Completion Deadline on account of delays resulting from any such design changes (including delays in acquisition of Utility Easements by INDOT or Utility Owners);
- (b) Design-Build Contractor shall not be entitled to any increase in the Contract Price for any additional costs which Design-Build Contractor incurs as a result of such design changes (including additional costs of Utility Adjustment Work, the costs of any additional Work on other aspects of the Project undertaken in order to facilitate the avoidance or minimization of Utility Adjustments, or increased costs resulting from any Site conditions associated with Utility Easements made necessary by such design changes);

- (c) If INDOT incurs any additional costs as a result of such design changes (including any increases in amounts owed by INDOT to Utility Owners, e.g., for work which is unusable or which must be redone), then Design-Build Contractor shall reimburse INDOT for such costs within 10 days after receipt of INDOT’s invoice therefor, or INDOT, in its sole discretion, may deduct the amount of reimbursement due from any payment due and payable to Design-Build Contractor under the DBA Documents should Design-Build Contractor fail to reimburse INDOT for such costs; and
- (d) INDOT shall not be entitled to a credit on account of reductions in the cost of the Work due to any such avoided or minimized Utility Adjustments.

## **7.6 Utility Enhancements**

Design-Build Contractor shall be responsible for addressing any requests by Utility Owners that Design-Build Contractor design or construct a Betterment or Utility Owner Project (collectively, “Utility Enhancement”). Notwithstanding any other provision of this Section 7.6 (Utility Enhancements), no Work, Utility Adjustments or other Utility-related items initially included in the Work shall be considered a Betterment, including any Utility Agreement. Any Betterment performed as part of a Utility Adjustment, whether by Design-Build Contractor or by the Utility Owner, shall be subject to the same standards and requirements as if it were a necessary Utility Adjustment, and shall be addressed in the applicable Utility Agreement. Design-Build Contractor shall perform any work on a Utility Owner Project only by separate contract outside of the Work. Under no circumstances shall Design-Build Contractor proceed with any Utility Enhancement that is incompatible with the Project or is not in compliance with applicable Governmental Rules, the Governmental Approvals or the DBA Documents, including the Completion Deadlines. Under no circumstances will Design-Build Contractor be entitled to any additional compensation or time extension under the DBA Documents as the result of any Utility Enhancement, whether performed by Design-Build Contractor or by the Utility Owner. Design-Build Contractor may, but is not obligated under this DBA to, design and construct Utility Enhancements. Design-Build Contractor shall provide INDOT with such information, analyses, and certificates as INDOT may request in order to determine compliance with this Section 7.6 (Utility Enhancements).

## **7.7 Failure of Utility Owners to Cooperate**

7.7.1 Design-Build Contractor shall make diligent efforts to obtain the cooperation of each Utility Owner as necessary for the Project. Design-Build Contractor is responsible for verifying the progress of each Utility Owner’s work. Design-Build Contractor shall provide to INDOT Notice within five days after the occurrence of any of the following: (a) Design-Build Contractor is unable (or anticipates that it will be unable), after diligent efforts, to reach agreement with a Utility Owner on a necessary Utility Agreement within a reasonable time, (b) Design-Build Contractor reasonably believes for any reason that any Utility Owner would not undertake or permit Utility Adjustment Work in a manner consistent with the timely completion of the Project or in accordance with Governmental Rules, the Governmental Approvals or the DBA Documents, (c) Design-Build Contractor becomes aware that any Utility Owner is not cooperating in a timely

manner to provide agreed-upon work or approvals in accordance with the DBA Documents, or (d) any other dispute arises between Design-Build Contractor and a Utility Owner with respect to the Project, despite Design-Build Contractor's diligent efforts to obtain such Utility Owner's cooperation or otherwise resolve such dispute. Such Notice may include a request that INDOT assist in resolving the dispute or in otherwise obtaining the Utility Owner's timely cooperation. Design-Build Contractor shall provide INDOT with such information as INDOT request regarding the Utility Owner's failure to cooperate and the effect of any resulting delay on the Project Baseline Schedule. After delivering to INDOT any Notice or request for assistance, Design-Build Contractor shall continue to use diligent efforts to pursue the Utility Owner's cooperation.

7.7.2 If Design-Build Contractor requests assistance of INDOT pursuant to Section 7.7.1 (Failure of Utility Owners to Cooperate), the following provisions apply:

- (a) Design-Build Contractor shall provide evidence reasonably satisfactory to INDOT that (i) the subject Utility Adjustment Work is necessary, (ii) the time for completion of the Utility Adjustment in the Project Baseline Schedule was, in its inception, a reasonable amount of time for completion of such work, (iii) Design-Build Contractor has made diligent efforts to obtain the Utility Owner's cooperation, and (iv) the Utility Owner is not cooperating (clauses (a)(i) through (iv) above are referred to herein as the "Conditions to Assistance").
- (b) Following receipt by INDOT of satisfactory evidence, INDOT shall take such reasonable steps as INDOT may reasonably determine to obtain the cooperation of the Utility Owner or resolve the dispute; provided, however, INDOT shall have no obligation to prosecute eminent domain or other legal proceedings, or to exercise any other legal remedy available to it under Governmental Rules or existing contract, unless INDOT elects to do so in its sole discretion. INDOT may, at its sole discretion, participate in the resolution of any dispute between Design-Build Contractor and a Utility Owner, whether or not requested to do so by Design-Build Contractor.
- (c) Without limiting INDOT's obligations under clause (b) above, if INDOT holds contractual rights that might be used to enforce the Utility Owner's obligation to cooperate, INDOT shall have the right not to exercise those rights. The decision not to exercise those rights shall be in the sole discretion of INDOT.

7.7.3 Any assistance provided by INDOT shall not relieve Design-Build Contractor of its sole and primary responsibility for the satisfactory compliance with its obligations under the DBA Documents and its obligations with respect to timely completion of all necessary Utility Adjustments.

## 7.8 Utility Delays

### 7.8.1 Definition of Utility Delay

Except as set forth in clause (b), below, the term “Utility Delay” shall mean:

- (a) Any unreasonable and unjustified delay by a Utility Owner in connection with a Utility Adjustment following receipt by INDOT of proper Notice pursuant to Section 7.7.1 (*Failure of Utility Owners to Cooperate*), provided that all of the “Conditions to Assistance” described in Section 7.7.2 (*Failure of Utility Owners to Cooperate*) have been satisfied.
- (b) Notwithstanding the foregoing, the term “Utility Delay” does not include (i) INDOT-Directed Changes relating to Utilities, (ii) any additional Utility Adjustments beyond Type 4 Utility Adjustments other than as a direct result of a Relief Event or a Compensation Event; (iii) the necessity to negotiate and enter into a new or modified Utility Agreement other than as a direct result of a Type 4 Utility Adjustment, a Relief Event, or a Compensation Event; (iv) additional Utility Work arising out of a Project design change as described in Section 7.5 (*Changes in Design*); or (v) any event described in this Section 7.8.1 (*Definition of Utility Delay*) which results from or arises out of the actions or omissions of any DB-Related Entity or any Design-Build Contractor Fault. Design-Build Contractor shall not rely upon any proposed schedules, durations or deadlines included in the Reference Information Documents with respect to Utility Adjustments, and Design-Build Contractor may not base any Claims for a time extension or additional compensation upon such proposed schedules, durations, and deadlines.

### 7.8.2 Allocation of Risk of Utility Delays

7.8.2.1 Subject to the limitations and restrictions in this Section 7.8 (*Utility Delays*) and Section 15.3.2 (*Limitations on Time Extensions*), any Completion Deadline(s) affected by a Utility Delay shall be extended by one day for each day of Critical Path delay caused by such Utility Delay; provided, however, that if one or more Utility Delays is or are concurrent with another delay to the Critical Path which is Design-Build Contractor’s responsibility hereunder but is not a Utility Delay, then such Utility Delay(s) shall not be grounds for a time extension. Furthermore, if two Utility Delays occur that are concurrent with each other but are not concurrent with any other delay, then the period of concurrent delay shall be considered a Utility Delay but shall only be counted once for purposes of any time extension.

7.8.2.2 Design-Build Contractor shall not be entitled to extension of any Completion Deadline for a Utility Delay pursuant to Section 7.8.2.1 (*Allocation of Risk of Utility Delays*) unless all of the following conditions are satisfied (in addition to satisfaction of any conditions specified in Section 7.8.1 (*Definition of Utility Delay*)):

- (a) Design-Build Contractor has timely complied with the monitoring and notification requirements of Section 7.8.3 (*Delays Relating to Utility Easements*) and satisfied the “Conditions to Assistance” requirements described in Section 7.7.2 (*Failure of Utility Owners to Cooperate*);
- (b) If applicable, Design-Build Contractor has provided a reasonable Utility Adjustment Plan to the Utility Owner that has been approved by INDOT;
- (c) Design-Build Contractor has provided evidence satisfactory to INDOT that (i) Design-Build Contractor took advantage of Float available early in the Project Baseline Schedule for coordination activities with respect to the Utility(ies) to which such Utility Delay relates, (ii) Design-Build Contractor has fulfilled its obligation to coordinate with the Utility Owner to prevent or reduce such delays, and (iii) Design-Build Contractor has otherwise made diligent efforts to obtain timely performance by the Utility Owner but has been unable to obtain such timely performance;
- (d) There exist no circumstances which have delayed or are delaying (including concurrent delay) the affected Utility Adjustment(s), other than those that fit within the definition of a Utility Delay; and
- (e) The delay is otherwise allowable under Section 15.3.2 (*Limitations on Time Extensions*).

**7.8.3 Delays Relating to Utility Easements**

If, pursuant to the applicable Utility Agreements, the Utility Owner is responsible for handling acquisition efforts for a particular Utility Easement, then any failure by the Utility Owner to provide Design-Build Contractor with timely access to such Utility Easement shall not be treated as an INDOT-Caused Delay. Instead, any such failure to provide Design-Build Contractor with access before the applicable deadline (determined in accordance with Section 7.8.1 (*Definition of Utility Delay*)) shall be treated as a Utility Delay, to the extent that it delays the Critical Path and otherwise satisfies the requirements of this Section 7.8 (*Utility Delays*) applicable to Utility Delays.

**7.8.4 Reserved.**

**7.8.5 Delay and Disruption Damages**

Design-Build Contractor shall not be entitled to compensation for delay, disruption, and consequential damages or for any other increased costs attributable to delays described in this Section 7.8 (*Utility Delays*).



## **7.9 Utility-Related Claims; Additional Restrictions on Relief Events and Compensation Events Relating to Utility Adjustments**

In addition to all of the other requirements and limitations contained in this Section 7 (*Access to Site; Utility Adjustments; Environmental Mitigation; Cooperation with Local Agencies*) or in Section 15 (*Relief Events; Compensation Events*), Design-Build Contractor's entitlement to any Relief Event or Compensation Event relating to Utility Adjustments shall be subject to the restrictions and limitations set forth in this Section 7.9 (*Utility-Related Claims; Additional Restrictions on Relief Events and Compensation Events Relating to Utility Adjustments*).

### **7.9.1 Burden of Proof**

Design-Build Contractor shall provide documentation satisfactory to INDOT showing that the required analysis was performed and an appropriate determination made regarding the need for the Utility Adjustment, and shall also bear the burden of proving that the amount of any additional costs or time incurred by Design-Build Contractor are both necessary and reasonable.

### **7.9.2 Incremental Costs Only**

Any Compensation Event increasing the Contract Price pursuant to this Section 7 (*Access to Site; Utility Adjustments; Environmental Mitigation; Cooperation with Local Agencies*) shall include only the incremental costs arising from the circumstances giving rise to such Relief Event or Compensation Event, i.e., the amount payable shall take into account the costs that would have been incurred absent such circumstances and, subject to any limitation in this Section 7 (*Access to Site; Utility Adjustments; Environmental Mitigation; Cooperation with Local Agencies*) a credit shall be allowed for any avoided costs.

### **7.9.3 Coordination Costs**

Design-Build Contractor shall not be entitled to any increase in the Contract Price for any costs of coordinating with Utility Owners.

### **7.9.4 Orders Only as Specified**

Except to the extent a Relief Event or a Compensation Event is expressly provided for under this DBA, Design-Build Contractor shall not be entitled to any time extension or Contract Price increase with respect to any Utility Adjustments, in either case, without regard to any act of or failure to act by any Utility Owner that may result in a delay to the Critical Path or in Design-Build Contractor's incurring costs not included in the Contract Price.

## **7.10 Hazardous Materials Management**

### **7.10.1 Procedures for Hazardous Materials Management**

7.10.1.1 Design-Build Contractor shall manage, treat, handle, store, remediate, remove, transport (where applicable), document and dispose of all Hazardous

Materials and Recognized Environmental Conditions, and Contaminated Groundwater, and perform all other aspects of Hazardous Materials Management as appropriate, in accordance with applicable Governmental Rules, Governmental Approvals, and all applicable provisions of the DBA Documents. If during the course of the Work, Design-Build Contractor encounters Hazardous Materials, Recognized Environmental Conditions, or Contaminated Groundwater in connection with the Project, Site, or Work, Design-Build Contractor shall promptly (a) provide to INDOT Notice of such encounter and advise INDOT of any obligation to notify any Governmental Entities under applicable Governmental Rules and Governmental Approvals; and (b) develop a plan to undertake Hazardous Materials Management, which plan shall take reasonable steps, including design modifications or construction techniques, to avoid excavation, dewatering or other active, intrusive management in areas where Hazardous Materials, Recognized Environmental Conditions, or Contaminated Groundwater are encountered. For purposes of this Section 7.10 (*Hazardous Materials Management*), the term “material quantities” means quantities that trigger any reporting, investigation, remediation or other response action requirements under any Environmental Law. Where excavation, dewatering or other active, intrusive management is unavoidable, Design-Build Contractor shall utilize appropriately trained personnel and shall select the most cost-effective approach to Hazardous Materials Management, unless otherwise directed by INDOT. All Hazardous Materials Management shall be conducted in accordance with applicable Governmental Rules, Governmental Approvals, the approved plans required to be provided under TP Section 14.3.3 (Hazardous Materials) and the approved Safety Plan.

7.10.1.2 Except where Design-Build Contractor is required to take immediate action under the DBA Documents or applicable Governmental Rules, Design-Build Contractor shall afford INDOT the opportunity to inspect sites containing Hazardous Materials, Recognized Environmental Conditions, or Contaminated Groundwater and to consult with Design-Build Contractor about the recommended approach before any Hazardous Materials Management or other action is taken which would inhibit INDOT’s ability to ascertain the nature and extent of the contamination.

#### **7.10.2 Hazardous Materials Generator Responsibilities**

As between Design-Build Contractor and INDOT, INDOT shall be considered the generator and assume generator responsibility for Hazardous Materials other than Design-Build Contractor Release(s) of Hazardous Materials. INDOT has exclusive decision-making authority regarding selection of the destination facility to which Hazardous Materials other than Design-Build Contractor Release(s) of Hazardous Materials will be transported. With regard to Hazardous Materials other than Design-Build Contractor Release(s) of Hazardous Materials, INDOT shall comply with the applicable standards for generators including those found at 40 CFR Part 262, including the responsibility to sign manifests and other waste tracking records for the transport of Hazardous Materials. The foregoing shall not preclude or limit any rights, remedies or defenses that INDOT or Design-Build Contractor may have against any Governmental Entity or other third parties, including prior owners, lessees, licensees, and occupants of any parcel of land that is or becomes part of the Site. Notwithstanding the foregoing, Design-Build Contractor (and not INDOT) shall be considered the generator with respect to any (a) Design-Build Contractor

Release(s) of Hazardous Materials and (b) Release(s) of Hazardous Materials for which Design-Build Contractor is responsible under Section 20.1.1(g) (*Indemnifications by Design-Build Contractor*).

### **7.10.3 Materials Brought to Site by Design-Build Contractor**

Design-Build Contractor shall be solely responsible for: (a) compliance with all Governmental Rules and Governmental Approvals applicable to Hazardous Materials brought onto the Site by any DB-Related Entity; (b) use, containment, storage, management, transport and disposal of all such Hazardous Materials in accordance with the DBA Documents and all Governmental Rules and Governmental Approvals; and (c) payment of all Losses (including damages to natural resources, property or Persons) associated with, arising out of or related to such Hazardous Materials.

### **7.10.4 Environmental Approvals Relating to Hazardous Materials**

Design-Build Contractor shall obtain all Governmental Approvals relating to Hazardous Materials Management performed by Design-Build Contractor, including federal and State surface water and groundwater discharge permits and permits for recycling or reuse of Hazardous Materials. Design-Build Contractor shall be solely responsible for compliance with such Governmental Approvals and applicable Governmental Rules, including those governing the preparation of waste profiles, waste manifests and bills of lading.

### **7.10.5 Limitation of INDOT Liability Relating to Hazardous Materials Releases**

Notwithstanding anything to the contrary in this Section 7.10 (*Hazardous Materials Management*), if Design-Build Contractor has contributed to any liability or responsibility with respect to any Release of Hazardous Materials, including any Hazardous Materials Release caused in part by INDOT or any Third Party Release of Hazardous Materials, INDOT will not be responsible for the portion of any liability or responsibility determined to be caused by Design-Build Contractor, whether determined judicially or pursuant to Dispute Resolution Procedures.

## **7.11 Environmental Compliance, Mitigation and Approval Requirements**

### **7.11.1 Environmental Compliance**

Design-Build Contractor shall comply with all Environmental Laws in performance of the Work, and with all other conditions and requirements of the DBA Documents and Governmental Approvals issued thereunder, whether obtained by INDOT or Design-Build Contractor, including the requirements set forth in INDOT-Provided Approvals and TP Section 14 (Environmental). The Contract Price includes compensation for Design-Build Contractor's performance of all environmental requirements and conditions, including mitigation measures, except for those items expressly described in Section 7.11.2 (*Performance of Mitigation Measures*) as being the responsibility of INDOT. Throughout the course of the Work, Design-Build Contractor shall perform or cause to be performed all environmental mitigation measures required under the DBA Documents and the Environmental Approvals and similar Governmental Approvals for the Work,

and shall comply with all other conditions and requirements thereof. Design-Build Contractor, at its sole cost and expense, shall also abide by and comply with the commitments contained in subsequent re-evaluations, re-validations, and modifications of Environmental Approvals. If INDOT directs Design-Build Contractor to comply with commitments contained in re-evaluations, re-validations, and modifications of Environmental Approvals submitted after the Proposal Date that affect the Work, such directive shall be deemed a Relief Event or a Compensation Event only to the extent expressly provided for under each definition. Design-Build Contractor shall reimburse INDOT for the costs of technical studies and documentation, including biological and cultural resource studies, prepared by or on behalf of INDOT in connection with any such environmental re-evaluations, re-validation, and new or modified Environmental Approvals, other Governmental Approvals and any Other Approvals, authorizations and consents required for the Work, unless such items are due to a Relief Event or a Compensation Event. Except as specifically provided otherwise, the cost incurred for, and the delay to the Project Baseline Schedule resulting from, restoration and, as applicable, mitigation of any inadvertent impacted areas shall be the sole responsibility of Design-Build Contractor.

### **7.11.2 Performance of Mitigation Measures**

7.11.2.1 Design-Build Contractor shall perform all environmental mitigation measures arising (i) from New Approvals which Section 7.11.4 (*New Approvals*) provides are Design-Build Contractor's responsibility, (ii) from any modifications, renewals and extensions of the INDOT-Provided Approvals required in connection with Design-Build Contractor's design of the Project, or (iii) as otherwise required by the DBA Documents.

7.11.2.2 Design-Build Contractor shall monitor the progress of performance of environmental mitigation measures and provide periodic reports to INDOT as required by the Environmental Compliance and Mitigation Plan and TP Section 14.3.2 (Environmental Compliance). Design-Build Contractor acknowledges and agrees that the plan may be updated from time to time to account for any revisions in mitigation requirements. Whenever a New Approval is obtained which changes the existing environmental mitigation requirements or adds new environmental mitigation requirements, the Environmental Compliance and Mitigation Plan will be revised to include such amendments or new requirements, and Design-Build Contractor shall comply with the revised plan from and after the date it receives the revised plan. No Relief Event or Compensation Event shall be allowed in connection with any update or revision to the Environmental Compliance and Mitigation Plan except as expressly provided for under each such definition.

### **7.11.3 INDOT-Provided Approvals**

7.11.3.1 Design-Build Contractor is responsible for complying with all the requirements and conditions of INDOT-Provided Approvals. INDOT has obtained the Project's final Environmental Determination as of the Effective Date.

7.11.3.2 INDOT has obtained or is in the process of obtaining the INDOT-Provided Approvals for the Project. All mitigation requirements or conditions contained in the

final INDOT-Provided Approvals shall automatically be deemed included in the scope of Work.

7.11.3.3 Design-Build Contractor hereby assumes responsibility for the Environmental Approvals other than the INDOT-Provided Approvals and shall obtain all other Governmental Approvals required in connection with the Project, the Site and the Work. In addition, Design-Build Contractor hereby assumes responsibility for, and shall obtain, any modifications, renewals and extensions of the INDOT-Provided Approvals required in connection with Design-Build Contractor's design of the Project. Design-Build Contractor shall deliver to INDOT true and complete copies of all new or amended Governmental Approvals. For avoidance of doubt, INDOT shall remain the permitting Party with respect to any reevaluation of the Environmental Determination or NEPA Documents arising out of or relating to Design-Build Contractor's design, but Design-Build Contractor shall bear the sole risk of any such reevaluation and shall be solely responsible for the costs of INDOT incurred in such role. In such instance, no act or omission by INDOT, nor the requirement for or duration of any reevaluation itself, shall be the basis for any Relief Event, Compensation Event, or any other Claim.

#### 7.11.4 **New Approvals**

##### 7.11.4.1 **Approvals To Be Obtained at the Expense of INDOT**

INDOT shall be responsible for obtaining any New Approvals necessitated by a Relief Event or a Compensation Event. Design-Build Contractor, at its sole cost, shall provide support services to INDOT with respect to obtaining any such New Approval.

##### 7.11.4.2 **New Approvals To Be Obtained at Design-Build Contractor's Expense**

If a New Approval becomes necessary for any reason other than those specified in Section 7.11.4.1 (*Approvals to be Obtained at the Expense of INDOT*), Design-Build Contractor shall be fully responsible for the cost, risk and delay of obtaining the New Approval and any other Governmental Approvals, including Environmental Approvals, that may be necessary, and for all mitigation, conditions, requirements and delays resulting therefrom, as well as for any litigation, challenges or proceedings arising in connection therewith. If Design-Build Contractor wishes to adopt any design or construction approach that would require a revision, modification or amendment to an INDOT-Provided Approval, Design-Build Contractor shall consult with INDOT. Design-Build Contractor shall not implement any such approach unless concurrence of INDOT has first been obtained and arrangements have been made to reimburse INDOT for the costs of the proposed change. If any New Approval is associated with a VECP, the costs of obtaining and complying with the terms of the New Approval shall be considered in determining the Contract Price adjustment under Section 24.6 (*Contract Price Adjustment*).

#### 7.11.5 **Environmental Compliance by Design-Build Contractor for Off-Site Activities**

If Design-Build Contractor chooses to add or select any ground or resource disturbing features such as material (gravel, borrow, disposal or re-use) sites, equipment staging sites, office sites, water lines, holding ponds, Hazardous Materials or non-Hazardous Materials staging areas, etc., for which a new Governmental Approval is required, Design-Build Contractor shall obtain and provide to INDOT such Governmental Approvals before commencing any activity within the feature(s). Design-Build Contractor is responsible for all costs of pursuing, obtaining, and complying with all such Governmental Approvals and any others which may be necessary, and is not entitled to any time extension for delays encountered in obtaining these approvals.

## **7.12 Cooperation with Local Agencies**

### **7.12.1 Compliance with Local Agency Requirements**

Design-Build Contractor shall comply with Local Agency requirements applicable to the Work, including payment of all plan review and construction inspection costs charged by Local Agencies relating to the Work.

### **7.12.2 Bonds and Insurance**

Upon request by INDOT, Design-Build Contractor shall: (a) provide additional obligee riders to the Payment Bond(s) and Performance Bond(s) in favor of Local Agencies, in form and substance consistent with the Payment Bond(s) and Performance Bond(s) and satisfactory to INDOT, and (b) provide certificates naming Local Agencies as additional insureds to the insurance policies as and where required under Section 10 (Insurance).

## **SECTION 8 SUBCONTRACTORS AND LABOR**

### **8.1 Subcontracts**

#### **8.1.1 Limitations on Subcontracting**

This DBA, or portions hereof, or the right, title, or interest herein, shall not be subcontracted, sold, transferred, assigned, or otherwise disposed of without the written approval of INDOT. In case such approval is given, Design-Build Contractor will be allowed to subcontract a portion thereof, but shall perform with its own organization, Work amounting to not less than 30% of the original or revised contract amount, whichever is less. All items designated in the contract as specialty items may be performed by Subcontract. The cost of such specialty items so performed by Subcontracts may be deducted from the total cost before computing the amount of work required to be performed by Design-Build Contractor with its own organization. No Subcontracts or transfer of contracts will release Design-Build Contractor of liability under this DBA. Approved Subcontractors will not be allowed to further subcontract their work, except that Major Subcontractors shall be able to subcontract one further tier below, subject to compliance with all subcontracting requirements in this DBA, including approval by INDOT, and that Design-Build Contractor shall remain fully responsible and liable for such subcontracting and Work. Design-Build Contractor shall not be entitled to any payment for subcontracted Work or materials

unless it is performed or supplied by a Subcontractor approved by INDOT prior to the Work being performed.

### **8.1.2 Subcontracting Requirements**

8.1.2.1 Subcontracting shall be in accordance with the requirements of 105 IAC 11-2-10, Subcontractors.

8.1.2.2 Design consultants and subconsultants shall satisfy the INDOT Prequalification Work Type Certification requirements for the type of Design Work they are engaged in for the Project.

### **8.1.3 Subcontractor Listing**

Within 10 days after issuance of the NTP1, Design-Build Contractor shall complete and provide to INDOT a schedule updating the list of Subcontractors and Suppliers included in the Proposal and identifying all intended Subcontractors and Suppliers. Design-Build Contractor shall provide an updated schedule each month thereafter so that INDOT will have, at all times, a current and accurate list of Subcontractors along with the Work that they will perform and Suppliers along with the material that they will supply. Design-Build Contractor shall allow INDOT access to all Subcontracts and records regarding the Subcontracts and shall deliver to INDOT certified copies of each Subcontract within the later of (i) 10 days after execution thereof; and (ii) issuance of the Notice to Proceed.

### **8.1.4 Leases and Subcontractor Payment Tracking**

8.1.4.1 Design-Build Contractor or Subcontractors may enter into leases or rental agreements for equipment with operators or trucks with drivers. When certified payrolls are required, they shall be submitted for all such equipment operators and truck drivers who perform the scope of services under such lease or rental agreement.

8.1.4.2 Design-Build Contractor shall submit payment records through INDOT's Subcontractor Payment Tracking System (<http://itap.indot.in.gov>) of all payments made to Subcontractors and DBE firms approved by INDOT. Reports shall be submitted no later than 10 days after the end of each month in which a Subcontractor is paid for the work it performs under its Subcontract. Reports shall include any release of retainage payments made to Subcontractors.

### **8.1.5 Responsibility for Work and Subcontractors**

Notwithstanding any Subcontract or agreement with any Subcontractor, Design-Build Contractor shall be fully responsible for all of the Work. The retention of Subcontractors by Design-Build Contractor will not relieve Design-Build Contractor of its responsibility hereunder or for the quality of the Work or materials provided by it. Design-Build Contractor shall supervise and be fully responsible to INDOT for the acts and omissions of any DB-Related Entity and any Design-Build Contractor Fault or by any member or employee of Design-Build Contractor or any

DB-Related Entity, as though Design-Build Contractor directly employed all such individuals. No Subcontract entered into by Design-Build Contractor will impose any obligation or liability upon INDOT to any such Subcontractor or any of its employees. Nothing in this DBA will create any contractual relationship between INDOT and any Subcontractor. INDOT shall not be bound by any Subcontract, and no Subcontract shall include a provision purporting to bind it. Each Subcontract shall include the following provision:

Nothing contained herein shall be deemed to create any privity of contract between or among INDOT and the Subcontractor, nor does it create any duties, obligations, or liabilities on the part of INDOT to the Subcontractor except those specified under State law. In the event of any claim or dispute arising under a Subcontract or the DBA Documents with INDOT, the Subcontractor shall look only to Design-Build Contractor for any payment, redress, relief, or other satisfaction. The Subcontractor hereby waives any claim or cause of action against INDOT arising out of the Subcontract or otherwise arising in connection with the Subcontractor's Work.

#### **8.1.6 Subcontract Work**

##### **8.1.6.1 INDOT Approval**

Design-Build Contractor shall coordinate the Work performed by Subcontractors. If INDOT makes a good faith objection to the use or continued use of a Subcontractor, the Subcontractor shall be replaced at the request of INDOT and shall not again be employed on the Project. No Subcontractor may start any Work until after INDOT receives a copy of its Subcontract, a copy of such Subcontractor's valid Indiana Certificate of Qualification, Indiana state business license, and any insurance documents required pursuant to Section 10 (Insurance).

##### **8.1.6.2 Form of Subcontract**

Design-Build Contractor shall ensure that each Subcontract (at all tiers) shall include those terms that are specifically required by the DBA Documents to be included therein as well as such additional terms and conditions as are appropriate to ensure compliance by the Subcontractor with all applicable requirements of the DBA Documents. Each Subcontract shall:

8.1.6.2.1 Except for any obligations and risks to be expressly retained by Design-Build Contractor and which do not flow through to the Subcontractor, set forth a standard of professional responsibility or a standard for commercial practice equal to or better than the requirements of the DBA Documents and Good Industry Practice for work of similar scope and scale and shall set forth effective procedures for claims and change orders;

8.1.6.2.2 Require the Subcontractor to carry out its scope of Work in accordance with the DBA Documents, applicable Other Approvals, the Governmental Approvals and Governmental Rules, including the applicable requirements of the DBE Performance Plan and



EEO/Workforce Project Plans, and to be joined in any Dispute Resolution Proceeding if such joinder is determined by INDOT to be reasonably necessary to resolve the Dispute;

8.1.6.2.3 Set forth effective procedures for claims and change orders which are consistent with the Change Order process set forth in the DBA Documents;

8.1.6.2.4 Set forth warranties, guaranties and liability provisions of the contracting party in accordance with Good Industry Practice for work of similar scope and scale;

8.1.6.2.5 Expressly state that all remaining warranties and guarantees, express or implied, shall inure to the benefit of INDOT and its successors and assigns upon expiration of the term or earlier termination of this DBA;

8.1.6.2.6 Include the following: (i) requirement to maintain usual and customary Books and Records for the type and scope of operations of business in which the Subcontractor is engaged (e.g., constructor, equipment supplier, designer, service provider); (ii) provision permitting audits to be conducted by Design-Build Contractor, INDOT, and FHWA; (iii) provision that Subcontractor warrants the completeness and accuracy of all information the Subcontractor (or its agents) provide in connection with Section 23.4 (Maintenance of, Access to and Audit of Records); (iv) requirement to provide progress reports to Design-Build Contractor appropriate for the type of work it is performing sufficient to enable Design-Build Contractor to provide the reports it is required to furnish to INDOT under this DBA; (v) requirement for the Subcontractor to maintain all appropriate licenses and qualifications; (vi) provision prohibiting assignment of the Subcontract by the Subcontractor without Design-Build Contractor's prior written consent; and (vii) provisions implementing the requirements of Section 23.2 (Subcontractor Pricing Documents);

8.1.6.2.7 For Major Subcontracts: (i) be terminable by the Subcontractor only for cause unless INDOT terminates this DBA pursuant to Section 17 (Termination for Convenience), in which case Design-Build Contractor may terminate the Subcontractor for convenience in accordance with Section 8.1.6.2.20 (Form of Subcontract); (ii) include an indemnity from the Subcontractor in favor of Design-Build Contractor and the Indemnified Parties against any and all Losses arising out of, related to or associated with, the actions, omissions, negligence, fraud, recklessness, willful misconduct, breach or other violation of Other Approvals, or breach or other violation of Governmental Approvals, violation of Governmental Rules or breach of contract by the Subcontractor or any of its officers, employees, agents or representatives; provided, however, that such Subcontractor indemnities shall not inure to the benefit of an Indemnified Party so as to impose liability on the Subcontractor for the gross negligence of INDOT, or to relieve INDOT of liability for such gross negligence; and (iii) include a covenant, expressly stated to survive termination of the Major Subcontract, to promptly execute and deliver to INDOT a new contract between the Subcontractor and INDOT on the same terms and conditions as the Major Subcontract, in the event: (A) the Major Subcontract is rejected by Design-Build Contractor in bankruptcy or otherwise wrongfully terminated by Design-Build Contractor or (B) INDOT delivers written request for such new contract following termination or expiration of this DBA;

8.1.6.2.8 Expressly require the Subcontractor to participate in meetings between Design-Build Contractor and INDOT, upon request, concerning matters pertaining to such Subcontract or its work; provided, however, that all direction to such Subcontractor shall be provided by Design-Build Contractor, and provided further that nothing in this clause (h) shall limit the authority of INDOT to give such direction or take such action which, in its opinion, is necessary to remove an immediate and present threat to the safety of life or property;

8.1.6.2.9 Contain certification by the Subcontractor that the Subcontractor is experienced in and qualified to do, and knowledgeable about, the subcontracted Work;

8.1.6.2.10 Include the right of Design-Build Contractor to terminate the Subcontract in whole or in part upon any Termination for Convenience of this DBA without liability of Design-Build Contractor or INDOT for the Subcontractor's lost profits or business opportunity, consequential or other damages;

8.1.6.2.11 Expressly provide that all Liens, Claims and charges of the Subcontractor and its Subcontractors at any time shall not attach to any interest of INDOT in the Project, the MOT Limits or the Project ROW;

8.1.6.2.12 Include a covenant to maintain all licenses required by applicable Governmental Rules;

8.1.6.2.13 Expressly provide that the Major Subcontractor shall have no right to suspend or demobilize unless and until it delivers to INDOT Notice of the other contracting party's breach or default;

8.1.6.2.14 Require the personal services of and not be assignable by the Major Subcontractor without prior written consent of Design-Build Contractor and INDOT, provided that this provision shall not prohibit the subcontracting of portions of the Work;

8.1.6.2.15 Expressly include the requirements and provisions set forth in this DBA applicable to Subcontractors regarding Intellectual Property rights and licenses;

8.1.6.2.16 Include an agreement by the Subcontractor to give evidence in any Dispute proceeding pursuant to the Dispute Resolution Procedures if such participation is requested by either INDOT or Design-Build Contractor;

8.1.6.2.17 Expressly include requirements that: the Subcontractor will (i) maintain usual and customary Books and Records for the type and scope of operations of business in which it is engaged, and retain such Books and Records for the period set forth in Section 23.5 (Retention of Records) or other applicable period set forth in the DBA Documents, (ii) permit audit thereof by INDOT and FHWA, (iii) provide progress reports to Design-Build Contractor appropriate for the type of work it is performing sufficient to enable Design-Build Contractor to provide the reports it is required to furnish INDOT under this DBA, and (iv) provide copies of Books and Records to INDOT upon the reasonable request of INDOT and at no cost to INDOT (and without limiting other reasonable requests, it shall be deemed reasonable if the request relates

to any of the foregoing: (1) a potential or actual breach of the DBA Documents, (2) a potential or actual violation of the DBA, Governmental Rule or Governmental Approval, (3) a Claim or Dispute, (4) a Change Order, Relief Event, or Compensation Event, (5) an invoice, (6) any unit-priced work or pay item; (7) any claim or matter covered by indemnity or insurance; or (8) if required by FHWA);

8.1.6.2.18 Expressly provide that INDOT is a third-party beneficiary of the Subcontract and shall have the independent right to enforce all of the terms of the Subcontract for its own benefit in accordance with the terms thereof;

8.1.6.2.19 Provide that all guarantees and warranties, express or implied, shall inure to the benefit of INDOT and its successors and assigns;

8.1.6.2.20 Without cost to Design-Build Contractor or INDOT, expressly permit assignment to INDOT or its successors, assignees or designees of all Design-Build Contractor's rights under the Subcontract, contingent only upon delivery of written request from INDOT following termination or expiration of this DBA, allowing INDOT or its successor, assign or designee to assume the benefit of Design-Build Contractor's rights with liability only for those remaining obligations of Design-Build Contractor accruing after the date of assumption, such assignment to include the benefit of all Subcontractor warranties, indemnities, guarantees and professional responsibility;

8.1.6.2.21 Expressly state that assumption of the Subcontract by either or both of INDOT or its successor, assignee or designee shall not operate to make the assignee responsible or liable for any breach of the Subcontract by Design-Build Contractor or the other contracting party or for any amounts due and owing under the Subcontract for work or services rendered prior to assumption, without prejudice, however, to any rights of the Subcontractor under the Subcontract or applicable Governmental Rules to suspend work or terminate the Subcontract by reason of any such breach or failure to pay amounts due;

8.1.6.2.22 Expressly include (i) a covenant to recognize and attorn to either or both of INDOT upon receipt of notice from INDOT that INDOT has exercised step-in rights under this DBA, without necessity for consent or approval from Design-Build Contractor or to determine whether INDOT validly exercised the step-in rights, and (ii) Design-Build Contractor's covenant to waive and release any claim or cause of action against the Subcontractor arising out of or relating to its recognition and attornment in reliance on any such notice;

8.1.6.2.23 Be consistent in all other respects with the terms and conditions of the DBA Documents to the extent such terms and conditions are applicable to the scope of work of such Subcontractors, and include all provisions required by this DBA;

8.1.6.2.24 Not impose upon INDOT any obligation or liability whatsoever;

8.1.6.2.25 Not create any contractual relationship between INDOT and the applicable Subcontractor, and specifically state that INDOT is not bound by any Subcontract, and no Subcontract shall include a provision purporting to bind it;

8.1.6.2.26 Include a copy of FHWA Form 1273, and require compliance to the extent applicable to the subcontracted scope of Work;

8.1.6.2.27 Include prompt payment requirements consistent with those under Section 13.5.1 (*Payment to Subcontractors*), and otherwise require the Subcontractor to make payments to its sub-subcontractors, vendors, and Suppliers in a similar manner;

8.1.6.2.28 Expressly provide that any purported amendment with respect to any of the foregoing matters without the prior written consent of INDOT shall be null and void;

8.1.6.2.29 Expressly include provisions regarding terminations for convenience, allowing terminations under Section 17 (*Termination for Convenience*) to be passed through to the Subcontractors and establishing terms and conditions relating thereto, including procedures for determining the amount payable to the Subcontractor upon a termination, consistent with Section 17 (*Termination for Convenience*);

8.1.6.2.30 Expressly provide that, in the event of a Termination for Convenience by INDOT, the Subcontractor will not be entitled to any anticipatory or unearned profit on Work terminated or partly terminated, or to any payment which constitutes consequential damages on account of the termination or partial termination;

8.1.6.2.31 Include the provisions required under Section 23.2 (*Subcontractor Pricing Contract*) pertaining to pricing;

8.1.6.2.32 If the Subcontract includes a right to withhold payments due Subcontractors as retainage, expressly provide that the withholding party shall release such retainage to the Subcontractor within 30 days after satisfactory completion of the work performed by the Subcontractor, and that “satisfactory completion” means when the Subcontractor has completed all physical work and completed other contract requirements, including submission of all submittals;

8.1.6.2.33 Include the provisions of Section 4.4.5.1 (*Compliance with Regulations*) through Section 4.4.5.5 (*Sanctions for Noncompliance*), inclusive, unless exempt by the Regulations, or directives issued pursuant to a Subcontract; and

8.1.6.2.34 Include a provision allowing for modification of the Subcontract per Section 8.1.6.3 (*Subcontract Work*).

8.1.6.3 INDOT shall have the right, but not the obligation, to review the form of subcontract used by Design-Build Contractor for the Project and INDOT shall have the right to require modifications thereto to conform to the requirements set forth herein.

8.1.6.4 Design-Build Contractor shall allow INDOT access to all Subcontracts and records regarding Subcontracts and shall deliver to INDOT, within the later of (i) 10 days after execution; or (ii) 10 days after issuance of the NTP1, true and complete copies of all Major Subcontracts and Subcontracts with DBEs and, within 10 days after receipt

of a request from INDOT, true and complete copies of all other Subcontracts as may be requested. At Design-Build Contractor's option, copies of the pages of the Subcontracts delivered to INDOT may be redacted to remove pricing information; provided, however, that in such event a full copy of the Subcontract shall be added to the EPDs maintained under Section 23.1 (Escrowed Proposal Documents).

#### 8.1.7 Subcontracts with Affiliates

8.1.7.1 Design-Build Contractor shall have the right to have Work and services performed by Affiliates only under the following terms and conditions:

- (a) Design-Build Contractor shall execute a written Subcontract with the Affiliate;
- (b) The Subcontract shall comply with all applicable provisions of this Section 8 (Subcontractors and Labor), be consistent with Good Industry Practice, and be in form and substance substantially similar to Subcontracts then being used by Design-Build Contractor or Affiliates for similar Work or services with unaffiliated Subcontractors;
- (c) The Subcontract shall set forth the scope of Work and services and all the pricing, terms and conditions respecting the scope of Work and services;
- (d) The pricing, scheduling and other terms and conditions of the Subcontract shall be no less favorable to Design-Build Contractor than those that Design-Build Contractor could reasonably obtain in an arms' length, competitively procured transaction with an unaffiliated Subcontractor. Design-Build Contractor shall bear the burden of proving that the same are no less favorable to Design-Build Contractor; and
- (e) No Affiliate shall be engaged to perform any Work or services which any DBA Documents or the Project Management Plan or any component part, plan or other documentation thereunder indicates are to be performed by an independent or unaffiliated party. No Affiliate shall be engaged to perform any Work or services which would be inconsistent with Good Industry Practice or other DBA Document requirements.

8.1.7.2 Before entering into a written Subcontract with an Affiliate or any supplement or amendment thereto, Design-Build Contractor shall submit a true and complete copy of the proposed Subcontract to INDOT for review and comment. INDOT shall have 20 days after receipt to deliver comments to Design-Build Contractor.

8.1.7.3 Design-Build Contractor shall make no payments to Affiliates for work or services in advance of provision of such work or services, except for reasonable mobilization payments or other payments consistent with arm's length, competitive transactions of similar scope.

### 8.1.8 Other Requirements

No Subcontractor shall perform Work if that Subcontractor is presently debarred, suspended, proposed for debarment, declared ineligible, or voluntarily excluded from public works projects by any federal agency or by any department, agency or political subdivision of the State.

## 8.2 Key Personnel; Character of Employees; Key Personnel Liquidated Damages

8.2.1 Design-Build Contractor, in its Proposal, identified certain personnel to fill specified categories of “Key Personnel” for the Project. Exhibit 3 (Key Personnel) hereto identifies certain job categories of “Key Personnel” for the Project and the personnel identified by Design-Build Contractor in its Proposal (or such other personnel as were approved by INDOT prior to the Effective Date). INDOT may, acting in good faith, at any time elect to add job categories to the “Key Personnel” list, but those new Key Personnel positions shall not be subject to liquidated damages as set forth below. Design-Build Contractor shall not change, or permit any change in, Key Personnel without the prior written consent of INDOT and only as described through the process below.

8.2.2 Design-Build Contractor shall designate an Authorized Representative who shall have onsite field and office authority to represent and act for Design-Build Contractor. An Authorized Representative shall be present at the jobsite at all times while Work is actually in progress. INDOT requires the ability to contact the following Key Personnel 24 hours per day, seven days per week for the duration of the Project: (a) Project Manager; (b) Construction Manager, (c) Project Controls Lead, and (d) Safety Manager. Design-Build Contractor shall provide phone, e-mail addresses and mobile telephone numbers for such Key Personnel, and shall provide the phone and mobile telephone number for an alternate contact, with appropriate authority, for each such Key Personnel should that Key Personnel not be available.

8.2.3 INDOT shall have the right to review the qualifications and character of each individual to be appointed to a Key Personnel position (including personnel employed by Subcontractors) and INDOT shall have the right to approve or disapprove use of such individual in such position prior to the commencement of any Work by such individual or during the prosecution of the Work. Design-Build Contractor shall provide to INDOT Notice of any proposed changes in any Key Personnel. Individuals proposed to fill Key Personnel positions must meet the minimum qualifications specified in TP Section 1.5.1 (Personnel) for that position and shall be subject to any requirements, restrictions or limitations therein. Consent regarding a change in any Key Personnel shall be within the good faith discretion of INDOT.

8.2.4 All individuals performing the Work shall have the skill and experience and any licenses or certifications required to perform the Work assigned to them. If INDOT determines, in its good faith discretion, that any individual employed by Design-Build Contractor or by any Subcontractor is not performing the Work in a proper, safe and skillful manner, then at the written request of INDOT, Design-Build Contractor or such Subcontractor shall promptly remove such individual and such individual shall not be re-employed on the Project without the prior written approval of INDOT, in its good faith discretion. If Design-Build Contractor or the Subcontractor fails to remove such individual or individuals or fails to furnish skilled and

experienced personnel for the proper performance of the Work, then INDOT may, in its good faith discretion, suspend the affected portion of the Work by delivery of Notice of such suspension to Design-Build Contractor. Such suspension shall in no way relieve Design-Build Contractor of any obligation contained in the DBA Documents or entitle Design-Build Contractor to a Relief Event or Compensation Event. Once compliance is achieved, as determined by INDOT, INDOT will notify Design-Build Contractor and Design-Build Contractor shall be entitled to and shall promptly resume the Work.

8.2.5 Design-Build Contractor acknowledges and agrees that the award of this DBA by INDOT to Design-Build Contractor was based, in large part, on the qualifications and experience of the personnel listed in the Proposal and Design-Build Contractor’s commitment that such individuals would be available to undertake and perform the Work. Design-Build Contractor represents, warrants, and covenants that such individuals are available for and will fulfill the roles identified for them in the Proposal in connection with the Work. Unless otherwise agreed to by INDOT in writing, individuals filling Key Personnel roles shall be available for the Work and shall maintain active involvement in the prosecution and performance of the Work. If any Key Persons will not be 100% dedicated to the Project, then Design-Build Contractor shall so advise INDOT and shall obtain approval from INDOT of the amount of time to be spent by each such individual on the Project, which amount shall in all events be sufficient for satisfactory and full performance of the tasks to be performed by such Key Person. Upon the request of INDOT, Design-Build Contractor shall document the percentage time commitment for each Key Personnel to the satisfaction of INDOT. In addition to the foregoing, INDOT reserves the right to require a 100% time commitment per position from any Key Personnel if INDOT, in its good faith discretion, determines that such personnel are not devoting sufficient time to the prosecution and performance of the Work.

**8.2.6 Key Personnel Liquidated Damages**

8.2.6.1 If an individual filling a Key Personnel role is not available for, or actively involved in, the performance of the Work, as determined by INDOT, in its good faith discretion, then:

- (a) Design-Build Contractor acknowledges that INDOT and the Project will suffer significant and substantial damages and that it is impracticable and extremely difficult to ascertain and determine the actual damages which would accrue to INDOT in such event; and
- (b) Design-Build Contractor agrees to pay INDOT a liquidated damage as follows, for each position held by such individual, as deemed compensation for such damages:

<b>POSITION</b>	<b>LIQUIDATED DAMAGE</b>
Project Manager	\$150,000
Design Manager	\$150,000
Roadway Design Lead	\$100,000
Construction Manager	\$100,000

POSITION	LIQUIDATED DAMAGE
Safety Manager	\$20,000
Project Controls Lead	\$100,000

8.2.6.2 A further liquidated damage in accordance with Section 8.2.6.1 (*Key Personnel Liquidated Damages*) for the positions listed above in the amount of \$20,000 will be payable from Design-Build Contractor to INDOT for each three month period where any Key Personnel position is vacant or not being fulfilled in accordance with the DBA Documents as determined by INDOT.

8.2.6.3 Design-Build Contractor agrees that any damages payable in accordance with this Section 8.2.6 (*Key Personnel Liquidated Damages*) are liquidated damages, not a penalty and are reasonable under the circumstances existing as of the Proposal Date. Design-Build Contractor is not liable for liquidated damages under Section 8.2.6.1 (*Key Personnel Liquidated Damages*) if: (a) Design-Build Contractor removes or replaces such personnel at the direction of INDOT; (b) such individual is unavailable due to retirement, death, disability, incapacity, injury or voluntary or involuntary termination of employment with the applicable DB-Related Entity (provided that moving to an Affiliate of Design-Build Contractor or a Subcontractor is not considered grounds for avoiding liquidated damages); or (c) such individual is unavailable due to INDOT’s failure to issue NTP1 within 270 days of the Proposal Date for a reason other than the acts or omissions of any DB-Related Entity, or any Design-Build Contractor Fault; provided, however, that Design-Build Contractor shall remain liable for liquidated damages under Section 8.2.6.1 (*Key Personnel Liquidated Damages*) unless it proposes to INDOT a replacement for such Key Personnel for review and approval within 21 days after unavailability, in the case of clause (a) or clause (b), or 21 days from the issuance of NTP2, in the case of clause (c).

8.2.6.4 Upon approval of any Key Personnel replacement under Section 8.2.1 (*Key Personnel Liquidated Damages*), the new individual shall be considered a Key Personnel for all purposes under the DBA Documents.

## SECTION 9 PERFORMANCE AND PAYMENT BONDS

### 9.1 Provisions of Bonds

9.1.1 Design-Build Contractor shall provide INDOT with a Performance Bond, Payment Bond as provided herein, securing Design-Build Contractor’s obligations under the DBA Documents, and shall maintain such bonds in full force and effect as described below (or other assurance satisfactory to INDOT in its sole discretion). Each bond required hereunder shall be provided by an Eligible Surety. If any bond previously provided becomes ineffective, or if the Surety that provided the bond no longer is an Eligible Surety, Design-Build Contractor shall, within seven days after such event, deliver to INDOT a replacement bond in the required form issued by an Eligible Surety, or other assurance satisfactory to INDOT, in its sole discretion.



9.1.2 On or before the issuance by INDOT of NTP2, Design-Build Contractor shall deliver to INDOT a performance bond in an amount equal to the Contract Price, in the form attached hereto as Exhibit 4-A (the “Performance Bond”). INDOT will release the Performance Bond upon Final Acceptance provided that Design-Build Contractor is not in default under the DBA Documents and no event has occurred which, with the passage of time or the giving of Notice, would constitute a default under the DBA Documents. If the Contract Price is increased in connection with a Change Order, INDOT may, in its good faith discretion, require a corresponding proportionate increase in the amount of the Performance Bond or a new performance bond covering the Change Order Work.

9.1.3 On or before the issuance by INDOT of NTP2, Design-Build Contractor shall deliver to INDOT a payment bond in an amount equal to the Contract Price, in the form attached hereto as Exhibit 4-B (the “Payment Bond”). Design-Build Contractor shall maintain the Payment Bond in full force and effect until (a) Final Acceptance has occurred; (b) Design-Build Contractor has delivered to INDOT (i) evidence satisfactory to INDOT that all Persons eligible to file a Third Party Claim against the Payment Bond have been fully paid and (ii) unconditional releases of Liens and notices from all Subcontractors who filed preliminary notices of a Third Party Claim against the Payment Bond, and (c) expiration of the statutory period for Subcontractors to file a Third Party Claim against the Payment Bond. If the Contract Price is increased in connection with a Change Order, INDOT may, in its good faith discretion, require a corresponding proportionate increase in the amount of the Payment Bond or a new payment bond covering the Change Order Work.

## 9.2 No Relief of Liability

Notwithstanding any other provision set forth in the DBA Documents, performance by a Surety [or Guarantor] of any of the obligations of Design-Build Contractor shall not relieve Design-Build Contractor of any of its obligations hereunder. **[NTD: To be conformed in execution version based on whether Design-Build Contractor is required to have a Guarantor]**

## 9.3 [Guaranty]

**[NTD: To be conformed in execution version based on whether Design-Build Contractor is required to have a Guarantor]**

9.3.1 The Guarantor shall provide and maintain the Guaranty, in the form of Exhibit 14 (*Form of Guaranty*), in full force and effect throughout the term of this DBA.

9.3.2 Design-Build Contractor shall periodically report to INDOT regarding the financial capacity of the Guarantor. If, at any point during the term of this DBA, the Guarantor’s financial capacity is materially negatively affected, as determined by INDOT in its good faith discretion, INDOT may require, and Design-Build Contractor shall provide, one or more additional guarantees so that the combined financial capacity of the Guarantor and the additional guarantors provides equivalent security to INDOT as the Guaranty provided as of the Effective Date. Each such Guaranty shall be substantially in the form provided in Exhibit 14 (*Form of Guaranty*),

together with appropriate evidence of authorization, execution, delivery and validity of such Guaranty.

## **SECTION 10 INSURANCE**

### **10.1 Insurance Policies and Coverage**

At minimum, Design-Build Contractor shall procure and keep in effect the insurance policies through the Final Acceptance Date, or cause them to be procured and kept in effect through the Final Acceptance Date, and in each case satisfy the requirements set forth in this Section 10 (Insurance) and Exhibit 18 (Insurance Coverage Requirements). INDOT reserves the right to review and approve the terms and conditions of all project-specific insurance policies, for compliance with the requirements of this Section 10 (Insurance) and Exhibit 18 (Insurance Coverage Requirements) prior to final placement of such insurance policies. Such review and approval includes policy wording language and proposed insurance program structure. Design-Build Contractor shall be a named insured on all insurance policies, unless otherwise noted.

### **10.2 General Insurance Requirements**

#### **10.2.1 Qualified Insurers**

Each of the insurance policies required hereunder shall be procured from an insurer that, at the time coverage under the applicable policy commences is:

10.2.1.1 authorized to do business in the State and having a current policyholder's management and financial size category rating of A- (A minus) or better and Class VIII by A.M. Best and Company's Insurance Reports Key Rating Guide; or

10.2.1.2 otherwise approved in writing by INDOT.

If an insurer providing any of the insurance policies (i) loses the ratings set forth in Section 10.2.1.1 (Qualified Insurers), or (ii) becomes the subject of bankruptcy proceedings, becomes insolvent or is the subject of an order by the State, Design-Build Contractor shall replace the insurer complying with the same coverages, terms and conditions of this Section 10 (Insurance) and Exhibit 18 (Insurance Coverage Requirements) within 60 days, or otherwise as may be approved by INDOT in its sole discretion.

#### **10.2.2 Deductibles**

10.2.2.1 INDOT shall not have any liability for deductibles or self-insured retentions ("SIRs") and amounts in excess of the coverage provided, unless part of a Compensation Amount or Termination Compensation. Design-Build Contractor may use SIRs in lieu of deductibles with respect to insurance policies, so long as Design-Build Contractor disclosed all such insurance policies, on a continuing basis, by Notice to INDOT.

10.2.2.2 Design-Build Contractor may allocate responsibility and liability for the payment of the deductible or SIR to DB-Related Entity responsible for the matter giving rise to an insurable claim under the applicable insurance policy under which it is a named insured, however Design-Build Contractor shall remain the party with primary responsibility for payment of any deductible or SIR. If responsibility for the matter giving rise to an insurable claim is indeterminable, then the first named insured under the applicable insurance policy shall be responsible and liable for the payment of the deductible or SIR. In no event will INDOT be responsible for the failure of a DB-Related Entity to pay a deductible or SIR under this Section 10 (Insurance), unless part of a termination payment pursuant to Section 17 (Termination for Convenience).

### 10.2.3 Primary Coverage

Each insurance policy specified in Exhibit 18 (Insurance Coverage Requirements) shall provide that the coverage thereof is primary and non-contributory coverage with respect to all named or additional insureds except for coverage that by its nature cannot be written as primary. Any other insurance maintained by an insured or an additional insured shall be excess of and non-contributory with any insurance available to the Project, and Design-Build Contractor shall provide evidence sufficient, in INDOT's sole determination, by Notice, of such other insurance that Design-Build Contractor intends to rely upon to respond to claims or potential claims with respect to the Work or the Project as and when the corresponding or analogous insurance is required to be placed hereunder.

### 10.2.4 Verification of Coverage

10.2.4.1 At any time Design-Build Contractor is required to obtain or cause to be obtained any insurance policy, including insurance coverage required of Subcontractors, and thereafter not later than 10 days prior to the expiration date of each insurance policy, Design-Build Contractor shall deliver to INDOT a certificate of insurance. At or before the time initial proof of insurance coverage is to be provided, Design-Build Contractor shall provide INDOT with a copy of the insurance company binder or, if available, the policy as evidence that compliant coverage is in place, if not previously provided.

10.2.4.2 In addition, within a reasonable time after coverages are initially bound or renewed (but not to exceed 60 days after placement), Design-Build Contractor shall deliver to INDOT (i) a complete certified copy of each such project specific insurance policy or modification, or renewal or replacement insurance policy and all endorsements thereto, and (ii) satisfactory evidence of payment of the premium therefor.

10.2.4.3 If Design-Build Contractor has not provided INDOT with the foregoing proof of coverage and payment within five days after INDOT delivers to Design-Build Contractor Notice of a Design-Build Contractor Default under Section 18.1 (Default of Design-Build Contractor) and demand for the foregoing proof of coverage, INDOT may, in addition to any other available remedy, without obligation or liability and without further inquiry as to whether such insurance is actually in place, (i) obtain such an insurance policy; and Design-Build Contractor shall reimburse INDOT for the cost thereof upon demand, and

(ii) suspend all or any portion of Work and close the Project until INDOT receives from Design-Build Contractor such proofs of coverage in compliance with this Section 10 (Insurance) (or until INDOT obtains an insurance policy, if it elects to do so).

10.2.4.4 In addition to the foregoing, promptly following INDOT's request, Design-Build Contractor shall make available for INDOT's review, copies of all such project insurance policies and reports of all losses reported and incurred on the Project, whether such losses are covered by Project-specific policies or not.

### 10.2.5 **Project-Specific Insurance**

Except as expressly provided otherwise in Exhibit 18 (Insurance Coverage Requirements), all insurance policies required hereunder shall be purchased specifically and exclusively for the Project with coverage limits, purchased on a Project term basis to include the design, construction, the Warranty Period and, as appropriate, any required extended discovery or reporting period. Design-Build Contractor must disclose the expected costs of all project specific insurance policies obtained or proposed to be obtained. Design-Build Contractor may request INDOT to approve, in its sole discretion, inclusion of Project insurance requirements under this Section 10 (Insurance) and Exhibit 18 (Insurance Coverage Requirements) within or under a DB-Related Entity/ies corporate or insurance program, so long as the program affords the Project dedicated policy limits and sublimits, as applicable, under each insurance policy, with Design-Build Contractor as a named insured.

### 10.2.6 **Policies with Insureds in Addition to Design-Build Contractor**

All insurance policies that are required to insure Persons (whether as named or additional insureds) in addition to Design-Build Contractor shall comply or be endorsed to comply with the following provisions.

10.2.6.1 For projects with a Contract Price over \$100 million, the general liability and builders risk insurance policies shall be written or endorsed so that no acts or omissions of an insured shall vitiate coverage of the other insureds. Without limiting the foregoing, any failure on the part of a named insured to comply with reporting provisions or other conditions of the insurance policies, any breach of warranty, any action or inaction of a named insured or others, or any change in ownership of all or any portion of the Project or Design-Build Contractor's interest therein shall not affect coverage provided to the other named insureds or additional insureds (and their respective members, managers, directors, officers, employees, agents and Project consultants).

10.2.6.2 The insurance shall apply separately to each named insured and additional insured against whom a claim is made or suit is brought, except with respect to the limits of the insurer's liability. Such provision shall provide that the interests and protections of each additional insured shall not be affected by any misrepresentation, act or omission of another named insured, or any breach by named insured of any provision in the policy that would otherwise result in forfeiture or reduction of coverage for the other insureds on the policy.

10.2.6.3 All endorsements adding additional insureds to required insurance policies shall contain no limitations, conditions, restrictions or exceptions to coverage in addition to those that apply under the insurance policy generally.

#### 10.2.7 **Additional Terms and Conditions**

10.2.7.1 Each insurance policy shall be endorsed to state that coverage cannot be canceled, or materially reduced in coverage or in limits except after 30 days' prior written Notice (or 10 Business Days' Notice in the case of cancellation for non-payment of premium) by registered or certified mail (return receipt requested), or by email (with a "hard copy" to follow), has been given to INDOT and each other insured or additional insured party requiring such notice. A material reduction in coverage or in limits shall not include payments under the policy that by their nature erode or deplete the limits of such policy. Such endorsement shall not include any limitation of liability of the insurer for failure to provide such notice.

10.2.7.2 Each insurance policy shall provide coverage on an "occurrence" basis and not a "claims made" basis (with the exception of any professional liability and pollution liability insurance policies).

10.2.7.3 Each insurance policy shall otherwise not contain exclusions or gaps that reduce coverage below the minimum levels and required limits set forth herein.

#### 10.2.8 **Waivers of Subrogation**

Design-Build Contractor waives all rights against the Indemnified Parties, for any claims to the extent covered by valid and collectible insurance placed by or on behalf of Design-Build Contractor, including insurance obtained pursuant to this Section 10 (Insurance), except such rights as they may have to the proceeds of such insurance. If Design-Build Contractor is deemed to self-insure a claim or loss under Section 10.2.17 (Prosecution of Insurance Claims), then Design-Build Contractor's waiver shall apply as if it carried the required insurance. Design-Build Contractor shall require all Subcontractors to provide similar waivers in writing each in favor of all other parties enumerated above. Each insurance policy, including workers' compensation if permitted under the applicable workers' compensation insurance Governmental Rules, shall include an express waiver of any right of subrogation against the Indemnified Parties or a consent to the insured's waiver of recovery in advance of loss, whether by endorsement or otherwise.

#### 10.2.9 **No Recourse**

There shall be no recourse against INDOT, the State, or any other agency or department thereof, or any of their respective members, managers, directors, officers, employees, agents or Project consultants, for payment of premiums, deductibles and SIRs, or other amounts with respect to the insurance policies required hereunder, except to the extent of increased premium costs recoverable under Section 14 (Changes in the Work) or Section 15 (Relief Events; Compensation Events).

#### **10.2.10 Support of Indemnifications**

The insurance policies shall support but are not intended to limit Design-Build Contractor's indemnification obligations under the DBA Documents.

#### **10.2.11 Adjustments in Coverage Amounts**

10.2.11.1 During the term of this DBA, as and to the extent that INDOT elects to increase any minimum coverage limits as required pursuant hereto and as set forth under Exhibit 18 (*Insurance Coverage Requirements*), such additional premium costs shall be reimbursed to Design-Build Contractor as a Compensation Event. Any such requirement for additional coverage shall be subject to Design-Build Contractor's ability to obtain such additional coverage as and to the extent reasonably and commercially available.

10.2.11.2 Any Dispute regarding increases in limits or adjustments to deductibles shall be resolved according to the Dispute Resolution Procedures.

#### **10.2.12 Subcontractor Insurance Requirements**

10.2.12.1 Design-Build Contractor's obligations regarding Subcontractors' insurance are contained in Exhibit 18 (*Insurance Coverage Requirements*).

10.2.12.2 If any Subcontractor fails to procure and keep in effect the insurance required of it under Exhibit 18 (*Insurance Coverage Requirements*) and INDOT asserts the same as a Design-Build Contractor Default hereunder, Design-Build Contractor may, within the applicable cure period, cure such Design-Build Contractor Default by (i) causing such Subcontractor to obtain the requisite insurance and providing to INDOT proof of insurance, (ii) procuring the requisite insurance for such Subcontractor and providing to INDOT proof of insurance, or (iii) terminating the Subcontractor and removing its personnel from the Site.

#### **10.2.13 Defense Costs**

No defense costs shall be included within or erode the limits of coverage of any of the insurance policies, except that defense costs may be included within the limits of coverage of professional and pollution liability insurance policies.

#### **10.2.14 Contesting Denial of Coverage**

If any insurer under an insurance policy denies coverage with respect to any claims reported to such insurer, upon Design-Build Contractor's request, INDOT and, to the extent necessary, the other Indemnified Parties shall cooperate in good faith to establish whether and to what extent to contest, and how to fund the cost of contesting, the denial of coverage; provided that if the reported claim is a matter covered by an indemnity in favor of an Indemnified Party, then Design-Build Contractor shall bear all costs of contesting the denial of coverage.

#### **10.2.15 Requirements Not Limiting**

10.2.15.1 The Parties acknowledge and agree that: (i) requirements of specific coverage features or limits contained in this Section 10 (Insurance) and in Exhibit 18 (Insurance Coverage Requirements) are minimum coverages only and not intended as a limitation on coverage, limits or other requirements, or a waiver of any coverage normally provided by any insurance policy; (ii) specific reference to a given coverage feature is not intended to be all-inclusive, or to the exclusion of other coverage, or a waiver of any type; and (iii) all insurance coverage and limits provided by Design-Build Contractor, or by third parties pursuant to obligations of Design-Build Contractor hereunder, and, in each case, available or applicable to this DBA are intended to apply to the full extent of the insurance policies, and nothing contained in this DBA limits, or shall be deemed to limit, the application of such insurance coverage.

10.2.15.2 It is understood that insurance coverage described herein does not limit any obligations or liability of Design-Build Contractor under this DBA. Furthermore, the insurance limits required hereunder are minimum limits only and not intended to restrict the liability imposed on Design-Build Contractor, any Subcontractor, or any of its or their Subcontractors or Suppliers at any tier, or otherwise to limit or reduce coverage amounts or limits under any insurance policies procured by any such Persons.

#### **10.2.16 Additional Insurance Policies**

If Design-Build Contractor carries (or procures) any other insurance applicable to the Project (other than Design-Build Contractor's customary blanket coverage), then Design-Build Contractor shall include the Indemnified Parties as additional insureds thereunder, if and to the extent they have an insurable interest. The additional insured endorsements shall be as described in Section 10.2.6.1 (Policies with Insureds in Addition to Design-Build Contractor); and Design-Build Contractor shall provide to INDOT the proofs of coverage and copy of the policy described in Section 10.2.4 (Verification of Coverage). If, however, Design-Build Contractor demonstrates to INDOT that inclusion of such Persons as additional insureds will increase the premium, INDOT will elect either to pay the increase in premium or forego additional insured coverage. The provisions of Section 10.2.4 (Verification of Coverage), Section 10.2.6.1 (Policies with Insureds in Addition to Design-Build Contractor), Section 10.2.7 (Additional Terms and Conditions), Section 10.2.8 (Waivers of Subrogation), Section 10.2.9 (No Recourse), Section 10.2.14 (Contesting Denial of Coverage) and Section 10.2.17 (Prosecution of Insurance Claims) shall apply to all such policies of insurance coverage, as if they were within the definition of insurance policies.

#### **10.2.17 Prosecution of Insurance Claims**

10.2.17.1 Unless otherwise directed by INDOT in writing with respect to INDOT's insurance claims and subject to the requirements of Section 20.1 (Indemnifications by Design-Build Contractor) and Section 20.2 (Defense and Indemnification Procedures), Design-Build Contractor shall be responsible for reporting and processing all potential claims by INDOT or Design-Build Contractor against the insurance policies required hereunder. Design-Build Contractor agrees to report timely to the insurer(s) under such insurance policies

any and all matters that may give rise to an insurance claim by Design-Build Contractor or INDOT or another Indemnified Party and to promptly and diligently pursue such insurance claims in accordance with the claims procedures specified in such insurance policies, whether for defense or indemnity or both. Design-Build Contractor shall enforce all legal rights against the insurer under the applicable insurance policies and applicable Governmental Rules in order to collect thereon, including pursuing necessary litigation and enforcement of judgments, provided that Design-Build Contractor shall be deemed to have satisfied this obligation if a judgment is not collectible through the exercise of lawful and diligent means.

10.2.17.2 INDOT agrees to promptly notify Design-Build Contractor of INDOT incidents, potential claims against INDOT, and matters that may give rise to an insurance claim against INDOT, to tender to the insurer INDOT's defense of the claim under such insurance policies, and to cooperate with Design-Build Contractor as necessary for Design-Build Contractor to fulfill its duties hereunder.

10.2.17.3 If in any instance Design-Build Contractor has not performed its obligations respecting insurance coverage set forth in the DBA Documents or is unable to enforce and collect any such insurance for failure to assert claims in accordance with the terms of the insurance policies or to prosecute claims diligently, then for purposes of determining Design-Build Contractor's liability and the limits thereon or determining reductions in compensation due from INDOT to Design-Build Contractor on account of available insurance, Design-Build Contractor 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-Build Contractor performed such obligations and not committed such failure. Nothing in this Section 10.2.17 (*Prosecution of Insurance Claims*) or elsewhere in this Section 10 (*Insurance*) shall be construed to treat Design-Build Contractor as electing to self-insure where Design-Build Contractor is unable to collect due to the bankruptcy or insolvency of any insurer that at the time the insurance policy is written meets the rating qualifications set forth in Section 10.2.1 (*Qualified Insurers*).

10.2.17.4 Design-Build Contractor shall not settle or accept any settlement of any insurance claim that is in excess of \$100,000 or that involves any claim that has been asserted against INDOT, the State or any agency or department thereof, without prior written approval of INDOT, provided that Design-Build Contractor shall not be required to obtain INDOT approval for workers' compensation claims. Design-Build Contractor shall provide Notice to INDOT promptly after settling or accepting any settlement of any insurance claim.

10.2.17.5 If in any instance Design-Build Contractor has not promptly performed its obligation to report to applicable insurers and process any potential insurance claim tendered by INDOT or another Indemnified Party, then INDOT or the other Indemnified Party may, but is not obligated to, (i) notify Design-Build Contractor in writing of INDOT's intent to report the claim directly with the insurer and thereafter process the claim, and (ii) proceed with reporting and processing the claim if INDOT or the other Indemnified Party does not receive from Design-Build Contractor, within 10 days after so notifying Design-Build Contractor, written proof that Design-Build Contractor has reported the claim directly to the insurer. INDOT or the other Indemnified Party may dispense with such notice to Design-Build



Contractor if INDOT or the other Indemnified Party has a good faith belief that more rapid reporting is needed to preserve the claim.

#### **10.2.18 Application of Insurance Proceeds**

All insurance proceeds received for physical property damage to the Project under any insurance policies, other than any business interruption insurance maintained as part of such insurance policies, shall be first applied to repair, reconstruct, rehabilitate, restore, renew, reinstate and replace each part or parts of the Project with respect to which such proceeds were received. For avoidance of doubt, and without limiting the provisions of Section 6.7 (Nonconforming Work), or Design-Build Contractor's right to assert a Relief Event or a Compensation Event, Design-Build Contractor assumes all liabilities regarding, and shall maintain, rebuild, repair, restore or replace, all Work or other portions of the Project, whether owned by Design-Build Contractor or another Person, or both, in each case that is damaged due to any construction or design defect or other cause related to Design-Build Contractor's Work until the Final Acceptance Date regardless of the cause of the damage or injury, at no additional cost to INDOT.

#### **10.2.19 Inadequacy of Required Coverages**

INDOT makes no representation that the scope of coverage and limits of liability specified for any insurance policy to be carried pursuant to this DBA or approved variances therefrom are adequate to protect Design-Build Contractor against its undertakings under this DBA to INDOT, or its liabilities to any third party. It is the responsibility of Design-Build Contractor and each Subcontractor to determine if any changes or additional coverages are required to adequately protect their interests. No such limits of liability or approved variances therefrom shall preclude INDOT from taking any actions as are available to it under the DBA Documents, or otherwise at law.

### **SECTION 11 SITE SECURITY; MAINTENANCE AND REPAIR; TITLE**

#### **11.1 Site Security**

Commencing upon issuance of NTP2, Design-Build Contractor shall provide appropriate security for the Site, and shall take all reasonable precautions and provide protection to prevent damage, injury, vandalism, theft or loss to the Work and materials and equipment to be incorporated therein, as well as all other property at or on the Site, whether owned by Design-Build Contractor, INDOT or any other Person.

#### **11.2 Obligation to Maintain and Repair**

##### **11.2.1 Maintenance and Repair Liability; Use of Insurance Proceeds**

11.2.1.1 Design-Build Contractor shall assume all liabilities regarding, and maintain, rebuild, repair, restore or replace, all Work, including Design Documents, Construction Documents, materials, equipment and supplies purchased for permanent installation in, or for use during construction of, the Project, and any property within the MOT

Limits and Project ROW, in each case, that is damaged prior to the date that Design-Build Contractor's maintenance responsibility ends as set forth in Section 11.2.2 (Relief from Maintenance Liability), regardless of who has title thereto under the DBA Documents. Design-Build Contractor, at its cost, shall also have the sole responsibility from the commencement of Construction Work until the Final Acceptance Date for rebuilding, repairing, and restoring all other property within the MOT Limits and Project ROW, whether owned by Design-Build Contractor, INDOT or any other Person. Without limiting Section 6.2.1 (Safety), Section 25.1 (Cooperation with other Contractors), and without regard to whether Design-Build Contractor might otherwise have been entitled to a Relief Event or a Compensation Event under this DBA, if directed by INDOT, Design-Build Contractor shall rebuild, repair, restore, or in the sole discretion of INDOT replace, any such property damaged by third parties prior to the date that Design-Build Contractor's maintenance responsibility commences, and INDOT will pay the actual, direct, and documented costs for rebuilding, repairing, restoring, or replacement. The obligations of INDOT in the preceding sentence are solely with respect to direct costs (net of any proceeds of insurance that are available to pay any such costs or would have been available if Design-Build Contractor had provided all required insurance coverage), and Design-Build Contractor shall not be entitled to any delay, disruption, or consequential damages or extension of any Completion Deadline in the event of any such damage to existing facilities on the Site. If INDOT elects to rebuild, repair, restore, or replace damaged property prior to the date upon which Design-Build Contractor's maintenance responsibility commences, no work by INDOT or any contractor of INDOT shall be the basis for any Claim, Change Request, Relief Event or Compensation Event, nor shall any such work preclude INDOT from pursuing any proceeds of insurance available to pay any such costs, where such insurance is required to be placed under the DBA Documents.

11.2.1.2 Reserved.

11.2.1.3 At all times prior to receipt of the Notice of Termination, Design-Build Contractor shall maintain in a growing condition all plantings, seedlings, and sodding furnished under the DBA Documents (if any) and shall protect new tree growth and other vegetative growth against injury, replacing all dead plants requiring replacement during said establishment period (if any), in accordance with Project Standards and the requirements of Governmental Approvals, including the CSGP.

11.2.1.4 If insurance proceeds with respect to any Losses are paid to INDOT under any insurance policies required to be provided hereunder, then INDOT shall arrange for such proceeds to be paid to Design-Build Contractor as repair or replacement work is performed by Design-Build Contractor to the extent that INDOT has not previously paid for such repair or replacement work; provided, however, that release of such proceeds to Design-Build Contractor shall not be a condition precedent to Design-Build Contractor performing such repair or replacement work or indicate that such repair or replacement work has been approved and accepted by INDOT, and Design-Build Contractor shall remain obligated to pay deductibles and self-insured retentions as specified in Section 10 (Insurance).

11.2.1.5 Design-Build Contractor shall protect from damage existing property, structures, Utilities, curbs, walks, drives, trees, shrubs, lawns, and landscape work of third parties on or adjacent to the Site or affected by its activities and shall provide such guards, protection, and covering as is necessary. Design-Build Contractor shall immediately notify affected third parties of any damage to their property caused by any DB-Related Entity. Damaged or destroyed items of the Work and Site shall be repaired or replaced to the condition required by the DBA Documents for the initial construction of the Project. Damaged or destroyed items that are the property of other affected parties shall be repaired or replaced to their prior condition; provided, however, that they shall be repaired or replaced to any better or different condition to the extent required by the DBA Documents, applicable Governmental Rules, or pursuant to any agreement between the property owner and INDOT or Design-Build Contractor. Design-Build Contractor shall either perform such repair or replacement itself, or the affected third-party may elect to make its own repairs at Design-Build Contractor's expense. Should Design-Build Contractor not repair or replace such damaged or destroyed items (or not reimburse a property owner electing to do its own repair or replacement), INDOT may take corrective measures at Design-Build Contractor's cost and expense (including an administrative charge equal to 10% of the costs). Design-Build Contractor shall pay and reimburse INDOT for such costs within 30 days after receipt of written demand from INDOT. INDOT, in its sole discretion, may also deduct the amount to be reimbursed from any payment due and payable to Design-Build Contractor.

#### **11.2.2 Relief from Maintenance Liability**

11.2.2.1 Once assumed upon issuance of NTP2, Design-Build Contractor shall be relieved of responsibility for maintenance of the Project on the Final Acceptance Date except that Design-Build Contractor's responsibility for conditions of the NPDES permits shall remain until Design-Build Contractor obtains the Notice of Termination. Notwithstanding the foregoing, all elements of the Work which will be owned by Persons other than INDOT (such as Local Agencies or Utility Owners) will be considered accepted for maintenance purposes only as of the date of acceptance of maintenance responsibilities by such Persons.

11.2.2.2 INDOT may monitor Design-Build Contractor's maintenance practices and take such actions, consistent with the terms of this DBA that INDOT considers appropriate to ensure the Work is properly maintained. Such monitoring and action by INDOT shall not relieve Design-Build Contractor of its obligations or liabilities under the DBA Documents and Design-Build Contractor is not entitled to rely on such monitoring.

### **11.3 Title**

Design-Build Contractor warrants that it owns, or will own, and has, or will have, good and marketable title to all materials, equipment, tools, and supplies furnished, or to be furnished, by it and its Subcontractors that become part of the Project or are purchased for INDOT for the operation, maintenance or repair thereof, free and clear of all Liens. Title to all of such materials, equipment, tools, and supplies delivered to the Site shall pass to INDOT, free and clear of all Liens, upon the sooner of (a) incorporation into the Project, or (b) payment by INDOT to Design-Build

Contractor of invoiced amounts pertaining thereto. Notwithstanding any such passage of title, Design-Build Contractor shall retain risk of loss and sole care, custody, and control of such materials, equipment, tools, and supplies and shall exercise due care with respect thereto until Final Acceptance or until Design-Build Contractor is removed from the Project.

## **SECTION 12 WARRANTIES AND NONCONFORMING WORK DURING THE WARRANTY PERIOD**

### **12.1 Design-Build Contractor Warranty**

12.1.1 Design-Build Contractor warrants that:

12.1.1.1 All Design Work furnished under this DBA shall conform to Good Industry Practice;

12.1.1.2 The Project and the Work shall be free of Nonconforming Work;

12.1.1.3 Materials furnished by or on behalf of DB-Related Entity(ies) shall be of good quality and new when installed;

12.1.1.4 Equipment furnished by or on behalf of DB-Related Entity(ies) shall be modern and in good working condition;

12.1.1.5 The Work shall be free of Deviations that do not constitute INDOT-approved Deviations;

12.1.1.6 The Work shall meet all of the requirements of the DBA; and

12.1.1.7 The Project shall be fit for use for the purposes, objectives, functions, uses and requirements set out in or reasonably inferable from the DBA.

12.1.2 Warranty Period

12.1.2.1 Subject to Sections 12.1.2.2 and 12.1.2.3, the original Warranty Period during which each element of the Project shall meet the General Warranty is as follows:

- (a) For each element of the Project, except elements that will be owned by Persons other than INDOT (e.g., Utility Owners and Local Agencies), the Warranty Period commences upon Substantial Completion and ends two years after the Substantial Completion Date; and
- (b) For each element of the Project that will be owned by Persons other than INDOT (e.g., Utility Owners and Local Agencies), the Warranty Period commences upon acceptance of the element by the Person that will own such element and ends two years after such acceptance, or, in the case of Relocations, for such longer term required by the applicable Utility Agreement(s).

12.1.2.2 For each element of the Project subject to Warranty Work, the Warranty Period for that element shall extend beyond the original Warranty Period, if necessary to provide at least a two-year Warranty Period after acceptance of the Warranty Work, except that no Warranty Period shall exceed three years after the relevant acceptance date.

12.1.2.3 If the DBA is terminated for any reason prior to Substantial Completion, then a two year Warranty Period shall apply to the elements of the Project completed or provided in accordance with the requirements of this DBA on or prior to such termination. For such elements, the Warranty Period shall commence upon the Termination Date and end two years after the Termination Date.

12.1.2.4 At the completion of the Warranty Period, Design-Build Contractor shall assign and transfer to INDOT all unexpired warranties relating to the Work.

### 12.1.3 Nonconformances during the Warranty Period; Warranty Work

12.1.3.1 If INDOT determines within the applicable Warranty Period that any Work does not meet the General Warranty, then, subject to Section 6.7 (*Nonconforming Work*), Design-Build Contractor shall perform the Warranty Work necessary to remedy such Work as specified in Section 12.1.3.2 (*Nonconformances during the Warranty Period; Warranty Work*), even if performance of such Warranty Work extends beyond the applicable Warranty Period.

12.1.3.2 To the extent applicable, the provisions of Section 6.7 (*Nonconforming Work*) regarding notice and remedy of Nonconforming Work shall apply to Warranty Work.

12.1.3.3 INDOT and Design-Build Contractor shall conduct a walkthrough of the Site prior to expiration of the applicable Warranty Period and produce a punch list of Nonconforming Work that requires Warranty Work.

## 12.2 Subcontractor Warranties

### 12.2.1 Warranty Requirements

12.2.1.1 Design-Build Contractor shall obtain from all Subcontractors for periods at least coterminous with the Warranties and cause to be extended to INDOT appropriate representations, warranties, guarantees, and obligations with respect to design, materials, workmanship, equipment, tools, and supplies furnished by such Subcontractors to effectuate the provisions of this Section 12 (*Warranties and Nonconforming Work During the Warranty Period*).

12.2.1.2 Design-Build Contractor shall cause Subcontractor warranties to be extended to INDOT and any other parties for whom Work is being performed or equipment, tools, supplies or software is being supplied by such Subcontractor; provided; however; 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 INDOT using commercially reasonable efforts. INDOT agrees to forebear from exercising remedies under any such warranty so long as Design-Build Contractor is diligently pursuing remedies thereunder and such forbearance does not materially prejudice the rights and remedies of INDOT.

12.2.1.3 All representations, warranties, guarantees, and obligations of Subcontractors shall (a) be written so as to survive all inspections, tests and approvals hereunder, and (b) run directly to and be enforceable by Design-Build Contractor, INDOT or their respective successors and assigns. Design-Build Contractor hereby assigns to INDOT all of Design-Build Contractor's rights and interest in all extended warranties for periods exceeding the Warranty Period which are received by Design-Build Contractor from any of its Subcontractors. To the extent that any Subcontractor warranty would be voided by reason of any Design-Build Contractor Fault, Design-Build Contractor shall be responsible for correcting such defect.

#### 12.2.2 Enforcement

Upon receipt from INDOT of notice of a failure of any of the Work to satisfy any Subcontractor warranty, representation, guarantee or obligation, Design-Build Contractor shall enforce or perform any such representation, warranty, guarantee or obligation, in addition to Design-Build Contractor's other obligations hereunder. The rights of INDOT under this Section 12.2.2 (Enforcement) shall commence at the time such representation, warranty, guarantee or obligation is furnished and shall continue until the expiration of Design-Build Contractor's relevant warranty (including extensions thereof under Section 12.1.2 (Warranty Period)). Until such expiration, the cost of any equipment, material, labor (including re-engineering) or shipping shall be for the account of Design-Build Contractor if such cost is covered by such a warranty, guarantee or obligation, and Design-Build Contractor shall be required to replace or repair defective equipment, material or workmanship furnished by Subcontractors.

### SECTION 13 PAYMENT FOR SERVICES

#### 13.1 Contract Price

##### 13.1.1 DBA Amount

Subject to Section 14 (Changes in the Work), as full compensation for the Work and all other obligations to be performed by Design-Build Contractor under the DBA Documents, INDOT shall pay to Design-Build Contractor a lump sum Contract Price. The term "Contract Price" as used herein shall be subject to adjustment from time to time only to account for Change Orders (including those resulting from Compensation Events). The Contract Price shall be increased or decreased only in accordance with Section 14 (Changes in the Work) or Section 15 (Relief Events; Compensation Events), or otherwise by a DBA amendment. The Contract Price shall be paid in accordance with Section 13.2 (Invoicing and Payment). The initial Contract Price shall be the lump sum amount of \$209,200,000, which includes the Allowances.

### 13.1.2 Items Included in Contract Price

Design-Build Contractor acknowledges and agrees that, subject only to Design-Build Contractor's rights under Section 14 (*Changes in the Work*) or Section 15 (*Relief Events; Compensation Events*), the Contract Price includes (a) all designs, equipment, materials, labor, insurance and bond premiums, home office, jobsite and other overhead, profit, and services, including Professional Services as provided for in Section 13.1.1 (*DBA Amount*), relating to Design-Build Contractor's performance of its obligations under the DBA Documents (including all Work, equipment, materials, labor, and services provided by Subcontractors and Intellectual Property rights necessary to perform the Work); (b) performance of each and every portion of the Work; (c) the cost of obtaining all Governmental Approvals (except as specified in Section 2.2.4 (*General Obligations of the Design-Build Contractor*)); (d) all costs of compliance with and maintenance of the Other Approvals and the Governmental Approvals and compliance with Governmental Rules, except to the extent compliance with or maintenance of Governmental Approvals is the responsibility of Utility Owners pursuant to TP Section 16 (Utilities); (e) payment of any taxes, duties, permit, and other fees or royalties imposed with respect to the Work and any equipment, materials, labor or services included therein; (f) all cooperation and coordination with Utility Owners, and all other Persons and parties; (g) compensation for all risks and contingencies assigned to Design-Build Contractor under the DBA Documents; and (h) the Allowances. Except as otherwise provided in this DBA, each Party shall perform its obligations in accordance with the DBA Documents at its own cost and risk, including, in the case of Design-Build Contractor, all Work.

### 13.1.3 Allowances

#### 13.1.3.1 Allowances, Generally

- (a) Each of the Allowances is available to pay for certain portions of the Work, with payments from the Allowance to be made on the basis identified with respect to each such Allowance under this Section 13.1.3 (*Allowances*).
- (b) Design-Build Contractor shall be paid for each Allowance as set forth in this Section 13.1.3 (*Allowances*).
- (c) The initial amount of each Allowance is identified in Exhibit 8 (*Allowances*).
- (d) Design-Build Contractor shall keep detailed records of the quantities, units, or other agreed metrics with respect to each Allowance listed below and shall submit to INDOT supporting documentation of such quantities with its invoices, and such other information as INDOT may require, in its sole discretion.
- (e) INDOT may elect to use some or all of any Allowance as a source of payment for Work for which Design-Build Contractor may be entitled under Section 14 (*Changes in the Work*).

- (f) No Change Order is required for invoicing amounts remaining (with respect to relevant portions of the Work) within any Allowance. Design-Build Contractor shall promptly provide to INDOT Notice if it becomes apparent that the amount with respect to any Allowance will be exceeded, in which event the Parties shall negotiate a Change Order increasing the relevant Allowance amount or modifying the scope of the Work to avoid the need to increase the Allowance; provided, however, that in lieu of modification to the relevant Allowance amount or scope of Work, INDOT may, in its sole discretion, issue a Change Order under Section 13.2 (Invoicing and Payment), and such Work otherwise eligible for invoicing against the applicable Allowance will not be invoiced against such Allowance, but, instead, be invoiced under such Change Order, and such Change Order shall be on the same unit and other pricing terms as if the Work were invoiced against the applicable Allowance.
- (g) As part of Final Acceptance, a Change Order deducting any unused Allowance values from the Contract Price will be issued.

#### 13.1.3.2 Patching Allowances

Design-Build Contractor shall be eligible to invoice against the Patching Allowances for Engineer-approved pavement patching Work requiring permanent asphalt pavement described in TP 1.6.1.1. (Pavement Patching Allowance).

- (a) Asphalt patching Work in the existing mainline shall be paid for on a unit price basis out of the Pavement Patching Allowance at the following rates:
  - (i) HMA Patching, Full Depth, Type D \$200 per Ton
  - (ii) HMA Patching, full Depth, Type C \$180.00 Per Ton
  - (iii) HMA Patching, Partial Depth, Type D \$200.00 per Ton
  - (iv) Subgrade Treatment, Type II \$20.00 per Square Yard
  - (v) Geotextile for Subgrade, Type 2B \$6.00 per Square Yard
- (b) For asphalt patching Work performed, Design-Build Contractor may invoice and receive total payment not to exceed the amount specified for the Pavement Patching Allowance in Exhibit 8 (*Allowances*). Invoicing for completed asphalt patching shall be included in the monthly invoice described in Section 13.2 (Invoicing and Payment).
- (c) Fiber and column patching for bridges shall be paid for on a unit price basis out of the Fiber and Column Patching Allowance at the following rates:
  - (i) Fiber Wrap Concrete Casing System, \$60.00 per square foot



- (ii) Patching Concrete Structures, \$150.00 per square foot
- (d) As applicable for fiber and column patching Work performed, Design-Build Contractor may invoice and receive total payment not to exceed the amount specified for the Fiber and Column Patching Allowance in Exhibit 8 (*Allowances*). Invoicing for completed patching shall be included in the monthly invoice described in Section 13.2 (*Invoicing and Payment*).
- (e) Any asphalt patching Work conducted after the Pavement Patching Allowance has been exhausted, or any fiber and column patching Work conducted after the Fiber and Column Patching Allowance has been exhausted, shall be invoiced and paid at the relevant unit prices listed in Sections 13.1.3.2(a) (*Patching Allowances*) or 13.1.3.2(c) (*Patching Allowances*), respectively, as full compensation for any additional units of patching.
- (f) This Section 13.1.3.2 (*Patching Allowances*) shall not apply to patching outside of the mainline, all of which is included in the Contract Price. Such patching shall not be subject to additional compensation or unit price payment as described in Section 13.1.3.2 (*Patching Allowances*).
- (g) In no event shall Design-Build Contractor be entitled to any additional time or extension of any Completion Deadline as a result of patching, including any additional patching described in this Section 13.1.3.2 (*Patching Allowances*).
- (h) In no event shall Design-Build Contractor be entitled to draw against the Patching Allowance for correction of any Nonconforming Work or for Work performed during any Prohibited Closure.
- (i) The Patching Allowances are not intended to address patching work on portions of the Project where construction of permanent improvements has commenced, nor shall it be used to correct or address Nonconforming Work.

## **13.2 Invoicing and Payment.**

The following process shall apply to invoicing and payment:

### **13.2.1 Schedule of Values**

13.2.1.1 Within 14 days after the Effective Date, Design-Build Contractor shall prepare and submit a detailed Schedule of Values giving a complete breakdown of the Contract Price, setting forth the estimated value of the various categories of the Work. The Schedule of Values shall be subject to INDOT's approval, in its good faith discretion.

13.2.1.2 The Schedule of Values shall be developed by Design-Build Contractor by dividing the lump sum amounts making up the Contract Price into components that represent the work and, where possible, can be defined by key quantities installed. INDOT

may provide a template defining the minimum items into which the Contract Price shall be divided in the Schedule of Values. The template may include the requirement that Design-Build Contractor define key quantities associated with certain Schedule of Value line items. The Schedule of Values shall take into consideration schedule monitoring and cost reporting requirements, and shall be cost coded to identify costs uniquely by physical location, element of work, or any other coding requirements deemed necessary by INDOT.

13.2.1.3 Design-Build Contractor shall ensure that the dollar amounts of each scheduled value in the Schedule of Values in fact represent fair market cost allocations for the work items listed. Each item in the Schedule of Values shall include its proportionate share of Design-Build Contractor overhead and profit. If requested by INDOT, Design-Build Contractor shall provide a detail cost breakdown for any work item in the Schedule of Values.

13.2.1.4 Design-Build Contractor shall not increase the cost of early activities, i.e., “front loading.” If INDOT determines that “front loading” has occurred, it may direct Design-Build Contractor to conduct a complete reallocation of moneys until such “front loading” is corrected. Repeated attempts at “front loading” may result in refusal to process payment until such time as the Schedule of Values is acceptable to INDOT.

13.2.1.5 The Schedule of Values is for the purpose of enabling the parties to determine the amount of progress payments owing. INDOT will base payments on an estimate of the percentage of Work completed. No progress payment shall be made for any Work that is not included in an INDOT-approved Schedule of Values.

13.2.1.6 Following INDOT’s approval of the Schedule of Values, the Parties shall revise and finalize the form of Invoice Certificate to correspond to the Schedule of Values, and INDOT will make progress payments based on the Schedule of Values and the Work performed through the payment period. The invoice showing progress made against the Schedule of Values shall be provided in both paper and electronic format (Excel or similar acceptable to INDOT). Invoicing for progress payments may be made no more frequently than once per month.

13.2.1.7 INDOT shall at any time have the right to conduct a detailed examination of the Schedule of Values. Design-Build Contractor shall cooperate with and, to the best of its ability, assist INDOT Representative in such review, including providing all such information as may be reasonably required in connection therewith. INDOT may determine that, in relation to any work item, the relationship between progress payments and progress and control of the work envisaged at the date of INDOT approval of the Schedule of Values has not been or will not be maintained. In such event, INDOT may require Design-Build Contractor to prepare a revised Schedule of Values that will, in INDOT’s good faith opinion, restore, so far as reasonably practicable, said relationship and degree of control. The revised Schedule of Values will be due 30 days after delivery of Notice from INDOT. If Design-Build Contractor fails to provide an acceptable revised schedule within said 30-day period, INDOT may revise the Schedule of Values in any manner that it sees fit, based on the rate of progress

of the work which INDOT anticipates and with the objective of restoring, so far as is reasonably practicable, said relationship and degree of control.

13.2.1.8 The Schedule of Values shall be updated in connection with each Change Order that modifies the Contract Price, and submitted to INDOT for approval. Each Change Order shall be reflected on the Schedule of Values as a separate line item.

13.2.1.9 Design-Build Contractor shall not be entitled to submit any invoice or seek any payment for a design Submittal (or Design Work related thereto) until the later of (i) when such design Submittal is submitted to INDOT; and (ii) when Design-Build Contractor is entitled to submit such design Submittal (including, for any sequential design Submittal, that all prerequisites to such design Submittal have been satisfied).

### 13.2.2 **Draft Invoice and Progress Meeting**

On or about the 25th day of each month following the issuance of NTP2 and continuing through Final Acceptance, Design-Build Contractor shall deliver a draft invoice and draft Invoice Certificate for that month to INDOT. Design-Build Contractor's draft invoice package shall include all materials, reports, schedules, and other submittals identified in TP Attachment 1-1 (Critical Path Method Schedule). At the Progress Meeting where the draft invoice package will be reviewed, Design-Build Contractor's and INDOT's Authorized Representatives shall ascertain the progress of the Work. Such Progress Meeting shall be attended by Design-Build Contractor and INDOT or its representatives. Design-Build Contractor's and INDOT's Authorized Representatives shall review the draft invoice and draft Invoice Certificate reflecting the value of Work completed as of the date of the Progress Meeting (based on quantities and unit prices for unit-priced Work (including any amounts paid out of the Allowances)), based on time and materials for Time and Materials Work and, for all other Work, based on the percentage completion of Project Baseline Schedule activities and the values distributed to such activities in the Schedule of Values. Design-Build Contractor's and INDOT's Authorized Representatives shall sign the draft invoice, indicating the portions of it that have been approved and setting forth the proposed total payment amount, which shall be the approved value of the Work then completed, calculated in accordance with the Project Baseline Schedule and Schedule of Values, plus the value of unit-priced and Time and Materials Work (including any amounts paid out of the Allowances)), less progress payments previously made. The amounts set forth in the draft invoice shall be used by Design-Build Contractor in preparation of its monthly payment request described in Section 13.2.3 (*Delivery of Invoice*). Invoices which cover Utility Work shall include documentation as required by TP Section 16 (Utilities), and shall separately identify the total amount due for (a) Utility Betterments and (b) any other Work for which the Utility Owner has Cost Liability.

### 13.2.3 **Delivery of Invoice**

Within seven days after each Progress Meeting, Design-Build Contractor shall submit to INDOT five copies of an invoice in the forms attached hereto as Exhibit 5 (*Invoice and Invoice Certificate*), or such other form as may be approved in INDOT's sole discretion, for the Work performed under the DBA Documents during the immediately preceding month. The form of

invoice shall be modified as appropriate to account for unit-priced and Time and Materials Work. Each invoice shall be based upon the approved draft invoice and may not include any amounts not approved by INDOT in the Progress Meeting reviewing the draft invoice. No invoice shall be considered complete unless it (a) describes the status of completion as it relates to the Project Baseline Schedule; (b) sets forth the related payments which are then due in accordance with the Project Baseline Schedule, as of the date of the most recent Progress Meeting; (c) includes all materials, reports, certifications, and other submittals identified in TP Attachment 1-1 (Critical Path Method Schedule); (d) includes Design-Build Contractor's monthly Project Status Schedule as accepted by INDOT in accordance with TP Section 1.5.2.2 (Project Status Schedule); (e) includes any other documents or submittals that the DBA Documents require to be included with invoice packages; and (f) satisfies the requirements set forth in Section 13.2.4 (*Form of Invoice*). Within 14 days after INDOT's receipt of the invoice, INDOT will review the invoice and all attachments thereto for consistency with the draft invoice prepared at the most recent Progress Meeting and conformity with all requirements of the DBA Documents, and shall notify Design-Build Contractor of the amount approved for payment and specify the reason for disapproval of any remaining invoiced amounts. Design-Build Contractor may include such disapproved amounts in the next month's invoice after correction of the deficiencies noted by INDOT (all such disapproved amounts shall be deemed in Dispute unless otherwise agreed).

#### 13.2.4 **Form of Invoice**

13.2.4.1 Each invoice submitted by Design-Build Contractor shall include the invoice and Invoice Certificate in the form included in Exhibit 5 (*Invoice and Invoice Certificate*) hereto or such other form as may be approved in INDOT's sole discretion, with no additions or deletions other than those approved by INDOT. Each invoice and Invoice Certificate shall be executed by Design-Build Contractor's Authorized Representative.

13.2.4.2 Each invoice shall have a cover sheet that shall indicate each of the following items: (a) Project number and title; (b) invoice number (numbered consecutively, starting with "1"); (c) period covered by the invoice (specific beginning and ending days); (d) total amount authorized; (e) total invoiced through last period; (f) current invoice amount; (g) total invoiced to-date; (h) percent invoiced; (i) remaining Allowances; (j) remaining Contract Price; (j) net amount due Design-Build Contractor; (k) total amount earned to date for the Project as a whole; and (l) authorized signature, title of signer and date of signature.

13.2.4.3 In addition, no invoice shall be considered complete unless it: (a) describes in detail the status of completion as it relates to the Project Baseline Schedule; (b) sets forth separately and in detail the related payments which are then due in accordance with the Project Baseline Schedule, as of the end of the prior month; (c) in the case of amounts to be paid on a unit-price basis, includes invoices, receipts or other evidence establishing the number of units delivered; (d) in the case of amounts invoiced for Time and Materials Work, includes all supporting documentation described in Section 14.8 (*Time and Materials Change Orders*); (e) sets forth in detail the amounts paid to Subcontractors (including Suppliers and Subcontractors at lower tiers) from the payments made by INDOT to Design-Build Contractor with respect to the prior month's invoice; (f) includes affidavits of payment and unconditional

waivers of Liens and Claims executed by Design-Build Contractor (and affidavits of payment and unconditional waivers of Liens and Third Party Claims executed by each Subcontractor) with respect to all amounts paid in the prior month's invoice; and (g) includes all materials, reports, certifications, and other submittals identified in Section 13.2.3 (*Delivery of Invoice*).

#### 13.2.5 Payment by INDOT

Within 35 days after receipt by INDOT of each complete invoice (including all required materials and reports) and the related Invoice Certificate, INDOT shall pay Design-Build Contractor the amount of the invoice approved for payment less any amounts which INDOT is otherwise entitled to withhold or deduct. In no event shall INDOT have any obligation to pay Design-Build Contractor any amount (a) which would result in payment for any activity in excess of the value of the activity times the completion percentage of such activity (for non-unit-priced Work); (b) which was not approved during the Progress Meeting reviewing the draft invoice for such month; or (c) which would result in aggregate payments hereunder in excess of the overall completion percentage for the Project multiplied by the Contract Price (for non-unit-priced Work) for the month to which the invoice applies, plus amounts allowed by Change Orders.

### 13.3 Deductions, Exclusions and Limitations on Payment

#### 13.3.1 Deductions

INDOT may deduct from any progress payment and the Final Payment the following:

- (a) Any Losses of INDOT or Third Party Claims for which Design-Build Contractor is responsible hereunder;
- (b) Any Liquidated Damages that have accrued as of the date of the application for payment or which are anticipated to accrue based on the dates shown in the current Project Baseline Schedule for (x) Substantial Completion and (y) Final Acceptance;
- (c) Any Liquidated Damages or other charges for which Design-Build Contractor is liable pursuant to Section 19 (*Liquidated Damages; Movement Charges for Movement Closures; Noncompliance Event Deductions; and Limitation of Liability*) or Section 8.2.6 (*Key Personnel Liquidated Damages*) that have accrued as of the date of the application for payment;
- (d) Any amounts INDOT is required to retain under applicable Governmental Rules;
- (e) Any sums expended by or owing to INDOT as a result of Design-Build Contractor's failure to complete and maintain the Record Drawings;
- (f) Any sums expended by INDOT in performing any of Design-Build Contractor's obligations under the DBA Documents which Design-Build Contractor has failed to perform or which INDOT may elect to undertake itself or through INDOT plus an administrative charge equal to 10% of such costs;

- (g) Any sums expended by or owing to INDOT as a result of Design-Build Contractor's failure to obtain the Notice of Termination; and
- (h) Any other sums which INDOT is entitled to recover or withhold from Design-Build Contractor under the terms of the DBA Documents.

The failure by INDOT to deduct any of these sums from a progress payment shall not constitute a waiver of INDOT's rights (i) to such sums or (ii) with respect to any breach or default related thereto. All amounts owing by Design-Build Contractor to INDOT under this DBA shall earn Interest from the date on which such amount is owing.

### 13.3.2 **Unincorporated Materials**

INDOT will not pay for materials not yet incorporated in the Work unless all of the following conditions are met:

13.3.2.1 Material shall be delivered to the Site, or delivered to Design-Build Contractor and promptly stored by Design-Build Contractor in bonded storage at a location and pursuant to terms approved by INDOT. Design-Build Contractor shall submit certified bills and certifications for such materials with the invoice, as a condition to payment for such materials. INDOT shall allow and pay only such portion of the amount represented by these bills and certifications as in its opinion is consistent with the reasonable cost of such materials.

13.3.2.2 All such materials that meet the requirements of the DBA Documents and are accepted by INDOT shall be and become the property of INDOT. Design-Build Contractor at its own cost shall promptly execute, acknowledge, and deliver to INDOT proper bills of sale or other instruments in writing in a form acceptable to INDOT conveying and assuring to INDOT title to such material included in any invoice, free and clear of all Liens. Design-Build Contractor at its own cost shall conspicuously mark such material as the property of INDOT, shall not permit such materials to become commingled with non-INDOT-owned property and shall take such other steps, if any, as INDOT may require or regard as necessary to vest title to such material in INDOT free and clear of Liens. Nothing contained herein shall modify or diminish the responsibilities, liabilities and obligations of Design-Build Contractor in the event of damage or loss of such materials.

13.3.2.3 Material included in an invoice but which is subsequently lost, damaged or unsatisfactory shall be deducted from succeeding invoices.

13.3.2.4 Payment for material furnished and delivered as indicated in this Section 13.3.2 (*Unincorporated Materials*) will not exceed the amount paid by Design-Build Contractor as evidenced by a bill of sale supported by the paid invoice.

### 13.3.3 **Mobilization Payments; Bond and Insurance Premiums**

13.3.3.1 Design-Build Contractor shall be entitled to payment for mobilization in installments, in an amount equal to the bid item price for mobilization set forth

in the Proposal, not to exceed 5% of the initial Contract Price. The first payment for mobilization shall be in an amount not to exceed 25% of the bid item price for mobilization, payable as part of the first invoice following issuance of NTP2. The second payment for mobilization shall be in an amount not to exceed 25% of the bid item price for mobilization, payable when at least 5% of the Contract Price (less mobilization) is earned. The third payment for mobilization shall be in the remaining amount of the bid item price for mobilization, payable when at least 10% of the Contract Price (less mobilization) is earned.

13.3.3.2 The portion of the Contract Price allocable to bond and insurance premiums, as set forth in the Proposal, shall be payable to reimburse Design-Build Contractor for bond and insurance premiums actually paid, without markup, not to exceed the line item for such premiums in the Proposal, with such pass-through amounts invoiced as part of the first invoice following issuance of NTP2. Any excess portion of the line item for such premiums set forth in the Proposal shall be payable following Substantial Completion.

#### 13.3.4 **Equipment**

INDOT shall not pay for direct costs of equipment. Costs of equipment, whether new, used or rented, and to the extent not included in the mobilization payments under Section 13.3.3 (Mobilization Payments; Bond and Insurance Premiums), shall be allocated to and paid for as part of the activities with which the equipment is associated, in a manner which is consistent with the requirements of Section 14.7.4 (Added Work).

#### 13.3.5 **Record Drawings**

The amount payable for Record Drawings acceptable to INDOT shall equal 0.2% of the Contract Price. Design-Build Contractor shall not be entitled to payment for the last 0.2% of the Contract Price until acceptable Record Drawings have been delivered to INDOT.

#### 13.3.6 **No Payment for Services Performed Prior to Authorization Under DBA**

Notwithstanding anything in this Section 13 (Payment for Services) to the contrary, no payments shall be due and Design-Build Contractor waives any right to payment under this Section 13 (Payment for Services) for any Work performed prior to applicable authorization with respect to such Work under Section 5.1.2 (Notice to Proceed 1), Section 5.1.3 (Notice to Proceed 2), Section 5.4 (Commencement of Design), and Section 5.5 (Conditions to Commencement of Construction), as applicable.

### 13.4 **Final Payment**

Final Payment for all Work (other than the Notice of Termination, unused amounts of the Allowances and any other amounts that INDOT is authorized to withhold in accordance with the DBA Documents) will be made as follows:

13.4.1 On or before the date of delivery of its Affidavit of Final Acceptance, Design-Build Contractor shall prepare and submit a proposed Application for Final Payment to INDOT

showing the proposed total amount due Design-Build Contractor. The Application for Final Payment shall list all outstanding or pending Compensation Event Notices or Relief Event Notices and all existing or threatened Third Party Claims and Liens by Subcontractors, Utility Owners or other third parties relating to the Project, including any Notices filed or to be filed with the Affidavit of Final Acceptance, stating the amount at issue associated with each such Notice. The Application for Final Payment shall be accompanied by: (a) complete and legally effective releases or waivers of Liens and Claims satisfactory to INDOT (which releases or waivers may be conditional, in INDOT's sole discretion, if payment is to be paid from receipt of the Final Payment), from all Persons legally eligible to file Liens or Claims in connection with the Work; (b) consent of any Guarantors and Surety(ies) to final payment; (c) an executed release meeting the requirements of Section 13.4.4 (Final Payment) and otherwise satisfactory in form and content to INDOT; and (d) such other documentation as INDOT may reasonably require. All releases and waivers of Liens and Claims shall be written to apply to and be in favor of INDOT. Prior applications and payments shall be subject to correction in the proposed Application for Final Payment.

13.4.2 As a condition to its obligation to make payment to Design-Build Contractor based on the Application for Final Payment, INDOT shall have received an executed release meeting the requirements of Section 13.4.4 (Final Payment) and otherwise satisfactory in form and content to INDOT. The payment amount will be adjusted by any deductions under Section 13.3.1 (Deductions), any deductions or credits under TP Section 18.2 (Modifications to INDOT Standards) relating to quality adjustments, and any amounts that INDOT is entitled to withhold under Section 13.4.3 (Final Payment).

13.4.3 If the Application for Final Payment lists any existing or threatened Third Party Claims, Liens of Subcontractors, Suppliers, laborers, Utility Owners or other third parties against Design-Build Contractor, INDOT or the Project, or if any is thereafter filed, INDOT may withhold from payment such amount as INDOT deems advisable to cover any amounts owing or which may become owing to INDOT by Design-Build Contractor, including costs to complete or remediate uncompleted Work or Nonconforming Work, and 125% of the amount of any existing or threatened Third Party Claims, Liens and stop payment notices of Subcontractors, Suppliers, laborers, Utility Owners, and other third parties against Design-Build Contractor, INDOT, or the Project.

13.4.4 The executed release from Design-Build Contractor shall be from any and all Claims arising from the Work, shall include an express and unconditional waiver and release sufficient to waive any rights and benefits Design-Build Contractor may have under applicable law and shall release and waive any Claims against the Indemnified Parties, excluding only those matters identified in any Compensation Event Notices or Relief Event Notices listed as outstanding in the Application for Final Payment. The release shall be accompanied by an affidavit from Design-Build Contractor certifying that:

- (a) all Work has been performed in strict accordance with the requirements of the DBA Documents;



- (b) it has resolved any Third Party Claims made by Subcontractors, Utility Owners and others against Design-Build Contractor or the Project;
- (c) it has no reason to believe that any Person has a valid Third Party Claim against Design-Build Contractor or the Project which has not been communicated in writing by Design-Build Contractor to INDOT as of the date of the certificate; and
- (d) all guarantees and warranties are in full force and effect.

13.4.5 The release and the affidavit shall survive Final Payment.

13.4.6 All prior partial estimates and payments shall be subject to correction in the final estimate of payments.

13.4.7 INDOT will review Design-Build Contractor's proposed Application for Final Payment, and any changes or corrections, including adjustments described in Section 13.4.2 (Final Payment), will be forwarded to Design-Build Contractor for correction within 30 days. Any changes or corrections made pursuant to this Section 13.4.7 (Final Payment) will be reflected in an updated monthly payment schedule showing the net amount owed to Design-Build Contractor by month.

13.4.8 INDOT shall fulfill its payment obligations under this DBA by paying the amounts identified in Section 13.4.7 (Final Payment), in accordance with the schedule described in Section 13.4.7 (Final Payment).

### **13.5 Payment to Subcontractors**

13.5.1 Design-Build Contractor shall pay each Subcontractor for satisfactory performance of the Subcontract no later than 10 days after Design-Build Contractor's receipt of payment from INDOT, and each Subcontractor shall in turn make payment to its Subcontractors within 10 days after receipt of payment. Any delay or postponement of payment from the above-referenced time frame may occur only for good cause following written approval of INDOT, in its sole discretion. Any violation of the prompt payment requirements in this Section 13.5.1 (Payment to Subcontractors) shall be a material breach of this DBA. These requirements shall not be construed to limit or impair any contractual, administrative, judicial or equitable remedies otherwise available to the Subcontractor in the event of a Dispute involving late payment or nonpayment by Design-Build Contractor. Each Subcontract shall include the prompt payment requirements set forth in this Section 13.5.1 (Payment to Subcontractors).

13.5.2 INDOT shall have no obligation to pay or to see to the payment of money to a Subcontractor, except as may otherwise be required by Governmental Rules.

### **13.6 Disputes**

Failure by INDOT to pay any amount in Dispute shall not alleviate, diminish or modify in any respect Design-Build Contractor's obligation to perform under the DBA Documents, including

Design-Build Contractor's obligation to achieve the Completion Deadlines and perform all Work in accordance with the DBA Documents, and Design-Build Contractor shall not cease or slow down its performance under the DBA Documents on account of any such amount in Dispute. Any Dispute regarding such payment shall be resolved pursuant to the Dispute Resolution Procedures. Design-Build Contractor shall proceed as directed by INDOT pending resolution of the Dispute. Upon resolution of any such Dispute, each Party shall promptly pay to the other any amount owing.

### **13.7 Appropriation of Funds**

The continuation of this DBA beyond the current biennium is subject to and contingent upon sufficient funds being appropriated, budgeted, and otherwise made available by the Indiana State Legislature or federal sources. INDOT may terminate (or "cancel" under State law) this DBA in accordance with Section 17.1 (*Termination for Convenience*), if for any reason INDOT's funding from State or federal sources is not appropriated or is withdrawn, limited or impaired. In the event INDOT's funding is not appropriated or is withdrawn, limited or impaired and INDOT is unable to access other funds to satisfy INDOT's obligations under this DBA, INDOT will provide prompt Notice to Design-Build Contractor upon obtaining actual knowledge thereof. The obligation of INDOT to make payments pursuant to this DBA does not constitute an indebtedness of the State or any political subdivision thereof within the meaning or application of any constitutional provision or limitation. The obligation of INDOT to make payments pursuant to this DBA does not constitute a pledge of the faith, credit or taxing power of the State or any political subdivision thereof within the meaning or application of any constitutional provision or limitation. INDOT has no taxing power. Design-Build Contractor shall have no right to have taxes levied or compel appropriations by the General Assembly of the State for any payments required by INDOT pursuant to this DBA. For avoidance of doubt, determinations by or on behalf of INDOT as to the sufficiency of funds being appropriated, budgeted, and otherwise made available for the Project shall be final and conclusive and not subject to dispute resolution hereunder.

## **SECTION 14 CHANGES IN THE WORK**

This Section 14 (*Changes in the Work*) sets forth the requirements relating to Change Orders, Directive Letters, and Time and Materials Change Orders under the DBA Documents. Design-Build Contractor hereby acknowledges and agrees that the Contract Price constitutes full and adequate compensation for performance of all of the Work, subject only to those exceptions specified in this Section 14 (*Changes in the Work*), and in Section 15 (*Relief Events; Compensation Events*), and that INDOT is subject to substantial constraints limiting its ability to increase the Contract Price or extend the Completion Deadlines. Design-Build Contractor hereby waives the right to make any Claim for a time extension or for any monetary compensation in addition to the Contract Price and other compensation specified in this DBA for any reason whatsoever, except as specifically set forth in this Section 14 (*Changes in the Work*) and in Section 15 (*Relief Events; Compensation Events*). To the extent that any other provision of this DBA expressly provides for a Change Order to be issued, such provision is incorporated into and subject to this Section 14 (*Changes in the Work*). The foregoing waiver encompasses all theories of liability, whether in contract, tort (including negligence), equity, quantum meruit or otherwise, and encompasses all theories to extinguish contractual obligations, including impracticability,

mutual mistake and frustration of purpose. Nothing in the Technical Provisions shall have the intent or effect or shall be construed to create any right of Design-Build Contractor to any claim at law or in equity for additional monetary compensation or other relief, any to the contrary notwithstanding.

#### **14.1 Definition of Change Orders**

The term “Change Order” shall mean a written amendment to the terms and conditions of the DBA Documents issued in accordance with this Section 14 (*Changes in the Work*). Change Orders may be requested by Design-Build Contractor only pursuant to Section 14.5 (*Design-Build Contractor-Initiated Change Orders*). A Change Order shall not be effective for any purpose unless executed by INDOT. Change Orders may be issued for the following purposes (or combination thereof):

- (a) to modify the scope of the Work, including additions and reductions to the Work;
- (b) to revise a Completion Deadline;
- (c) to revise the Contract Price;
- (d) to revise other terms and conditions of the DBA Documents; and
- (e) without limiting clauses (a)-(d) above, to implement a Relief Event or a Compensation Event (as provided for in Section 15 (*Relief Events; Compensation Events*)).

Upon INDOT’s approval of the matters and terms and conditions set forth in the Change Order (whether it is initiated by INDOT or requested by Design-Build Contractor) and after receipt of any required approvals from FHWA, INDOT shall sign such Change Order form indicating approval thereof.

#### **14.2 INDOT-Initiated Change Orders**

##### **14.2.1 Right of INDOT to Issue Change Orders**

INDOT may, at any time and from time to time, without notice to any Surety or Guarantor, authorize or require changes in the Work within the general scope of the DBA Documents, including addition or deletions, or in the terms and conditions (including changes in the standards applicable to the Work) pursuant to a Change Order. For the purpose of this Section 14.2.1 (*Right of INDOT to Issue Change Orders*), any direction to perform work shall be considered within the general scope of the DBA Documents if it is related to the Project; any direction to delete or modify Work shall be considered within the general scope unless as a result the DBA Documents would no longer be considered a design-build contract for the Project of the nature generally described in the RFP. Design-Build Contractor shall have no obligation to perform any work outside the general scope of the DBA Documents, except on terms mutually acceptable to INDOT and Design-Build Contractor.

## 14.2.2 Change Notice

14.2.2.1 If INDOT desires to issue an INDOT-Directed Change or to evaluate whether to initiate such a change, then INDOT may, at its sole discretion, issue a Change Notice.

14.2.2.2 Within five days after Design-Build Contractor's receipt of a Change Notice, or such longer period as may be mutually agreed to by INDOT and Design-Build Contractor, INDOT and Design-Build Contractor shall consult to define the proposed scope of the change. Within five days after the initial consultation, or such longer period as may be mutually agreed to by INDOT and Design-Build Contractor, INDOT and Design-Build Contractor shall consult concerning the estimated cost and time impacts, if any. Design-Build Contractor shall provide data regarding such matters as requested by INDOT.

14.2.2.3 Within five days after the second consultation and provision of any data described in Section 14.2.2 (*Change Notice*), INDOT shall notify Design-Build Contractor whether INDOT (a) wishes to issue a Change Order, (b) wishes to request Design-Build Contractor to provide a Cost and Schedule Proposal as discussed at the meeting, (c) wishes to request Design-Build Contractor to prepare a modified work plan for the change and a Cost and Schedule Proposal based on the modified plan, or (d) no longer wishes to issue a Change Order. INDOT may at any time, in its good faith discretion, require Design-Build Contractor to provide two alternative Cost and Schedule Proposals, one of which shall provide for a time extension and any additional costs permitted hereunder, and the other of which shall show all Acceleration Costs associated with meeting the original Completion Deadlines, as well as any additional costs permitted hereunder. Notwithstanding the obligation to undertake the two consultations described above, INDOT may, in its sole discretion, proceed directly under clauses (a) through (d) above without having one or both of the consultations.

14.2.2.4 If so requested, Design-Build Contractor shall, within 14 days after receipt of the notification described in Section 14.2.2.3 (*Change Notice*), or such longer period as may be mutually agreed to by INDOT and Design-Build Contractor, prepare and submit to INDOT for review and approval by INDOT a Cost and Schedule Proposal (in the format provided by INDOT) for the requested change, complying with all applicable requirements of Section 14.6 (*Contents of Change Orders*), and incorporating and fully reflecting all requests made by INDOT. Design-Build Contractor shall bear the cost of developing the Cost and Schedule Proposal, including any modifications thereto requested by INDOT, except that actual and reasonable out-of-pocket costs of design and engineering work required for preparation of plans or exhibits necessary to the Cost and Schedule Proposal, as pre-authorized by INDOT, may be included in the Change Order as reimbursable items. If the Change Order is approved, such actual and reasonable out-of-pocket design and engineering costs will be included within the Change Order; otherwise, they shall be separately reimbursed through a separate Change Order.

14.2.2.5 If Design-Build Contractor and INDOT agree that a change in the requirements relating to the Work has occurred but disagree as to whether the change justifies

additional compensation or time or disagree as to the amount of any change to be made to the Contract Price or a Completion Deadline, INDOT may, in its sole discretion, order Design-Build Contractor to proceed with the performance of the Work in question notwithstanding such disagreement. Such order may, at INDOT's option, be in the form of: (i) a Time and Materials Change Order as provided in Section 14.8 (*Time and Materials Change Orders*), or (ii) a Directive Letter under Section 14.3 (*Directive Letters*).

14.2.2.6 If it is not practicable, due to the nature or timing of the event giving rise to a proposed Change Order, for Design-Build Contractor to provide a complete Cost and Schedule Proposal meeting all of the requirements of Section 14.6 (*Contents of Change Orders*), Design-Build Contractor shall provide an incomplete proposal which includes all information capable of being ascertained. Said incomplete proposal shall: (i) include a list of those Cost and Schedule Proposal requirements which are not fulfilled together with an explanation reasonably satisfactory to INDOT stating why such requirements cannot be met, (ii) provide such information regarding the proposed Change Order's projected impact on the Critical Path and Completion Deadlines as is requested by INDOT, and (iii) in all events include sufficient detail to ascertain the basis for the proposed Change Order and for any Contract Price increase associated therewith, to the extent such amount is then ascertainable. Design-Build Contractor shall provide monthly updates to any incomplete Cost and Schedule Proposals in the same manner as updates to incomplete Design-Build Contractor Change Requests under Section 14.5.8.1.2 (*Incomplete Design-Build Contractor Change Requests*).

#### 14.2.3 [Reserved]

#### 14.2.4 **INDOT-Directed Changes Under \$10,000**

Design-Build Contractor shall not be entitled to an increase in the Contract Price for each of the first 20 instances of an INDOT-Directed Change involving less than \$10,000 in additional direct costs incurred by Design-Build Contractor. If the additional direct costs exceed \$10,000 in additional direct costs in any such instance, subject to the terms of the DBA Documents, Design-Build Contractor is entitled to the full amount of such additional direct costs (including the initial \$10,000). The instances under this Section 14.2.4 (*INDOT-Directed Changes under \$10,000*) shall be aggregated with the instances under Section 14.3 (*Directive Letters*) for purposes of determining if 20 instances have occurred.

#### 14.2.5 **Changes in Law**

INDOT shall be entitled to a decrease in the Contract Price for any Change in Law that reduces the cost of the Work, if and to the extent that the Change in Law (i) allows a material modification in the design of the Project resulting in a net cost savings, or (ii) reduces the mitigation requirements for the Project associated with archaeological, paleontological, biological or cultural resources or artifacts. The decrease in Contract Price shall be calculated in accordance with Section 14.7.5 (*Deleted Work*). Design-Build Contractor shall be entitled to an increase in the Contract Price for any Change in Law pursuant to Section 15.6.3 (*Change in Law Compensation/Relief*).

## 14.3 Directive Letters

### 14.3.1 Issuance of Directive Letter

INDOT may at any time issue a Directive Letter to Design-Build Contractor regarding any matter for which a Change Order can be issued or in the event of any Dispute regarding the scope of the Work or whether Design-Build Contractor has performed in accordance with the requirements of the DBA Documents. The Directive Letter will state that it is issued under this Section 14.3.1 (*Issuance of Directive Letter*), will describe the Work in question and will state the basis for determining compensation, if any. Design-Build Contractor shall proceed immediately as directed in the letter, pending the execution of a formal Change Order (or, if the Directive Letter states that the Work is within Design-Build Contractor's original scope of Work or is necessary to comply with the requirements of the DBA Documents, Design-Build Contractor shall proceed with the Work as directed, but shall have the right pursuant to Section 14.5 (*Design-Build Contractor-Initiated Change Orders*) to request that INDOT issue a Change Order with respect thereto).

### 14.3.2 Directive Letter as Condition Precedent to Assertion that INDOT-Directed Change Has Occurred

14.3.2.1 Without limiting any other Notice requirement under this Section 14 (*Changes in the Work*) or Section 15 (*Relief Events; Compensation Events*), in the absence of a Change Order issued by INDOT, receipt of a Directive Letter from INDOT shall be a condition precedent to Design-Build Contractor's right to assert that an INDOT-Directed Change has occurred. Design-Build Contractor shall be deemed to have waived any right to an extension of time or payment for Work performed prior to receipt of a Directive Letter from INDOT stating that it is issued pursuant to Section 14.3.1 (*Issuance of Directive Letter*), or a Change Order for such Work signed by INDOT, notwithstanding that Design-Build Contractor believes such work is outside of its original scope.

14.3.2.2 The fact that a Directive Letter was issued by INDOT shall not be considered evidence that, in fact, an INDOT-Directed Change occurred. The determination whether an INDOT-Directed Change in fact occurred shall be based on an analysis of the original requirements of the DBA Documents and a determination whether the Directive Letter, in fact, constituted a change in those requirements.

## 14.4 Directive Letter Recordkeeping

Design-Build Contractor shall contemporaneously collect, record in writing, segregate, and preserve: (a) all data necessary to determine the costs described in this Section 14.4 (*Directive Letter Recordkeeping*) with respect to all Work which is the subject of a Directive Letter, and (b) all data necessary to show the actual delay (if any) to the Critical Path, the Project Baseline Schedule, and Completion Deadlines with respect to all Work which is the subject of such Directive Letter. Such data shall be provided to INDOT and any Authorized Representative of INDOT reviewing any Claim or Dispute regarding compensation or time extension for such Work. Design-Build Contractor hereby waives the right to obtain compensation or time extensions for any Work for which cost or schedule data is required to be maintained and provided hereunder, if

Design-Build Contractor fails to maintain and timely provide to INDOT cost or schedule data meeting the requirements of the DBA Documents.

## **14.5 Design-Build Contractor-Initiated Change Orders**

14.5.1 **Eligible Changes.** Design-Build Contractor may submit a written Notice to INDOT (a “Design-Build Contractor Change Request”) for approval of the following changes:

14.5.1.1 modifications to the Technical Provisions;

14.5.1.2 changes that are “no cost”/“zero sum” changes that do not affect the Project Baseline Schedule;

14.5.1.3 changes to relieve Design-Build Contractor from certain obligations and extend the time for performance due to the occurrence of a Relief Event, which Notice shall be given in accordance with the requirements applicable to Relief Event Notices set forth in Section 15 (Relief Events; Compensation Events); and

14.5.1.4 changes to the Contract Price due to the occurrence of a Compensation Event, which Notice shall be given in accordance with the requirements applicable to Compensation Event Notices set forth in Section 15 (Relief Events; Compensation Events).

### **14.5.2 Design-Build Contractor Change Request**

14.5.2.1 Design-Build Contractor Change Requests shall state in detail (a) the facts underlying the Design-Build Contractor Change Request, (b) the reasons that Design-Build Contractor believes justify the proposed modification, (c) any change in the Contract Price or a Completion Deadline that would result from implementation of the Design-Build Contractor Change Request, and (d) which subsection(s) of the DBA and Technical Provisions are applicable. The Notice described in Section 6.3.1.1 (Notification to INDOT) may also serve as a Design-Build Contractor Change Request provided it meets all of the requirements for Design-Build Contractor Change Requests. Design-Build Contractor Change Requests pursuant to Section 14.5.1.3 (Design-Build Contractor-Initiated Change Orders) and Section 14.5.1.4 (Design-Build Contractor-Initiated Change Orders) shall comply with any additional requirements specified in Section 15.1.2 (Relief Event Notice) and Section 15.1.3 (Compensation Event Notice), respectively.

14.5.2.2 If the Design-Build Contractor Change Request relates to a decision that the DBA Documents leave to the discretion of a Person, or as to which the DBA Documents provide that such Person’s decision is final, the Design-Build Contractor Change Request shall set out in detail all facts supporting Design-Build Contractor’s objection to the decision, including all facts supporting any contention that the decision was capricious or arbitrary or is not supported by substantial evidence; provided, however, that the foregoing shall not apply to matters within the sole discretion of INDOT, as such matters are not subject to Dispute or Claim.

14.5.2.3 Design-Build Contractor Change Requests (including separately numbered Relief Event Notices and Compensation Event Notices given pursuant to Section 15.1 (Notices), and Change Notices issued pursuant to this Section 14 (Changes in the Work), shall correspond to the number of a Change Order, with the intent that the first Notice would be assigned “No. 1”, regardless of whether it was a Design-Build Contractor Change Request or a Change Notice. Subsequent Notices shall be numbered sequentially

### 14.5.3 Procedures

Each Design-Build Contractor Change Request shall be delivered as promptly as possible after the occurrence of the relevant event or situation. Design-Build Contractor’s delivery of a Design-Build Contractor Change Request that is a Relief Event Notice or Compensation Event Notice later than 10 days after Design-Build Contractor first) the occurrence described therein, shall result in waiver in accordance with Section 15.1.1.2 (Relief Event Notice; Compensation Event Notice).

### 14.5.4 INDOT Review

14.5.4.1 INDOT, in its sole discretion, may accept or reject any modifications to the Technical Provisions proposed by Design-Build Contractor, provided that INDOT will accept a proposed modification necessary to bring the Technical Provisions into compliance with applicable Law.

14.5.4.2 INDOT may condition its approval of a Design-Build Contractor Change Request pursuant to Section 14.5.1.1 (Design-Build Contractor-Initiated Change Orders) or Section 14.5.1.2 (Design-Build Contractor-Initiated Change Orders) on modification of compensation to be paid by INDOT under this DBA in order to benefit equally in the estimated net cost savings, if any, attributable to the proposed change; provided, however, that INDOT shall receive the full benefit of the net cost savings, if any, attributable to any Design-Build Contractor Change Request that consists of a reduction in (a) performance, safety, durability, quality, utility or reliability, as applicable, of the Work or the Project or (b) in a reduction in the scope of the Project (including reductions in quantities without achieving equal or better safety, durability, quality, utility or reliability, as applicable), in each case, as determined by INDOT in its sole discretion. If INDOT accepts such change, INDOT and Design-Build Contractor shall execute a Change Order and Design-Build Contractor shall implement such change in accordance with this DBA, applicable Technical Provisions, the Project Management Plan, Good Industry Practice, and all applicable Laws.

14.5.4.3 INDOT shall make its determination regarding a Design-Build Contractor Change Request given pursuant to Section 14.5.1.3 (Design-Build Contractor-Initiated Change Orders) or Section 14.5.1.4 (Design-Build Contractor-Initiated Change Orders) in accordance with the procedures set forth in Section 15 (*Relief Events; Compensation Events*).

### 14.5.5 Impacts of Design-Build Contractor Change Request



Design-Build Contractor shall be solely responsible for the payment of any increased costs and for any Project Baseline Schedule delays or other impacts resulting from a Design-Build Contractor Change Request, other than on account of a Compensation Event or Relief Event accepted by INDOT.

#### 14.5.6 “No Cost”/“Zero Sum” Changes

Certain minor “no cost”/“zero sum” changes may be approved in writing by INDOT as a deviation, change, modification, alteration, or exception from applicable Technical Provisions regarding design or construction, as described in DBA Section 2.1.3.41(*Deviations; Design Exceptions*), and in such event shall not require a Change Order. Any other change in the requirements of the DBA Documents shall require a Change Order.

#### 14.5.7 Prohibited Design-Build Contractor Initiated Change Requests

Notwithstanding anything to the contrary in this DBA Section 14.5 (*Design-Build Contractor-Initiated Changes*), Design-Build Contractor shall not submit any Design-Build Contractor Change Request that proposes any modifications to the Technical Provisions that would (a) not be compliant with, or requires a change to, any applicable Law, (b) add a separate INDOT project (or other third-party contract) to the Project, or (c) except to the extent justified by the occurrence of a Relief Event (as determined in accordance with Section 15 (*Relief Events; Compensation Events*)), delay any Completion Deadline the deadline listed in DBA Exhibit 15 (*Preliminary Project Baseline Schedule*).

#### 14.5.8 Delivery of Design-Build Contractor Change Request

Design-Build Contractor shall deliver all Design-Build Contractor Change Requests in the form set forth in Exhibit 9 (*Form of Design-Build Contractor Change Request*) or such other form as INDOT may approve, in its sole discretion. INDOT may require design and construction costs to be covered by separate Design-Build Contractor Change Requests. If Design-Build Contractor requests a time extension (including a request in a Relief Event Notice pursuant to Section 15.1.1 (*Relief Event Notice; Compensation Event Notice*)), then INDOT, in its sole discretion, may require Design-Build Contractor to provide two alternative Design-Build Contractor Change Requests, one of which shall provide for a time extension, and the other of which shall show all Acceleration Costs associated with meeting the original Completion Deadlines, as well as any additional costs permitted hereunder. If it is not feasible to recover to the original Completion Deadline or if Design-Build Contractor believes that the costs associated with such a recovery are prohibitive, then Design-Build Contractor shall recommend a date to be shown in the alternative Design-Build Contractor Change Request.

##### 14.5.8.1 Incomplete Design-Build Contractor Change Requests

14.5.8.1.1 Each Design-Build Contractor Change Request provided under Section 14.5.2 (*Design-Build Contractor Change Request*) shall meet all requirements set forth in Section 14.6 (*Contents of Change Orders*); provided, however, that except as provided otherwise in Section 15 (*Relief Events; Compensation Events*) with respect to submission requirements for

(a) Relief Event Notices and Relief Event Packages, and (b) Compensation Event Notices and Compensation Event Packages, if any such requirements cannot be met due to the nature or timing of the occurrence giving rise to the request, Design-Build Contractor shall provide an incomplete Design-Build Contractor Change Request which provides all information capable of being ascertained. Said incomplete Design-Build Contractor Change Request shall: (a) include a list of those Change Order requirements which are not fulfilled together with an explanation reasonably satisfactory to INDOT stating why such requirements cannot be met, (b) provide such information regarding projected delays to the Critical Path and Completion Deadlines as is requested by INDOT, and (c) in all events, include sufficient detail to ascertain the basis for the proposed Change Order and for any Contract Price increase associated therewith, to the extent such amount is then ascertainable.

14.5.8.1.2 Design-Build Contractor shall furnish, when requested by INDOT or any designee, such further information and details as may be required to determine the facts or contentions involved. Design-Build Contractor agrees that it shall give INDOT and its designees access to any and all Books and Records, and shall cause its Subcontractors to do the same, so that INDOT and its designees can investigate the basis for such proposed Change Order. Design-Build Contractor shall provide INDOT with a monthly update to all outstanding Design-Build Contractor Change Requests describing the status of all previously unfulfilled requirements and stating any changes in projections previously delivered to INDOT, expenditures to date and time anticipated for completion of the activities for which a time extension is claimed. INDOT may reject Design-Build Contractor Change Request at any point in the process. Once a complete Design-Build Contractor Change Request is provided, INDOT's failure to respond thereto within 21 days after delivery of the request shall be deemed a rejection of such Design-Build Contractor Change Request.

**14.5.8.2 Reserved.**

**14.5.8.3 Review of Subcontractor Claims**

Prior to submission by Design-Build Contractor of any Design-Build Contractor Change Request which is based in whole or in part on a request by a Subcontractor to Design-Build Contractor for a price increase or time extension under its Subcontract, Design-Build Contractor shall have reviewed and analyzed all Third Party Claims by the Subcontractor which constitute the basis for the Design-Build Contractor Change Request and determined in good faith that each such Third Party Claim has sufficient merit to warrant Design-Build Contractor requesting an increase in the Contract Price and change in Completion Deadlines in the amounts specified in the Design-Build Contractor Change Request. Each Design-Build Contractor Change Request involving Subcontractor Work, and each update to an incomplete Change Order request involving such Work, shall include a summary of Design-Build Contractor's analysis of all Subcontractor Third Party Claims components and shall include a certification signed by Design-Build Contractor's Project Manager stating that Design-Build Contractor has (a) investigated the basis for the Subcontractor's Third Party Claims and believes that there is sufficient merit as to entitlement and the amount of money or time requested, (b) reviewed and verified the adequacy of all back-up documentation to be placed in escrow pursuant to Section 23.2 (*Subcontractor Pricing*

*Documents*), and (c) no reason to believe and does not believe that the factual basis for the Subcontractor's Third Party Claim is falsely represented. Any Design-Build Contractor Change Request involving Subcontractor Work which is not accompanied by such analysis and certification shall be considered incomplete and not eligible for a Change Order or additional compensation or time extension.

#### **14.5.9 Performance of Disputed Work**

In the event INDOT issues a Directive Letter, the Work thereunder shall henceforth be deemed part of Design-Build Contractor's required scope of Work under the DBA Documents to be performed by Design-Build Contractor in accordance with the requirements thereof; provided that Design-Build Contractor may submit any claim for additional relief and compensation for any Work as a Design-Build Contractor Change Request pursuant to Section 14.5.2.3 (*Design-Build Contractor Change Request*) respectively, in accordance with the procedures set forth in Section 15 (*Relief Events; Compensation Events*). Design-Build Contractor shall maintain and deliver to INDOT, upon request, contemporaneous records, meeting the requirements of Section 14.8.4 (*Time and Materials Change Order Recordkeeping and Reporting*), for all Work performed which Design-Build Contractor believes constitutes extra Work (including non-Construction Work), until all Disputes regarding entitlement to relief and compensation, or cost of such Work, are resolved.

### **14.6 Contents of Change Orders**

#### **14.6.1 Form of Change Order**

Each Cost and Schedule Proposal and Design-Build Contractor Change Request shall be prepared in substantially the form appearing in Exhibit 9 (*Form of Design-Build Contractor Change Request*) or such other form approved by INDOT, in its sole discretion, and shall meet all applicable requirements of this Section 14 (*Changes in the Work*). All Change Orders, regardless as to the Notice or Directive Letter giving rise to it, shall be numbered sequentially consistent with the intent of Section 14.5.2.3 (*Design-Build Contractor Change Request*).

#### **14.6.2 Scope of Work, Cost Estimate, Delay Analysis and Other Supporting Documentation**

Design-Build Contractor shall prepare a scope of work, cost estimate, delay analysis and other information as required by this Section 14.6.2 (*Scope of Work, Cost Estimate, Delay Analysis and Other Supporting Documentation*) for each Cost and Schedule Proposal and Design-Build Contractor Change Request.

##### **14.6.2.1 Scope of Work**

The scope of work shall describe in detail satisfactory to INDOT all activities associated with the Change Order, including a description of additions, deletions, and modifications to the existing requirements of the DBA Documents.

##### **14.6.2.2 Cost Estimate**

The cost estimate shall set out the estimated costs in such a way that a fair evaluation can be made. It shall include a breakdown for labor, materials, equipment, and any allowable markups for overhead and profit, unless INDOT agrees otherwise. The estimate shall include only costs allowable under Section 14.7.4 (Added Work), if any. If the work is to be performed by Subcontractors and if the work is sufficiently defined to obtain Subcontractor quotes, Design-Build Contractor shall obtain quotes (with breakdowns showing cost of labor, materials, equipment, and markups for overhead and profit) on the Subcontractor's letterhead and shall include such quotes as back-up for Design-Build Contractor's estimate. Design-Build Contractor shall identify all conditions with respect to prices or other aspects of the cost estimate, such as pricing contingent on firm orders being made by a certain date or the occurrence or non-occurrence of an event. If the cost estimate involves unit priced work based on previously agreed unit prices or relates to the Allowances, the cost estimate shall include a breakdown of quantities/units and the applicable prices.

#### 14.6.2.3 **Delay Analysis**

If Design-Build Contractor asserts that such event, situation or change delays the Critical Path, it shall provide a time impact analysis in accordance with TP Section 1.5.2.5 (Time Impact Analysis), indicating all activities represented or affected by the change, with activity numbers, durations, predecessor and successor activities, resources and cost, and with a narrative report, in form satisfactory to INDOT, which compares the proposed new schedule to the then-current, approved Project Baseline Schedule.

#### 14.6.2.4 **Other Supporting Documentation**

Design-Build Contractor shall provide such other supporting documentation as may be required by INDOT.

#### 14.6.3 **Reserved.**

#### 14.6.4 **Design-Build Contractor Representation**

Each Design-Build Contractor Change Request shall contain a certification under penalty of perjury according to the laws of the State, in a form acceptable to INDOT, executed by Design-Build Contractor (and Subcontractor(s), as applicable, if involved in the precipitating event) and stating that (a) the amount of time or compensation requested is justified as to entitlement and amount, (b) Design-Build Contractor has independently investigated the Change Request and Design-Build Contractor (and Subcontractor(s)) has/have no reason to believe and does/do not believe that the factual basis for the proposed change is falsely represented, (c) the amount of time or compensation requested includes all known and anticipated impacts or amounts, direct, indirect, and consequential, which may be incurred as a result of the event or matter giving rise to such proposed change, and (d) the cost and pricing data forming the basis for the Change Order is complete, accurate, and current. Each Change Order involving Work by a Subcontractor for which pricing data is required to be provided under Section 23.2 (Subcontractor Pricing Documents) shall include a statement that the Subcontractor pricing data has been provided and shall include a

copy of the certification required to be provided by the Subcontractor under Section 23.2 (Subcontractor Pricing Documents).

## **14.7 Change Order Pricing**

The price of a Change Order (except for any Time and Materials Change Order) shall be a negotiated lump sum price or unit prices as provided below as determined by INDOT. Lump sum price or unit prices shall be based on the original allocations of the Contract Price to comparable activities, whenever possible. Negotiation for lump sum or unit price Change Orders shall be on an Open Book Basis and may be based on the pricing contained in Escrowed Proposal Documents as well as competitive Subcontractors' bid prices.

### **14.7.1 Detailed Cost Proposal**

Design-Build Contractor may be required to submit a detailed cost proposal identifying all categories of costs: (a) showing all impacts on this DBA from Work additions, deletions, and modifications shown in the Change Order being priced; and (b) setting out the proposed costs in such a way that a fair and transparent evaluation can be made. Proposed costs (and cost impacts due to a Compensation Event) shall:

14.7.1.1 exclude (i) third-party entertainment costs, lobbying and political activity costs, costs of alcoholic beverages, costs for first class travel in excess of prevailing economy travel costs, and costs of club memberships, in each case to the extent that such costs would not be reimbursed to an employee of INDOT in the regular course of business, and (ii) unallowable costs under the following provisions of the federal Contract Cost Principles, 48 C.F.R. § 31.205, § 31.205-8 (contributions or donations), § 31.205-13 (employee morale, health, welfare, food service, and dormitory costs and credits), § 31.205-14 (entertainment costs), § 31.205-15 (fines, penalties, and mischarging costs), § 31.205-27 (organization costs), § 31.205-34 (recruitment costs), § 31.205-35 (relocation costs), § 31.205-43 (trade, business, technical and professional activity costs), § 31.205-44 (training and education costs), and § 31.205-47 (costs related to legal and other proceedings);

14.7.1.2 exclude amounts paid or to be paid to Affiliates in excess of the pricing Design-Build Contractor could reasonably obtain in an arms' length, competitive transaction with an unaffiliated Contractor;

14.7.1.3 exclude costs incurred in asserting, pursuing, or enforcing any Compensation Event, Relief Event, or Dispute;

14.7.1.4 be reduced by savings in costs resulting from the change;

14.7.1.5 exclude costs for any rejected Work that failed to meet the requirements of the DBA Documents and any necessary remedial Work;

14.7.1.6 not include any amount on account of federal, State, or local income taxes, and shall not include, under any circumstances, costs incurred by Design-Build

Contractor or any Contractors on account of charges or expenses due to (i) the business organization existence or maintenance of its business of any DB-Related Entity, (ii) labor or employment matters as a result of any Change in Law (other than recovery of costs for additional labor hours required directly as a result of a Change in Law); and

14.7.1.7 to the extent not further restricted pursuant to the foregoing, otherwise be allowable, allocable, and reasonable in accordance with the cost principles and procedures of 48 C.F.R. Part 31.

#### 14.7.2 Identification of Conditions

Design-Build Contractor shall identify all conditions with respect to prices or other aspects of the proposal, such as pricing contingent on firm orders being made by a certain date or the occurrence or nonoccurrence of an event.

#### 14.7.3 Contents

A negotiated Change Order shall specify costs, scheduling requirements, time extensions, and all costs of any nature arising out of the Work covered by the Change Order. Notwithstanding the foregoing, the Parties may mutually agree to use a multiple-step process involving issuance of a Change Order which includes an estimated construction cost and which provides for a revised Change Order to be issued after a certain design level has been reached, thus allowing a refinement and further definition of the estimated construction cost.

#### 14.7.4 Added Work

When the Change Order adds Work to Design-Build Contractor's scope, the increase in the Contract Price shall be negotiated based on (a) estimated costs of labor, material and equipment, (b) unit prices in accordance with Section 14.7.7 (Unit Priced Change Orders), or (c) actual costs in accordance with Section 109.05(b) of the Standard Specifications. For negotiated Change Orders, markups for profit and overhead shall be consistent with the principles of Section 109.05(b) of the Standard Specifications. Risk associated with the Work described in the Change Order shall be addressed through the assumptions contained therein regarding the scope of such Work.

#### 14.7.5 Deleted Work

When the Change Order deletes Work from Design-Build Contractor's scope (including deletion of any Work contained in the DBA Documents that is found to be unnecessary), the amount of the reduction in the Contract Price shall be based upon a current estimate including a bill of material, a breakdown of labor, material, and equipment costs and overhead and profit associated with the deleted work. The current estimated amount of risk associated with such Work shall be a factor in determining the markup for the deduction. When a deduction is involved, documented cancellation and restocking charges may be included in costs and subtracted from the price deduction.

#### 14.7.6 Change Order Both Adding and Deleting Work

When the Change Order includes both added and deleted Work, Design-Build Contractor shall prepare a statement of the cost of labor, material, and equipment for both added and deleted Work. If the cost of labor, material, and equipment for the Work added and deleted results in a:

- (a) Net increase in cost, the change shall be treated as Work added and the provisions of Section 14.7.4 (Added Work) shall be used to determine markups for overhead and profit. Markups for overhead and profit will be allowed only for the net increase in cost in order to establish the amount to be added to the Contract Price;
- (b) Net decrease in cost, the change shall be treated as Work deleted and the provisions of Section 14.7.5 (Deleted Work) shall be used on the net decrease in cost in order to establish the amount deducted from the Contract Price; or
- (c) Net change of zero, there will be no change in the Contract Price.

#### 14.7.7 Unit Priced Change Orders

Measurement of unit-priced quantities will be in accordance with Section 109.01 of the Standard Specifications. Unit-priced Change Orders shall initially include an estimated increase in the Contract Price based on estimated quantities. Upon final determination of the quantities, INDOT will issue a modified Change Order setting forth the final adjustment to the Contract Price. Design-Build Contractor shall keep detailed records of the quantities for unit-priced Work, and shall submit supporting documentation of such quantities with its invoices.

### 14.8 Time and Materials Change Orders

#### 14.8.1 Issuance

INDOT may, at its sole discretion, issue a Time and Materials Change Order whenever INDOT determines that a Time and Materials Change Order is advisable. A “Time and Materials Change Order” shall mean a written Notice from INDOT to Design-Build Contractor instructing Design-Build Contractor to perform the Work, indicating expressly the intention to treat the items as changes in the Work, and setting forth the kind, character, and limits of the Work as far as they can be ascertained, the terms under which changes to the Contract Price will be determined, further to Section 14.8.2 (Pricing and Payment), and the estimated total change in the Contract Price anticipated thereunder. Upon final determination of the allowable costs, INDOT shall issue a modified Change Order setting forth the final adjustment to the Contract Price.

#### 14.8.2 Pricing and Payment

14.8.2.1 Time and Materials Change Orders shall be issued in accordance with Section 109.05(b) of the Standard Specifications. Design-Build Contractor shall comply with all record keeping and other obligations set forth in Section 109.05(b) of the Standard Specifications.

14.8.2.2 Payments for Time and Materials Work shall be invoiced with the regular monthly invoice, based on the extra work reports furnished by Design-Build Contractor for each period. Costs evidenced by daily extra work reports furnished less than seven days prior to preparation of the invoice shall be included in the subsequent month's invoice.

### 14.8.3 Overhead Items

The following items are considered overhead costs and are included in the Change Order markups set forth in Section 109.05 of the Standard Specifications:

- (a) Salary and expenses of executive officers, supervising officers or supervising employees;
- (b) Design-Build Contractor's superintendent (general foreman);
- (c) Clerical or stenographic employees;
- (d) Charges for minor equipment, such as small tools, including shovels, picks, axes, saws, bars, sledges, lanterns, jacks, cables, pails, wrenches, etc., consumables, and other miscellaneous supplies and services;
- (e) Any and all field and home office overhead and operating expenses whatsoever; and
- (f) Subsistence and travel expenses for personnel (craft personnel excluded).

With respect to non-construction related labor costs, overhead is covered by the labor surcharge, and includes accessories such as computer assisted drafting and design (CADD) systems, software and computers, facsimile machines, scanners, plotters, etc.

### 14.8.4 Time and Materials Change Order Recordkeeping and Reporting

14.8.4.1 Design-Build Contractor shall maintain its Books and Records in such a manner as to provide a clear distinction between the direct costs of Work for which it is entitled (or for which it believes it is entitled) to an increase in the Contract Price and the costs of other operations. Design-Build Contractor shall contemporaneously collect, record in writing, segregate, and preserve (i) separate daily occurrence logs, (ii) all other data necessary to determine the costs of all Work which is the subject of a Time and Materials Change Order, specifically including costs associated with Design Work as well as Utility Adjustments, and (iii) all data necessary to show the actual delay (if any) of the change on the Critical Path and Completion Deadline with respect to all Work which is the subject of a Time and Materials Change Order. Design-Build Contractor shall maintain its Books and Records in such a manner as to provide a clear distinction between: (i) the direct cost of Work for which it is entitled (or for which it believes it is entitled) to an increase in the Contract Price, and (ii) the costs of other Work or operations.



14.8.4.2 Design-Build Contractor shall furnish to INDOT completed daily work reports for each day's Work under each Time and Materials Change Order. The daily time and material Work reports shall be detailed as follows:

- (i) Name, classification, date, daily hours, total hours, rate, and extension for each worker (including both construction and non-construction personnel) for whom reimbursement is requested;
- (ii) Designation, dates, daily hours, total hours, rental rate, and extension for each unit of machinery and equipment;
- (iii) Quantities of materials, prices, and extensions;
- (iv) Transportation of materials; and
- (v) The total costs to date for the Time and Materials Change Order Work.

Materials charges shall be substantiated by valid copies of Supplier's invoices. Such invoices shall be submitted with the daily time and material Work reports, or if not available, they shall be submitted with subsequent daily time and material Work reports. Should said Supplier's invoices not be submitted within 60 days after the date of delivery of the materials, INDOT shall have the right to establish the cost of such materials at the lowest current wholesale prices at which such materials are available, in the quantities concerned, delivered to the location of Work, less any discounts available.

14.8.4.3 All reports required under this Section 14.8.4 (*Time and Materials Change Order Recordkeeping and Reporting*) shall be signed by Design-Build Contractor and certified as true, accurate, and complete. The cost of furnishing such reports is included in Design-Build Contractor's predetermined overhead and profit markups and shall not be the subject of any additional Claims for compensation.

14.8.4.4 INDOT will compare its records with the completed daily time and material Work reports furnished by Design-Build Contractor and make any necessary adjustments. When these daily time and material Work reports are agreed upon and signed by both Parties, said reports shall become the basis of payment under the subject Time and Materials Change Order, but shall not preclude subsequent adjustment based on a later audit. Design-Build Contractor's cost records pertaining to Time and Materials Change Order Work paid for on a time and material basis shall be open, during all regular business hours, to inspection or audit by representatives of INDOT during the term of this DBA and for a period of not less than five years after the Final Acceptance Date, and Design-Build Contractor shall retain such records for that period. Where payment for materials or labor is based on the cost thereof to any Person other than Design-Build Contractor, Design-Build Contractor shall make every reasonable effort to insure that the cost records of each such other Person will be open to inspection and audit by representatives of INDOT on the same terms and conditions as the cost records of Design-Build Contractor. Payment for such costs may be withheld or rescinded by INDOT if the records of such third parties are not made available to INDOT's

representatives. If an audit is to be commenced more than 120 days after the Final Acceptance Date, Design-Build Contractor will be given reasonable Notice of the time when such audit is to begin.

14.8.4.5 Design-Build Contractor hereby waives the right to obtain compensation or time extensions for any Time and Materials Change Order Work for which cost or schedule data is required to be maintained and provided hereunder if Design-Build Contractor fails to maintain and timely provide to INDOT cost or schedule data meeting the requirements of the DBA Documents.

#### **14.9 Bond and Insurance Premiums**

Design-Build Contractor shall be reimbursed for additional bond and insurance premiums actually paid directly in connection with a Change Order, without markup, not to exceed the line item for such premiums in the Change Order. Any excess portion shall be payable following Substantial Completion.

#### **14.10 Income Tax and Certain Business Expenses**

The Change Order price shall not include any amount on account of federal, State, or local income taxes. Further and notwithstanding anything to the contrary herein, the Compensation Amount shall not include, under any circumstances, costs incurred by Design-Build Contractor or any Contractors on account of charges or expenses due to (i) the business organization existence or maintenance of its business of any DB-Related Entity, (ii) labor or employment matters as a result of any Change in Law (other than recovery of costs for additional labor hours required directly as a result of a Change in Law).

#### **14.11 Work Performed Without Discretion**

To the extent that Design-Build Contractor undertakes any efforts outside of the scope of Work, unless Design-Build Contractor has received a Directive Letter or Change Order signed by INDOT to undertake such efforts, Design-Build Contractor shall be deemed to have undertaken the extra work voluntarily and shall not be entitled to a Change Order in connection therewith. In addition, INDOT may require Design-Build Contractor to remove or otherwise undo any such work, at Design-Build Contractor's sole cost and without any time extension.

#### **14.12 [Reserved]**

#### **14.13 Disputes**

14.13.1 If INDOT and Design-Build Contractor agree that Design-Build Contractor is entitled to an increase the Contract Price or an extension of any Completion Deadline under this Section 14.13 (Disputes), but are unable to agree as to the amount of such Contract Price increase or time extension, INDOT agrees to markup Design-Build Contractor Change Request or Cost and Schedule Proposal, as applicable, provided by Design-Build Contractor to reduce the amount of the Contract Price increase or time extension as deemed appropriate by INDOT. In such event,

INDOT will execute and deliver the marked-up Change Order to Design-Build Contractor within a reasonable period after receipt of a request by Design-Build Contractor to do so, and thereafter will make payment or grant a time extension based on such marked-up Change Order.

14.13.2 Except as otherwise specified in the Change Order, execution of a Change Order by both Parties shall be deemed accord and satisfaction of all Claims by Design-Build Contractor of any nature arising from or relating to the Work covered by the Change Order and Design-Build Contractor shall be deemed to have expressly released, waived, and disclaimed any further compensation and time extension related thereto. Design-Build Contractor's Claim and any award by the Dispute resolver shall be limited to the incremental costs incurred by Design-Build Contractor with respect to the Disputed matter (crediting INDOT for any corresponding reduction in Design-Build Contractor's other costs) and shall in no event exceed the amounts allowed by Section 14.7 (*Change Order Pricing*) with respect thereto.

14.13.3 Except for items which are subject to INDOT's sole discretion, the failure of INDOT and Design-Build Contractor to agree to any Change Order under this Section 14 (*Changes in the Work*) (including agreement as to merit, the amount of compensation allowed under a Time and Materials Change Order and the Disputed amount of the increase in the Contract Price or extension of any Completion Deadline in connection with a Change Order as described above) shall be a Dispute to be resolved pursuant to Section 21 (*Partnering and Dispute Resolution*).

#### **14.14 Changes Not Requiring Change Order**

Deviations from design standards specified in the DBA Documents which have a neutral net cost effect and do not delay the Critical Path or a Completion Deadline shall not require a Change Order provided such Deviations are approved by INDOT pursuant to Section 2.1.3 (*Deviations; Design Exceptions*). Any other change in the requirements of the DBA Documents shall require either a Directive Letter or a Change Order.

#### **14.15 No Release or Waiver**

14.15.1 No extension of time granted hereunder shall release Design-Build Contractor's Surety or any Guarantor from its obligations. Work shall continue and be carried on in accordance with all the provisions of the DBA Documents and the DBA Documents shall be and shall remain in full force and effect during the continuance unless formally suspended or terminated by INDOT in accordance with the terms hereof. Permitting Design-Build Contractor to finish the Work or any part thereof after a Completion Deadline, or the making of payments to Design-Build Contractor after such date, shall not constitute a waiver on the part of INDOT of any rights or remedies under the DBA Documents, at law or in equity.

14.15.2 Neither the grant of an extension of time beyond the date fixed for the completion of any part of the Work, nor the performance and acceptance of any part of the Work or materials specified by this DBA after a Completion Deadline, shall be deemed to be a waiver by INDOT of any of its rights and remedies under the DBA Documents, at law or in equity, including its right to terminate this DBA for abandonment or failure to complete within the time

specified (as it may have been extended) or to impose and deduct Losses or seek recovery of Losses as may be provided.

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

#### **14.16 Change Order and Compensation Event/Relief Event Interface**

For avoidance of doubt, notwithstanding the fact that an "INDOT-Directed Change" is included within the definition of Compensation Event, and within the definition of Relief Event (through the definition of INDOT-Caused Delay), any Change Order initiated pursuant to a Change Notice pursuant to Section 14.2.2 (*Change Notice*) shall be subject to the procedures set forth in this Section 14 (*Changes in the Work*). Any Change Order initiated pursuant to a Compensation Event and Relief Event, including pursuant to a Directive Letter resulting in a Relief Event or Compensation Event, shall be subject to the procedures set forth in Section 15 (*Relief Events; Compensation Events*).

### **SECTION 15 RELIEF EVENTS; COMPENSATION EVENTS**

#### **15.1 Notices**

##### **15.1.1 Relief Event Notice; Compensation Event Notice**

15.1.1.1 Except as otherwise expressly provided in this DBA, if at any time Design-Build Contractor determines that a change to the Work has occurred or is imminent, and that change constitutes a Relief Event or a Compensation Event, Design-Build Contractor shall submit a Notice of Compensation Event or Relief Event to INDOT per this Section 15 (*Relief Events; Compensation Events*) stating that a Relief Event or a Compensation Event has occurred or will occur (a "Relief Event Notice" or "Compensation Event Notice", as applicable). The first Compensation Event Notice shall be labeled "Notice of Compensation Event No. 1" and subsequent Compensation Event Notices shall be numbered sequentially. The first Relief Event Notice shall be labeled "Notice of Relief Event No. 1" and subsequent Relief Event Notices shall be numbered sequentially. Any Notice of Relief Event submitted pursuant to this Section 15.1.1.1 (*Relief Event Notice; Compensation Event Notice*) shall be deemed a Design-Build Contractor Change Request pursuant to Section 14.5.1.3 (*Design-Build Contractor-Initiated Change Orders*), and any Notice of Compensation Event submitted pursuant to this Section 15.1 (*Notices*) shall be deemed a Design-Build Contractor Change Request pursuant to Section 14.5.1.4 (*Design-Build Contractor-Initiated Change Orders*), and

shall also comply with requirements for such request set forth in Section 14.5 (*Design-Build Contractor-Initiated Change Orders*).

15.1.1.2 Time is of the essence in Design-Build Contractor's delivery of its Notice of Compensation Event or Notice of a Relief Event. Accordingly, if for any reason Design-Build Contractor fails to deliver a Compensation Event Notice or Relief Event Notice in strict accordance with Section 15.1.2 (*Relief Event Notice*) or Section 15.1.3 (*Compensation Event Notice*), Design-Build Contractor shall be deemed to have irrevocably and forever waived the right to assert a Relief Event or a Compensation Event, or both, as applicable, with respect to the incident giving rise to the determination made under Section 15.1.1.1 (*Relief Event Notice; Compensation Event Notice*).

15.1.1.3 If any notice of Relief Event or Compensation Event concerns any Hazardous Materials, then Design-Build Contractor shall be deemed to have waived the right to collect any and all costs incurred in connection therewith to the extent that INDOT is not afforded the opportunity to inspect such material or condition before it is disturbed.

#### 15.1.2 Relief Event Notice

##### 15.1.2.1 Notices of Relief Events shall include:

15.1.2.1.1 a description of the Relief Event (and citation to the corresponding clause in the definition of "Relief Event") upon which the delay or inability to perform is based, including its nature, the reasons why Design-Build Contractor believes additional time will or may be due, and the date of the asserted Relief Event's occurrence, and its actual (or if it has not concluded, its anticipated) duration, all in reasonable detail;

15.1.2.1.2 a statement as to the effect of the Relief Event on Design-Build Contractor's ability to perform any of its obligations under the DBA Documents, including details of the relevant obligations;

15.1.2.1.3 an explanation of the measures that Design-Build Contractor proposes to undertake to mitigate all or some of the delay and other consequences of the Relief Event; and

15.1.2.1.4 an estimate of the time within which a response to the notice is required to minimize delay of performance of affected Work.

15.1.2.2 Design-Build Contractor shall be deemed to have irrevocably and forever waived and released any claim to relief for the Relief Event for failing to deliver to INDOT a Relief Event Notice within 10 days following the date (herein the "starting date") on which Design-Build Contractor first became aware (or should have been aware, using all reasonable due diligence) of the precipitating event.

##### 15.1.2.3 Continuing Relief Event; Additional Event(s).

15.1.2.3.1 If, following delivery of a Relief Event Notice, while the asserted Relief Event is ongoing (i.e., the event has not concluded), Design-Build Contractor receives or becomes aware of any further information relating to the asserted Relief Event, but subject to Section 15.1.2.3.2 (*Continuing Relief Event; Additional Event(s)*), Design-Build Contractor shall amend its original Relief Event Notice (labeling as, for example, “Amendment 1 to Notice of Relief Event No. 1”) and deliver such amended Notice to INDOT not later than five Business Days after Design-Build Contractor’s receipt or knowledge of the additional information. INDOT may request from Design-Build Contractor any further information that INDOT may reasonably require, and Design-Build Contractor shall supply the same within a reasonable period but not later than five Business Days after such INDOT request. Within five Business Days after the conclusion of an asserted Relief Event, Design-Build Contractor shall update (or further update), by amendment, the Relief Event Notice with the date of its actual or estimated conclusion. It is the intent of the Parties that the original Relief Event Notice meet all of the requirements of Section 15.1.2.1 (*Relief Event Notice*) and not present cursory or pro forma information to INDOT, so as to rely on this Section 15.1.2.3 (*Continuing Relief Event; Additional Event(s)*) to provide information then-available at a later date, and INDOT may, and shall be deemed to have reasonably, reject(ed) any purported amendment to the original Compensation Event Notice offering such information.

15.1.2.3.2 Any additional event thereafter asserted by Design-Build Contractor as a Relief Event or a Compensation Event may not be included in the amended Relief Event Notice(s) delivered pursuant to Section 15.1.2.3.1 (*Continuing Relief Event; Additional Event(s)*), as Design-Build Contractor’s assertion of an entitlement to relief or compensation as a result of such additional events shall be handled separately as Relief Event Notices or Compensation Event Notices, as applicable, to proceed according to this Section 15 (*Relief Events; Compensation Events*).

### 15.1.3 Compensation Event Notice

15.1.3.1 A “Notice of Compensation Event” shall include:

15.1.3.1.1 a description of the Compensation Event (and citation to the corresponding clause in the definition of “Compensation Event”) upon which Design-Build Contractor’s asserted entitlement to additional monetary compensation is based, including its nature, the reasons why Design-Build Contractor believes additional costs will or may be due, the date of the asserted Compensation Event’s occurrence and its actual (or if it has not concluded, its anticipated) duration, and the portion of the Project affected, all in reasonable detail;

15.1.3.1.2 a statement as to the reasons why Design-Build Contractor believes additional compensation will or may be due;

15.1.3.1.3 a statement of the basis that any asserted additional work or costs are not already included in the Work;

15.1.3.1.4 identification of particular elements of performance for which additional compensation may be sought;

15.1.3.1.5 Design-Build Contractor’s current estimate of the anticipated adverse and beneficial effects of the Compensation Event on the Project; and

15.1.3.1.6 an estimate of the time within which a response to the notice is required to minimize additional cost of performance.

15.1.3.2 Design-Build Contractor shall be deemed to have irrevocably and forever waived and released any claim to relief for the Compensation Event for failing to deliver to INDOT a Compensation Event Notice within 10 days following the date (herein the “starting date”) on which Design-Build Contractor first became aware (or should have been aware, using all reasonable due diligence) of the precipitating event.

15.1.3.3 Continuing Compensation Event; Additional Event(s).

15.1.3.3.1 If, following delivery of a Compensation Event Notice, while the asserted Compensation Event is ongoing (i.e., the event has not concluded), Design-Build Contractor receives or becomes aware of any further information relating to the asserted Compensation Event, but subject to Section 15.1.3.3 (Continuing Compensation Event; Additional Event(s)), Design-Build Contractor shall amend its original Compensation Event Notice (labeling as, for example, “Amendment 1 to Notice of Compensation Event No. 1”) and deliver such amended Notice to INDOT not later than five Business Days after Design-Build Contractor’s receipt or knowledge of the additional information. INDOT may request from Design-Build Contractor any further information that INDOT may reasonably require, and Design-Build Contractor shall supply the same within a reasonable period but not later than five Business Days after such INDOT request. Within five Business Days after the conclusion of an asserted Compensation Event, Design-Build Contractor shall update (or further update), by amendment, the Compensation Event Notice with the date of its actual or estimated conclusion. It is the intent of the Parties that the original Compensation Event Notice meet all of the requirements of Section 15.1.3.1 (Compensation Event Notice) and not present cursory or pro forma information to INDOT, so as to rely on this Section 15.1.3.3 (Continuing Compensation Event; Additional Event(s)) to provide information then-available at a later date, and INDOT may, and shall be deemed to have reasonably, reject(ed) any purported amendment to the original Compensation Event Notice offering such information.

15.1.3.3.2 Any additional event thereafter asserted by Design-Build Contractor as a Relief Event or a Compensation Event may not be included in the amended Compensation Event Notice(s) delivered pursuant to Section 15.1.3.3 (Continuing Compensation Event; Additional Event(s)), as Design-Build Contractor’s assertion of an entitlement to relief or compensation as a result of such additional events shall be handled separately as Compensation Event Notices or Relief Event Notices, as applicable, to proceed according to this Section 15 (Relief Events; Compensation Events).

15.1.4 Compensation Event Package or Relief Event Package

15.1.4.1 Design-Build Contractor shall deliver to INDOT as soon as practicable and in any event within 20 Business Days after delivery of the Compensation Event

Notice or Relief Event Notice, a Compensation Event Package or Relief Event Package labelled with the Compensation Event number or Relief Event number from the corresponding Compensation Event Notice or Relief Event Notice, and containing every item specified in Section 15.1.4.2 (*Compensation Event Package or Relief Event Package*). INDOT may elect, in its sole discretion, to grant a longer time period if promptly solicited to do so (in no case later than expiration of the aforementioned 20 Business Days).

15.1.4.2 Each Compensation Event Package or Relief Event Package shall at a minimum include:

15.1.4.2.1 (for asserted Relief Events only) a scope of work describing in detail satisfactory to INDOT all activities associated with the asserted Relief Event.

15.1.4.2.2 (for asserted Compensation Events only) a cost estimate that sets out the estimated costs in such a way and in sufficient detail that a fair evaluation can be made. The cost estimate shall be in a form approved by INDOT and shall include both a separate breakdown of costs that impact design and those that impact construction activities. Such breakdown shall include as separate items labor, materials, equipment, overhead (which includes all indirect costs), and profit, as and to the extent allowed under Section 14 (*Changes in the Work*) and this Section 15 (*Relief Events; Compensation Events*), as applicable, and otherwise under the DBA Documents. Design-Build Contractor shall indicate whether it intends that the work is to be performed by Subcontractors, and if the work is sufficiently defined to obtain Subcontractor quotes, Design-Build Contractor shall obtain quotes (with breakdowns showing cost of labor, materials, equipment, overhead and profit) on the Subcontractor's stationery and shall include such quotes as back-up for Design-Build Contractor estimate.

15.1.4.2.3 a narrative justification detailing all causes of the asserted Relief Event or Compensation Event, making specific reference and citing to the applicable provisions of the DBA Documents (including specifically the relevant clause of the definition(s) of Relief Event or Compensation Event), and describing the data and documents that establish the necessity of (in the case of Relief Events), any asserted relief or (in the case of Compensation Events) any asserted additional compensation; and

15.1.4.2.4 a sworn certification in a form acceptable to INDOT by Design-Build Contractor (and Subcontractor(s), as applicable, if involved in the Work or event) meeting all of the requirements specified in Section 14.6.4 (*Design-Build Contractor Representation*) or.

15.1.4.3 After INDOT's receipt and review of the Compensation Event Package or Relief Event Package, provided for in Section 15.1.4.2 (*Compensation Event Package or Relief Event Package*), at INDOT's sole option, if Design-Build Contractor claims that a Relief Event has occurred adversely affecting the Critical Path, INDOT may, by Notice to Design-Build Contractor, require Design-Build Contractor to update the Compensation Event Package or Relief Event Package within 10 Business Days following receipt of INDOT's Notice. The update shall include the results of a time impact analysis in accordance with Section 14.6.2.3 (*Delay Analysis*), demonstrating that the relevant Relief Event will result in an identifiable and measurable delay to commence Construction Work or to achieve any



Completion Deadline, and the likely duration of the impact on any Critical Path activity/ies (after consuming all the Float) related to such delay.

#### 15.1.5 Relief Event and Compensation Event Notices at Final Payment

Relief Event Notices and Compensation Event Notices filed concurrently with the Application for Final Payment must be otherwise timely and meet all requirements under this Section 15 (*Relief Events; Compensation Events*).

### 15.2 Relief Event and Compensation Event Determinations

15.2.1 If Design-Build Contractor complies with the notice and information requirements in this Section 15 (*Relief Events; Compensation Events*), then within 40 Business Days after receiving the Relief Event Package (and, if applicable, any required update pursuant to Section 15.1.4.3 (*Compensation Event Package or Relief Event Package*)) or such longer period of time to which the Parties may mutually agree, INDOT will issue a “Relief Event Determination”, specifying: (a) the relevant obligations for which relief is given, (b) the period of time that Completion Deadlines or periods set forth in the Project Baseline Schedule will be extended based on the number of days of delay affecting a Critical Path, after consumption of Float available pursuant to Section 5.3.2 (*Float*), that is directly attributable to the Relief Event and that cannot be avoided through reasonable mitigation measures, and (c) if applicable, the period of time, if any, that the Contract Time will be extended. Design-Build Contractor shall be relieved from the performance of obligations to the extent specified in the Relief Event Determination.

15.2.2 If Design-Build Contractor complies with the notice and information requirements in this Section 15 (*Relief Events; Compensation Events*), then within 40 Business Days after receiving the Compensation Event Package or such longer period of time to which the Parties may mutually agree, (and, if applicable, any required updates thereto) INDOT will issue a Compensation Event Determination. INDOT will specify in the Compensation Event Determination the modification of the Contract Price. Design-Build Contractor shall be relieved from performance only to the extent set forth in the Compensation Event Determination.

15.2.3 Any final Relief Event Determination or final Compensation Event Determination not Disputed by Design-Build Contractor (or, if disputed, determined pursuant to Dispute Resolution Procedures) shall be set forth in a Change Order in accordance with Section 14.6 (*Contents of Change Order*). Such Change Order shall provide for modification of the Contract Time and the Project Baseline Schedule, including to the extent so established by such Relief Event Determination, the Completion Deadlines, or modification of the Contract Price pursuant to any such Compensation Event Determination, as the case may be. All Change Orders shall be all-inclusive, comprehensive, and complete, and shall not include any conditions with respect to pricing or schedule or any other matters. Design-Build Contractor is not entitled to any additional costs or time whether deriving from or related to a Change Order.

15.2.4 The Compensation Event Package or Relief Event Package submitted by Design-Build Contractor will address any and all costs and delays, and after negotiation and upon agreement of the terms and verification that all applicable requirements of Section 14 (*Changes in*

*the Work*) and this Section 15 (Relief Events; Compensation Events) are met, INDOT will draft the Change Order based on the agreed upon terms and Design-Build Contractor and INDOT will execute the Change Order.

15.2.5 Any final Relief Event Determination or final Compensation Event Determination that has been accepted by the Parties, or finally determined pursuant to Dispute Resolution Procedures, shall be set forth in a Change Order. Such Change Order shall provide for modification of the Contract Time, the Project Baseline Schedule and the Completion Deadlines (pursuant to any such Relief Event Determination) and any modification of the Contract Price (pursuant to any such Compensation Event Determination), as the case may be.

### **15.3 Relief Events Constraints**

#### **15.3.1 Extensions of Time for Relief Events**

15.3.1.1 Design-Build Contractor shall not be excused from compliance with applicable Laws, Governmental Approvals, or other portions of the DBA Documents due to the occurrence of a Relief Event, except temporary inability to comply as a direct result of a Relief Event or as finally accounted for under the Change Order pursuant to any Relief Event Determination.

15.3.1.2 If INDOT is obligated to but does not provide a Relief Event Determination within such 40 Business Day period or such longer period of time to which the Parties may mutually agree, or if Design-Build Contractor disagrees with the length of the extension of the Contract Time or other relief set forth in the Relief Event Determination, then Design-Build Contractor shall have the right to Dispute the occurrence of a Relief Event, the terms of the Relief Event Determination, or waiver of Design-Build Contractor's right to relief according to the Dispute Resolution Procedures.

15.3.1.3 Without limiting Design-Build Contractor's rights with respect to monetary relief for Compensation Events as set forth in this DBA, the extensions of time as provided, if any, pursuant to this Section 15.3 (Relief Events Constraints) are Design-Build Contractor's sole remedy for a Relief Event.

#### **15.3.2 Limitations on Time Extensions**

15.3.2.1 Design-Build Contractor shall be required to demonstrate to INDOT's satisfaction that the change in the Work or other event or situation that is being asserted as a Relief Event will result in or has caused an identifiable and measurable delay of the Work that will impact or has impacted the Critical Path affecting any Completion Deadline.

15.3.2.2 Any extension of any Completion Deadline allowed hereunder shall exclude any delay to the extent that it did not impact the Critical Path affecting any Completion Deadline or was a concurrent delay with any other delay for which Design-Build Contractor is not entitled to an extension.

15.3.2.3 The extent to which any extension of any Completion Deadline is as a result of a Compensation Event accommodated under this Section 15 (*Relief Events; Compensation Events*), then, for the avoidance of doubt, any entitlement to additional costs shall exclude costs associated with any delay that did not impact the Critical Path affecting the Completion Deadline or was concurrent with any other delay for which Design-Build Contractor is not entitled to an extension.

## 15.4 Compensation Events Constraints

### 15.4.1 Determining Compensable Amounts

Without limiting Section 15.3.2.3 (*Limitations on Time Extensions*), the Compensation Amount, if any, for any Compensation Event shall be determined in accordance with Section 14.7 (*Change Order Pricing*) and this Section 15.4 (*Compensation Events Constraints*). The calculation of the Compensation Event will be based on the difference in the projected costs immediately prior to the occurrence of the Compensation Event and the estimated increase in costs after taking into account the impact of the Compensation Event.

15.4.1.1 In all cases the Compensation Amount shall be net of all insurance available to Design-Build Contractor including deductibles or deemed to be self-insured by Design-Build Contractor under Section 10 (*Insurance*), with respect to cost impacts of the Compensation Event.

15.4.1.2 If the Compensation Event is under clause (e) of the definition of “Compensation Event”, then the Compensation Amount reflected in its corresponding, executed Change Order shall be limited to the incremental increase in costs of initial design and construction due to delay directly attributable to the court order.

15.4.1.3 Any Dispute resolution body(ies) shall apply the provisions of this Section 15.4 (*Compensation Events Constraints*) in determining the Compensation Amount.

15.4.1.4 Following a determination of the Compensation Amount by mutual agreement or the Dispute Resolution Procedures, and as thereafter memorialized by Change Order, INDOT will pay such Compensation Amount (a) through periodic payments of the Compensation Amount in accordance with a written payment schedule determined by mutual agreement or through such concluded Dispute Resolution Procedures, (b) in a lump sum, payable as determined by mutual agreement or through the Dispute Resolution Procedures, or (c) in such other manner as agreed upon by the Parties, in each case, as set forth in the corresponding, executed Change Order. INDOT, in its sole discretion, shall be entitled to select one or any combination of the foregoing methods of compensation.

15.4.1.5 Without limiting Design-Build Contractor’s rights with respect to non-monetary relief for Relief Events as set forth in this DBA, the Compensation Amount shall

represent the sole right to compensation and damages for the adverse financial effects of a Compensation Event.

#### 15.4.2 Limitations on Acceleration Costs

15.4.2.1 Acceleration costs shall be compensable hereunder only with express, written direction by INDOT to Design-Build Contractor to accelerate its efforts and evidenced by Change Orders issued by INDOT.

15.4.2.2 Acceleration costs are those fully documented increased costs reasonably incurred by Design-Build Contractor (i.e., costs over and above what Design-Build Contractor would otherwise have incurred) that are directly attributable to increasing the performance level of the Work in an attempt to complete necessary activities of the Work earlier than otherwise anticipated, such as for additional equipment, additional crews, overtime and shift premiums, increased supervision, and any unexpected movement of materials, equipment, or crews necessary for resequencing in connection with acceleration efforts. Acceleration costs shall not include any costs for disruption damages as described below in Section 15.4.3 (No Disruption Damages).

#### 15.4.3 No Disruption Damages

Disruption damages, whether from a single event or continual, multiple or repetitive events, are not allowed or recoverable under the DBA. Disruption damages include costs of (a) rearranging Design-Build Contractor's Work plan not associated with an extension of any Completion Deadline, and (b) loss of efficiency, momentum, or productivity.

#### 15.4.4 Additional Limitations on Damages

15.4.4.1 Limitations on Delay and Consequential Damages. Where allowed under this DBA, the amount of delay and consequential damages shall be determined in accordance with Section 109.05.2 of the Standard Specifications and shall be limited to (i) direct costs solely and directly attributable to the subject Relief Event, and (ii) any additional field office and jobsite overhead costs incurred by Design-Build Contractor solely and directly attributable to such delays. In addition, before Design-Build Contractor may obtain any increase in the Contract Price to compensate for additional or extended overhead, Acceleration Costs or other Losses relating to delay to which Design-Build Contractor may be entitled as expressly provided under the DBA Documents, Design-Build Contractor shall have demonstrated to INDOT's satisfaction that:

- (i) its schedule which defines the Critical Path and Completion Deadline in fact sets forth a reasonable method for completion of the Work;
- (ii) the change in the Work or other event or situation which is the subject of the requested Change Order has caused or will result in an identifiable and measurable disruption of the Work which impacted the Critical Path activity (i.e., consumed all available Float and extended the time required to achieve

Substantial Completion or Final Acceptance beyond the applicable Completion Deadline);

- (iii) the delay or damage was not due, in whole or in part, to any act or omission of any DB-Related Entity or any Design-Build Contractor Fault, and could not reasonably have been avoided by Design-Build Contractor, including by resequencing, reallocating or redeploying its personnel and resources to other portions of the Work or other activities unrelated to the Work (subject to reimbursement for additional costs reasonably incurred in connection with such reallocation or redeployment);
- (iv) the delay for which compensation is sought is not concurrent with any delay for which any DB-Related Entity is responsible hereunder; and
- (v) Design-Build Contractor has suffered or will suffer actual costs due to such delay, each of which costs shall be documented in a manner satisfactory to INDOT.

15.4.4.2 Limitations on Time Extensions Any extension of a Completion Deadline allowed hereunder shall exclude any delay to the extent that it (a) did not delay the Critical Path; (b) was due, in whole or in part, to the acts or omissions of any DB-Related Entity or any Design-Build Contractor Fault; (c) is concurrent with any other unrelated delay to the Critical Path that is Design-Build Contractor's responsibility hereunder; or (d) could reasonably have been avoided by Design-Build Contractor, including by resequencing, reallocating or redeploying its personnel and resources to other portions of the Work. Design-Build Contractor shall be required to demonstrate to INDOT's satisfaction that the change in the Work or other event or situation which is the subject of a Design-Build Contractor Change Request in a Completion Deadline has caused or will result in an identifiable and measurable disruption of the Work which has delayed the Critical Path activity (i.e., consumed all available Float and extended the time required to achieve Substantial Completion or Final Acceptance beyond the applicable Completion Deadline).

#### 15.4.5 Compensation Amount Payment Structure

15.4.5.1 The preferred approach by both Parties is that Compensation Amounts will be paid on a lump sum basis, if the Parties can agree on a lump sum amount. Lump sum prices shall be determined in accordance with Section 14.7 (*Change Order Pricing*).

15.4.5.2 Without limiting Section 15.4.5.1 (*Compensation Amount Payment Structure*), if the Parties cannot agree on a lump sum amount for a Compensation Amount, then INDOT may elect in its sole discretion to make payments via: (i) issuance of a Directive Letter under Section 14.3 (*Directive Letters*); (ii) interim payment(s) to Design-Build Contractor on a monthly basis consistent with INDOT's final written offer regarding the Compensation Amount during the negotiations conducted pursuant to Section 15.2.4 (*Relief Event and Compensation Event Determinations*), such interim payments being subject to subsequent adjustment, if applicable, upon the Change Order executed further to completion

of Dispute Resolution Procedures; or ); or (iii) any other payment structure reasonably agreed upon by Design-Build Contractor and INDOT; provided, however, that application of any such payment structure shall not abrogate any of the constraints set forth under this Section 15.4 (Compensation Event Constraints). Any Dispute regarding payment amounts and terms will be determined pursuant to the Dispute Resolution Procedures.

15.4.6 General Provisions, Obligations Relating to Relief Events, Compensation Events

15.4.6.1 Design-Build Contractor shall, and shall cause all Subcontractors and Suppliers to, ensure that all activities are undertaken in a manner that will minimize any adverse effects (including adverse monetary and non-monetary impacts) of any Relief Event or Compensation Event on the Project, as well as any adverse effect on surrounding property and to the public, in each case, to the maximum extent practicable.

15.4.6.2 Notwithstanding anything to the contrary in the DBA Documents, the occurrence of any Relief Event or Compensation Event shall not excuse Design-Build Contractor from any liability or obligation that arose before such occurrence or that occurs concurrently.

15.4.6.3 Design-Build Contractor shall not be entitled to assert a Relief Event or a Compensation Event with respect to the consequences of any Design-Build Contractor Fault.

15.4.6.3.1 Design-Build Contractor acknowledges and agrees that no compensation or increase in the Contract Price or extension of any Completion Deadline is available except in the specific circumstances expressly provided for in this DBA, that such compensation or increase in the Contract Price and time extension shall be available only as expressly provided in this Section 15 (Relief Events; Compensation Events), and that Design-Build Contractor shall bear full responsibility for the consequences of all other conditions, events and circumstances. A non-exhaustive list of matters which are Design-Build Contractor's exclusive responsibility include the following:

15.4.6.3.2 Errors in the Design Documents and Construction Documents (including Errors therein traceable to Errors in the Reference Information Documents);

15.4.6.3.3 any design changes requested by INDOT as part of the process of approving the Design Documents that are necessary for consistency and compliance with the requirements of the DBA Documents, the Governmental Approvals, or applicable Governmental Rules and other matters set forth in Section 3.3.5 (Resolution of Comments and Objections from INDOT);

15.4.6.3.4 defective or incorrect schedules of Work or changes in the planned sequence of performance of the Work (unless arising from causes which otherwise give rise to a right to a Change Order);

15.4.6.3.5 action or inaction of any DB-Related Entity;

15.4.6.3.6 action or inaction of adjoining property owners or other agents, representatives, and contractors of third parties, including failure to organize and integrate their work with Design-Build Contractor's Work;

15.4.6.3.7 impacts on Design-Build Contractor's Work caused by the action or inaction of contractors of INDOT, except as may constitute a Relief Event or a Compensation Event;

15.4.6.3.8 groundwater levels or subsurface moisture content;

15.4.6.3.9 untimely delivery of equipment or material, or unavailability or defectiveness or increases in costs of material, equipment or products specified by the DBA Documents to be furnished by or on behalf of any DB-Related Entity, except to the extent resulting directly from a Relief Event or a Compensation Event;

15.4.6.3.10 any costs covered by insurance proceeds received by (or on behalf of) Design-Build Contractor;

15.4.6.3.11 assessment, remediation, and correction of Nonconforming Work and review and acceptance thereof by INDOT (including rejected Submittals and other submittals);

15.4.6.3.12 Design-Build Contractor Fault (including any failure to provide the notifications to property owners, Utility Owners and others required by the DBA Documents);

15.4.6.3.13 delays not on the Critical Path;

15.4.6.3.14 obtaining all Governmental Approvals except as specified in Section 2.2.4 (General Obligations of Design-Build Contractor) and compliance with the terms and conditions of all Governmental Approvals;

15.4.6.3.15 any suspensions, terminations, interruptions, denials, non-renewals of, or delays in issuance of a Governmental Approval that is required to be obtained by Design-Build Contractor, or any failure to obtain such Governmental Approval;

15.4.6.3.16 any increased costs or delays related to any Utility Adjustments or failure to timely obtain any approval, work or other action from a Utility Owner, except as may constitute a Relief Event or a Compensation Event;

15.4.6.3.17 except for payment of the unit prices as set forth in Section 13.1.3 (Allowances), patching in areas, sizes, depths or amounts in addition to or other than as identified in the Reference Information Documents;

15.4.6.3.18 except for payment of the unit prices as set forth in Section 13.1.3 (Allowances), the cost of providing Portable Moveable Message Signs to perform the Work;

15.4.6.3.19 the addition and implementation by INDOT of Hold Points in addition to the list of Hold Points set forth in TP Section 2.2.2 (Hold Points);

15.4.6.3.20 matters pertaining to any Other Approval;

15.4.6.3.21 any situations (other than Relief Event or Compensation Event) which, while not within one of the categories delineated in this Section, were or should have been anticipated because such situations are referred to elsewhere in the DBA Documents or are reasonably expected to arise out of the nature of the Work; and

15.4.6.3.22 all other events beyond the control of INDOT for which INDOT has not expressly agreed to assume liability, whether jointly or individually, hereunder.

15.4.6.4 Design-Build Contractor hereby assumes responsibility for all such matters and all other matters not expressly subject to a Relief Event or a Compensation Event under this Section 15 (Relief Events; Compensation Events), and acknowledges and agrees that assumption by Design-Build Contractor of responsibility for such risks, and the consequences and costs and delays resulting therefrom, is reasonable under the circumstances of the DBA Documents and that contingencies included in the Scope Proposal and in developing the Project Baseline Schedule, in Design-Build Contractor's sole judgment, constitute sufficient consideration for its acceptance and assumption of said risks and responsibilities.

## **15.5 Burden of Proof**

Design-Build Contractor bears the burden of proving both the occurrence of a Relief Event or a Compensation Event (or both, in any case, as applicable) and the resulting direct and adverse impacts on Design-Build Contractor.

## **15.6 Provisions Relating to Certain Relief Events and Compensation Events**

### **15.6.1 Type I/Type II Differing Site Conditions Compensation/Relief**

15.6.1.1 Any Relief Event or Compensation Event granted in connection with a Type I/Type II Differing Site Condition shall (as applicable) be limited to (i) compensating Design-Build Contractor for additional direct costs (excluding delay, disruption, and consequential damages) directly attributable to changes in the scope of the Work arising from Type I/Type II Differing Site Conditions, and (ii) extending the Completion Deadlines as the result of any delay in the Critical Path directly caused by any such conditions.

15.6.1.2 Design-Build Contractor shall bear the burden of proving that a Type I/Type II Differing Site Condition exists and that it could not reasonably have worked around the Type I/Type II Differing Site Condition so as to avoid additional cost. Each Compensation Event Package or Relief Event Package (as applicable) relating to a Type I/Type



II Differing Site Condition shall be accompanied by a statement signed by a qualified professional setting forth all relevant assumptions made by Design-Build Contractor with respect to the condition of the Project ROW, justifying the basis for such assumptions, explaining exactly how the existing conditions differ from those assumptions, and stating the efforts undertaken by Design-Build Contractor to find alternative design or construction solutions to eliminate or minimize the problem and the associated costs.

15.6.1.3 Prior to submitting any Compensation Event Package or Relief Event Package relating to a Type I/Type II Differing Site Condition, Design-Build Contractor shall inquire if insurance proceeds may be available to cover costs in connection with such item. If Design-Build Contractor finds that reasonable grounds for filing an insurance Claim exist, then Design-Build Contractor shall provide to INDOT Notice of such grounds. INDOT shall have no obligation to agree upon a Compensation Event Determination for amounts Design-Build Contractor or INDOT finds may be covered by insurance, unless and until 30 days after the Claim is denied by the insurance company. Design-Build Contractor shall maintain contemporaneous records of all costs incurred by it with respect to the Type I/Type II Differing Site Condition pending the insurance company's determination regarding the Claim. INDOT shall have the right to contest the denial of any insurance Claim, and Design-Build Contractor shall cooperate with INDOT in that regard. This Section 15.6.1 (Type I/Type II Differing Site Conditions Compensation/Relief) is not intended to expand the insurance policy and coverage requirements set forth in Exhibit 18 (Insurance Coverage Requirements).

#### 15.6.2 Hazardous Materials Compensation/Relief

If Design-Build Contractor is entitled to a Relief Event or a Compensation Event based upon clause (d) (unknown Hazardous Materials) or clause (v) (third-party release of Hazardous Materials) of the definition of Compensation Event, clause (e) of the definition of INDOT-Caused Delay, or clause (f) (unknown Hazardous Materials) or clause (x) (third-party release of Hazardous Materials) of the definition of Relief Event, any compensation or relief shall be subject to the requirements set forth in this Section 15.6.2 (Hazardous Materials Compensation/Relief).

##### 15.6.2.1 Determination of Reimbursable Amount

15.6.2.1.1 Design-Build Contractor shall be deemed to have waived the right to collect any and all costs incurred in connection with any Hazardous Materials Management and any right to obtain an extension of any Completion Deadline if INDOT is not provided Notice of the discovery of Hazardous Materials and afforded the opportunity pursuant to Section 6.3 (Process to be Followed Upon Discovery of Certain Site Conditions) to inspect sites containing Hazardous Materials before any action is taken which would inhibit the ability of INDOT to ascertain, based on a Site inspection, the nature and extent of the Hazardous Materials. In the event of an emergency involving Hazardous Materials, Design-Build Contractor may take limited actions as are required by Governmental Rules without providing to INDOT advance Notice, but shall provide such Notice immediately thereafter (which in no event shall be more than two hours after the incident by phone and 24 hours after the incident by Notice).

15.6.2.1.2 In cases involving reimbursement for Hazardous Materials Management under this Section 15.6.2 (Hazardous Materials Compensation/Relief), allowable costs shall be limited to the incremental direct costs but excluding delay, disruption, and consequential damages and markup for overhead and profit incurred after completion of the testing process to determine whether Hazardous Materials are present, associated with the Hazardous Materials at issue (deducting any avoided costs such as the cost of disposal that would have been incurred had Hazardous Materials not been present). Investigating and characterizing Hazardous Materials are included in the Contract Price and Design-Build Contractor shall not be entitled to additional compensation therefor. Design-Build Contractor shall take all reasonable steps to minimize any such costs. Compensation shall be allowed only to the extent that Design-Build Contractor demonstrates to INDOT's satisfaction that (A) the Hazardous Materials Management could not have been avoided by reasonable design modifications or construction techniques, and (B) Design-Build Contractor's plan for the Hazardous Materials Management represents the approach which is most beneficial to the Project and the public. Design-Build Contractor shall provide INDOT with such information, analyses, and certificates as may be requested by INDOT in order to enable a determination regarding eligibility for payment.

**15.6.2.2 Reserved.**

**15.6.2.3 Limitations on Compensation and Relief**

Notwithstanding any contrary provision of the DBA Documents, Design-Build Contractor shall have no right to receive (i) any compensation for delay, disruption, and consequential damages or markup for overhead and profit related to Hazardous Materials Management, (ii) any compensation for any Hazardous Materials Management resulting from a situation described in Section 20.1.1(g) (Indemnifications by Design Build Contractor), or (iii) any compensation or time extension in connection with any work stoppage in affected areas during the investigation period described in Section 6.3.1 (Notification to INDOT). Design-Build Contractor shall also not be entitled to receive any compensation or time extension for or with respect to:

- (i) Removal, disposal or remediation of lead, lead-containing materials, asbestos or asbestos-containing materials on or in the Site that shall be removed in accordance with TP Section 14.3.3 (Hazardous Materials) and the approved Environmental Quality Management Plan;
- (ii) Release(s) of Hazardous Materials or threatened Release(s) of Hazardous Materials for which Design-Build Contractor is responsible under Section 20.1.1(g) (Indemnifications by Design Build Contractor);
- (iii) Any (A) Known or Suspected Hazardous Materials; and (B) Hazardous Materials of which Design-Build Contractor has Actual Knowledge, in each case, that could have been avoided by reasonable design modifications or construction techniques, means and methods; or
- (iv) Any Hazardous Materials on property outside of the MOT Limits and Planned ROW Limits, except that compensation will be allowed for

environmental remediation work on such property to the extent that it is required by Governmental Rule to be undertaken with Hazardous Materials Management work required within the MOT Limits and Planned ROW Limits.

#### 15.6.2.4 Insurance Proceeds

If the cost of any Hazardous Materials Management is covered by the insurance described in Exhibit 18 (*Insurance Coverage Requirements*), Design-Build Contractor shall be entitled to reimbursement of its costs from proceeds of insurance and self-insurance, up to the limits of the applicable policy, less any deductibles which shall be Design-Build Contractor's responsibility. To the extent that such proceeds are available, Design-Build Contractor shall not be entitled to payment hereunder on any other basis for such Hazardous Materials Management.

#### 15.6.3 Change in Law Compensation/Relief

Any Relief Event or Compensation Event stemming from a Change in Law shall be limited solely to the extent that such Change in Law (a) requires a material modification in the design of the Project, or (b) results in imposition of material additional mitigation requirements on the Project due to impacts on archaeological, paleontological, biological or cultural resources or artifacts.

#### 15.6.4 Flood Events Compensation/Relief

15.6.4.1 For each Flood Event, Design-Build Contractor shall bear (i) the amount of its deductible or self-insured retention under its then applicable insurance policy for the Flood Event, plus (ii) all cost impacts other than the costs to repair or replace tangible property damage to the Project caused by the Flood Events.

15.6.4.2 If the Project fails to meet flooding or other design requirements under the Technical Provisions, then INDOT shall have no liability for any Losses arising out of the Flood Event that would not have been suffered had Design-Build Contractor met such flooding or other design requirements.

15.6.4.3 Each claim seeking the recovery of compensation for a Flood Event shall be net of all insurance available to Design-Build Contractor.

(a)

### 15.7 New Approvals Compensation/Relief

Any Relief Event or Compensation Event granted pursuant to a New Approval shall include compensation to Design-Build Contractor for any material changes in the Work (including performance of material additional mitigation measures, but excluding performance of such support services) resulting from such New Approvals, as well as any time extension necessitated by such New Approvals.

## SECTION 16 SUSPENSION

### 16.1 Suspension for Convenience

INDOT may, at any time and for any reason, by Notice, order Design-Build Contractor to suspend all or any part of the Work required under the DBA Documents for the period of time that INDOT deems appropriate for the convenience of INDOT. Design-Build Contractor shall promptly comply with any such written suspension order. Design-Build Contractor shall promptly recommence the Work upon receipt of Notice from INDOT directing Design-Build Contractor to resume Work. Any such suspension for convenience shall be considered an INDOT-Caused Delay, if the Critical Path is delayed; provided, however, that INDOT shall have the right to direct suspensions for convenience not exceeding 48 hours each, up to a total of 144 hours, of Work otherwise scheduled by Design-Build Contractor pursuant to the most recent summary of planned Work activities provided in accordance with TP Section 1 (Project Administration), which shall not be considered an INDOT-Caused Delay or entitle Design-Build Contractor to any compensation, time extension or other relief.

### 16.2 Suspension for Cause

16.2.1 INDOT has the authority to suspend the Work by written order, wholly or in part, for Design-Build Contractor's failure to:

- (a) Correct conditions unsafe for the Project personnel, personnel of INDOT, Other Owner Contractor personnel, the general public or the property of INDOT or any third parties;
- (b) Comply with any Governmental Approval, Governmental Rule or otherwise carry out the requirements of the DBA Documents;
- (c) Carry out orders of INDOT or Directive Letters;
- (d) Comply with requirements for developing and implementing the Quality Management System;
- (e) Certain failures to remove and replace personnel as set forth in Section 8.2.4 (*Key Personnel; Character of Employees; Key Personnel Liquidated Damages*);
- (f) Provide proof of required insurance coverage as set forth in Section 10 (*Insurance*);
- (g) Reopen lanes closed to public traffic as part of a Permitted Closure by the time specified in the approved closure request as set forth in TP Section 9.3.1 (Transportation Management Plan) (provided that the suspension will allow Design-Build Contractor to safely reopen the closed lanes as soon as possible);
- (h) Comply with environmental requirements; or

- (i) Cure any failure to correct any failure to comply with requirements for maintenance of the Work as set forth in Section 11.2 (*Obligation to Maintain and Repair*) within 24 hours after receipt of notice of such non-compliance from the Engineer.

16.2.2 Design-Build Contractor shall promptly comply with any such written suspension order. Design-Build Contractor shall promptly recommence the Work upon receipt of Notice from INDOT directing Design-Build Contractor to resume the Work. INDOT shall have no liability to Design-Build Contractor in connection with any such suspension, and Design-Build Contractor shall have no right to any adjustment in the Contract Price or Completion Deadline(s) in connection with any suspension of Work founded on any of the grounds set forth in this Section 16.2 (*Suspension for Cause*). If INDOT orders suspension of Work on grounds in Section 16.2.1(i) (*Suspension for Cause*), INDOT may proceed to maintain the Project to cure such failure at Design-Builder's cost. If INDOT orders suspension of Work on one of the foregoing grounds but it is finally determined under the Dispute Resolution Procedures that such grounds did not exist, it shall be treated as a suspension for INDOT's convenience under Section 16.1 (*Suspension for Convenience*).

### **16.3 Responsibilities of Design-Build Contractor During Suspension Periods**

During periods that Work is suspended, Design-Build Contractor shall continue to be responsible for the Work and shall prevent Losses to the Project, provide for drainage and erosion control and shall erect necessary temporary structures, signs or other facilities required to maintain the Project. During any suspension period, Design-Build Contractor shall maintain in a growing condition all newly established plantings, seedlings, and sod furnished under the DBA Documents and shall protect new tree growth and other vegetative growth against injury, replacing all dead plants requiring replacement during the suspension period. Additionally, Design-Build Contractor shall continue other Work that is not subject to the suspension, if any, and that has been or can be performed on-Site or off-Site during the period that Work is suspended.

## **SECTION 17 TERMINATION FOR CONVENIENCE**

### **17.1 Termination for Convenience**

17.1.1 INDOT may, at any time, terminate this DBA and the performance of the Work by Design-Build Contractor in whole or in part, if INDOT determines, in its sole discretion, that a termination is in INDOT's best interest ("Termination for Convenience"). INDOT shall terminate by delivering to Design-Build Contractor a Notice of Termination for Convenience or Notice of Partial Termination for Convenience specifying the extent of termination and its effective date. Termination (or partial termination) of this DBA shall not relieve any Surety or Guarantor of its obligation for any Claims arising out of the Work performed.

17.1.2 Within three days after receipt of a Notice of Termination for Convenience or Notice of Partial Termination for Convenience, Design-Build Contractor shall meet and confer with INDOT for the purpose of developing an interim transition plan for the orderly transition of the terminated Work, demobilization, and transfer of the Project to INDOT or its designee. The Parties shall use diligent efforts to complete preparation of the interim transition plan within 15

days after the date Design-Build Contractor receives such Notice of termination. The Parties shall use diligent efforts to complete a final transition plan within 30 days after such date. The transition plan shall be in form and substance acceptable to INDOT, in its good faith discretion, and shall include and be consistent with the other provisions and procedures set forth in Section 17.1 (*Termination for Convenience*), all of which provisions and procedures Design-Build Contractor shall immediately follow, regardless of any delay in preparation or acceptance of the transition plan.

17.1.3 Design-Build Contractor acknowledges and agrees that INDOT has no obligation to issue a Notice to Proceed hereunder, and further agrees that unless and until a Notice to Proceed is issued, INDOT shall have no liability to Design-Build Contractor for a Termination for Convenience hereunder.

## **17.2 Design-Build Contractor's Responsibilities After Receipt of Notice of Termination for Convenience**

After receipt of a Notice of Termination for Convenience or Notice of Partial Termination for Convenience, and except as otherwise directed by INDOT, Design-Build Contractor shall immediately proceed with the following obligations, regardless of any delay in determining or adjusting any amounts due under this Section 17 (*Termination for Convenience*):

- (a) Stop Work as specified in the Notice;
- (b) Notify all affected Subcontractors that this DBA is being terminated and that their Subcontracts (including orders for materials, services or facilities) are not to be further performed unless otherwise authorized in writing by INDOT;
- (c) Place no further Subcontracts (including orders for materials, services, equipment or facilities), except as necessary to complete the continued portion of the Work, if any, or for mitigation of Losses;
- (d) Unless instructed otherwise by INDOT, terminate all Subcontracts to the extent they relate to the Work terminated;
- (e) To the extent directed by INDOT, in its sole discretion, execute and deliver to INDOT, or its designee written assignments, in form and substance acceptable to INDOT, acting reasonably, of all of Design-Build Contractor's right, title, and interest in and to (i) Subcontracts and Utility Agreements that relate to the terminated Work provided INDOT or its designee assumes in writing all of Design-Build Contractor's obligations thereunder that arise after the effective date of the termination and (ii) all assignable warranties and, Third Party Claims held by Design-Build Contractor against Subcontractors and other third parties in connection with the terminated Work;
- (f) Subject to the prior written approval of INDOT, settle all outstanding liabilities and all termination settlement proposals arising from termination of Subcontracts;

- (g) No later than 30 days from the effective date of termination, unless extended in writing by INDOT upon written request of Design-Build Contractor within this 30 day period, provide INDOT with an inventory list of all materials and equipment previously produced, purchased or ordered from Suppliers for use in the Work and not yet used in the Work, including its storage location, as well as any documentation or other property required to be delivered hereunder which is either in the process of development or previously completed but not yet delivered to INDOT, and such other information as INDOT may request; and transfer title and deliver to INDOT, or its designee, through bills of sale or other documents of title, as directed by INDOT, (i) the Work in process, completed Work, supplies and other material produced or acquired for the Work terminated, and (ii) the Design Documents, Construction Documents, and all other completed or partially completed drawings (including plans, elevations, sections, details, and diagrams), specifications, records, samples, information, and other property that would have been required to be furnished to INDOT if the Work had been completed;
- (h) Complete performance in accordance with the DBA Documents of all Work not terminated;
- (i) Take all action that may be necessary, or that INDOT may direct, for the safety, protection, and preservation of (i) the public, including public and private vehicular movement, (ii) the Work; and (iii) equipment, machinery, materials and property related to the Project that is in the possession of Design-Build Contractor and in which INDOT or its designee has or may acquire an interest;
- (j) As authorized by INDOT in writing, use its best efforts to sell at reasonable prices any property of the types referred to in clause (g) above; provided, however, that (i) Design-Build Contractor is not required to extend credit to any purchaser, (ii) Design-Build Contractor may acquire the property under the conditions prescribed and at prices approved by INDOT; and (iii) the proceeds of any transfer or disposition will be applied to reduce any payments to be made by INDOT under the DBA Documents or paid in any other manner directed by INDOT;
- (k) If requested by INDOT, withdraw from the portions of the Site designated by INDOT and remove such materials, equipment, tools, and instruments used by, and any debris or waste materials generated by, Design-Build Contractor and any Subcontractor in the performance of the Work as INDOT may direct; and
- (l) Take other actions as directed by INDOT.

### 17.3 Acceptance

17.3.1 Design-Build Contractor shall continue to be responsible for Losses to materials after issuance of the Notice of Termination for Convenience, except as follows:

- (a) Design-Build Contractor's responsibility for damage to materials for which partial payment has been made as provided herein shall terminate when INDOT's Authorized Representative certifies that those materials have been stored in the manner and at the locations directed by INDOT; and
- (b) Design-Build Contractor's responsibility for damage to materials purchased by INDOT subsequent to the issuance of the Notice that this DBA is to be terminated shall terminate when title and delivery of those materials has been taken by INDOT.

17.3.2 When INDOT determines that Design-Build Contractor has completed the Work directed to be completed prior to termination and such other work as may have been ordered to secure the Project for termination, INDOT's Project Manager will recommend that INDOT formally accept such Work, and immediately upon and after the acceptance by INDOT, Design-Build Contractor will not be required to perform any further work thereon (except for such work that otherwise would have been required with respect to the terminated Work after Final Acceptance) and shall be relieved of maintenance responsibility for such terminated Work after the formal acceptance of such Work by INDOT.

#### **17.4 Settlement Proposal**

After receipt of a Notice of Termination for Convenience or Notice of Partial Termination for Convenience, Design-Build Contractor shall submit a final termination settlement proposal to INDOT in the form and with the certification prescribed by INDOT. Design-Build Contractor shall submit the proposal promptly, but no later than 90 days from the effective date of termination unless Design-Build Contractor has requested a time extension in writing within such 90-day period and INDOT has agreed in writing to allow such an extension. Design-Build Contractor's termination settlement proposal shall then be reviewed by INDOT and acted upon, returned with comments, or rejected. If Design-Build Contractor fails to submit the proposal within the time allowed, INDOT may determine, on the basis of information available, the amount, if any, due Design-Build Contractor because of the termination and shall pay Design-Build Contractor the amount so determined and Design-Build Contractor shall not have the right or ability to Dispute such amount. If INDOT returns the termination settlement proposal with comments, Design-Build Contractor shall address such comments and resubmit the termination settlement proposal within 30 days after receiving INDOT's comments.

#### **17.5 Amount of Negotiated Termination Settlement**

Design-Build Contractor and INDOT may agree (or be deemed to agree), as provided in Section 17.4 (*Settlement Proposal*), upon the whole or any part of the amount or amounts to be paid to Design-Build Contractor by reason of the total or partial termination of Work for convenience pursuant to this Section 17 (*Termination for Convenience*). Such negotiated settlement may include a reasonable allowance for profit solely on Work which has been completed as of the termination date and subsequently inspected and accepted by INDOT. Such agreed amount or amounts, exclusive of settlement costs, shall not exceed the total Contract Price as reduced by the amount of payments otherwise made and the Contract Price of Work not terminated. Upon determination of the settlement amount, this DBA will be amended accordingly,



and Design-Build Contractor will, subject to Section 17.7 (*Conditions to Payment; Reduction in Amount of Claim*), be paid the agreed amount as described in this Section 17.5 (*Amount of Negotiated Termination Settlement*). Nothing in Section 17.6 (*No Agreement as to Amount of Termination Settlement*), prescribing the amount to be paid to Design-Build Contractor should Design-Build Contractor and INDOT fail to agree upon the amount to be paid to Design-Build Contractor by reason of the termination of Work pursuant to this Section 17 (*Termination for Convenience*), shall be deemed to limit, restrict or otherwise determine or affect the amount or amounts which may be agreed upon to be paid to Design-Build Contractor pursuant to this Section 17.5 (*Amount of Negotiated Termination Settlement*). INDOT's execution and delivery of any settlement agreement shall not affect any of its rights under the DBA Documents with respect to completed Work, relieve Design-Build Contractor from its obligations with respect thereto, affect Design-Build Contractor's obligations under the Performance Bond[,][or] Payment Bond, [or Guaranty][NTD: ***To be conformed in execution version based on whether Design-Build Contractor is required to have a Guarantor***] as to such completed or non-terminated Work.

## **17.6 No Agreement as to Amount of Termination Settlement**

17.6.1 If Design-Build Contractor and INDOT fail to agree upon the amount to be paid Design-Build Contractor by reason of the termination of Work for convenience pursuant to this Section 17 (*Termination for Convenience*), the amount payable (exclusive of Interest charges and any amounts deducted pursuant to Section 17.7 (*Conditions to Payment; Reduction in Amount of Claim*) and Section 17.8 (*Payment*) shall be determined by INDOT in accordance with the following, but without duplication of any items or of any amounts agreed upon in accordance with Section 17.4 (*Settlement Proposal*) and Section 17.5 (*Amount of Negotiated Termination Settlement*):

17.6.2 Subject to Section 17.7 (*Conditions to Payment; Reduction in Amount of Claim*), INDOT will pay Design-Build Contractor the sum of the following amounts for Work performed prior to the effective date of the Notice of Termination for Convenience or Notice of Partial Termination for Convenience:

- (a) Design-Build Contractor's actual reasonable out-of-pocket cost, without profit, and including equipment costs only to the extent permitted by Section 14 (*Changes in the Work*), for all Work performed, including mobilization, demobilization, and work done to secure the Project for termination, including reasonable overhead and accounting for any refunds payable with respect to insurance premiums, deposits or similar items, as established to INDOT's satisfaction. In determining the reasonable cost, deductions will be made for the cost of materials to be retained by Design-Build Contractor, amounts realized by the sale of materials, and for other appropriate credits against the cost of the Work. Deductions will also be made, when this DBA is terminated as the result of a Relief Event, for the cost of materials damaged by the "occurrence." When, in the opinion of INDOT, the cost of a contract item of Work is excessively high due to costs incurred to remedy or replace defective or rejected Work or Nonconforming Work, the reasonable cost to be allowed will be the estimated reasonable cost of performing that Work in

compliance with the requirements of the DBA Documents and the excessive actual cost shall be disallowed;

- (b) As profit on clause (a) above, a sum determined by INDOT to be fair and reasonable; provided, however, that if it appears that Design-Build Contractor would have sustained a loss on this entire DBA had it been completed, no profit shall be included or allowed under this Section 17.6.2 (*No Agreement as to Amount of Termination Settlement*). In connection with any Dispute regarding the amount of profit payable, if any, Design-Build Contractor shall be entitled to introduce information establishing that any negative cash flow position at the time of termination would have been resolved and Design-Build Contractor would have made a profit under the DBA;
- (c) The cost of settling and paying Third Party Claims arising out of the termination of Work under Subcontracts as provided in Section 17.2(f) (*Design-Build Contractor's Responsibilities After Receipt of Notice of Termination for Convenience*), exclusive of the amounts paid or payable on account of supplies or materials delivered or services furnished by the Subcontractor prior to the effective date of the Notice of Termination for Convenience or Notice of Partial Termination for Convenience under this DBA, which amounts shall be included in the cost on account of which payment is made under clause (a) above; and
- (d) The reasonable out-of-pocket cost (including reasonable overhead) of the preservation and protection of property incurred pursuant to Section 17.2(i) (*Design-Build Contractor's Responsibilities After Receipt of Notice of Termination for Convenience*) and any other reasonable out-of-pocket cost (including overhead) incidental to termination of Work under the DBA Documents, including the reasonable cost to Design-Build Contractor of handling material returned to the vendor, delivered to INDOT, or its designee, or otherwise disposed of as directed by INDOT, and including a reasonable allowance for Design-Build Contractor's administrative costs in determining the amount payable due to termination of this DBA.

17.6.3 Design-Build Contractor acknowledges and agrees that it shall not be entitled to any compensation in excess of the value of the Work performed (determined as provided in Section 17.6.2 (*No Agreement as to Amount of Termination Settlement*)) plus its settlement costs, and that items such as lost or anticipated profits, unabsorbed overhead and opportunity costs shall not be recoverable by it upon termination of this DBA. The total amount to be paid to Design-Build Contractor, exclusive of costs described in Section 17.6.2(c) (*No Agreement as to Amount of Termination Settlement*) and Section 17.6.2(d) (*No Agreement as to Amount of Termination Settlement*), may not exceed the total Contract Price less the amount of payments previously made and the Contract Price of Work not terminated. Furthermore, if any refund is payable with respect to insurance or bond premiums, deposits or other items which were previously passed through to INDOT by Design-Build Contractor, then the refund shall be paid directly to INDOT or otherwise credited to INDOT. Except for normal spoilage, and except to the extent that INDOT, or its

designee, will have otherwise expressly assumed the risk of loss, there will be excluded from the amounts payable to Design-Build Contractor under Section 17.6.2 (*No Agreement as to Amount of Termination Settlement*), the fair value, as determined by INDOT, of equipment, machinery, materials, and property which is destroyed, lost, stolen, or damaged so as to become undeliverable to INDOT, or its designee, or sold pursuant to Section 17.2(j) (*Design-Build Contractor's Responsibilities After Receipt of Notice of Termination for Convenience*). Information contained in the Escrowed Proposal Documents may be a factor in determining the value of the Work terminated. Upon determination of the amount of the termination payment, this DBA shall be amended to reflect the agreed termination payment, Design-Build Contractor shall be paid the agreed amount, and the Contract Price shall be reduced to reflect the reduced scope of Work.

17.6.4 If a termination hereunder is partial, Design-Build Contractor may file a proposal with INDOT for an equitable adjustment of the Contract Price for the continued portion of this DBA. Any proposal by Design-Build Contractor for an equitable adjustment under this Section 17.6.4 (*No Agreement as to Amount of Settlement Agreement*) shall be requested within 90 days from the effective date of termination unless extended in writing by INDOT. The amount of any such adjustment as may be agreed upon shall be set forth in an amendment to this DBA.

## **17.7 Conditions to Payment; Reduction in Amount of Claim**

17.7.1 As a condition to its obligation to make payment to Design-Build Contractor of amounts due under this Section 17 (*Termination for Convenience*), INDOT shall have received the following:

- (a) A list of all outstanding or pending Compensation Event Notices or Relief Event Notices and all existing or threatened Third Party Claims and Liens by Subcontractors, Utility Owners, or other third parties relating to the Project;
- (b) Complete and legally effective releases or waivers of Liens and Claims satisfactory to INDOT, from all Persons legally eligible to file Liens, Claims and stop payment notices in connection with the Work (except that Design-Build Contractor, as to itself, shall not be deemed to release or waive payment by INDOT of the amounts due under this Section 17 (*Termination for Convenience*));
- (c) Consent of any Guarantors and Surety(ies);
- (d) Executed release(s) meeting the requirements of Section 13.4.4 (*Final Payment*) and Section 17.10.2 (*No Waiver; Release; Preservation of Claims*) and otherwise satisfactory in form and content to INDOT;
- (e) An affidavit from Design-Build Contractor meeting the requirements of Section 13.4.4 (*Final Payment*); and
- (f) Such other documentation as INDOT may reasonably require.

17.7.2 The amount otherwise due Design-Build Contractor under this Section 17 (*Termination for Convenience*) shall be reduced by (a) any Losses of INDOT or Third Party Claims for which Design-Build Contractor is responsible hereunder; (b) the amount of any Claim which INDOT may have against any DB-Related Entity in connection with the DBA Documents; (c) any unpaid Liquidated Damages; (d) the agreed price for, or the proceeds of sale, of property, materials, supplies or other things acquired by Design-Build Contractor or sold, pursuant to the provisions of this Section 17 (*Termination for Convenience*), and not otherwise recovered by or credited to INDOT; (e) all unliquidated advances or other payments made to or on behalf of Design-Build Contractor applicable to the terminated portion of the Work or DBA; (f) amounts that INDOT deems advisable, in its good faith discretion, including attorneys' fees and other legal or consultant costs, to retain to cover any existing or threatened Third Party Claims and Liens relating to the Project, including Third Party Claims by Utility Owners; (g) the cost of repairing any Nonconforming Work plus an administrative charge equal to 10% of such costs; (h) any amounts INDOT is required to retain under applicable federal law; and (i) any amounts due or payable by Design-Build Contractor to INDOT or which INDOT is otherwise entitled to recover from Design-Build Contractor under the terms of the DBA Documents. INDOT shall return to Design-Build Contractor the amounts withheld under clause (f) if unused.

## **17.8 Payment**

INDOT may from time to time, under such terms and conditions as it may prescribe and, in its good faith discretion, make partial payments on account against costs incurred by Design-Build Contractor in connection with the terminated portion of this DBA, whenever, in the opinion of INDOT, the aggregate of such payments shall be within the amount to which Design-Build Contractor will be entitled hereunder. If the total of such payments is in excess of the amount finally agreed or determined to be due under this Section 17 (*Termination for Convenience*), such excess shall be payable by Design-Build Contractor to INDOT upon demand together with Interest.

## **17.9 No Consequential Damages**

Under no circumstances shall Design-Build Contractor be entitled to anticipatory or unearned profits or consequential or other damages as a result of a termination or partial termination under this Section 17 (*Termination for Convenience*). The payment to Design-Build Contractor determined in accordance with this Section 17 (*Termination for Convenience*) constitutes Design-Build Contractor's exclusive remedy for a termination hereunder.

## **17.10 No Waiver; Release; Preservation of Claims**

17.10.1 Anything contained in the DBA Documents to the contrary notwithstanding, a termination under this Section 17 (*Termination for Convenience*) shall not waive any right or Claim that INDOT may have and INDOT may pursue any cause of action which it may have under the DBA Documents and INDOT may pursue any cause of action which it may have by law or in equity.

17.10.2 INDOT's payment to Design-Build Contractor of the amounts required under this Section 17 (*Termination for Convenience*) shall constitute full and final satisfaction of, and, upon payment, INDOT shall be forever released and discharged from, any and all Claims and Losses, known or unknown, suspected or unsuspected, that Design-Build Contractor may have against INDOT arising out of or relating to the terminated Work. Concurrently with such payment, Design-Build Contractor shall execute and deliver to INDOT all such releases and discharges as INDOT may reasonably require to confirm the foregoing (which release shall include an express and unconditional waiver and release sufficient, in INDOT's good faith discretion, to waive any rights and benefits Design-Build Contractor may have), but no such written release and discharge shall be necessary to give effect to the foregoing satisfaction and release.

17.10.3 In the event any latent defect or gross mistake in the Work, or instance of fraud on behalf of Design-Build Contractor, is discovered following termination of this DBA, INDOT reserves to itself all Claims and remedies at law subject to applicable statutes of limitation.

### **17.11 Dispute Resolution**

Subject to Section 17.4 (*Settlement Proposal*), the failure of the Parties to agree on amounts due under this Section 17 (*Termination for Convenience*) shall be a Dispute to be resolved in accordance with Section 21 (*Partnering and Dispute Resolution*).

### **17.12 Allowability of Costs**

All costs Claimed by Design-Build Contractor under this Section 17 (*Termination for Convenience*) shall be allowable, allocable, and reasonable in accordance with the cost principles and procedures of 48 CFR Part 31.

### **17.13 Termination for Failure to Issue NTP1; Termination for Materially Delayed NTP2**

17.13.1 Design-Build Contractor shall be entitled to terminate this DBA and receive the following payments from INDOT if INDOT fails to issue NTP1 within 180 days following Design-Build Contractor's timely satisfaction of all conditions to issuance of NTP1 set forth in Section 5.1 (*Time of Essence; Notices to Proceed*):

- (a) Bond and insurance premiums, as set forth in the Proposal, actually paid, without markup or profit; and
- (b) Stipulated stipend payment of \$500,000.

17.13.2 Termination under this Section 17.13 (*Termination for Failure to Issue NTP1; Termination for Materially Delayed NTP2*) is not a Termination for Convenience.

## SECTION 18 DEFAULT

### 18.1 Default of Design-Build Contractor

18.1.1 Design-Build Contractor shall be in default under this DBA upon the occurrence of any one or more of the following events or conditions (each a “Design-Build Contractor Default”):

- (a) Design-Build Contractor fails (i) promptly to begin the Work under the DBA Documents following issuance of the Notice to Proceed, or (ii) to resume performance of Work which has been suspended or stopped within a reasonable time after receipt of Notice from INDOT to do so or (if applicable) after cessation of the event preventing performance;
- (b) Design-Build Contractor fails to perform the Work in accordance with the DBA Documents, including conforming to applicable standards set forth therein in design and construction of the Project, or refuses to remove, replace, and correct rejected materials or Nonconforming Work or unacceptable Work;
- (c) Design-Build Contractor suspends, ceases, stops or abandons the Work (exclusive of authorized Work stoppage (i) due to termination by INDOT, (ii) due to and during the continuance of a Relief Event or suspension by INDOT, or (iii) in accordance with Section 18.3 (*Failure by INDOT to Make Undisputed Payment*));
- (d) Design-Build Contractor fails to continuously and diligently prosecute the Work (exclusive of authorized Work stoppage (i) due to termination by INDOT, (ii) due to and during the continuance of a Relief Event preventing such performance or suspension by INDOT, or (iii) in accordance with Section 18.3 (*Failure by INDOT to Make Undisputed Payment*));
- (e) Design-Build Contractor fails to obtain, provide, and maintain in full force and effect any insurance, bonds, guarantees, or other performance security as and when required hereunder for the benefit of relevant parties, or fails to comply with any requirement of this DBA pertaining to the amount, terms or coverage of the same;
- (f) Design-Build Contractor makes or attempts to make or suffers a voluntary or involuntary assignment or transfer of the DBA Documents or any right or interest herein, except as expressly permitted under Section 26.4 (*Successors and Assigns*);
- (g) Design-Build Contractor shall have failed, absent a valid Dispute, to make payment when due for labor, equipment or materials in accordance with its agreements with Subcontractors and applicable law, or shall have failed to comply with any Governmental Rule or failed reasonably to comply with the instructions of INDOT consistent with the DBA Documents;

- (h) Design-Build Contractor shall have failed to make payment when due to INDOT of any amounts owing to INDOT under the DBA Documents, including Liquidated Damages assessed;
- (i) Design-Build Contractor fails to timely observe or perform or cause to be observed or performed any other agreement or covenant to be performed by Design-Build Contractor contained in the DBA Documents;
- (j) [Any Guarantor revokes or attempts to revoke its obligations under its Guaranty or otherwise takes the position that such instrument is no longer in full force and effect;]**[NTD: To be conformed in execution version based on whether Design-Build Contractor is required to have a Guarantor.]**
- (k) Any representation or warranty made by Design-Build Contractor [or any Guarantor]**[NTD: To be conformed in execution version based on whether Design-Build Contractor is required to have a Guarantor]** in the DBA Documents (including the Questionnaire included in the Proposal and the questionnaire included as Form C in the Statement of Qualifications) or any certificate, schedule, instrument or other document delivered by Design-Build Contractor pursuant to the DBA Documents shall have been false or materially misleading when made;
- (l) Design-Build Contractor commences a voluntary case seeking liquidation, reorganization or other relief with respect to itself or its debts under any bankruptcy, insolvency or other similar law now or hereafter in effect; seeks the appointment of a trustee, receiver, liquidator, custodian or other similar official of it or any substantial part of its assets; becomes insolvent, or generally does not pay its debts as they become due; admits in writing its inability to pay its debts; makes an assignment for the benefit of creditors; or takes any action to authorize any of the foregoing; or any of the foregoing acts or events shall occur with respect to any Surety or Guarantor;
- (m) An involuntary case is commenced against Design-Build Contractor seeking liquidation, reorganization, dissolution, winding up, a composition or arrangement with creditors, a readjustment of debts or other relief with respect to Design-Build Contractor or Design-Build Contractor's debts under any bankruptcy, insolvency or other similar Governmental Rules now or hereafter in effect; seeking the appointment of a trustee, receiver, liquidator, custodian or other similar official of Design-Build Contractor or any substantial part of Design-Build Contractor's assets; seeking the issuance of a writ of attachment, execution, or similar process; or seeking like relief, and such involuntary case shall not be contested by Design-Build Contractor in good faith or shall remain undismissed and unstayed for a period of 60 days; or any such involuntary case; or any of the foregoing acts or events shall occur with respect to any Surety or Guarantor;
- (n) Design-Build Contractor fails to comply with an approved Recovery Schedule except as a sole and direct result of any event or circumstance which entitles

Design-Build Contractor to an extension of a Completion Deadline under this DBA;

- (o) Design-Build Contractor fails to achieve Final Acceptance by the applicable Completion Deadline, as the same may be extended pursuant to this DBA;
- (p) Design-Build Contractor fails to achieve Substantial Completion by the Long-Stop Date; or
- (q) Design-Build Contractor commences any Work prior to satisfying the conditions set forth in Section 5.4 (Commencement of Design) or Section 5.5 (Conditions to Commencement of Construction).

#### 18.1.2 Cure Periods

18.1.2.1 Except with respect to Design-Build Contractor Defaults described in Sections 18.1.1(a), 18.1.1(c), 18.1.1(e), 18.1.1(f), 18.1.1(h), and 18.1.1(j) – 18.1.1(p) (Default of Design-Build Contractor), Design-Build Contractor and Surety shall be entitled to 15 days' Notice and simultaneous opportunity to cure any Design-Build Contractor Default before an Event of Default is declared; provided, however, that no such Notice and opportunity to cure is required for any Design-Build Contractor Default which by its nature cannot be cured. Failure to provide notice to Surety or any Guarantor shall not preclude INDOT from exercising its remedies against Design-Build Contractor.

18.1.2.2 If a Design-Build Contractor Default (other than Design-Build Contractor Defaults described in Sections 18.1.1(a), 18.1.1(c), 18.1.1(e), 18.1.1(f), 18.1.1(h), and 18.1.1(j) – 18.1.1(p) (Default of Design-Build Contractor), is capable of cure but, by its nature, cannot be cured within 15 days, as determined by INDOT, such additional period of time shall be allowed as may be reasonably necessary to cure the Design-Build Contractor Default so long as Design-Build Contractor commences such cure within such 15-day period and thereafter diligently prosecutes such cure to completion; provided, however, that in no event shall such cure period exceed 60 days in total.

18.1.2.3 In the event of a Design-Build Contractor Default under Sections 18.1.1(a), 18.1.1(c), 18.1.1(e), 18.1.1(h) and 18.1.1(n) (Default of Design-Build Contractor), Design-Build Contractor shall be entitled to seven days' Notice and opportunity to cure.

18.1.2.4 In the event of a Design-Build Contractor Default under Section 18.1.1(k) (Default of Design-Build Contractor), Design-Build Contractor shall be entitled to five days' Notice and opportunity to cure.

18.1.2.5 Design-Build Contractor hereby acknowledges and agrees that Design-Build Contractor Defaults described in Sections 18.1.1(a), 18.1.1(f), 18.1.1(j), 18.1.1(l), 18.1.1(m), 18.1.1(p), and 18.1.1(q) (Default of Design-Build Contractor) are not curable and no notice or cure period shall apply; provided, however, that in the event of a



Design-Build Contractor Default under Sections 18.1.1(l) or 18.1.1(m) (*Default of Design-Build Contractor*) that arises solely due to the specified acts or events as they pertain to Guarantor, Design-Build Contractor shall have an opportunity to cure such Design-Build Contractor Default within five days by providing INDOT with alternative security or a new guarantor, which security or new guarantor must be in a form satisfactory to INDOT, in its sole discretion.

18.1.3 Notwithstanding the foregoing, INDOT may, without Notice and without awaiting lapse of the period to cure any Design-Build Contractor Default, in the event of existence of a condition on or affecting the Project which INDOT believes poses an immediate and imminent danger to revenues or public health or safety, rectify the dangerous condition at Design-Build Contractor's cost, and so long as INDOT undertakes such action in good faith, even if under a mistaken belief in the occurrence of such Design-Build Contractor Default, such action shall not expose INDOT to any liability to Design-Build Contractor and shall not entitle Design-Build Contractor to any other remedy, it being acknowledged that INDOT has a paramount public interest in providing and maintaining safe public use of and access to the Project. INDOT's good faith determination of the existence of such danger shall be deemed conclusive in the absence of clear and convincing evidence to the contrary.

## 18.2 Remedies

18.2.1 If any Design-Build Contractor Default described in Section 18.1.1 (*Default of Design-Build Contractor*) is not subject to cure or is not cured within the period (if any) specified in Section 18.1.2 (*Default of Design-Build Contractor*), INDOT may declare that an "Event of Default" has occurred. The declaration of an Event of Default shall be in writing and given to Design-Build Contractor. In addition to all other rights and remedies provided by law or in equity and such rights and remedies as are otherwise available under the DBA Documents[,][or] the Performance Bond, [or the Guaranty][**NTD: To be conformed in execution version based on whether Design-Build Contractor is required to have a Guarantor.**], if an Event of Default shall occur, then, subject to Section 18.4 (*Event of Default Due Solely to Design-Build Contractor's Failure to Achieve Certain Completion Deadlines*), INDOT shall have the following rights without further Notice and without waiving or releasing Design-Build Contractor from any obligations, and Design-Build Contractor shall have the following obligations (as applicable):

- (a) Subject to Section 19.7 (*Consequential Damages*), INDOT shall be entitled to recover any and all Losses available at law or in equity on account of the occurrence of a Design-Build Contractor Default, including all Losses that accrue after the occurrence of Design-Build Contractor Default regardless of when any applicable Notice is given or whether Design-Build Contractor Default is subsequently cured.
- (b) INDOT may terminate this DBA or a portion thereof, including Design-Build Contractor's rights of entry upon the Site and possession, control, and operation of the Project, in which case, the provisions of Section 17.2 (*Design-Build Contractor's Responsibilities After Receipt of Notice of Termination for Convenience*) and Section 17.3 (*Acceptance*) shall apply;

- (c) If and as directed by INDOT, Design-Build Contractor shall discontinue the Work, withdraw from the Site, and shall remove materials, equipment, tools, and instruments used by, and any debris or waste materials generated by, any DB-Related Entity in the performance of the Work;
- (d) If and as directed by INDOT, Design-Build Contractor shall deliver to INDOT possession of any or all Design Documents, Construction Documents, and all other completed or partially completed drawings (including plans, elevations, sections, details and diagrams), specifications, records, information, schedules, samples, shop drawings, electronic files and other documents and facilities related to the Project that INDOT deems necessary for completion of the Work;
- (e) If and as directed by INDOT, Design-Build Contractor shall confirm the assignment to INDOT, or its designee of the Subcontracts requested by INDOT, and Design-Build Contractor shall terminate, at its sole cost, all other Subcontracts;
- (f) INDOT may deduct from any amounts payable by INDOT to Design-Build Contractor such amounts payable by Design-Build Contractor to INDOT, including the aggregate of (i) reimbursements owing; (ii) Liquidated Damages owing pursuant to Section 8.2.6 (Key Personnel Liquidated Damages) or Section 19 (Liquidated Damages; Movement Charges for Movement Closures; Noncompliance Event Deductions; and Limitation of Liability); (iii) 125% of the amounts INDOT deems advisable to cover any existing or threatened Third Party Claims, and Liens of Subcontractors, laborers or other Persons; (iv) amounts of any Losses or Third Party Claims that have accrued; (v) the cost to complete or remediate uncompleted Work or Nonconforming Work plus an administrative charge equal to 10% of such costs; and (vi) the amount of other Losses that INDOT has determined are or may be payable to INDOT under the DBA Documents;
- (g) INDOT shall have the right, but not the obligation, to pay such amounts or perform such acts as may then be required from Design-Build Contractor under the DBA Documents or Subcontracts;
- (h) INDOT may (i) appropriate any or all materials and equipment on the Site that were acquired primarily for the Project, as may be suitable and acceptable and, consistent with the terms of the Performance Bond, (ii) appropriate any or all other materials and equipment on the Site (subject to any existing security interest or lease which was identified to INDOT as of the date of Design-Build Contractor Default) that were acquired for the Project, as may be appropriate in INDOT's discretion and consistent with the terms of the Performance Bond; (iii) direct the Surety to complete the Work and the Project or (iv) enter into an agreement for the completion of the Work and the Project according to the terms and provisions hereof with another contractor or the Surety, or (v) use such other methods as may be required for the completion of the Work and the Project, including completion of the Work by INDOT; or

- (i) If INDOT exercises any right to perform any obligations of Design-Build Contractor, in the exercise of such right, INDOT may, but is not obligated to, among other things: (i) perform or attempt to perform, or cause to be performed, such work; (ii) spend such sums as INDOT deems necessary and reasonable to employ and pay such architects, engineers, consultants, and contractors and obtain materials and equipment as may be required for the purpose of completing such work; (iii) execute all applications, certificates, and other documents as may be required for completing the work; (iv) modify or terminate any contractual arrangements; (v) take any and all other actions which it may, in its sole discretion, consider necessary to complete the Work; and (vi) prosecute and defend any action or proceeding incident to the Work.

18.2.2 If an Event of Default shall have occurred, Design-Build Contractor, any Guarantor and Surety shall be jointly and severally liable to INDOT for all Losses incurred by INDOT or any party acting on behalf of INDOT in completing the Work or having the Work completed by another Person (including any re-procurement costs and throw away costs for unused portions of the completed Work). Upon occurrence of an Event of Default and so long as it continues, INDOT shall be entitled to withhold all or any portion of further payments to Design-Build Contractor until the Final Acceptance Date or the date on which INDOT otherwise accepts the Project as complete or determines that it will not proceed with completion, at which time INDOT will determine whether Design-Build Contractor is entitled to further payments. Promptly following the Final Acceptance Date or the date on which INDOT otherwise accepts the Project as complete or determines that it will not proceed with completion, the total cost of all completed Work shall be determined, and INDOT shall notify Design-Build Contractor, Surety, and each Guarantor in writing of the amount, if any, that Design-Build Contractor, each Guarantor and the Surety shall pay INDOT or INDOT shall pay Design-Build Contractor or its Surety with respect thereto. INDOT will deduct, from any moneys due or which will become due Design-Build Contractor or its Surety, all costs and charges incurred by INDOT, including attorneys', accountants' and expert witness fees and costs; together with (a) the cost of completing the Work under the DBA Documents together with an administrative charge of 10% of such costs; (b) any reimbursements owing to INDOT; (c) Liquidated Damages for which Design-Build Contractor is liable to INDOT pursuant to Section 8.2.6 (Key Personnel Liquidated Damages) or Section 19 (Liquidated Damages; Movement Charges for Movement Closures; Noncompliance Event Deductions; and Limitation of Liability); (d) 125% of the amounts INDOT deems advisable to cover any existing or threatened Third Party Claims, and Liens of Subcontractors, laborers or other Persons; (e) the amounts of any Losses or Third Party Claims that have accrued; and (f) the amount of other Losses that INDOT has determined are or may be payable to INDOT under the DBA Documents. If such expense exceeds the sum which would have been payable under this DBA, then Design-Build Contractor, each Guarantor and its Surety(ies) shall be liable and shall pay to INDOT the amount of such excess. If any Guarantor or the Surety fails to pay such amount immediately upon INDOT's demand, then INDOT shall be entitled to collect Interest from the Surety or such Guarantor(s) on the amounts Design-Build Contractor is required to pay in excess of the remaining balance of the Contract Price. Interest shall accrue on all amounts INDOT has had to pay in excess of the remaining balance of the Contract Price from the date of INDOT payment.

18.2.3 Design-Build Contractor acknowledges that if a Design-Build Contractor Default under Section 18.1.1(l) (*Default of Design-Build Contractor*) or Section 18.1.1(m) (*Default of Design-Build Contractor*) occurs, such event could impair or frustrate Design-Build Contractor's performance of the Work. Accordingly, Design-Build Contractor agrees that, upon the occurrence of any such Design-Build Contractor Default, INDOT shall be entitled to request of Design-Build Contractor, or its successor in interest, adequate assurance of future performance in accordance with the terms and conditions hereof. Failure to comply with such request within 10 days after delivery of the request shall entitle INDOT to terminate this DBA and to the accompanying rights set forth above. Pending receipt of adequate assurance of performance and actual performance in accordance therewith, INDOT shall be entitled to proceed with the Work with its own personnel and resources or with other contractors on a time and material or other appropriate basis, the cost of which (plus an administrative charge of 10% of such cost) will be credited against and deducted from INDOT's payment obligations hereunder. The foregoing shall be in addition to all other rights and remedies provided by law or equity and such rights and remedies as are otherwise available under the DBA Documents, the Performance Bond, [and the Guaranty][**NTD: To be conformed in execution version based on whether Design-Build Contractor is required to have a Guarantor.**].

18.2.4 In lieu of the provisions of this Section 18.2 (*Remedies*) for terminating this DBA and completing the Work, INDOT may pay Design-Build Contractor for the Work already done according to the provisions of the DBA Documents (including INDOT's right to deduct certain amounts therefrom) and may treat the Work remaining undone as if they had never been included or contemplated by this DBA. No Claim under this provision will be allowed for prospective profits on, or any other compensation relating to, Work uncompleted by Design-Build Contractor.

18.2.5 If this DBA is terminated for grounds which are later determined not to justify a termination for default, then the termination shall be deemed to constitute a termination for convenience pursuant to Section 17 (*Termination for Convenience*).

18.2.6 The exercise or beginning of the exercise by INDOT of any one or more rights or remedies under this Section 18.2 (*Remedies*) shall not preclude the simultaneous or later exercise by INDOT of any or all other such rights or remedies, each of which shall be cumulative.

18.2.7 In the event INDOT suffer Losses as a result of any Design-Build Contractor Fault, INDOT shall be entitled to recovery of such Losses from Design-Build Contractor regardless of whether the breach or failure that gives rise to the Losses ripens into an Event of Default.

18.2.8 Design-Build Contractor, each Guarantor, and Surety shall not be relieved of liability for continuing Liquidated Damages on account of a Design-Build Contractor Default by Design-Build Contractor hereunder or by INDOT's declaration of an Event of Default, or by actions taken by INDOT under this Section 18.2 (*Remedies*).

18.2.9 INDOT's remedies associated with a Design-Build Contractor Default under Section 18.1.1(k) (*Default of Design-Build Contractor*) shall include the right to rescind this DBA.

### **18.3 Failure by INDOT to Make Undisputed Payment**

18.3.1 Design-Build Contractor shall have the right to stop Work if (i) INDOT fails to make an undisputed payment due hereunder within 60 days after receipt of Notice of nonpayment or (ii) upon 10 days' Notice if INDOT provides Notice under Section 13.7 (*Appropriation of Funds*) that funding is not appropriated or is withdrawn, limited or impaired and INDOT is or will be unable to access other funds to satisfy INDOT's obligations under this DBA. Any such Work stoppage shall be considered a suspension for convenience under Section 16.1 (*Suspension for Convenience*) and shall be subject to the following terms and conditions:

- (a) Design-Build Contractor shall be responsible for safely securing and monitoring the Site and all materials and equipment;
- (b) Design-Build Contractor shall continue to provide traffic management in accordance with the Transportation Management Plan and Temporary Traffic Control Plan;
- (c) The right to suspend Work does not include the right to suspend or cancel insurance policies or any Payment Bond or Performance Bond;
- (d) The suspension of Work shall cease, and Design-Build Contractor shall resume performance of the Work, within 10 days after the default is cured; and
- (e) Promptly after INDOT receives Notice described in this Section 18.3.1 (*Failure by INDOT to Make Undisputed Payments*), INDOT and Design-Build Contractor shall coordinate to effect a smooth, uninterrupted transition of the maintenance from Design-Build Contractor and its Subcontractors to INDOT or its designated contractor. INDOT shall use diligent efforts to complete such transition and assume performance of the maintenance not later than 30 days after receipt of such Notice.

18.3.2 Design-Build Contractor shall not have the right to terminate this DBA for default as the result of any failure by INDOT to make an undisputed payment due hereunder. However, if such nonpayment continues for more than 180 days, upon Notice from Design-Build Contractor to INDOT, Design-Build Contractor shall have the right to declare a Termination for Convenience under Section 17 (*Termination for Convenience*) by delivering to INDOT a Notice of termination specifying its effective date. Upon such termination, the Parties' rights and obligations shall be as set forth in Section 17 (*Termination for Convenience*).

### **18.4 Event of Default Due Solely to Design-Build Contractor's Failure to Achieve Certain Completion Deadlines**

18.4.1 If an Event of Default consists solely of Design-Build Contractor's failure to achieve Substantial Completion or Final Acceptance by the applicable Completion Deadline, INDOT's sole monetary remedy for such Event of Default shall be the right to assess the Liquidated Damages determined under Section 19.1 (*Liquidated Damages for Late Opening to Traffic and Late Completion*); provided, however, that: (a) such Event of Default does not delay

Substantial Completion or Final Acceptance beyond 180-days after the applicable Completion Deadline; and (b) Design-Build Contractor continues to diligently perform the Work despite such Event of Default. Nothing in this Section 18.4 (*Event of Default Due Solely to Design-Build Contractor's Failure to Achieve Certain Completion Deadlines*) shall prejudice any other rights or remedies that INDOT may have due to any other Event of Default during such 180-day period.

18.4.2 If Substantial Completion or Final Acceptance has not occurred within 180-days after the applicable Completion Deadline, INDOT shall have the right to: (a) terminate this DBA; (b) continue to assess such Liquidated Damages subject only to the limitations set forth in Section 19.1 (*Liquidated Damages for Late Opening to Traffic and Late Completion*); or (c) exercise any other right or remedy under the DBA Documents, at law or in equity.

## **SECTION 19 LIQUIDATED DAMAGES; MOVEMENT CHARGES FOR MOVEMENT CLOSURES; NONCOMPLIANCE EVENT DEDUCTIONS; AND LIMITATION OF LIABILITY**

Design-Build Contractor understands and agrees that if Design-Build Contractor fails to complete the Work in accordance with the DBA Documents, INDOT will suffer damages which cannot be quantified as of the date of execution hereof. Therefore, Design-Build Contractor and INDOT have agreed to stipulate the amount payable by Design-Build Contractor in the event of its failure to meet a Completion Deadline, failure to timely open lanes, local streets, ramps or movements after a Permitted Closure, making Prohibited Closures, and failure to meet other requirements as described in this Section 19 (*Liquidated Damages; Movement Charges for Movement Closures; Noncompliance Event Deductions; and Limitation of Liability*) and Exhibit 10 (*Liquidated Damages, Movement Charges, and Noncompliance Event Deductions*). Design-Build Contractor may use Permitted Closures during the Work subject to the requirements of this Section 19 (*Liquidated Damages; Movement Charges for Movement Closures; Noncompliance Event Deductions; and Limitation of Liability*), and TP Section 7 (Hydraulics and Drainage).

### **19.1 Liquidated Damages for Late Opening to Traffic and Late Completion**

19.1.1 Subject to Section 19.1 (*Liquidated Damages for Late Opening to Traffic and Late Completion*), Design-Build Contractor shall be liable for and pay to INDOT liquidated damages with respect to any failure to achieve Substantial Completion or Final Acceptance by the applicable Completion Deadline, as the same may be extended pursuant to this DBA. Such liability shall apply even though: (a) a cure period remains available to Design-Build Contractor, or (b) a cure occurs. The amounts of such liquidated damages are as follows:

- (a) for each day of failure to provide two lanes open to traffic in each direction within the Project Limits along I-65 upon expiration of Pre-Phase-I exception to IHCP allowing for restriction to one lane in each direction:
  - (i) \$10,000 for each day of the first week after expiration of the Pre-Phase I exception to IHCP allowing for restriction to one lane in each direction;

- (ii) \$50,000 for each day of the second week after expiration of the Pre-Phase I exception to IHCP allowing for restriction to one lane in each direction;
- (iii) \$100,000 for each day of the third week after expiration of the Pre-Phase I exception to IHCP allowing for restriction to one lane in each direction;
- (b) \$7,500 for each day after the Substantial Completion Deadline until Substantial Completion is achieved; and
- (c) \$7,500 for each day after the Final Acceptance Deadline until Final Acceptance is achieved.

19.1.2 Liquidated damages under this Section 19.1 (*Liquidated Damages for Late Opening to Traffic and Late Completion*) shall commence on the applicable Completion Deadline, as the same may be extended pursuant to this DBA, and shall continue to accrue until the date of Substantial Completion or Final Acceptance, as applicable, or until termination of this DBA.

19.1.3 In no event shall more than 270 total days of liquidated damages be assessed under each of Section 19.1.1(a) and 19.1.1(c) (*Liquidated Damages for Late Opening to Traffic and Late Completion*). Liquidated damages under Section 19.1.1(a) (*Liquidated Damages for Late Opening to Traffic and Late Completion*) and (b) Section 19.1.1(c) (*Liquidated Damages for Late Opening to Traffic and Late Completion*) may be assessed independently and concurrently with each other.

## 19.2 Movement Closures and Movement Charges

Movement Closures at times and locations not consistent with the restrictions, constraints, and requirements of the DBA Documents could result in traffic obstructions, inconvenience to the public and delay of vital commerce, and increased risk to highway users. All of these consequences result in direct and indirect financial impacts to INDOT, road users, businesses, communities, and taxpayers. These impacts are not readily calculable and, therefore, the Parties agree that in addition to liquidated damages that may be payable by Design-Build Contractor under Section 8.2.6 (*Key Personnel Liquidated Damages*) or this Section 19 (*Liquidated Damages; Movement Charges for Movement Closures; Noncompliance Event Deductions; and Limitation of Liability*), Design-Build Contractor shall be liable for and pay Movement Charges to INDOT in the amounts set forth in Section 19.3 (*Movement Charges for Prohibited Closures*).

## 19.3 Movement Charges for Prohibited Closures

19.3.1 Design-Build Contractor shall be liable for and pay Movement Charges to INDOT, as set forth in Table 10-1-2 (Movement Charges for Prohibited Closures -- Exceeding Maximum Movement Closure Durations for Allowable Movement Closures) of Exhibit 10 (*Liquidated Damages, Movement Charges, and Noncompliance Event Deductions*) for exceeding the maximum Movement Closure durations set forth in Table 10-1-1 (Allowable Mainline Interstate Movement Closures – Exceptions to IHCP) of Exhibit 10 (*Liquidated Damages, Movement Charges, and Noncompliance Event Deductions*);.

19.3.2 A Movement Closure that would otherwise qualify as a Permitted Closure if Design-Build Contractor complied with all applicable requirements related thereto shall be considered a Prohibited Closure pursuant to Section 19.3.1 (Movement Charges for Prohibited Closures) if Design-Build Contractor did not comply with all applicable requirements of the DBA Documents and approvals, if any, relating to Permitted Closures, including the notice, planning and, as applicable, pre-approval requirements relating thereto (to include, location, duration, timing). Any Movement Closure that arises out of or relates to any act or omission of any DB-Related Entity not in compliance with the DBA Documents shall be a Prohibited Closure, even if occurring during a period which otherwise would be a Permitted Closure.

#### **19.4 Noncompliance Event Deductions**

19.4.1 In addition to any other remedies available to INDOT under this DBA, Design-Build Contractor acknowledges that Design-Build Contractor shall be liable for and pay to INDOT Noncompliance Event Deductions with respect to certain failures identified in further detail in Exhibit 10 (Liquidated Damages, Movement Charges, and Noncompliance Event Deductions).

19.4.2 Such liability shall apply even though cure or remedy occurs.

19.4.3 The amounts of the Noncompliance Event Deductions are determined in accordance with Table 10-4 (Noncompliance Event Deductions) of Exhibit 10 (Liquidated Damages, Movement Charges, and Noncompliance Event Deductions).

19.4.4 Such Noncompliance Event Deductions shall commence and accrue until they cease as set forth in Table 10-4 (Noncompliance Event Deductions) of Exhibit 10 (Liquidated Damages, Movement Charges, and Noncompliance Event Deductions), or until termination of this DBA.

#### **19.4.5 Noncompliance Event Deductions Assessment Process**

19.4.5.1 For those occurrences for which Noncompliance Event Deductions may be assessed that are annotated in Table 10-4 (Noncompliance Event Deductions) of Exhibit 10 (Liquidated Damages, Movement Charges, and Noncompliance Event Deductions) as affording the Design-Build Contractor an NCE Notice, INDOT will issue an NCE Notice to Design-Build Contractor no later than 10 Business Days prior to the date that, if not remedied, INDOT intends to assess a Noncompliance Event Deduction, directing remedy of the occurrence that forms the basis for assessment of such Noncompliance Event Deduction. Design-Build Contractor shall commence to remedy the underlying Noncompliance Event promptly, and in no case later than the date identified in the NCE Notice. If not remedied at such time, INDOT may assess, and Design-Build Contractor shall be liable to INDOT for, the applicable Noncompliance Event Deductions as set forth pursuant to Exhibit 10 (Liquidated Damages, Movement Charges, and Noncompliance Event Deductions).

19.4.5.2 For those occurrences for which Noncompliance Event Deductions may be assessed that are annotated in the table within Table 10-4 (Noncompliance Event Deductions) of Exhibit 10 (Liquidated Damages, Movement Charges, and Noncompliance



*Event Deductions*) as not affording the Design-Build Contractor an NCE Notice, or for which the NCE Notice would not be timely related to the nature of the occurrence, where the submission timing is clear, INDOT will notify Design-Build Contractor, directing remedy of the occurrence and, in INDOT's discretion, a reasonable timeframe for remedy and INDOT's intent to assess a Noncompliance Event Deduction, it being the intent that INDOT will nevertheless offer opportunities to cure possible Noncompliance Events where feasible, as determined in INDOT's discretion. Design-Build Contractor shall commence to remedy such occurrence promptly, and if not remedied within such timeframe, if afforded a timeframe, INDOT may assess, and Design-Build Contractor shall be liable to INDOT for, the applicable Noncompliance Event Deductions as set forth pursuant to Exhibit 10 (*Liquidated Damages, Movement Charges, and Noncompliance Event Deductions*).

## **19.5 ] ( Acknowledgements Regarding Liquidated Damages, Movement Charges, and Noncompliance Event Deductions**

19.5.1 Design-Build Contractor acknowledges that the Liquidated Damages (including Movement Charges and Noncompliance Event Deductions) are reasonable in order to compensate INDOT for Losses they will incur by reason of the matters that result in liquidated damages in this Section 19 (*Liquidated Damages; Movement Charges for Movement Closures; Noncompliance Event Deductions; and Limitation of Liability*). Such Losses include loss of use, enjoyment, and benefit of the Project, not connecting INDOT transportation facilities for the general public who depend on and expect availability of service, and injury to the credibility and reputation of INDOT's transportation improvement program with policy makers and the general public, which injury may directly result in loss of use of the Project and connecting INDOT transportation facilities, or additional costs administering this DBA (including engineering, legal, accounting, overhead and other administrative costs). Design-Build Contractor further acknowledges that these Losses are incapable of accurate measurement because of, among other things, the unique nature of the Project and the unavailability of a substitute for it.

19.5.2 As of the Proposal Date, the amounts of Liquidated Damages (including Movement Charges and Noncompliance Event Deductions) represent good faith estimates and evaluations by the Parties as to the actual potential Losses that INDOT would suffer as a result of the matters set forth above, and do not constitute a penalty.

19.5.3 The Parties have agreed to Liquidated Damages (including Movement Charges and Noncompliance Event Deductions) in order to fix and limit Design-Build Contractor's costs and to avoid later Disputes over what amounts of Losses are properly chargeable to Design-Build Contractor.

19.5.4 Such sums are reasonable in light of the anticipated or actual harm caused by the matters set forth above, the difficulties of the proof of loss, and the inconvenience or infeasibility of otherwise obtaining an adequate remedy.

19.5.5 Liquidated Damages (including Movement Charges and Noncompliance Event Deductions) are not intended to, and do not, liquidate Design-Build Contractor's liability under the indemnification provisions of Section 20.1 (*Indemnification by Design-Build Contractor*),

even though Third Party Claims against Indemnified Parties may arise out of the same event, breach, or failure that gives rise to the Liquidated Damages.

## **19.6 Payment; Offset; Reduction; Waiver; Non-Exclusive Remedy**

19.6.1 Design-Build Contractor shall pay any Liquidated Damages owing under this Section 19 (*Liquidated Damages; Movement Charges for Movement Closures; Noncompliance Event Deductions; and Limitation of Liability*) or under Section 8.2.6 (*Key Personnel Liquidated Damages*) within 10 days after Design-Build Contractor's receipt of INDOT's invoice or demand therefor.

19.6.2 INDOT shall have the right to deduct and offset any unpaid Liquidated Damages from any amounts owed by INDOT to Design-Build Contractor. INDOT also shall have the right to draw on any bond, certificate of deposit, letter of credit or other security provided by Design-Build Contractor pursuant to the DBA Documents to satisfy Liquidated Damages not paid when due.

19.6.3 Permitting or requiring Design-Build Contractor to continue and finish the Work or any part thereof after a Completion Deadline as applicable shall not act as a waiver of the right to receive Liquidated Damages hereunder or any rights or remedies otherwise available to INDOT.

19.6.4 If Design-Build Contractor fails to timely make payment of any Movement Charges, then, in addition to any other remedies INDOT may have under the DBA Documents, at law, or in equity, (a) INDOT may prohibit Design-Build Contractor from pursuing or implementing any further Permitted Closures until such past-due payments are made; and (b) Design-Build Contractor shall not be entitled to any Relief Event or Compensation Event arising out of any inability to pursue or implement such Permitted Closures.

19.6.5 Subject to Section 18.4 (*Event of Default Due Solely to Design-Build Contractor's Failure to Achieve Certain Completion Deadlines*), INDOT's right to, and imposition of, Liquidated Damages are in addition, and without prejudice, to any other rights and remedies available to INDOT under the DBA Documents, at law or in equity respecting the breach, failure to perform or Design-Build Contractor Default, except for recovery of Losses that the Liquidated Damages are intended to compensate.

## **19.7 Consequential Damages**

19.7.1 Except as otherwise specified in the DBA Documents, including this Section 19 (*Liquidated Damages; Movement Charges for Movement Closures; Noncompliance Event Deductions; and Limitation of Liability*), to the extent permitted by Governmental Rules,

- (a) neither Party shall be liable to the other for punitive damages; and
- (b) neither Party shall be liable to the other Party for any indirect, incidental or consequential damages, whether arising out of breach of this DBA, tort (including

negligence) or any other theory of liability, and each Party hereby releases the other Party from any such liability.

19.7.2 The foregoing limitations on Design-Build Contractor's liability for punitive damages under Section 19.7.1(a) (*Consequential Damages*) and for indirect, incidental or consequential damages under Section 19.7.1(b) (*Consequential Damages*) shall not apply to or limit any right of recovery INDOT may have respecting the following:

- (a) Losses (including defense costs) to the extent (i) the Losses are covered by the proceeds of insurance required to be carried hereunder or for which Design-Build Contractor was required to provide insurance coverage is not in force, (ii) the Losses are covered by the proceeds of insurance actually carried by or insuring Design-Build Contractor under policies solely with respect to the Project and the Work, regardless of whether required to be carried pursuant to the DBA Documents, or (iii) Design-Build Contractor is deemed to have self-insured the Losses pursuant to the DBA Documents;
- (b) Losses arising out of fraud, violation of Governmental Rules and other illegal activities (or inaction), violation or breach of Governmental Approval or contract, intentional misconduct, recklessness, arbitrary or capricious acts, bad faith, or negligence on the part of any DB-Related Entity;
- (c) Design-Build Contractor's indemnities set forth in Section 20.1 (*Indemnifications by Design-Build Contractor*) or elsewhere in the DBA Documents (but only to the extent any such indemnities relate to Third Party Claims);
- (d) Design-Build Contractor's obligation to pay Liquidated Damages or other payments relating thereto as and when required under this DBA;
- (e) Losses arising out of any Design-Build Contractor Release of Hazardous Materials;
- (f) Losses arising out of or relating to any violation of, or negligent observation of, Design-Build Contractor's obligations relating to encounters with actual or suspected archaeological, paleontological, biological or cultural resources or artifacts under Section 6.3.1 (*Notification to INDOT*);
- (g) Amounts Design-Build Contractor may be obligated to reimburse to INDOT or that are otherwise due from Design-Build Contractor to INDOT under the express provisions of the DBA Documents;
- (h) Interest, late charges, fees, transaction fees and charges, penalties, and similar charges that the DBA Documents expressly state are due from Design-Build Contractor to INDOT; and
- (i) Any credits, deductions or offsets that the DBA Documents expressly provide to INDOT against amounts owing Design-Build Contractor.

## 19.8 Limitation on Consequential Damages

19.8.1 Notwithstanding any other provision of the DBA Documents and except as set forth in DBA Section 19.8.2 (Limitation on Consequential Damages), to the extent permitted by applicable Law, Design-Build Contractor shall not be liable for punitive damages or special, indirect or incidental, or consequential damages, whether arising out of breach of this DBA, tort (including negligence) or any other theory of liability, and INDOT releases Design-Build Contractor from any such liability, other than for Deductions, as provided pursuant to this DBA or otherwise to the extent recoverable from insurance

19.8.2 The foregoing limitation on Design-Build Contractor's liability for consequential damages shall not apply to or limit, nor be construed to apply to or limit, any right of recovery INDOT may have respecting the following, each of which are agreed by the Parties to be, or to give rise to, direct damages, and not special, indirect, or consequential damages:

- (a) any Liquidated Damages payable by Design-Build Contractor under this DBA;
- (b) any Movement Charges payable by Design-Build Contractor under this DBA;
- (c) any Noncompliance Event Deductions assessed under this DBA;
- (d) amounts Design-Build Contractor may be obligated to reimburse to INDOT or that are otherwise due from Design-Build Contractor to INDOT under the express provisions of the DBA;
- (e) any losses, claims, and amounts (including defense costs) paid under either or both of the P&P Bonds;
- (f) any amounts paid or payable pursuant to Design-Build Contractor's indemnification obligations hereunder;
- (g) any amounts paid or payable by Design-Build Contractor that are covered by Insurance Policies that Design-Build Contractor is required to place or has placed in addition to those required hereunder, including any SIRs or for which Design-Build Contractor was required to provide insurance if coverage was not then in place, or other insurance procured, even though not required to be placed hereunder, for purposes of the Project;
- (h) Losses arising out of Design-Build Contractor release of Hazardous Materials;
- (i) any Losses, claims (including claims of any Indemnified Parties), and amounts arising out of, relating to, or resulting from any Design-Build Contractor-Related Entity's negligence, reckless or willful misconduct, violation of Law and other illegal activities (or inaction), violation or breach of Governmental Approval or contract, criminal conduct, bad faith, intentional misconduct (which excludes intentional Design-Build Contractor Default), arbitrary or capricious acts, or fraud under or relating to this DBA;

(j) interest, late charges, fees, transaction fees and charges, penalties, and similar charges that the DBA Documents expressly state are due from Design-Build Contractor to INDOT; and

(k) any credits, deductions or offsets that the DBA Documents expressly provide to INDOT against amounts owing Design-Build Contractor.

## **SECTION 20 INDEMNIFICATION**

### **20.1 Indemnifications by Design-Build Contractor**

20.1.1 Subject to Section 20.1.2 (*Indemnifications by Design-Build Contractor*), Design-Build Contractor shall release, defend, indemnify and hold harmless the Indemnified Parties from and against any and all Third Party Claims and other Losses (including those incurred in connection with the enforcement of this indemnity) arising out of, relating to or resulting from the following (each an “Indemnified Claim”):

- (a) The breach or alleged breach of any of the DBA Documents by any DB-Related Entity;
- (b) The failure or alleged failure by any DB-Related Entity to comply with any Other Approval, the Governmental Approvals, any applicable Environmental Laws or other Governmental Rules (including Environmental Laws) or any other responsibility prescribed in Section 7.10 (*Hazardous Materials Management*) and Section 7.11 (*Environmental Compliance, Mitigation and Approval Requirements*);
- (c) Any alleged patent or copyright infringement or other allegedly improper appropriation or use of trade secrets, patents, proprietary information, know-how, copyright rights or inventions in performance of the Work, or arising out of any use in connection with the Project of methods, processes, designs, information, or other items furnished or communicated to INDOT or another Indemnified Party pursuant to the DBA Documents; provided, that this indemnity shall not apply to any infringement resulting from failure by INDOT to comply with specific written instructions regarding use provided to INDOT by Design-Build Contractor;
- (d) The actual or alleged Design-Build Contractor Fault in or associated with performance of the Work;
- (e) Any and all Third Party Claims by any Governmental Entity or taxing authority claiming taxes based on gross receipts, purchases or sales, the use of any property or income of any DB-Related Entity or any of their respective agents, officers or employees with respect to any payment for the Work made to or earned by any DB-Related Entity;

- (f) Any and all stop notices, Liens and Third Party Claims filed in connection with the Work, including all expenses and attorneys', accountants' and expert witness fees and costs incurred in discharging any stop notice, Lien or Third Party Claim, and any other liability to Subcontractors, laborers and Suppliers for failure to pay sums due for their work, services, materials, goods, equipment or supplies, provided that INDOT is not in default in payments owing (if any) to Design-Build Contractor with respect to such Work and such INDOT payment default is the direct reason for the stop notice, Lien or Third Party Claim;
- (g) Any Release of Hazardous Materials or threatened Release of Hazardous Materials (i) which was brought onto the Site by any DB-Related Entity, or (ii) attributable to any Design-Build Contractor Fault, regardless of the source, origin, or method of deposit of such Hazardous Materials;
- (h) To the extent of any Design-Build Contractor Fault, the Third Party Claim or assertion by any other Person (excluding Persons in privity of contract with INDOT) that any DB-Related Entity (i) interfered with or hindered the progress or completion of work being performed by such other contractor, so as to cause inconvenience disruption, delay, or loss, except where the DB-Related Entity was not in any manner engaged in performance of the Work, or (ii) failure of any DB-Related Entity to cooperate reasonably with other contractors in accordance therewith;
- (i) Any dispute between Design-Build Contractor and a Utility Owner, or any DB-Related Entity's performance of, or failure to perform, the obligations under any Utility Agreement or Other Approval with respect to such Utility Owner;
- (j) [Reserved];
- (k) Any DB-Related Entity's breach of or failure to perform an obligation that INDOT owes to a third Person, including Governmental Entities, and Utility Owners, under law or under any agreement between INDOT and a third Person, where (i) INDOT has delegated performance of the obligation to Design-Build Contractor under the DBA Documents or (ii) the acts or omissions of any DB-Related Entity which render INDOT unable to perform or abide by an obligation that INDOT owes to a third Person, including Governmental Entities and Utility Owners, under any agreement between INDOT and a third Person, where the agreement was expressly disclosed to Design-Build Contractor;
- (l) Inverse condemnation, trespass, nuisance or similar taking of or harm to real property by reason of: (i) the failure of any DB-Related Entity to comply with Good Industry Practices, requirements of the DBA Documents, Project Management Plan or Governmental Approvals, (ii) any Design-Build Contractor Fault, or (iii) the actual physical entry onto or encroachment upon another's property by any DB-Related Entity;

- (m) The failure of Design-Build Contractor to fully comply with any insurance requirements described in Section 10 (Insurance);
- (n) Any failure to protect or maintain valuable papers and records that the DBA Documents require Design-Build Contractor to maintain;
- (o) Any Third Party Claim or amount arising or recovered under workers' compensations law;
- (p) Any errors, inconsistencies or other defects in the design or construction of the Project or of Utility Adjustments included in the Work;
- (q) Any violation of any representation, warranty, or other covenant, obligation or agreement under the DBA Documents or any applicable Governmental Rules to be complied with by Design-Build Contractor hereunder or thereunder;
- (r) Any failure to pay any Liquidated Damages under the DBA Documents;
- (s) Errors in the Design Documents provided by Design-Build Contractor (including those pertaining to Utility Adjustments), regardless of whether such Errors were also included in the Reference Information Documents. Design-Build Contractor agrees that, because the concepts in the Reference Information Documents are subject to review and modification by Design-Build Contractor, it is appropriate for Design-Build Contractor to assume liability for Errors in the completed Project even though they may be related to Errors in Reference Information Documents; or
- (t) Any act or omission of any DB-Related Entity or any Design-Build Contractor Fault in any way causing, contributing to, relating to or arising out of (i) any bodily injury (including death) to any person or (ii) any Losses to the tangible property of INDOT or third parties.

20.1.2 Subject to the releases and disclaimers herein, Design-Build Contractor's indemnity obligation shall not extend to any third-party Losses to the extent directly caused by:

20.1.2.1 The gross negligence, recklessness, willful misconduct, bad faith or fraud of the Indemnified Party;

20.1.2.2 INDOT's breach of any of its material obligations under the DBA Documents;

20.1.2.3 An Indemnified Party's violation of any Governmental Rules or Governmental Approvals; or

20.1.2.4 Any material defect inherent in a prescriptive design, construction, operations or maintenance specification included in the Technical Provisions, but only where prior to occurrence of the third-party Losses, Design-Build Contractor complied with such

specification and did not actually know, or would not reasonably have known, while exercising reasonable diligence, that it was deficient or, if Design-Build Contractor actually knew of the deficiency, unsuccessfully sought INDOT's waiver or approval of a Deviation from such specification.

20.1.3 In Third Party Claims by an employee of Design-Build Contractor, a Subcontractor, anyone directly or indirectly employed by them or anyone for whose acts they may be liable, the indemnification obligation under this Section 20.1 (*Indemnifications by Design-Build Contractor*) shall not be limited by a limitation on the amount or type of damages, compensation or benefits payable by or for Design-Build Contractor or a Subcontractor under workers' compensation, disability benefit or other employee benefits laws.

20.1.4 Design-Build Contractor is advised that Utility Agreements may include certain agreements by INDOT to indemnify, defend, save and hold harmless the Utility Owners and third party, respectively, with respect to certain matters. Design-Build Contractor's obligations under this Section 20 (*Indemnification*) shall automatically apply to require Design-Build Contractor, subject to Section 20.1.2 (*Indemnifications by Design-Build Contractor*), to release, indemnify, defend, save and hold harmless the Utility Owners and Third Party and their employees and agents, in addition to the Indemnified Parties, with respect to all such matters. If any Utility Agreement contains provisions requiring contractor(s) of INDOT to indemnify, defend, save and hold harmless the Utility Owner or Third Party, respectively, with respect to any matters, then, subject to Section 20.1.2 (*Indemnifications by Design-Build Contractor*), Design-Build Contractor agrees to and shall perform and comply with such provisions of the Utility Agreements (for the benefit of the Utility Owners, their employees and agents).

20.1.5 For purposes of this Section 20.1 (*Indemnifications by Design-Build Contractor*), "third-party" means any Person other than an Indemnified Party and Design-Build Contractor, except that a "third-party" includes any Indemnified Party's employee, agent or contractor who asserts a Third Party Claim that is (a) against an Indemnified Party, (b) within the scope of the indemnities and (c) not covered by the Indemnified Party's worker's compensation program.

20.1.6 INDOT, and the State shall have no obligation to indemnify, defend and hold harmless Design-Build Contractor or any other DB-Related Entity.

20.1.7 The requirement to provide an indemnity as specified in this Section 20.1 (*Indemnifications by Design-Build Contractor*) is intended to provide protection to INDOT with respect to Third Party Claims associated with the event giving rise to the indemnification obligation, and is not intended to provide INDOT with an alternative cause of action against Design-Build Contractor for Losses incurred directly by INDOT with respect to the event giving rise to the indemnification obligation.

## **20.2 Defense and Indemnification Procedures**

20.2.1 If INDOT receive notice of a Third Party Claim or otherwise has actual knowledge of a Third Party Claim that it believes is within the scope of the indemnities under



Section 20.1 (Indemnifications by Design-Build Contractor), and if INDOT gives Notice thereof pursuant to Section 26.11 (Notices and Communications), then INDOT shall have the right to conduct its own defense unless either an insurer accepts defense of the Third Party Claim within the time required by Governmental Rules or Design-Build Contractor accepts the tender of the Third Party Claim in accordance with Section 20.2.3 (Defense and Indemnification Procedures).

20.2.2 If the insurer under any applicable insurance policy accepts the tender of defense, INDOT and Design-Build Contractor shall cooperate in the defense as required by the insurance policy and, for purposes of the DBA Documents and proceedings relating to such matter, the applicable Indemnified Party/ies shall be deemed to be (an) insured party/ies. If no insurer under potentially applicable insurance policies provides defense, then Section 20.2.3 (Defense and Indemnification Procedures) shall apply.

20.2.3 If the defense is tendered to Design-Build Contractor, then within 30 days after receipt of the tender, Design-Build Contractor shall provide to the Indemnified Party Notice whether it has tendered the matter to an insurer, and, if not tendered to an insurer or if the insurer has rejected the tender, shall deliver a Notice stating that Design-Build Contractor:

20.2.3.1 Accepts the tender of defense and confirms that the Third Party Claim is subject to full indemnification hereunder without any “reservation of rights” to deny or disclaim full indemnification thereafter;

20.2.3.2 Accepts the tender of defense but with a “reservation of rights” in whole or in part; or

20.2.3.3 Rejects the tender of defense based on a determination that it is not required to indemnify against the Third Party Claim under the terms of this DBA.

20.2.4 If Design-Build Contractor has tendered the matter to an insurer, and the insurer has not rejected the tender, then, for purposes of the DBA Documents and proceedings relating to such matter, the applicable Indemnified Party/ies shall be deemed to be (an) insured party/ies.

20.2.5 If Design-Build Contractor accepts the tender of defense under Section 20.2.3.1 (Defense and Indemnification Procedures) or Section 20.2.3.2 (Defense and Indemnification Procedures), Design-Build Contractor shall have the right to select legal counsel for the Indemnified Party, subject to reasonable approval by the Indemnified Party, and Design-Build Contractor shall otherwise control the defense of such Third Party Claim, including settlement, and bear the attorneys’, consultants’ and expert witness fees and costs of defending and settling such Third Party Claim. During such defense:

20.2.5.1 Design-Build Contractor shall fully and regularly inform the Indemnified Party of the progress of the defense and of any settlement discussions; and

20.2.5.2 The Indemnified Party shall reasonably cooperate in said defense, provide to Design-Build Contractor all materials and access to personnel it requests as necessary for defense, preparation and trial and which or who are under the control of or

reasonably available to the Indemnified Party, and, subject to Governmental Rules, maintain the confidentiality of all communications between it and Design-Build Contractor concerning such defense.

20.2.6 If Design-Build Contractor responds to the tender of defense as specified in Section 20.2.3.3 (*Defense and Indemnification Procedures*), the Indemnified Party shall be entitled to select its own legal counsel and otherwise control the defense of such Third Party Claim, including settlement.

20.2.7 Notwithstanding Section 20.2.3.1 (*Defense and Indemnification Procedures*) and Section 20.2.3.2 (*Defense and Indemnification Procedures*), the Indemnified Party may revocably assume its own defense at any time by delivering to Design-Build Contractor Notice of such election and the reasons therefor, if the Indemnified Party, at the time it gives Notice of the Third Party Claim or at any time thereafter, reasonably determines that:

20.2.7.1 A conflict exists between it and Design-Build Contractor which prevents or potentially prevents Design-Build Contractor from presenting a full and effective defense;

20.2.7.2 Design-Build Contractor is otherwise not providing an effective defense in connection with the Third Party Claim; or

20.2.7.3 Design-Build Contractor lacks the financial capacity to satisfy potential liability or to provide an effective defense.

20.2.8 If the Indemnified Party is entitled and elects to conduct its own defense pursuant hereto of a Third Party Claim for which it is entitled to indemnification, Design-Build Contractor shall reimburse on a current basis all costs and expenses the Indemnified Party incurs in investigating and defending such Third Party Claim. If the Indemnified Party is entitled to and elects to conduct its own defense, then:

20.2.8.1 In the case of a defense that otherwise would be conducted under Section 20.2.3.1 (*Defense and Indemnification Procedures*), the Indemnified Party shall have the right to settle or compromise the Third Party Claim with notice to Design-Build Contractor and each of Design-Build Contractor's relevant insurer(s)' prior written consent, which, in each case, shall not be unreasonably withheld or delayed;

20.2.8.2 In the case of a defense that otherwise would be conducted under Section 20.2.3.2 (*Defense and Indemnification Procedures*), the Indemnified Party and Design-Build Contractor shall consult with each other on a regular basis to determine whether settlement is appropriate and, subject to the rights of any insurer providing coverage for the Third Party Claim under a policy required under this DBA, and the Indemnified Party shall have the right to settle or compromise the Third Party Claim with Design-Build Contractor's prior written consent without prejudice to the Indemnified Party's rights to be indemnified by Design-Build Contractor; and

20.2.8.3 In the case of a defense conducted under Section 20.2.3.3 (Defense and Indemnification Procedures), the Indemnified Party shall, subject to the rights of any insurer providing coverage for the Third Party Claim under a policy required under this DBA, have the right to settle or compromise the Third Party Claim without Design-Build Contractor's prior written consent and without prejudice to its rights to be indemnified by Design-Build Contractor.

20.2.8.4 Where Design-Build Contractor has the right under these procedures to settle a Third Party Claim, in no event shall Design-Build Contractor agree to a settlement that will increase the risk, liability or costs of INDOT or any other Indemnified Party or adversely affect the Project, the Work or the Completion Deadlines without the prior written consent of INDOT or such Indemnified Party, in its sole discretion.

20.2.9 A refusal of, or failure to accept, a tender of defense, as well as any Dispute over whether an Indemnified Party which has assumed control of defense is entitled to do so under Section 20.2.7 (Defense and Indemnification Procedures), shall be resolved according to the Dispute Resolution Procedures. Design-Build Contractor shall be entitled to contest an indemnification of a Third Party Claim and pursue, through the Dispute Resolution Procedures, recovery of defense and indemnity payments it has made to or on behalf of the Indemnified Party.

### **20.3 No Effect on Other Rights**

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

### **20.4 CERCLA Agreement**

The indemnities set forth in Section 20.1.1(g) (Indemnifications by Design-Build Contractor) are intended to operate as agreements pursuant to Section 107(e) of CERCLA to insure, protect, hold harmless and indemnify the Indemnified Parties.

## **SECTION 21 PARTNERING AND DISPUTE RESOLUTION**

### **21.1 Partnering**

21.1.1 The provisions of this Section 21.1 (Partnering) are not part of the Informal Resolution Procedures or the Dispute Resolution Procedures contemplated under this DBA. Compliance with the provisions of this Section 21.1 (Partnering) or the terms of any partnering charter is not required as a condition precedent to any Party's right to initiate a Claim or seek resolution of any Dispute under this Section 21 (Partnering and Dispute Resolution).

21.1.2 INDOT and Design-Build Contractor have developed and intend to continue fostering a cohesive relationship to carry out their respective responsibilities under this DBA through the voluntary, non-binding "partnering" provided for in TP Section 1.2.2.10 (Partnering).

21.1.3 Reserved.

21.1.4 In continuance of their existing partnering process, within 90 days after the Effective Date, INDOT and Design-Build Contractor shall attend a team-building workshop and through such workshop negotiate and sign a mutually acceptable non-binding partnering charter to govern the process of partnering for the Project. INDOT may also, at its option, participate in such workshop and partnering activities under this DBA. The charter shall include non-binding rules and guidelines for engaging in free and open communications, discussions and partnering meetings between them, in order to further the goals of the partnering process. The charter shall call for the formation and meetings of a partnering panel, identify the Key Personnel of Design-Build Contractor and key representatives of INDOT who shall serve on the partnering panel, and set the location for meetings. The charter also shall include non-binding rules and guidelines on whether and under what circumstances to select and use the services of a facilitator, where and when to conduct partnering panel meetings, who should attend such meetings, and, subject to Section 21.2.5 (*Confidentiality of Settlement Negotiations and Other Documents Used in the Dispute Resolution Process*), exchange of statements, materials and communications during partnering panel meetings. Should the charter include the use of a facilitator, Design-Build Contractor shall bear any associated costs. In any event, the partnering charter shall recognize and be consistent with the obligations of INDOT and Design-Build Contractor contained in this DBA with respect to communications, cooperation, coordination and procedures for resolving Claims and Disputes.

21.1.5 Under the non-binding procedures, rules and guidelines of the partnering charter, the Parties will address at partnering meetings specific interface issues, oversight interface issues, division of responsibilities, communication channels, application of alternative resolution principles and other matters.

21.1.6 If Design-Build Contractor and INDOT succeed in resolving a Claim or Dispute through the partnering procedures, they shall memorialize the resolution in writing, including execution of Change Orders as appropriate, and promptly perform their respective obligations in accordance therewith.

## **21.2 Dispute Resolution Procedures**

### **21.2.1 Disputes Governed by These Procedures**

- (a) Either Party may invoke the Dispute Resolution Procedures (as otherwise permitted under this DBA) regardless of the status of any ongoing partnering activities pursuant to Section 21.1 (*Partnering*).
- (b) Resolutions of Claims and Disputes pursuant to this Section 21.2 (*Dispute Resolution Procedures*) shall be final, binding, conclusive and enforceable as set forth in this Section 21.2 (*Dispute Resolution Procedures*).
- (c) FAILURE OF DESIGN-BUILD CONTRACTOR TO CONFORM TO THE DISPUTE RESOLUTION PROCEDURES IN ALL MATERIAL RESPECTS AS TO ANY DISPUTE OR CLAIM SUBJECT THERETO SHALL CONSTITUTE A FAILURE TO PURSUE DILIGENTLY AND EXHAUST THE

ADMINISTRATIVE PROCEDURES IN THE DBA DOCUMENTS AND SHALL OPERATE AS A BAR TO THE DISPUTE OR CLAIM. THIS SECTION 21.2.1(b) (*DISPUTE RESOLUTION PROCEDURES*) SHALL NOT BAR A CLAIM OR DISPUTE IF THE FAILURE TO MEET APPLICABLE DEADLINES IS DUE TO CONDUCT ON BEHALF OF INDOT OR ITS REPRESENTATIVES.

- (d) The Parties adopt these expedited methods for resolving Disputes between or among INDOT, Design-Build Contractor, and units of local government that contain any part of the Project, all of whom are proper parties to these Dispute Resolution Procedures.

#### 21.2.2 **Burden of Proof**

The Party bringing a Claim or Dispute shall bear the burden of proving the same.

#### 21.2.3 **Mandatory Informal Resolution Procedures**

##### 21.2.3.1 **Notice of Dispute to Designated Agent**

- (a) A Party desiring to pursue a Dispute against the other Party shall initiate the Informal Resolution Procedures by serving a Notice on the other Party's designated agent. Unless otherwise indicated by Notice from one Party to the other Party, each Party's designated agent shall be its Authorized Representative. The Notice shall contain a concise statement describing:
  - (i) The date of the act, inaction or omission giving rise to the Dispute;
  - (ii) An explanation of the Dispute, including a description of its nature, circumstances and cause;
  - (iii) A reference to any pertinent provision(s) from the DBA Documents;
  - (iv) If applicable, the estimated dollar amount of the Dispute, and how that estimate was determined (including any cost and revenue element that has been or may be affected);
  - (v) If applicable, an analysis of the Project Baseline Schedule and Completion Deadlines showing any changes or disruptions (including an impacted delay analysis reflecting the disruption in the manner and sequence of performance that has been or will be caused, delivery schedules, staging, and adjusted Completion Deadlines);
  - (vi) If applicable, the claiming Party's plan for mitigating the amount claimed and the delay claimed;

- (vii) The claiming Party’s desired resolution of the Dispute; and
  - (viii) Any other information the claiming Party considers relevant.
- (b) The Notice shall be signed by the Authorized Representative of the claiming Party, and shall contain a written certification by the claiming Party that:
- (i) The Notice of Dispute is served in good faith;
  - (ii) Except as to specific matters stated in the Notice as being unknown or subject to discovery, all supporting information is reasonably believed by the claiming Party to be accurate and complete;
  - (iii) The Dispute accurately reflects the amount of money or other right, remedy or relief to which the claiming Party reasonably believes it is entitled; and
  - (iv) The Authorized Representative is duly authorized to execute and deliver the Notice and such certification on behalf of the claiming Party.
- (c) Any Notice by Design-Build Contractor shall be delivered within 10 days after any decision, action, order or position of INDOT (including any rejection or modification of a proposed Change Order by INDOT) to which Design-Build Contractor objects. INDOT may initiate the Dispute Resolution Procedures at any time by delivering to Design-Build Contractor a Notice.
- (d) The Parties shall attempt in good faith to resolve such Dispute within 15 days after delivery of the Notice of Dispute to the responding Party. If the responding Party agrees with the claiming Party’s position and desired resolution of the Dispute, it shall so state in a written response. The Notice of the Dispute and such response shall suffice to evidence the Parties’ resolution of the subject Dispute unless either Party requests further documentation. Upon either Party’s request, within seven days after the claiming Party’s receipt of the responding Party’s response in agreement, the Parties’ designated representatives shall state the resolution of the Dispute in writing.

### 21.2.3.2 Authorized Representatives Meetings

If either or both “designated agent(s)” under Section 21.2.3.1(a) (*Notice of Dispute to Designated Agent*) was/were not a Party’s Authorized Representative, and if the Dispute is not resolved pursuant to Section 21.2.3.1(d) (*Notice of Dispute to Designated Agent*), then commencing within 14 days after the Notice of Dispute is served and concluding 14 days thereafter, the Authorized Representatives of each Party, or his or her designee, shall meet and confer, in good faith, to seek to resolve the Dispute raised in the claiming Party’s Notice of Dispute. If they succeed in resolving the Dispute, Design-Build Contractor and INDOT shall memorialize the resolution in writing.

### 21.2.3.3 Time Limitations

Time limitations set forth for the Informal Resolution Procedures may be changed by mutual written agreement of the Parties. Changes to the time limitations for the Informal Resolution Procedures agreed upon by the Parties shall pertain to a particular Dispute only and shall not affect the time limitations for Informal Resolution Procedures applicable to other or subsequent Disputes.

### 21.2.4 Failure to Resolve Dispute with Informal Resolution Procedures

21.2.4.1 If a Dispute is not timely resolved under the Informal Resolution Procedures within 60 days of service of the initial Notice under Section 21.2.3 (*Mandatory Informal Resolution Procedures*), then the Parties shall participate in a mediation in accordance with Indiana Rules for Alternative Dispute Resolution, Rule 8 (Optional Early Mediation).

21.2.4.2 If a Dispute is not timely resolved under the Informal Resolution Procedures or by mediation, either Party may file a lawsuit in the Indiana Commercial Court in Marion County, Indiana as provided in Section 21.2.6 (*Administrative Hearings; Venue and Jurisdiction*).

### 21.2.5 Confidentiality of Settlement Negotiations and Other Documents Used in the Dispute Resolution Process

21.2.5.1 All discussions, negotiations, Informal Resolution Procedures, and mediation described in Sections 21.2.3 (*Mandatory Informal Resolution Procedures*) and 21.2.4.1 (*Failure to Resolve Dispute with Information Resolution Procedures*) between the Parties to resolve a Dispute, and all documents and other written materials furnished to a Party or exchanged between the Parties during any such discussions, negotiations, procedures or proceedings shall be considered confidential and not subject to disclosure by either Party.

21.2.5.2 During any mediation or judicial proceeding regarding a Dispute, all information that has been deposited with the Escrowed Proposal Documents shall be available as evidence but treated as confidential and subject to a protective order issued by the court to protect the information from public disclosure.

21.2.5.3 The Parties may also request a protective order in any judicial proceeding to prohibit the public disclosure of any other information they believe is confidential. Determinations of such requests by the Court shall be governed by the standards in the Indiana Rules of Evidence and Indiana Rules of Trial Procedure or Indiana's Administrative Rules, as applicable.

### 21.2.6 Administrative Hearings; Venue and Jurisdiction

21.2.6.1 INDOT acknowledges that Design-Build Contractor Claims are not subject to the jurisdiction of any Indiana administrative agency, and INDOT agrees that no

defense based on failure to exhaust administrative remedies not otherwise set forth in this DBA may be raised in any court proceeding arising out of or relating to the Project.

21.2.6.2 The Parties agree that the exclusive original jurisdiction and venue for any legal action or proceeding, at law or in equity, that is permitted to be brought by a Party in court arising out of the DBA Documents shall be the Indiana Commercial Court in Marion County, Indiana. All rights to jury trial are hereby waived. The Commercial Court Rules established by the Indiana Supreme Court shall apply.

### **21.2.7 Continuation of Disputed Work and Payments**

21.2.7.1 At all times during Dispute Resolution Procedures, Design-Build Contractor and all other DB-Related Entities shall continue with the performance of the Work and their obligations, including any Disputed Work or obligations, diligently and without delay, in accordance with this DBA, except to the extent enjoined by order of a court or otherwise approved by INDOT, in its sole discretion. Design-Build Contractor acknowledges that it shall be solely responsible for the results of any delaying actions or inactions taken during the course of Dispute Resolution Procedures relating to the Disputed Work even if Design-Build Contractor's position in connection with the Dispute ultimately prevails.

21.2.7.2 During the course of any Dispute Resolution Procedure, the Parties shall continue to comply with all provisions of the DBA Documents, the Project Management Plan, the Governmental Approvals and applicable Governmental Rules.

21.2.7.3 Throughout the course of any Disputed Work, Design-Build Contractor shall keep complete records that provide a clear distinction between the incurred direct and indirect costs of Disputed Work and that of undisputed Work. Design-Build Contractor shall provide INDOT access to all Project-related Books and Records on an Open Book Basis as INDOT desires to evaluate the Dispute. These records shall be retained for a period of not less than one year after the date of resolution of the Dispute pertaining to such Disputed Work (or for any longer period required under any other applicable provision of the DBA Documents).

21.2.7.4 During the course of any Dispute Resolution Procedure, INDOT shall continue to pay to Design-Build Contractor when due all undisputed amounts owing under this DBA.

## **SECTION 22 ACCEPTANCE**

### **22.1 Substantial Completion**

#### **22.1.1 Requirements**

22.1.1.1 INDOT will issue a written Certificate of Substantial Completion at such time as Substantial Completion occurs for the Project.



22.1.1.2 In determining whether Substantial Completion has occurred, INDOT shall require satisfaction of the following criteria:

- (a) Design-Build Contractor has completed all Work (excepting only for Punch List items), and Design-Build Contractor represents that the Work has been performed and the Project completed in accordance with the requirements of the DBA Documents;
- (b) Required pavement markings, signs, ITS, and signals are installed and functional;
- (c) All temporary traffic controls or Movement Closures at any time have ceased (except for (i) any required for routine maintenance or (ii) temporary lane closures during hours of low traffic volume in accordance with and as permitted by TP Section 9 (Maintenance of Traffic) and the Transportation Management Plan solely in order to complete Punch List items and any other Work required to achieve Final Acceptance);
- (d) All lanes of traffic (including freeway lanes, ramps, interchanges, collector distributor, overpasses, underpasses, other crossings and roads) set forth in the Design Documents are in their final configuration and available for public use;
- (e) Design-Build Contractor has otherwise completed the Work, in accordance with the DBA Documents and Design Documents, such that the Project is in a condition that it can be used for normal and safe vehicular travel in all lanes and at all points of entry and exit, including bicycle and pedestrian access, subject only to Punch List items and other Work that do not affect the ability to safely open the Project for such normal use and operation by the traveling public;
- (f) Construction of the Project is sufficiently completed in accordance with the DBA Documents, as modified by any executed Change Orders, so that it can be used for its intended purpose. In order for the Project to be “used for its intended purpose”, all lanes shall be, or have the ability to be, opened to traffic without further need for them to be restricted for any purpose except for (i) temporary lane closures during hours of low traffic volume in accordance with and as permitted by TP Section 9 (Maintenance of Traffic) and the Transportation Management Plan solely in order to complete Punch List items and any other Work required to achieve Final Acceptance) (ii) the placement or maintenance of permanent erosion and sediment control; or (iii) the maintenance or removal of temporary erosion and sediment control. At a minimum, all of the following criteria must be met: all lanes shall be completed through their final roadway surface, including shoulders, with all the sidewalks, curbs, drainage features, markings, permanent safety appurtenances, lighting, traffic signals, ITS, and signing as shown in the DBA Documents;
- (g) All conditions to acceptance by Utility Owners have been satisfied or waived, and any waivers approved by INDOT, in its sole discretion;

- (h) There exists no Design-Build Contractor Default or uncured breaches that with the giving of notice or passage of time, or both, could become a Design-Build Contractor Default (except any Design-Build Contractor Default for which Final Acceptance will affect its cure);
- (i) INDOT and Design-Build Contractor have agreed upon a Punch List of items to be completed for Final Acceptance;
- (j) Design-Build Contractor has certified to INDOT in writing that no overdue amounts owing to any Subcontractor remain unpaid (except for amounts relating to good faith disputes); and
- (k) All other conditions to Substantial Completion in the DBA Documents shall have been satisfied.

#### 22.1.2 **Notification of Substantial Completion; Inspections**

22.1.2.1 Design-Build Contractor shall provide INDOT with not less than 120 days' prior Notice of the date Design-Build Contractor determines it will achieve Substantial Completion. During such 120-day period, Design-Build Contractor and INDOT shall meet and confer and exchange information on a regular cooperative basis with the goal being INDOT's orderly, timely inspection and review of the Project and the Released for Construction Documents and Construction Documents, and INDOT's issuance of a Certificate of Substantial Completion.

22.1.2.2 During such 120-day period, INDOT shall conduct an inspection of the Project and its components, a review of the Released for Construction Documents and Construction Documents and such other investigation as may be necessary to evaluate whether Substantial Completion is achieved.

22.1.2.3 Design-Build Contractor shall provide INDOT a second Notice when Design-Build Contractor determines it has achieved Substantial Completion.

22.1.2.4 INDOT will then conduct such inspections, surveys or testing described in the Project Standards or otherwise as it deems advisable. If such inspections, surveys or tests disclose that any of Work does not meet the requirements of the DBA Documents, INDOT will promptly advise Design-Build Contractor as to any Errors in the Work necessary to be corrected as a condition to achieving Substantial Completion and as to any Errors which may be corrected as Punch List items. Upon correction of the Errors identified as a prerequisite to Substantial Completion, Design-Build Contractor shall provide to INDOT Notice, and INDOT will conduct additional inspections, surveys or testing as it deems desirable. This procedure shall be repeated until INDOT finds that all prerequisites to Substantial Completion have been met.

22.1.2.5 Within seven days after expiration of the 120-day period and receipt by INDOT of the second Notice described in Section 22.1.2.3 (*Notification of Substantial*

*Completion; Inspections*), INDOT shall either: (a) issue the Certificate of Substantial Completion or (b) notify Design-Build Contractor in writing setting forth, as applicable, why the Project has not reached Substantial Completion. If INDOT and Design-Build Contractor cannot agree as to the date of Substantial Completion, such Dispute shall be resolved according to the Dispute Resolution Procedures.

## **22.2 Punch List**

22.2.1 The Project Management Plan shall establish procedures and schedules for preparing a Punch List and completing Punch List work. Punch List(s) shall include an itemized list of Construction Work which remains to be completed, the existence, correction and completion of which will have no adverse effect on the normal and safe operation and use of the Project. Such procedures and schedules shall conform to this Section 22.2 (*Punch List*). The Project Management Plan shall provide for development of Punch Lists for Substantial Completion and Final Acceptance.

22.2.2 For Substantial Completion, the schedule for preparation of the Punch List either shall be consistent and coordinated with the inspections regarding Substantial Completion, or shall follow such inspections.

22.2.3 Design-Build Contractor shall prepare and maintain the Punch List. Design-Build Contractor shall deliver to INDOT not less than seven days' prior Notice stating the date when Design-Build Contractor will commence Punch List field inspections and Punch List preparation. INDOT may, but is not obligated to, participate in the development of the Punch List. Each participant shall have the right to add items to the Punch List and none shall remove any item added by any other without such other's express permission. If Design-Build Contractor objects to the addition of an item by INDOT, the item shall be noted as included under protest, and if the Parties thereafter are unable to reconcile the protest, the Dispute shall be resolved according to the Dispute Resolution Procedures. Design-Build Contractor shall deliver to INDOT a true and complete copy of the Punch List, and each modification thereto, as soon as it is prepared.

22.2.4 Design-Build Contractor shall immediately commence work on the Punch List items and diligently prosecute such work to completion, consistent with the DBA Documents, within the time period to be set forth in the Project Management Plan.

## **22.3 Early Open to Traffic**

22.3.1 Certain sections of the Project may be opened to traffic when specified in the DBA Documents or when directed by INDOT. Such opening shall not constitute acceptance of the Work or any part thereof or a waiver of any provision of the DBA Documents.

22.3.2 The Project Baseline Schedule shall set forth Design-Build Contractor's plan for completing sections of the Project specified in the DBA Documents and for opening them to traffic.

22.3.3 INDOT may request that Design-Build Contractor expedite certain sections of the Project, and Design-Build Contractor shall accommodate such requests to the extent that it can do so in consideration of safety to the public and construction personnel and without significant disruption to the Project Baseline Schedule or a significant increase in Design-Build Contractor's costs.

22.3.4 If, with respect to certain sections where the DBA Documents do not provide for traffic to be carried through the Work, INDOT orders Design-Build Contractor to open sections of the Project that cannot be accommodated without significant disruption to the Project Baseline Schedule or without a significant increase in Design-Build Contractor's costs, then such direction shall be considered an INDOT-Directed Change; provided; however, that Design-Build Contractor has complied with the Notice and other obligations under Section 13.2 (Invoicing and Payment); provided further, that with respect to such sections, INDOT shall pay Design-Build Contractor (a) any additional cost incurred to complete other items of Work solely because of the changed working conditions, and (b) repair of damage directly attributable to traffic.

22.3.5 Design-Build Contractor shall thereafter perform the remainder of any Work so as to cause the least obstruction to traffic.

## **22.4 Final Acceptance**

### **22.4.1 Conditions to Final Acceptance**

Final Acceptance shall be deemed to have occurred when all of the following have occurred:

- (a) Substantial Completion;
- (b) All Punch List items have been completed to the satisfaction of INDOT;
- (c) Design-Build Contractor has provided INDOT with all Design Documents, final Working Drawings, and Record Drawings of the Work, right of way record maps, surveys, test data and other Submittals required under the DBA Documents in a manner acceptable to INDOT;
- (d) All special tools, equipment, furnishings and supplies purchased or used by Design-Build Contractor as provided in the DBA Documents have been delivered to INDOT and all replacement spare parts, if any, shall have been purchased and delivered to INDOT free and clear of Liens;
- (e) Design-Build Contractor has provided INDOT with an executed sworn Affidavit of Final Acceptance;
- (f) Record Drawings have been delivered and accepted by INDOT pursuant to TP Section 2.3.5 (Final Documents);

- (g) The final schedule has been delivered and approved by INDOT pursuant to TP Section 1.5.2.3 (Final Schedule);
- (h) Design-Build Contractor has certified to INDOT in writing that there are no overdue amounts owing to any Subcontractor or Supplier that remain unpaid, and Design-Build Contractor has resolved all, and there are no outstanding claims; actual, pending, or threatened claims against the Payment Bonds and Performance Bonds, Liens on any materials, supplies, or equipment; or stop notices relating to the Project, including claims by Utility Owners;
- (i) Design-Build Contractor has no reason to believe that any other Person has a valid Claim against Design-Build Contractor, INDOT, or the Project which has not been communicated in writing by Design-Build Contractor to INDOT;
- (j) Design-Build Contractor has paid in full all amounts due and owing to INDOT pursuant to the DBA Documents;
- (k) There is no existing default by Design-Build Contractor under any Utility Agreement, and no event has occurred which, with the passing of time or giving of notice or both, would lead to a Claim relating to the Work or event of default under any Utility Agreement;
- (l) There exists no Design-Build Contractor Default or uncured breaches that with the giving of notice or passage of time, or both, could become Design-Build Contractor Defaults;
- (m) All guarantees, warranties, and the Surety Bonds are in full force and effect; and
- (n) All of Design-Build Contractor's other obligations under the DBA Documents (other than obligations which by their nature are required to be performed after Final Acceptance) shall have been satisfied in full or waived in writing by INDOT.

#### 22.4.2 Affidavit of Final Acceptance

- (a) Promptly after Substantial Completion has occurred, Design-Build Contractor shall perform all Work, if any, that was deferred for purposes of Final Acceptance, and shall satisfy its other obligations under the DBA Documents so as to achieve Final Acceptance. When all of the foregoing have occurred, Design-Build Contractor shall provide an executed sworn "Affidavit of Final Acceptance" to INDOT including the following statement:

*To the best of Design-Build Contractor's knowledge and belief, except for the Notice of Termination not yet obtained, all Work has been completed in strict accordance with the DBA Documents, no lawful debts for labor or materials are outstanding and no federal excise tax has been included in the Contract Price; all requests for*

*funds for undisputed work under the DBA Documents, including changes in the Work, and under all billings of whatsoever nature are accurate, complete and final and no additional compensation over and above the final payment will be requested or is due under the DBA Documents or under any adjustment issued thereunder for said undisputed work; there are no outstanding Claims, claims, Liens or stop payment notices relating to the Project or the Work, including claims by Utility Owners, Governmental Entities, Local Agencies, and other Persons, there is no existing default of the obligations of INDOT under any Utility Agreement that are Design-Build Contractor's responsibility pursuant to the DBA Documents, and no event has occurred which, with the passing of time or giving of notice or both, would lead to a claim relating to the Work or an event of default under any Utility Agreement; and upon receipt of final payment, Design-Build Contractor and Subcontractors acknowledge that INDOT and any and all employees of INDOT and INDOT's authorized representatives will thereby be released, discharged and acquitted from any and all Claims or liability for additional sums on account of undisputed Work performed under the DBA Documents.*

- (b) If Design-Build Contractor is unable to provide the affidavit in the above form as it relates to outstanding Claims, Liens or stop payment notices relating to the Project or the Work, the affidavit shall certify that all such outstanding matters are in an attached list which shall describe the outstanding matters in such detail as may be requested by INDOT. The affidavit shall include a representation of Design-Build Contractor that it is diligently and in good faith contesting all such matters by appropriate legal proceedings and shall provide a status report regarding the same including an estimate of the maximum payable with respect to each such matter. INDOT may condition its acceptance of such affidavit in such form by requiring that Design-Build Contractor post security or take other actions which, in the sole discretion of INDOT, will adequately protect INDOT and the Project against such outstanding matters.

#### **22.4.3 Inspection and Issuance of Certificate of Final Acceptance**

Upon receipt of Notice from Design-Build Contractor that all conditions to Final Acceptance have been met, INDOT will make final inspection and INDOT will either issue a Certificate of Final Acceptance or notify Design-Build Contractor regarding any Work remaining to be performed. If INDOT fails to issue a Certificate of Final Acceptance, Design-Build Contractor shall promptly remedy the defective or uncompleted portions of the Work. Thereafter, Design-Build Contractor shall give INDOT a revised Affidavit of Final Acceptance with a new date based on when the defective or uncompleted portions of the Work were corrected. The foregoing procedure shall apply successively thereafter until INDOT has given Design-Build Contractor an executed Certificate of Final Acceptance.

#### 22.4.4 No Relief from Liability

Final Acceptance will not prevent INDOT from correcting any measurement, estimate, or certificate made before or after completion of the Work, nor shall it prevent INDOT from recovering from Design-Build Contractor, any Guarantor, the Surety(ies), or other provider of performance security or any combination of the foregoing, overpayment sustained for failure of Design-Build Contractor to fulfill the obligations under the DBA Documents. A waiver on the part of INDOT of any breach of Design-Build Contractor shall not be held to be a waiver of any other or subsequent breach. Final Acceptance shall not relieve Design-Build Contractor from any of its continuing or surviving obligations hereunder.

### SECTION 23 DOCUMENTS AND RECORDS

#### 23.1 Escrowed Proposal Documents

Prior to execution of this DBA, Design-Build Contractor has delivered to INDOT one copy of the Escrowed Proposal Documents. Concurrently with submission of quotations or revisions to quotations provided in connection with formally proposed amendments to this DBA and concurrently with approval of each Change Order, if appropriate, one copy of all documentary information used in preparation of the quotation, amendment or Change Order, as applicable, shall be added to a jointly keyed and locked fireproof cabinet to be held with the other EPDs. The EPDs will be held in such cabinet at INDOT headquarters in Indianapolis, Indiana or the INDOT Project field office or otherwise maintained subject to Section 23.1.1 (*Availability for Review*) until all of the following have occurred: (a) 180 days have elapsed from Final Acceptance or termination of the Work, as applicable; (b) all Disputes regarding the DBA Documents have been settled; and (c) Final Payment on this DBA has been made by INDOT and accepted by Design-Build Contractor.

##### 23.1.1 Availability for Review

Upon at least two days' Notice, Design-Build Contractor and INDOT, and their successors and assigns, may jointly examine, through one or more designated representatives all or any part of the EPDs during regular business hours. The Party undertaking an examination need not have or state a specific reason to examine such material. INDOT shall be entitled to review all or any part of the EPDs in order to satisfy themselves regarding the applicability of the individual documents to the matter at issue. INDOT shall be entitled to make and retain copies of such documents as they deem appropriate in connection with any such matters; provided, however, that INDOT has executed and delivered to Design-Build Contractor a confidentiality statement specifying that, to the extent consistent with Governmental Rules, all proprietary information contained in such documents will be kept confidential, that copies of such documents will not be distributed to any third parties other than the attorneys and experts of INDOT, and any mediator or court considering a Dispute or Claim, and that all copies of such documents (other than those delivered to Dispute resolvers) will be either destroyed or returned to the depository (or to Design-Build Contractor if the EPDs have been returned to it) upon final resolution of the negotiations or Disputes or Claims.

##### 23.1.2 Proprietary Information

The EPDs are, and shall always remain, the property of Design-Build Contractor and shall be considered to be in Design-Build Contractor's possession, subject to the right of INDOT to review and use the EPDs as provided in this Section 23 (*Documents and Records*). INDOT acknowledges that Design-Build Contractor may consider that the EPDs constitute trade secrets or proprietary information. This acknowledgment is based upon the representation by Design-Build Contractor that the information contained in the EPDs is not known outside Design-Build Contractor's business, is known only to a limited extent and by a limited number of employees of Design-Build Contractor, is safeguarded while in Design-Build Contractor's possession, and may be valuable to Design-Build Contractor's construction strategies, assumptions and intended means, methods, and techniques of construction. INDOT further acknowledges that, based upon the representation by Design-Build Contractor, Design-Build Contractor expended money in developing the information included in the EPDs and INDOT further acknowledges that, based upon the representation by Design-Build Contractor, it would be difficult for a competitor to replicate the information contained therein. INDOT acknowledges that, based upon the representation by Design-Build Contractor, the EPDs and the information contained therein are being made accessible to INDOT only because it is an express prerequisite to award of this DBA.

### 23.1.3 Representations

Design-Build Contractor represents and warrants that (i) the EPDs were or will be personally examined prior to delivery by an authorized officer of Design-Build Contractor and meet the requirements of Section 23.1.4 (*Contents of EPDs*); (ii) the EPDs constitute all of the information used in the preparation of its Scope Proposal and pricing related to DBA amendments and Change Orders and agrees that no other Scope Proposal, DBA amendment or Change Order preparation information will be considered in resolving Disputes or Claims; (iii) the EPDs provided in connection with quotations, DBA amendments, and Change Orders will be personally examined prior to delivery by an authorized officer of Design-Build Contractor, and that they will meet the requirements of Section 23.1.4 (*Contents of EPDs*); (iv) the information contained in the EPDs is not known outside Design-Build Contractor's business, is known only to a limited extent and by a limited number of employees of Design-Build Contractor, is safeguarded while in Design-Build Contractor's possession, and may be valuable to Design-Build Contractor's construction strategies, assumptions and intended means, methods, and techniques of construction; (v) Design-Build Contractor expended money in developing the information included in the EPDs; and (vi) the EPDs and the information contained therein are being made accessible to INDOT only because it is an express prerequisite to award of this DBA. Design-Build Contractor agrees that the EPDs are not part of the DBA Documents and that nothing in the EPDs shall change or modify the DBA Documents.

### 23.1.4 Contents of EPDs

The EPDs shall, inter alia, clearly detail how the components of the Scope Proposal were determined and shall be in sufficient detail as is adequate to enable a complete understanding and interpretation of how Design-Build Contractor arrived at the Scope Proposal. The EPDs provided in connection with quotations, DBA amendments, and Change Orders shall, inter alia, clearly detail how the total price and individual components of that price were determined. In this regard,



crews, equipment, materials, quantities, and rates of production shall be detailed. Estimates of costs shall be further divided into Design-Build Contractor's usual cost categories such as direct labor, repair labor, equipment ownership, rental and operation, expendable materials, permanent materials, and Subcontract costs as appropriate. Plant and equipment and indirect costs shall also be detailed in Design-Build Contractor's usual format. Design-Build Contractor's allocation of plant and equipment, indirect costs, risk contingencies, markup, and other items to each direct cost item shall be clearly identified. The EPDs shall itemize the estimated costs of the Payment Bond, Performance Bond and the insurance premiums for each coverage required to be provided by Design-Build Contractor under Section 10 (Insurance). The EPDs shall include electronic media data files associated with all assumptions, detailed quantity takeoffs, rates of production and progress calculations, quotes from Subcontractors and Suppliers, quotes for insurance and bond premiums, memoranda, narratives, and all other information used by Design-Build Contractor to arrive at the Scope Proposal or amendment or Change Order. The EPDs shall be submitted in format as is used by Design-Build Contractor to develop its Proposal, Contract Price and, as applicable, Change Order.

#### **23.1.5 Form of EPDs**

Design-Build Contractor shall submit the initial EPDs in such format as is used by Design-Build Contractor in connection with its Proposal.

#### **23.1.6 Review by INDOT; Supplementary Information**

INDOT may, at any time, conduct a review of the EPDs to determine whether they are complete. In the event INDOT determines that any data is missing, Design-Build Contractor shall provide such data within five days after the request, and at that time it will be date stamped, labeled to identify it as supplementary EPD information, and added to the EPDs. Design-Build Contractor shall have no right to add documents to the EPDs except upon INDOT's request. At INDOT's option, which may be exercised at any time, the EPDs associated with any Change Order or DBA amendment shall be reviewed, organized, and indexed, to be jointly undertaken with Design-Build Contractor. INDOT may also participate in such review. The review by INDOT shall assess the completeness and accuracy of the EPDs, and INDOT and Design-Build Contractor shall jointly develop and countersign a detailed index and catalogue of the contents of the EPDs. If, following the review and organization, INDOT determines that the EPDs are incomplete, INDOT may require Design-Build Contractor to supply data to make the EPDs complete.

### **23.2 Subcontractor Pricing Documents**

Design-Build Contractor shall require the principal design Subcontractor (including any joint venture) and each Major Subcontractor to submit to Design-Build Contractor a copy of all documentary information used in determining its Subcontract price (or the price for Subcontract Work included in any Change Order or DBA amendment), immediately prior to executing the Subcontract and each Change Order and Subcontract amendment, to be held in the same manner as the EPDs and which shall be accessible by Design-Build Contractor and its successors and assigns (including INDOT), on terms substantially similar to those contained herein. Each such Subcontract shall include a representation and warranty from the Subcontractor, for the benefit of

Design-Build Contractor and INDOT, stating that its EPDs constitute all the documentary information used in establishing its Subcontract price, and agreeing to provide a sworn certification in favor of Design-Build Contractor and INDOT together with each supplemental set of EPDs, stating that the information contained therein is complete, accurate, and current. Each Subcontract that is not subject to the foregoing requirement shall include a provision requiring the Subcontractor to preserve all documentary information used in establishing its Subcontract price and to provide such documentation to Design-Build Contractor or INDOT in connection with any Third Party Claim made by such Subcontractor.

### **23.3 Financial Reporting Requirements**

23.3.1 Design-Build Contractor shall, for itself and any Guarantor, furnish, or cause to be furnished, to INDOT such information and statements as INDOT may reasonably request from time to time for any purpose related to the Project, the Work or the DBA Documents, including the information required to assist INDOT in the preparation of its financial plan in respect to INDOT's obligations to FHWA, and Design-Build Contractor's financial capacity to perform the Work. Design-Build Contractor shall furnish, or cause to be furnished, such information and statements within 14 days after request by INDOT.

23.3.2 Design-Build Contractor shall cooperate and provide, and shall cause [any Guarantor][**NTD: To be conformed in execution version based on whether Design-Build Contractor is required to have a Guarantor**] and the Subcontractors to cooperate and provide, such information as is necessary or requested by INDOT to assist or facilitate the submission by INDOT of any documentation, reports or analysis required by the FHWA or any other Governmental Entity with jurisdiction over the Project. Design-Build Contractor shall provide such information, or shall cause such information to be provided, on an annual basis until termination of this DBA, unless requested more frequently by INDOT as a result of reporting requirements, or otherwise on a reasonable basis or for cause (and see Section 8.1.6.2.17 (Form of Subcontract) for a non-exhaustive list of requests that shall be deemed reasonable).

23.3.3 All reports and information delivered by Design-Build Contractor under Section 23.3.1 (Financial Reporting Requirements) shall also be delivered electronically, to the extent electronic files exist, and be suitable for posting on the web.

### **23.4 Maintenance of, Access to and Audit of Records**

23.4.1 Except for EPDs (which shall be maintained as set forth in Section 23.1 (Escrowed Proposal Documents)), Design-Build Contractor shall maintain at its Project field office within one mile of the Project in Clark and Scott Counties, Indiana, a complete set of all Books and Records including copies of all original documents delivered to INDOT. Notwithstanding the foregoing, Design-Build Contractor may, for those Books and Records that are maintained and kept in its ordinary course of business at its home office, maintain such books, records and documents in a home office or satellite office located within 75 miles of the INDOT offices in Indianapolis, Indiana. Design-Build Contractor shall keep and maintain such Books and Records in accordance with applicable provisions of the DBA Documents and of the Project Management Plan, and in accordance with Good Industry Practice. Design-Build Contractor shall, upon 48

hours' prior Notice from INDOT (or unannounced and without prior notice where there is good faith suspicion of fraud or other criminal activity), grant to INDOT and its Authorized Representatives and legal counsel and FHWA access to the Books and Records such that INDOT and its Authorized Representatives and legal counsel may review and conduct audits as and when INDOT deems necessary. Furthermore, Design-Build Contractor shall provide such Persons copies of such Books and Records (including all tax returns and supporting documentation filed with any Governmental Entity) upon the request of INDOT and at no cost to INDOT. These rights of audit and inspection by INDOT include the right to make such copies and extracts (at Design-Build Contractor's expense) and to take notes. Where the payment method for any Work is on a time and materials basis, such examination and audit rights shall include all books, records, documents, and other evidence and accounting principles and practices sufficient to reflect properly all direct and indirect costs of whatever nature claimed to have been incurred and anticipated to be incurred for the performance of such Work. If an audit indicates Design-Build Contractor has been overcredited under a previous progress report or progress payment, that overcredit will, at INDOT's sole option, be credited against current progress reports or payments or reimbursed to INDOT by Design-Build Contractor upon demand therefor. For avoidance of doubt, this paragraph shall remain in full force and effect regardless of whether either Party or both Parties have invoked or commenced the Dispute Resolution Procedures herein.

23.4.2 For cost and pricing data submitted in connection with pricing Change Orders or DBA amendments, unless such pricing is based on adequate price competition (as determined by INDOT), established catalog or market prices of commercial items sold in substantial quantities to the public, or prices set by Governmental Rule, INDOT and its representatives, consultants, Authorized Representatives and legal counsel have the right to examine all Books and Records related to the negotiation of or performance of Work under such Change Orders and DBA amendments for the purpose of evaluating the accuracy, completeness, and currency of the cost or pricing data submitted. The right of examination shall extend to all Books and Records deemed necessary by such Persons to permit adequate evaluation of the cost or pricing data submitted, along with the computations and projections used therein.

23.4.3 All Claims or Disputes filed against INDOT shall be subject to audit at any time following the filing of the Claim or Dispute. The audit may be performed by employees, legal counsel, or other representatives of INDOT or by an auditor under contract with INDOT. No Notice is required before commencing any audit before 60 days after the Final Acceptance Date. Thereafter, INDOT shall provide 20 days' Notice to Design-Build Contractor, any Subcontractors or their respective agents before commencing an audit. Design-Build Contractor, Subcontractors or their agents shall provide adequate facilities, acceptable to INDOT, for the audit during normal business hours. Design-Build Contractor, Subcontractors or their agents shall cooperate with the auditors and other representatives of INDOT. Failure of Design-Build Contractor, Subcontractors or their agents to maintain and retain sufficient records to allow the auditors/representatives of INDOT to verify all or a portion of the Claim or Dispute or to permit the auditors/representatives access to the Books and Records of Design-Build Contractor, Subcontractors or their agents shall constitute a waiver of the Claim or Dispute and shall bar any recovery thereunder.

23.4.4 Full compliance by Design-Build Contractor with the provisions of this Section 23.4 (Maintenance of, Access to and Audit of Records) is a contractual condition precedent to Design-Build Contractor's right to seek relief under Section 21 (Partnering and Dispute Resolution).

23.4.5 Any rights of FHWA, Inspectors General, and the U.S. Comptroller General to review and audit Design-Build Contractor, its Subcontractors, and their respective Books and Records are set forth in Exhibit 11 (Federal Requirements).

23.4.6 Design-Build Contractor represents and warrants the completeness and accuracy of all information it or its agents provide in connection with the audits identified herein, and shall cause all Subcontractors to warrant the completeness and accuracy of all information such Subcontractors or their agents provide in connection with this Section 23.4 (Maintenance of, Access to and Audit of Records).

23.4.7 Design-Build Contractor's internal quality and compliance auditing responsibilities shall be set forth in the Project Management Plan, shall be consistent with the requirements set forth in TP Section 1.5.3 (Project Management Plan).

## **23.5 Retention of Records**

Design-Build Contractor shall maintain all Books and Records relating to the Work and the Project (including copies of all original documents delivered to INDOT) in Marion County, Indiana, until five years after the Final Acceptance Date or the termination of this DBA, whichever is applicable. Design-Build Contractor shall provide to INDOT Notice of where such Books and Records are kept. Notwithstanding the foregoing, all Books and Records which relate to Claims being processed or Disputes brought under the Dispute Resolution Procedures shall be retained and made available until such Disputes and Claims have been finally resolved. Books and Records to be retained include all books, electronic information, and files and other evidence bearing on Design-Build Contractor's costs under the DBA Documents. Design-Build Contractor shall make these Books and Records available for audit and inspection to INDOT, at Design-Build Contractor's offices in Clark or Scott Counties, Indiana, at all reasonable times, without charge, and shall allow INDOT to make copies of such Books and Records (at no expense to Design-Build Contractor). If approved by INDOT, photographs, microphotographs or other authentic reproductions may be maintained instead of original Books and Records.

## **23.6 Public Records Act**

23.6.1 Design-Build Contractor acknowledges and agrees that all Submittals, records, documents, drawings, plans, specifications and other materials in the possession of INDOT, including materials submitted by Design-Build Contractor to INDOT, are subject to the provisions of the Public Records Act. If Design-Build Contractor believes information or materials submitted to INDOT constitute trade secrets or are otherwise exempt from disclosure under the Public Records Act pursuant to IC § 5-14-3, Design-Build Contractor shall be solely responsible for specifically and conspicuously designating that information by placing "CONFIDENTIAL" in the center header of each such document or page affected, as it determines to be appropriate. Any

specific trade secret or other basis for exemption shall be clearly identified as such, and shall be accompanied by a concise statement of reasons supporting the Claim including the specific Governmental Rules that exempts the material from disclosure under the Public Records Act. Nothing contained in this Section 23.6.2 (*Public Records Act*) shall modify or amend requirements and obligations imposed on INDOT by the Public Records Act or other applicable Governmental Rules, and the provisions of the Public Records Act or other Governmental Rules shall control in the event of a conflict between the procedures described above and the applicable Governmental Rules. Design-Build Contractor is advised to contact legal counsel concerning such Governmental Rules and its application to Design-Build Contractor.

23.6.2 If INDOT receives a request for public disclosure of materials marked “CONFIDENTIAL,” INDOT will use reasonable efforts to notify Design-Build Contractor of the request and give Design-Build Contractor an opportunity to assert, in writing and at its sole expense, a claimed exception under the Public Records Act or other applicable Governmental Rules within the time period specified in the Notice issued by INDOT and allowed under the Public Records Act. Under no circumstances, however, will INDOT be responsible or liable to Design-Build Contractor or any other Person for the disclosure of any such labeled materials, whether the disclosure is required by Governmental Rules, or court order, or occurs through inadvertence, mistake or negligence on the part of INDOT or its officers, employees, contractors or consultants.

23.6.3 In the event of any proceeding or litigation concerning the disclosure of any material submitted by Design-Build Contractor to INDOT, the sole involvement of INDOT will be as stakeholders retaining the material until otherwise ordered by a court or such other authority having jurisdiction with respect thereto, and Design-Build Contractor shall be fully responsible for otherwise prosecuting or defending any action concerning the materials at its sole cost and risk; provided, however, that INDOT reserve the right, in its sole discretion, to intervene or participate in the litigation in such manner as they deem necessary or desirable. Design-Build Contractor shall pay and reimburse INDOT within 30 days after receipt of written demand from INDOT and reasonable supporting documentation for all costs and fees, including attorneys’ fees and costs, INDOT incurs in connection with any litigation, proceeding or request for disclosure.

## **23.7 Ownership of Documents**

Subject to Section 23.8 (*Intellectual Property*), all data, sketches, charts, calculations, plans, specifications, electronic files, correspondence, reports, analyses, studies, and other documents and materials created or collected under the terms of the DBA Documents shall be considered “works made for hire” for which INDOT own the copyright. Design Documents shall become property of INDOT upon preparation; Construction Documents shall become property of INDOT upon delivery to INDOT; and other documents prepared or obtained by Design-Build Contractor in connection with the performance of its obligations under the DBA Documents, including studies, manuals, Record Drawings, technical, and other reports and the like, shall become the property of INDOT upon Design-Build Contractor’s preparation or receipt thereof. Copies of all Design Documents and Construction Documents shall be furnished to INDOT upon preparation or receipt thereof by Design-Build Contractor. Design-Build Contractor shall maintain all other documents described in this Section 23.7 (*Ownership of Documents*) in accordance with the

requirements of Section 23.4 (*Maintenance of, Access to and Audit of Records*) and shall deliver copies to INDOT, at no cost to INDOT, as required by the DBA Documents or upon request if not otherwise required to be delivered, with an indexed set delivered to INDOT as a condition to Final Acceptance.

## **23.8 Intellectual Property**

23.8.1 All Proprietary Intellectual Property shall remain exclusively the property of Design-Build Contractor or its Affiliates or Subcontractors that supply the same, notwithstanding any delivery of copies thereof to INDOT.

23.8.2 INDOT shall have and is hereby granted a nonexclusive, transferable, irrevocable, royalty-free, fully paid up right and license to use, reproduce, modify, adapt, and disclose, and sublicense others to use, reproduce, modify, adapt, and disclose, the Proprietary Intellectual Property of Design-Build Contractor, including with respect to Source Code and Source Code Documentation, solely in connection with the Project and any interstate or state highway, tolled or not tolled, owned and operated by INDOT or a State or regional Governmental Entity; provided that INDOT shall have the right to exercise such license only at the following times:

- (a) From and after the expiration or earlier termination of this DBA for any reason whatsoever;
- (b) During any time that a receiver is appointed for Design-Build Contractor, or during any time that there is pending a voluntarily or involuntary proceeding in bankruptcy in which Design-Build Contractor is the debtor, in which case INDOT may exercise such license only in connection with the Project; and
- (c) During any time that Design-Build Contractor has been replaced.

23.8.3 Subject to the license and rights granted to INDOT pursuant to Section 23.8.2 (*Intellectual Property*), INDOT shall not at any time sell any Proprietary Intellectual Property of Design-Build Contractor or use, reproduce, modify, adapt, and disclose, or allow any party to use, reproduce, modify, adapt, and disclose, any such Proprietary Intellectual Property for any other purpose.

23.8.4 The right to transfer the license is limited to any Governmental Entity(ies) that succeeds to the power and authority of INDOT generally or with respect to the Project.

23.8.5 The right to sublicense is limited to State or regional Governmental Entities that own or operate an interstate or state highway or other road, tolled or not tolled, and to the lessees, operators, contractors, subcontractors, employees, attorneys, consultants and agents that are retained by or on behalf of INDOT or any such State or regional Governmental Entity in connection with the Project or an interstate or another state highway or other road, tolled or non-tolled. All such sublicenses shall be subject to Section 23.8.6 (*Intellectual Property*).

23.8.6 Subject to Section 23.6 (*Public Records Act*), INDOT shall:

- (a) Not disclose any Proprietary Intellectual Property of Design-Build Contractor to any Person other than authorized transferees and sublicensees who agree to be bound by any confidentiality obligations of INDOT relating thereto;
- (b) Include, or where applicable require such State or regional Governmental Entity to include, in the contract with the sublicensee its covenant to employ sound business practices no less diligent than those used for its own confidential information, and no less diligent than required by commercially reasonable standards of confidentiality, to protect all Proprietary Intellectual Property of Design-Build Contractor and other materials provided under the sublicense against disclosure to third parties not in receipt of a sublicense, and to use the sublicense only for the permitted purposes.

23.8.7 Notwithstanding any contrary provision of this DBA, in no event shall INDOT or any of its directors, officers, employees, consultants or agents be liable to Design-Build Contractor, any Affiliate or any Subcontractor for any Losses, including loss of profit, arising out of or relating to breach of the duty of confidentiality set forth in Section 23.8.6 (*Intellectual Property*) if such breach is not the result of gross negligence or intentional misconduct. Design-Build Contractor hereby irrevocably waives all Claims to any such Losses.

23.8.8 Design-Build Contractor shall continue to have a full and complete right to use any and all duplicates or other originals of its Proprietary Intellectual Property in any manner it chooses.

23.8.9 With respect to any Proprietary Intellectual Property, owned by a Person other than Design-Build Contractor, including any Affiliate, and other than INDOT or a Governmental Entity acting as a Subcontractor, Design-Build Contractor shall obtain from such owner, concurrently with the execution of any contract, Subcontract or purchase order with such owner or with the first use or adaptation of the Proprietary Intellectual Property in connection with the Project, both for Design-Build Contractor and INDOT, nonexclusive, transferable, irrevocable, fully paid up licenses to use, reproduce, modify, adapt, and disclose such Proprietary Intellectual Property solely in connection with the Project and any state highway, tolled or not tolled, owned and operated by INDOT or a State or regional Governmental Entity, of at least identical scope, purpose, duration and applicability as the license granted under Section 23.8.2 (*Intellectual Property*). The foregoing requirement shall not apply, however, to mass-marketed software products (sometimes referred to as “shrink wrap software”) owned by such a Person where such a license cannot be extended to INDOT using commercially reasonable efforts. The limitations on sale, transfer, sublicensing, and disclosure by INDOT set forth in Section 23.8.3 (*Intellectual Property*) through Section 23.8.6 (*Intellectual Property*) shall also apply to licenses of INDOT in such Proprietary Intellectual Property.

## SECTION 24 VALUE ENGINEERING

### 24.1 General

This Section 24 (*Value Engineering*) sets forth the requirements applicable to preparation, review, and approval of value engineering recommendations (“Value Engineering Change Proposals” or “VECPs”) for the purpose of enabling Design-Build Contractor and INDOT to take advantage of potential cost savings or provide potential improvements to the Work through changes in the requirements relating to the Work. Design-Build Contractor is encouraged to submit VECPs whenever it identifies potential savings or improvements for the Project. INDOT may also request Design-Build Contractor to develop and submit a specific VECP (“INDOT-Initiated VECP”). Design-Build Contractor shall have the right to refuse to consider such INDOT-Initiated VECP; provided, however, that nothing herein is intended to alter the right of INDOT to issue INDOT-Directed Changes in accordance with Section 14 (*Changes in the Work*).

### 24.2 Value Engineering Recommendation

A VECP is a proposal developed and documented by Design-Build Contractor which:

- (a) Would modify or require a change in any of the commitments, requirements of or constraints set forth in the DBA Documents in order to be implemented; and
- (b) Reduces the Project cost without impairing essential functions or characteristics of the Project (including the meeting of requirements contained in all Governmental Approvals) including service life, economy of operation, ease of maintenance, desirability, and safety, and provided that it is not based solely upon a change in quantities, performance or reliability or a relaxation of the requirements contained in the DBA Documents.

### 24.3 Information to be Provided

24.3.1 At a minimum, the following information shall be submitted by Design-Build Contractor with each VECP:

- (a) A statement that the submission is a VECP, and a narrative description of the proposed change;
- (b) Description of the existing requirements of the DBA Documents which are involved in the proposed change;
- (c) Description of the proposed change;
- (d) Discussion of differences between existing requirements in the DBA Documents and the proposed change, together with advantages and disadvantages of each changed item;



- (e) Itemization of the requirements of the DBA Documents which must be changed if the VECP is approved (e.g., document sections, drawing numbers, and specifications);
- (f) A complete cost analysis including: (i) Design-Build Contractor's cost estimate for performing the subject Work in accordance with the DBA Documents compared to Design-Build Contractor's cost estimate for performing the subject Work in accordance with the proposed changes, (ii) an estimate of additional costs that will be incurred by INDOT, including estimated impact on future maintenance costs; and (iii) costs of development and implementation of the VECP by Design-Build Contractor. The cost of any additional Governmental Approvals, rights of way or easements and other costs or impacts to the Project, shall be included in the cost analysis;
- (g) Justification for changes in function or characteristics of each item, and the effect of the change on the performance of the end item, as well as on the meeting of requirements contained in the DBA Documents, including environmental compliance and requirements contained in Governmental Approvals;
- (h) If available, a description of any previous use or tests of the VECP and the conditions and results; and
- (i) Date or time by which a Change Order adopting the VECP must be issued in order to obtain the maximum cost reduction, noting any effect on the Project Baseline Schedule.

24.3.2 Any additional information requested by INDOT shall be provided in a timely manner. Additional information could include results of field investigations and surveys, design computations, and field change sheets.

#### **24.4 Review of VECPs**

Design-Build Contractor shall submit VECPs directly to INDOT. Each VECP shall be prepared in a form acceptable to INDOT and shall meet all applicable requirements of this Section 24 (*Value Engineering*). INDOT, in its sole discretion, will determine whether a VECP qualifies for consideration and evaluation. VECPs that require excessive time or costs for review, evaluation or investigations, or that are not consistent with INDOT's design policies and basic design criteria may be rejected without evaluation. Design-Build Contractor shall have no Claim for any additional costs or delays resulting from the rejection of a VECP initiated by Design-Build Contractor, including VECP development costs, loss of anticipated profits or increased material or labor costs. INDOT will consider only proven features that have been employed under similar conditions or projects acceptable to INDOT. INDOT shall not be liable for any delay in acting upon any proposal submitted pursuant to this Section 24 (*Value Engineering*). Design-Build Contractor may withdraw all or part of any VECP at any time prior to approval by INDOT. Subject to Section 24.6 (*Contract Price Adjustment*), in all other situations each Party shall bear its own costs in connection with preparation and review of VECPs.

## 24.5 Approval of VECPs

24.5.1 INDOT may approve, in its sole discretion, in whole or in part, by Change Order, any VECP submitted. Designs for approved VECPs shall be prepared by Design-Build Contractor for incorporation into the Design Documents. Until a Change Order is issued based on a VECP, Design-Build Contractor shall remain obligated to perform in accordance with the Released for Construction Documents and other DBA Documents. INDOT shall have sole discretion to reject or approve of any VECP.

24.5.2 The following provisions shall apply to any Dispute between INDOT and Design-Build Contractor regarding Design-Build Contractor's performance of Work that INDOT believes should have properly been submitted as a VECP. Design-Build Contractor agrees that, within 30 days following a request from INDOT for a VECP with regard to any such Work, Design-Build Contractor shall deliver a VECP to INDOT meeting all of the requirements of this Section 24 (*Value Engineering*), but may specify that the VECP is delivered under protest. In such case, either Party shall have the right to submit the question of Design-Build Contractor's entitlement to proceed without an approved VECP to Dispute resolution pursuant to Section 21 (*Partnering and Dispute Resolution*). If a determination is ultimately made that Design-Build Contractor is not entitled to proceed without an approved VECP, INDOT shall be entitled to a credit against the Contract Price as provided in Section 24.6 (*Contract Price Adjustment*). If a determination is ultimately made that Design-Build Contractor is entitled to proceed without an approved VECP, the VECP shall be deemed withdrawn and have no effect. If Design-Build Contractor fails to deliver a complete VECP within the foregoing deadline, INDOT shall have the right to submit the issue to Dispute resolution pursuant to Section 21 (*Partnering and Dispute Resolution*) at any time. In such event, if the Dispute proceeding under the Dispute Resolution Procedures ultimately results in a determination that Design-Build Contractor was not entitled to perform such Work without a prior approved VECP, INDOT shall be entitled to receive a credit against the Contract Price equal to 100% of Design-Build Contractor's cost savings, plus profit, rather than 50% of estimated net savings as provided in Section 24.6 (*Contract Price Adjustment*).

24.5.3 Unless Design-Build Contractor has received specific written permission from INDOT to proceed with VECP work pending approval of a VECP, Design-Build Contractor shall not have the right to proceed with such work until the VECP is approved. Furthermore, if Design-Build Contractor proceeds with any work that might have been the basis for a VECP price increase based on savings in INDOT's right of way costs, without first submitting a VECP, Design-Build Contractor shall be deemed to have performed such work as a volunteer and shall not have the right to later submit a VECP hereunder.

## 24.6 Contract Price Adjustment

If INDOT accepts a VECP submitted by Design-Build Contractor pursuant to this Section 24 (*Value Engineering*), the Contract Price shall be adjusted in accordance with the following:

24.6.1 The term "estimated net savings" as used herein shall mean (a) the difference between the cost of performing the Work according to the DBA Documents and the actual cost to perform it according to the proposed change, less (b) the reasonable costs of studying and preparing

the VECP as proven by Design-Build Contractor and approved by INDOT in accordance with the Change Order procedures set forth herein, less (c) any additional costs incurred or to be incurred by INDOT resulting from the VECP, including the cost of review by INDOT of the VECP and implementation and maintenance costs associated therewith. Design-Build Contractor's profit shall not be considered part of the cost.

24.6.2 Except as specified in Section 24.6.4 (Contract Price Adjustment), Design-Build Contractor is not entitled to share in either collateral or future contract savings. The term "collateral savings" means additional revenues that may arise as a result of the VECP and those measurable net reductions in costs of INDOT resulting from the VECP, including operations and maintenance costs and cost of INDOT-furnished property. The term "future DBA savings" shall mean reductions in the cost of performance of future construction contracts for essentially the same item resulting from a VECP submitted by Design-Build Contractor.

24.6.3 Subject to Section 24.6.4 (Contract Price Adjustment) and Section 24.6.5 (Contract Price Adjustment), the Contract Price shall be reduced by an amount equal to the sum of (a) 100% of any additional costs incurred by INDOT resulting from the VECP plus (b) 50% of estimated net savings; provided, however, that Design-Build Contractor's profit shall not be reduced by application of the VECP.

24.6.4 In a case where Design-Build Contractor proposes that an adjustment be made to the planned acquisition of real property in order to result in an overall cost savings to the Project (such as a proposal that additional real property be purchased outside of the Planned ROW Limits in order to save on construction costs, or a proposal which would enable a reduction in the real property required to be obtained by INDOT hereunder by incurring additional construction costs), the VECP shall compare (a) the incremental reduction in costs (such as for not designing and building a wall), and (b) the costs involved in adjusting the real property limits or Environmental Approvals (which shall be based on Design-Build Contractor's additional costs, such as for providing real property acquisition support services (including profit) plus additional costs of INDOT, including costs of personnel as well as out-of-pocket costs such as the price of the additional real property), or (as appropriate) shall compare (i) the incremental reduction in costs (if any) for not acquiring the unnecessary real property, and (ii) the additional construction costs to be incurred. The estimated net savings shall be shared 50-50 between INDOT and Design-Build Contractor. Reimbursements for Utility Adjustment expenses owed to Utility Owners shall be addressed in calculating estimated net savings to be shared between INDOT and Design-Build Contractor. Design-Build Contractor shall include in its VECP an analysis of any impacts on Utility Owners for consideration by INDOT. If Design-Build Contractor wishes to propose such a VECP, Design-Build Contractor shall provide a separate notification to INDOT describing the proposed impact concurrently with delivery of the VECP to INDOT.

24.6.5 Design-Build Contractor's share of any VECP cost savings shall be payable at such time as payments would have been made for the Work which is the subject of the VECP had the VECP not been implemented.

24.6.6 A VECP shall not be required for any Deviations from Project Standards allowed by INDOT, except for changes based on concepts submitted by other proposers, or changes that also entail a modification of commitments contained in the Proposal or requirements of or constraints set forth in the DBA Documents.

#### **24.7 Use of VECs by INDOT**

All approved or disapproved VECs will become the property of INDOT, and shall contain no restrictions imposed by Design-Build Contractor on their use or disclosure, except as permitted in Section 24.8 (Public Records Act Exclusion). Notwithstanding any restrictions pursuant to Section 24.8 (Public Records Act Exclusion), INDOT retains the right to use, duplicate, and disclose in whole or in part any data necessary for the utilization of the VECP on any other or subsequent projects without any obligation to Design-Build Contractor. This provision is not intended to deny rights provided by law with respect to patented materials or processes.

#### **24.8 Public Records Act Exclusion**

If Design-Build Contractor proposes any VECP that incorporates Intellectual Property or other proprietary information developed prior to award of the DBA, or developed by Design-Build Contractor after award of this DBA (provided that Design-Build Contractor establishes to the satisfaction of INDOT that it was developed apart from, and in isolation from, this DBA), Design-Build Contractor may identify such data and information included in the VECP as “Confidential,” in which event the provisions of Section 23.6 (Public Records Act) shall be applicable.

### **SECTION 25 COOPERATION AND COORDINATION WITH OTHER CONTRACTORS AND ADJACENT PROPERTY OWNERS**

#### **25.1 Cooperation with Other Contractors**

25.1.1 Design-Build Contractor acknowledges and agrees that:

- (a) INDOT Contractors might be working at, near or otherwise be present on or near the Site during performance of the Work;
- (b) The work of INDOT Contractors might interfere with Design-Build Contractor’s use of certain facilities on or near the Site;
- (c) DB-Related Entities, including Design-Build Contractor, shall fully cooperate and be solely responsible for coordinating the Work with (i) all INDOT Contractors, and (ii) Local Agencies, Utility Owners, and their respective contractors and shall schedule and sequence the Work as reasonably necessary to accommodate the work and projects of all of the foregoing entities; and
- (d) INDOT reserves the right to contract for and perform other or additional work on or near the Site.

25.1.2 In addition to contracts with INDOT Contractors, if additional, separate contracts are awarded, or separate projects are performed by INDOT, Local Agencies, or Utility Owners that affect the Work, Design-Build Contractor shall conduct its Work without interfering with or hindering the progress or completion of the work being performed by, or on behalf of, such Persons.

## **25.2 Interference by Other Contractors**

25.2.1 If Design-Build Contractor asserts that any INDOT Contractor, Governmental Entity (other than INDOT), any Utility Owner, Local Agencies, or any of their respective contractors have caused damage to the Work, or have hindered or interfered with the progress or completion of the Work, then Design-Build Contractor's sole remedy shall be to seek recourse against such Person(s).

25.2.2 In no event shall Design-Build Contractor have any Claim or other right to compensation, time extension or other relief against INDOT for (i) the actions or omissions of any INDOT Contractor; or (ii) work performed by INDOT, any INDOT Contractor, any other Governmental Entity, Utility Owner or Local Agency, except as expressly provided otherwise in this DBA.

## **25.3 Coordination with Utility Owners and Adjacent Property Owners**

Design-Build Contractor shall coordinate with Utility Owners and owners of property adjacent to the Project, and with their respective contractors, as more particularly described in the DBA Documents.

# **SECTION 26 MISCELLANEOUS PROVISIONS**

## **26.1 Amendments**

The DBA Documents may be amended only by a written instrument duly executed by the Parties or their respective successors or assigns, except to the extent expressly provided otherwise in this DBA.

## **26.2 Waiver**

26.2.1 No waiver of any term, covenant or condition of the DBA Documents shall be valid unless in writing and signed by the obligee Party.

26.2.2 The exercise by a Party of any right or remedy provided under the DBA Documents shall not waive or preclude any other or further exercise thereof or the exercise of any other right or remedy. No waiver by any Party of any right or remedy under the DBA Documents shall be deemed to be a waiver of any other or subsequent right or remedy under the DBA Documents. The consent by one Party to any act by the other Party requiring such consent shall not create a course of conduct or be deemed to render unnecessary the obtaining of consent to any

subsequent act for which consent is required, regardless of whether similar to the act for which consent is given.

26.2.3 Except as provided otherwise in the DBA Documents, no act, delay or omission done, suffered or permitted by one Party or its agents shall be deemed to create a course of conduct or waive, exhaust or impair any right, remedy or power of such Party hereunder, or to relieve the other Party from the full performance of its obligations under the DBA Documents.

26.2.4 Either Party's waiver of any breach or failure to enforce any of the terms, covenants, conditions or other provisions of the DBA Documents at any time shall not in any way create a course of conduct or limit or waive that Party's right thereafter to enforce or compel strict compliance with every term, covenant, condition or other provision, any course of dealing or custom of the trade notwithstanding. Furthermore, if the Parties make and implement any interpretation of the DBA Documents without documenting such interpretation by an instrument in writing signed by both Parties, such interpretation and implementation thereof will not be binding in the event of any future Disputes.

26.2.5 Neither the review, approval or acceptance of, nor payment for, the services required under this DBA or the other DBA Documents by INDOT shall be construed to operate as a waiver of any rights under this DBA or any of the other DBA Documents or for any cause of action arising out of the performance of this DBA or the other DBA Documents, and Design-Build Contractor shall be and remain liable to INDOT in accordance with applicable Governmental Rules for all Losses suffered by INDOT as set forth in the DBA Documents.

### **26.3 Independent Contractor**

Design-Build Contractor is an independent contractor, and nothing contained in the DBA Documents shall be construed as constituting any relationship with INDOT other than that of Project owner and independent contractor. In no event shall the relationship between INDOT and Design-Build Contractor be construed as creating any relationship whatsoever between INDOT or the State and any employees or applicants for employment of Design-Build Contractor or any other DB-Related Entity. Neither Design-Build Contractor nor any of the employees (or applicants) of Design-Build Contractor or any other DB-Related Entity is or shall be deemed to be an employee of INDOT or the State. Except as otherwise specified in the DBA Documents, Design-Build Contractor has sole authority and responsibility to employ, discharge, and otherwise control its employees and has complete and sole responsibility as a principal for its agents, for all Subcontractors, and for all other Persons that Design-Build Contractor or any Subcontractor hires to perform or assist in performing the Work.

### **26.4 Successors and Assigns**

26.4.1 The DBA Documents shall be binding upon and inure to the benefit of INDOT and Design-Build Contractor and each of their permitted successors, assigns and legal representatives.

26.4.2 INDOT may assign all or part of its right, title, and interest in and to any DBA Documents and performance security, including rights with respect to the Payment Bonds and Performance Bonds[, and the Guaranty, ]**[NTD: To be conformed in execution version based on whether Design-Build Contractor is required to have a Guarantor.]** to any other Person.

26.4.3 Design-Build Contractor shall not voluntarily or involuntarily sell, assign, convey, transfer, pledge, mortgage or otherwise encumber Design-Build Contractor's interest in and to the DBA Documents or any portion thereof without the prior written approval of INDOT, except to any entity in which the organizations signing this DBA for Design-Build Contractor, or the shareholder(s), general partner(s) or member(s) that exercise management control over such organizations, hold and exercise effective management control and hold the same percentage of equity interest in Design-Build Contractor that exists as of the Proposal Date. Design-Build Contractor shall not sublease or grant any other special occupancy or use of the Project to any other Person, without the prior written approval of INDOT. Any sale, assignment, conveyance, transfer, pledge, mortgage, encumbrance, sublease or grant of other special occupancy or use in violation of this provision shall be null and void ab initio and INDOT, at its option, may declare any such attempted action to be a material Design-Build Contractor Default.

26.4.4 Design-Build Contractor shall not voluntarily or involuntarily cause or permit any Change of Control prior to Final Acceptance without the prior written approval of INDOT. If there occurs any voluntary or involuntary Change of Control without prior written approval, INDOT may declare it to be a material Design-Build Contractor Default.

26.4.5 Where the prior written approval of INDOT is required for a proposed sale, assignment, conveyance, transfer, pledge, mortgage, encumbrance, sublease or grant of other special occupancy or use, or for any proposed Change of Control prior to Final Acceptance, INDOT may withhold or condition its approval in its sole discretion. Any such decision of INDOT to withhold consent shall be final, binding and not subject to the Dispute Resolution Procedures. If for any reason INDOT does not act within 30 days after receiving all required information, or any extension thereof by mutual agreement of the Parties, the proposed sale, assignment, conveyance, transfer, pledge, mortgage, encumbrance, sublease or grant of other special occupancy or use, or for any proposed Change of Control shall not be permitted.

26.4.6 Assignments and transfers of Design-Build Contractor's interest permitted under this Section 26.4 (*Successors and Assigns*) or otherwise approved in writing by INDOT shall be effective only upon receipt by INDOT of Notice of the assignment or transfer and a written recordable instrument executed by the transferee (and any Guarantor and any Surety), in form and substance acceptable to INDOT, in which the transferee, without condition or reservation, assumes all of Design-Build Contractor's obligations, duties, and liabilities under this DBA and the other DBA Documents then in effect and agrees to perform and observe all provisions thereof applicable to Design-Build Contractor. Each transferee shall take Design-Build Contractor's interest subject to, and shall be bound by, the Project Management Plan, the Major Subcontracts, the Utility Agreements, all INDOT-Provided Approvals, the Governmental Approvals, the Other Approvals, and all agreements between the transferor and Governmental Entities with jurisdiction over the

Project or the Work, except to the extent otherwise approved by INDOT in writing, in its sole discretion.

26.4.7 No assignment, conveyance, transfer, pledge, mortgage, encumbrance, sublease or grant by Design-Build Contractor or any permitted successor and assign thereto shall release Design-Build Contractor, any Guarantor, any Surety or the assignor from any liabilities or obligations under the DBA Documents and each of such entities shall remain liable and obligated therefor.

26.4.8 Design-Build Contractor shall not change the legal form of its organization without the prior written approval of INDOT, which consent may be granted or withheld in the sole discretion of INDOT.

26.4.9 Any permitted assignment of Design-Build Contractor's interest shall not take effect until replacement Bonds and Guaranties are provided without lapse in coverage. This requirement may be met if the Surety/ies and Guarantor(s) amend existing Bonds and Guarantees to name Design-Build Contractor's assignee as the Principal (under the Bonds) and "Design-Build Contractor" (under the Guarantees).

## **26.5 Designation of Representatives; Cooperation with Representatives**

26.5.1 INDOT and Design-Build Contractor shall each designate an individual or individuals who shall be authorized to make decisions and bind the Parties on matters relating to the DBA Documents ("Authorized Representatives"). Exhibit 6 (*Designation of Initial Authorized Representatives*) hereto provides the initial Authorized Representative designations. Such designations may be changed by a subsequent writing delivered to the other Party in accordance with Section 26.11 (*Notices and Communications*). The Parties may also designate technical representatives who shall be authorized to investigate and report on matters relating to the construction of the Project and negotiate on behalf of each of the Parties but who do not have authority to bind INDOT or Design-Build Contractor.

26.5.2 Design-Build Contractor shall cooperate with INDOT and all representatives of INDOT designated as described above.

## **26.6 Term**

Except for such provisions that survive the expiration or termination of this DBA, including the indemnity obligations under Section 20 (*Indemnification*), and INDOT' benefits, rights and remedies under applicable law and in equity this DBA shall be effective as of the Effective Date and shall terminate on the expiry of the Warranty Period, or, if this DBA is terminated prior, upon such earlier termination.

## **26.7 Survival**

Design-Build Contractor's representations and warranties, the Dispute Resolution Procedures, the indemnifications and releases contained in Section 20 (*Indemnification*) and elsewhere in the DBA



Documents, the express rights and obligations of the Parties following termination of this DBA under Section 17 (Termination for Convenience) and Section 18 (Default), the provisions regarding invoicing and payment under Section 13 (Payment for Services), the obligations regarding Application for Final Payment under Section 13.4 (Final Payment), Section 17.10.3 (No Waiver; Release; Preservation of Claims), and all other provisions which by their express terms or their inherent character should survive termination of this DBA or Final Acceptance, shall survive the termination of this DBA and the Final Acceptance Date.

## **26.8 INDOT as Third-Party Beneficiary Limitation on Other Third-Party Beneficiaries**

26.8.1 INDOT is an intended third-party beneficiaries to this DBA and the Indemnified Parties are intended third-party beneficiaries of the indemnity and insurance provisions of this DBA.

26.8.2 Except as set forth in Section 26.8.1 (INDOT as Third-Party Beneficiary on Other Third-Party Beneficiaries), it is not intended by any of the provisions of the DBA Documents to create any third-party beneficiary hereunder or to authorize anyone not a Party hereto to maintain a suit for personal injury or property damage pursuant to the terms or provisions hereof, except to the extent that specific provisions (such as the warranty and indemnity provisions) identify third parties and state that they are entitled to benefits hereunder. Except as otherwise provided in Section 26.8.1 (INDOT as Third-Party Beneficiary on Other Third-Party Beneficiaries) and this Section 26.8.2 (INDOT as Third-Party Beneficiary on Other Third-Party Beneficiaries), the duties, obligations and responsibilities of the Parties to the DBA Documents with respect to third parties shall remain as imposed by Governmental Rules. The DBA Documents shall not be construed to create a contractual relationship of any kind between INDOT and a Subcontractor or any Person other than Design-Build Contractor.

26.8.3 The statute of limitations for any cause of action under this Section 26.8 (INDOT as Third-Party Beneficiary on Other Third-Party Beneficiaries) shall not begin to run until the Substantial Completion Date, or such other date as may be provided by law, whichever is later.

## **26.9 Personal Liability of Employees of INDOT and DB Contractor Employees**

26.9.1 The Authorized Representatives of INDOT are acting solely as agents and representatives of INDOT when carrying out the provisions of or exercising the power or authority granted to them under this DBA. They shall not be liable either personally or as employees of INDOT for actions in their ordinary course of employment.

26.9.2 No agent, consultant, officer or authorized employee of INDOT shall be personally responsible for any liability arising under this DBA.

26.9.3 No agent, officer or authorized employee of Design-Build Contractor shall be personally responsible for any liability arising under this DBA.

## 26.10 Governing Law; Venue; Forum

The DBA Documents shall be governed by and construed in accordance with the laws of the State, without regard to conflict of law principles or provisions. Any suit must be brought in the Indiana Commercial Court in Marion County, Indiana, and the Dispute Resolution Procedures of Section 21.2 (*Dispute Resolution Procedures*) shall apply. Design-Build Contractor hereby specifically consents to this jurisdiction.

## 26.11 Notices and Communications

26.11.1 Notices under the DBA Documents shall be in writing and (a) delivered personally, (b) sent by certified mail, return receipt requested, (c) sent by a recognized overnight mail or courier service, with delivery receipt requested, or (d) email communication followed by a hard copy and with receipt confirmed by telephone, to the following addresses (or to such other address as may from time to time be specified in writing by such Person):

26.11.2 All Notices to Design-Build Contractor shall be sent to Design-Build Contractor's Authorized Representative or as otherwise directed by Design-Build Contractor's Authorized Representative. The address for such communications shall be:

**[Insert name of Design-Build Contractor]**

**[Insert contact information]**

Attention:

Phone:

Facsimile:

E-mail address:

26.11.3 All Notices to INDOT or to INDOT shall be marked as regarding the Project and shall be delivered to the following address or as otherwise directed by the Authorized Representative(s) of INDOT:

Indiana Department of Transportation

100 North Senate, Suite [TBD]

Indianapolis, Indiana 46204

Attention: [TBD]

Telephone: [TBD]

E-mail: [TBD][NTD: **insert contact info**]

Indiana Department of Transportation

100 North Senate, Suite N601

Indianapolis, Indiana 46204

Attention: Kevin Jasinski, Major Projects Delivery Director

Telephone: 317-233-8510

E-mail: [kjasinski@indot.in.gov](mailto:kjasinski@indot.in.gov)[NTD: **insert contact info**]

26.11.4 In addition, copies (which shall not constitute notice) of all Notices to Proceed, Notices regarding Disputes, and suspension, termination and default Notices shall be delivered to the following persons:

Indiana Department of Transportation  
100 North Senate, Suite N750  
Indianapolis, Indiana 46204  
Attention: Travis Underhill, Deputy Commissioner of Districts  
Telephone: 317-234-5136  
E-mail: [tunderhill@indot.in.gov](mailto:tunderhill@indot.in.gov) [NTD: insert contact info]

Indiana Department of Transportation  
100 North Senate, Suite N758  
Indianapolis, Indiana 46204  
Attention: Heather Kennedy, Chief Counsel and Deputy Commissioner  
Telephone: 317-233-3699  
E-mail: [hkennedy@indot.in.gov](mailto:hkennedy@indot.in.gov) [NTD: insert contact info]

26.11.5 Notices shall be deemed received when actually received in the office of the addressee (or by the addressee if personally delivered) or when delivery is refused, as shown on the receipt of the U.S. Postal Service, private carrier or other Person making the delivery. Notwithstanding the foregoing, all Notices received after 5:00 p.m. Eastern Time shall be deemed received on the first Business Day following delivery (that is, in order for an email to be deemed received on the same day, at least the first page of the written confirmation must have been received before 5:00 p.m. Eastern Time). Any technical or other communications pertaining to the Work shall be conducted by Design-Build Contractor's Project Manager and technical representatives designated by INDOT. Design-Build Contractor's representatives shall be available at all reasonable times for consultation. Except as otherwise provided in Section 26.5.1 (*Designation of Representatives; Cooperation with Representatives*), each Party's Authorized Representative shall be authorized to act on behalf of such Party in matters concerning the Work.

## 26.12 Taxes

Design-Build Contractor shall pay, prior to delinquency, all applicable taxes and pursuant to Section 107.02 of the Standard Specifications, all sales taxes in each case for which Design-Build Contractor is responsible in carrying out the Work and its other obligations hereunder. Design-Build Contractor accepts sole responsibility, and agrees that it shall have no right to a Relief Event or a Compensation Event, or to any other Claim, due to its misinterpretation of Governmental Rules respecting Taxes or incorrect assumptions regarding applicability of Taxes. INDOT is exempt from state, federal, and local Taxes; INDOT will not be responsible for any Taxes levied on Design-Build Contractor or any other DB-Related Entities as a result of this DBA. If Design-Build Contractor wishes to utilize the Project's general sales tax exemption, Design-Build Contractor must complete, in its own name, a General Sales Tax Exemption Certificate to present to Suppliers when purchasing materials for the Project. A blank copy of Form ST-105, General Sales Tax Exemption Certificate, is available on the Indiana Department of Revenue website at

<http://www.in.gov/dor/3504.htm>. See, also, IN Code §8-15.7-7-2 regarding a sales tax exemption for certain purchases by certain persons purchasing tangible personal property for incorporation into or improvement of a project pursuant to the Act.

### **26.13 Ownership of Project**

Throughout the term of this DBA, INDOT shall own, in fee simple title or other property interest or right, the Project, MOT Limits, Project ROW, and all improvements constructed thereon.

### **26.14 Notification of Cyber Incident.**

In addition to any notification obligations under the cyber liability insurance policy/ies placed by the Progressive Contractor as required hereunder or otherwise as would be applicable to the Project, and without limiting Section 2.2 (*General Obligations of Design-Build Contractor*), the Progressive Contractor shall promptly notify the Department as soon as reasonably possible of any incident that, if asserted, constitutes an event that meet the criteria for a covered claim under such cyber liability insurance policy/ies

### **26.15 Further Assurances**

Design-Build Contractor shall promptly execute and deliver to INDOT all such instruments and other documents and assurances as are reasonably requested by INDOT to further evidence the obligations of Design-Build Contractor hereunder, including assurances regarding the validity of (a) the assignments of Subcontracts contained herein and (b) any instruments securing performance hereof.

### **26.16 Integration of DBA Documents**

INDOT and Design-Build Contractor agree and expressly intend that, subject to Section 26.17 (*Severability*), this DBA and other DBA Documents constitute a single, non-severable, integrated agreement whose terms are interdependent and non-divisible.

### **26.17 Severability**

If any clause, provision, Section or part of the DBA Documents is ruled invalid under Section 21.2 (*Dispute Resolution Procedures*) or otherwise by a court having proper jurisdiction, then the Parties shall: (a) promptly meet and negotiate a substitute for such clause, provision, Section or part, which shall, to the greatest extent legally permissible, effect the original intent of the Parties, including an equitable adjustment to the Contract Price to account for any change in the Work resulting from such invalidated portion; and (b) if necessary or desirable, apply to the court or other decision maker (as applicable) which declared such invalidity for an interpretation of the invalidated portion to guide the negotiations. The invalidity or unenforceability of any such clause, provision, Section or part shall not affect the validity or enforceability of the balance of the DBA Documents, which shall be construed and enforced as if the DBA Documents did not contain such invalid or unenforceable clause, provision, Section or part.

## **26.18 Usury Savings**

The DBA Documents are subject to the express condition that at no time shall either Party be obligated or required to pay interest on any amount due the other Party at a rate which could subject the other Party to either civil or criminal liability as a result of being in excess of the maximum non-usurious interest rate permitted by State law (the “maximum legal rate”), if any. All sums paid or agreed to be paid to a Party for the use, forbearance, or detention of the sums due that Party under the DBA Documents shall, to the extent permitted by applicable Indiana Law, be amortized, prorated, allocated, and spread throughout the full period over which Interest accrues until payment in full so that the rate or amount of Interest on account of the amount due does not exceed the maximum legal rate in effect from time to time during such period. If after the foregoing adjustments a Party still holds Interest payments in excess of such maximum rate, it shall promptly refund the excess to the other Party.

## **26.19 Headings**

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

## **26.20 Entire Agreement**

The DBA Documents contain the entire understanding of the Parties with respect to the subject matter hereof and supersede all prior agreements, understandings, statements, representations, and negotiations between the Parties with respect to its subject matter. No modification of the terms and conditions of this DBA shall be binding on the Parties hereto unless such provision is contained in a written amendment expressing a clear intent to so modify this DBA and is executed by the Parties.

## **26.21 Authority to Bind Design-Build Contractor**

The signatory for Design-Build Contractor represents that he/she has been duly authorized to execute this DBA on behalf of Design-Build Contractor and has obtained all necessary or applicable approvals to make this DBA fully binding upon Design-Build Contractor when his/her signature is affixed, and accepted by INDOT.

## **26.22 Counterparts**

26.22.1 This instrument may be executed in two or more counterparts, each of which shall be deemed an original, but all of which together shall constitute one and the same instrument.

26.22.2 The undersigned attests, subject to the penalties for perjury, that the undersigned is Design-Build Contractor, or that the undersigned is the properly authorized representative, agent, member or officer of Design-Build Contractor. Further, to the undersigned’s knowledge, neither the undersigned nor any other member, employee, representative, agent or officer of Design-Build Contractor, directly or indirectly, has entered into or been offered any sum of money or other consideration for the execution of this DBA other than that which appears upon

the face hereof. Furthermore, if the undersigned has knowledge that a state officer, employee, or special state appointee, as those terms are defined in IC § 4-26-1, has a financial interest in this DBA, Design-Build Contractor attests to compliance with the disclosure requirements in IC § 4-2-6-10.5.

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**Non-Collusion and Acceptance**

The undersigned attests, subject to the penalties for perjury, that the undersigned is the Party, or that the undersigned is the properly authorized representative, agent, member or officer of the Party. Further, to the undersigned’s knowledge, neither the undersigned nor any other member, employee, representative, agent or officer of the Party, directly or indirectly, has entered into or been offered any sum of money or other consideration for the execution of this DBA other than that which appears upon the face hereof. **Furthermore, if the undersigned has knowledge that a state officer, employee, or special state appointee, as those terms are defined in IC § 4-2-6-1, has a financial interest in this DBA, the Party attests to compliance with the disclosure requirements in IC § 4-2-6-10.5.**

**In Witness Whereof**, the Parties have, through their duly authorized representatives, entered into this DBA. The Parties, having read and understood the foregoing terms of this DBA, do by their respective signatures dated below agree to the terms thereof.

[Design-Build Contractor]

*[Insert name of Design-Build Contractor]*

\_\_\_\_\_  
Name:  
Title:  
Date:\_\_\_\_\_

STATE OF INDIANA

Indiana Department of Transportation  
Recommended for approval by:

\_\_\_\_\_  
  
Contract Administration

Date: \_\_\_\_\_

Executed By:

Approved as to Form and Legality:

\_\_\_\_\_  
(For)

Attorney General of Indiana

\_\_\_\_\_(For) Date Approved: \_\_\_\_\_

Indiana Department of Transportation  
Date: \_\_\_\_\_

ADDENDUM

[Joint Venture Members] agree that they shall be jointly and severally liable for the obligations of Design-Build Contractor under the DBA Documents. [Joint Venture Members] agree that INDOT and its successors and assignees shall be entitled to enforce any Claim or judgment against Design-Build Contractor arising out of the DBA Documents directly against Design-Build Contractor, [Joint Venture Members] in any order. ***[NTD: to be conformed in execution version based on entity]***

Date: \_\_\_\_\_, 20[●]

*[To be Signed by Each Joint Venture Member]*

By: \_\_\_\_\_

Name: \_\_\_\_\_

Title: \_\_\_\_\_



## EXHIBIT 1

### ABBREVIATIONS AND DEFINITIONS

Unless otherwise specified, wherever the following abbreviations or terms are used in this DBA and the Technical Provisions, they have the meanings set forth below. References to Sections and Appendices mean Sections and Appendices of this DBA unless otherwise specified.

°C	Degrees Celsius
°F	Degrees Fahrenheit
AADT	Average Annual Daily Traffic
AADTT	Average Annual Daily Truck Traffic
AASHTO	American Association of State Highway and Transportation Officials
A-C or AC	Alternating Current
ACHP	Advisory Council on Historic Preservation
ACI	American Concrete Institute
ADA	Americans with Disabilities Act
ADAS	Automatic Data Acquisition System
ADL	Aerially Deposited Lead
ADS	Authentication and Directory Service
AEIP	Aesthetics and Enhancement Implementation Plan
AM	Ante Meridiem (before noon)
AMM	Avoidance and Minimization Measures
AMP	Ampere(s)
AMRL	AASHTO Materials Reference Laboratory
ANSI	American National Standards Institute
APE	Area of Potential Effects
APWA	American Public Works Association
AREMA	American Railway Engineering and Maintenance-of-Way Association
AST	Aboveground Storage Tank
ASTM	American Society of Testing and Materials
AT&T	American Telephone & Telegraph
ATC	Alternative Technical Concept
ATIS	Advanced Traveler Information System
ATM	Active Transportation Management
ATP	Acceptance Test Plan
ATR	Automatic Traffic Recorder
ATS	Automatic Transfer
ATSSA	American Traffic Safety Services Association
ATVA	Accident and Terrorist Vulnerabilities Assessment
AV	Audio Visual
AWG	American Wire Gauge
AWS	American Welding Society
BA	Biological Assessment

<b>BICSI</b>	Building Industry Consulting Services International
<b>BIS</b>	Bypass Isolation Switch
<b>BMP</b>	Best Management Practice
<b>BMV</b>	Indiana Bureau of Motor Vehicles
<b>BNC</b>	Bayonet Neill-Concelman type connector
<b>BO</b>	Biological Opinion
<b>CADD</b>	Computer-Aided Drafting and Design
<b>CAPWAP</b>	Case Pile Wave Analysis Program
<b>CAT</b>	Category
<b>CB</b>	Citizen's Board
<b>CBR</b>	Concrete Barrier Rail
<b>CCI</b>	Construction Cost Index
<b>CCITT</b>	International Telegraph and Telephone Consultative Committee
<b>CCRL</b>	Concrete Cement Reference Laboratory
<b>CCTV</b>	Closed Circuit Television
<b>CD</b>	Compact Disc or Collector/Distributor, depending upon context
<b>CDCA</b>	Fiber Optic Branch Cable
<b>CDS</b>	Collector-Distributor System
<b>CE</b>	Categorical Exclusion
<b>CERCLA</b>	Comprehensive Environmental Response, Compensation, and Liability Act
<b>CES</b>	Cost Estimating Software
<b>CESSWI</b>	Certified Erosion Sediment and Storm Water Inspector
<b>CFD</b>	Computational Fluid Dynamics
<b>CFR</b>	Code of Federal Regulations
<b>CFS</b>	Cubic feet per second
<b>CGL</b>	Commercial General Liability
<b>CIF</b>	Construction in a Floodway
<b>CIFS</b>	Common Internet File System
<b>CIP</b>	Cast-in-Place
<b>CIPP</b>	Cured-in-Place Thermosetting Resin Pipe Liner
<b>CISEC</b>	Certified Inspector of Sediment and Erosion Control
<b>CMP</b>	Construction Monitoring Plan or Corrugated Metal Pipe (as context may require)
<b>CO</b>	Change Order
<b>COA</b>	Certificate of Appropriateness
<b>CPESC</b>	Certified Professional in Erosion and Sediment Control
<b>CPI</b>	Consumer Price Index
<b>CPL</b>	Contractor's Pollution Liability (insurance)
<b>CPM</b>	Critical Path Method
<b>CPT</b>	Cone Penetration Test
<b>CPU</b>	Central Processing Unit
<b>CQMP</b>	Construction Quality Management Plan
<b>CRCP</b>	Continuously Reinforced Concrete Pavement

<b>CRO</b>	Cultural Resources Office
<b>CSC</b>	Customer Service Center
<b>CSGP</b>	Construction Stormwater General Permit (formerly Rule 5 permit)
<b>CSL</b>	Cross-Hole Sonic Log
<b>CSM</b>	Context Sensitive Mitigation
<b>CSS</b>	Context Sensitive Solution
<b>CVISNP</b>	Commercial Vehicle Information Systems Networks Program
<b>CVO</b>	Commercial Vehicle Operations
<b>CWTS</b>	Certified Worksite Traffic Supervisor
<b>D&amp;C</b>	Design and Construction
<b>DBA</b>	Design-Build Agreement
<b>DBE</b>	Disadvantaged Business Enterprises
<b>DC</b>	Direct Current
<b>DCP</b>	Dynamic Cone Penetrometer
<b>DCR</b>	Design-Build Contractor Change Request
<b>DDO</b>	Definitive Design of Operations
<b>DEIS</b>	Draft Environmental Impact Statement
<b>DHCP</b>	Dynamic Host Configuration Protocol
<b>DLC</b>	Detector Lead-In Cable
<b>DMS</b>	Dynamic Message Sign
<b>DNS</b>	Domain Naming Service
<b>DOSH</b>	Division of Occupational Safety and Health
<b>DQMP</b>	Design Quality Management Plan
<b>DSRC</b>	Dedicated Short-Range Communications
<b>DSS</b>	Decent, Safe and Sanitary
<b>DTM</b>	Digital Terrain Model
<b>DTSC</b>	Department of Toxic Substances Control
<b>DVD</b>	Digital Versatile Disc
<b>EA</b>	Expenditure Authorization or Environmental Assessment, as context may require
<b>EB</b>	Eastbound
<b>ECMP</b>	Environmental Compliance and Mitigation Plan
<b>ECP</b>	Erosion Control Plan
<b>ECR</b>	Environmental Commitments Record
<b>EDA</b>	Earth Disturbance Area
<b>EDMS</b>	Electronic Document Management System
<b>EEO</b>	Equal Employment Opportunity
<b>EIR/EIS</b>	Environmental Impact Report/Environmental Impact Statement
<b>EMP</b>	Environmental Management Plan
<b>EMS</b>	Environmental Management System
<b>eNOI</b>	Electronic Notice of Intent
<b>eNOT</b>	Electronic Notice of Termination
<b>ENR-CCI</b>	Engineering News Record Construction Cost Index
<b>EP</b>	Exceedance Probability

<b>EPD</b>	Escrowed Proposal Documents
<b>EPIC</b>	Environmental Permits Issues and Commitments
<b>EQMP</b>	Environmental Quality Management Plan
<b>ERMS</b>	INDOT's Electronic Records Management System
<b>ERP</b>	Emergency Response Plan
<b>ERSG</b>	Electrical Resistant Strain Gauges
<b>ESA</b>	Environmentally Sensitive Area
<b>ETL</b>	Electronic Testing Laboratories
<b>EWPO</b>	Ecology and Waterway Permitting Office
<b>FAA</b>	Federal Aviation Administration
<b>FAST</b>	Freeway and Arterial System of Transportation
<b>FC or fc</b>	Foot-candle(s) or "F" Shape Standard Barrier, as context may require
<b>FCC</b>	Federal Communications Commission
<b>FDC</b>	Field Design Change
<b>FEIS</b>	Final Environmental Impact Statement
<b>FEMA</b>	Federal Emergency Management Agency
<b>FHWA</b>	Federal Highway Administration
<b>FICA</b>	Federal Insurance Contributions Act
<b>F/O</b>	Fiber Optic
<b>FONSI</b>	Finding of No Significant Impact
<b>FSP</b>	Field Sampling Plan
<b>FT</b>	"F" Shape Truck Barrier
<b>FTP</b>	File Transfer Protocol
<b>FWCA</b>	Fish and Wildlife Coordination Act (16 U.S.C. §§ 661 <i>et seq.</i> ), as amended
<b>FWD</b>	Falling Weight Deflectometer
<b>GAAP</b>	Generally Accepted Accounting Principles
<b>GB</b>	Gigabyte
<b>GCI</b>	Geosynthetic Research Institute
<b>GIS</b>	Geographic Information System
<b>GP</b>	General Purpose
<b>GPS</b>	Global Positioning System
<b>GSA</b>	General Services Administration
<b>HAR</b>	Highway Advisory Radio
<b>HCDDM</b>	Hydrologic Criteria Drainage Design Manual
<b>HEC</b>	Hydraulic Engineering Center in Davis, California
<b>HMA</b>	Hot Mix Asphalt
<b>HMCP</b>	Hazardous Materials Control Plan
<b>HMHSP</b>	Hazardous Materials Health and Safety Plan
<b>HMMP</b>	Hazardous Materials Management Plan
<b>HPMS</b>	Highway Performance Monitoring System
<b>HPP</b>	Historic Preservation Plan
<b>HPS</b>	High Pressure Sodium
<b>HSA</b>	Hollow Stem Auger

<b>HSPPD</b>	Handling, Storage, Packaging, Preservation and Delivery
<b>HVAC</b>	Heating Ventilation and Air Conditioning
<b>I-264</b>	Interstate 264
<b>I-265</b>	Interstate 265
<b>I-64</b>	Interstate 64
<b>I-65</b>	Interstate 65
<b>IAC</b>	Indiana Administrative Code
<b>IAD</b>	Interstate Access Document
<b>IC</b>	Indiana Code
<b>ICPR</b>	Interconnected Channel and Pond Mound Routing
<b>ICRI</b>	International Concrete Repair Institute
<b>IDEM</b>	Indiana Department of Environmental Management
<b>IDM</b>	Indiana Design Manual
<b>IDNR</b>	Indiana Department of Natural Resources
<b>IES</b>	Illuminating Engineer Society
<b>IH</b>	Interstate Highway
<b>IHCP</b>	Interstate Highway Congestion Policy
<b>IHMP</b>	Indiana Department of Natural Resources – Office of Habitat Management and Permitting
<b>IISNS</b>	Internally Illuminated Street Name Signs
<b>IMRS</b>	Impact Resistance System
<b>IMSA</b>	International Municipal Signal Association
<b>IMUTCD</b>	Indiana Manual on Uniform Traffic (Control) Devices
<b>in.</b>	Inch
<b>INDOT</b>	Indiana Department of Transportation
<b>IN SWMP</b>	Indiana Stream and Wetland Mitigation Program
<b>INVEST</b>	Infrastructure Voluntary Evaluation Sustainability Tool
<b>IP</b>	Internet Protocol
<b>IPMP</b>	Indiana Department of Natural Resources Office of Project Management and Permitting
<b>IRI</b>	International Roughness Index
<b>IRS</b>	Internal Revenue Service
<b>ISA</b>	International Society of Arborists
<b>ISPLS</b>	Indiana Society of Professional Land Surveyors
<b>ISO</b>	International Organization for Standardization or Insurance Services Office (in context of insurance)
<b>IT</b>	Information Technology
<b>ITM</b>	Indiana Test Method
<b>ITP</b>	Instructions to Proposers
<b>ITS</b>	Intelligent Transportation System
<b>IVHS</b>	Intelligent Vehicle Highway System
<b>IVR</b>	Interactive Voice Response
<b>JPCP</b>	Jointed Plain Concrete Pavement
<b>JPEG</b>	Joint Photographic Experts Group

<b>JRT</b>	Joint Resolution Team
<b>Kbps</b>	Kilobits per Second
<b>L&amp;A</b>	Landscape and Aesthetics
<b>LBP</b>	Lead-Based Paint
<b>LC</b>	Lucent Connector
<b>LCB</b>	Lean Concrete Base
<b>LCCA</b>	Life Cycle Cost Analysis
<b>LCP</b>	Labor Compliance Program
<b>LCS</b>	Lane Closure Signal
<b>LED</b>	Light Emitting Diode
<b>LEG</b>	London Engineering Group
<b>LiDAR</b>	Laser Image Detection and Ranging
<b>LLF</b>	Light Loss Factor
<b>LMC</b>	Latex Modified Concrete
<b>LMC-VE</b>	Latex Modified Concrete – Very Early
<b>LPG</b>	Liquefied Petroleum Gas
<b>LOS</b>	Level of Service
<b>LOTB</b>	Log of Test Borings
<b>LRFD</b>	Load and Resistance Factor Design (an AASHTO specification)
<b>LRFR</b>	Load and Resistance Factor Rating
<b>LUS</b>	Lane Use Signal
<b>LWD</b>	Light Weight Deflectometer
<b>MACS</b>	Mainline Automated Clearance System
<b>MB</b>	Megabyte
<b>MBTA</b>	Migratory Bird Treaty Act
<b>MEPDG</b>	Mechanistic-Empirical Pavement Design Guide
<b>MGS</b>	Midwest Guardrail System
<b>MHHW</b>	Mean Higher High Water
<b>Min.</b>	Minimum
<b>MISO</b>	Midcontinent Independent System Operator
<b>MLLW</b>	Mean Lower Low Water
<b>mm</b>	Millimeter
<b>MMU</b>	Malfunction Management Unit
<b>MOA</b>	Memorandum of Agreement
<b>MOMS</b>	Maintenance On-line Management Subsystem
<b>MOT</b>	Maintenance of Traffic
<b>MOU</b>	Memorandum of Understanding
<b>MOV</b>	Metal Oxide Varistor
<b>MPH</b>	Miles Per Hour
<b>MPO</b>	Metropolitan Planning Organization
<b>MS4</b>	Municipal Separate Storm Sewer System
<b>MSAT</b>	Mobile Source Air Toxics
<b>MSDS</b>	Materials Safety Data Sheet(s)
<b>MSE</b>	Mechanically Stabilized Earth

<b>MVP</b>	Maintenance Vehicle Pullout
<b>N/A</b>	Not Applicable
<b>NAD</b>	North American Datum
<b>NAQTC</b>	Indiana Alliance for Quality Transportation Construction
<b>NAVD88</b>	North American Vertical Datum of 1988
<b>NB</b>	Northbound
<b>NBI</b>	National Bridge Inventory
<b>NBIS</b>	National Bridge Inspection Standards
<b>NCHRP</b>	National Cooperative Highway Research Program
<b>NDC</b>	Notice of Design Change
<b>NDE</b>	Nondestructive Examination
<b>NDT</b>	Non-Destructive Testing
<b>NEC</b>	National Electrical Code
<b>NEMA</b>	National Electrical Manufacturers Association
<b>NEPA</b>	National Environmental Policy Act
<b>NESC</b>	National Electric Safety Code
<b>NFIP</b>	National Flood Insurance Program
<b>NFPA</b>	National Fire Protection Association
<b>NGVD</b>	National Geodetic Vertical Datum of 1929
<b>NHI</b>	National Highway Institute
<b>NHS</b>	National Highway System
<b>No.</b>	Number
<b>NOI</b>	Notice of Intent (submitted to IDEM)
<b>NORPASS</b>	North America Preclearance and Safety System
<b>NPDES</b>	National Pollutant Discharge Elimination System
<b>NRCS</b>	Natural Resources Conservation Service
<b>NTCIP</b>	National Transportation Communications for ITS Protocol
<b>NTP</b>	Notice to Proceed
<b>OC</b>	Overcrossing
<b>OEM</b>	Original Equipment Manufacturer
<b>OER</b>	Office of Emergency Response
<b>OFAC</b>	Office of Foreign Assets Control of the United States Department of the Treasury
<b>OH</b>	Overhead
<b>OHWM</b>	Ordinary High Water Mark
<b>OIT</b>	Operator Interface Terminal
<b>OJT</b>	On-the-Job Training
<b>OSHA</b>	Occupational Safety and Health Administration
<b>OTDR</b>	Optical Time-Domain Reflectometer
<b>PA</b>	Section 106 Programmatic Agreement
<b>PBS</b>	Preliminary Baseline Schedule
<b>PC</b>	Point of Curvature
<b>PCB</b>	Polychlorinated Biphenyl
<b>PCC</b>	Portland Cement Concrete

<b>PCCP</b>	Portland Cement Concrete Pavement
<b>PCI</b>	Prestressed Concrete Institute
<b>PCM</b>	Preconstruction Manual
<b>PCMS</b>	Portable Changeable Message Signs
<b>PCS</b>	Pavement Condition Survey
<b>PDA</b>	Pile Driving Analyzer
<b>PDF</b>	portable document format
<b>PE</b>	Preliminary Engineering
<b>Ph.</b>	Phone
<b>PI</b>	Point of Intersection
<b>PIP</b>	Public Involvement Plan
<b>PIV</b>	Post Indicator Valve
<b>PLC</b>	Programmable Logic Controller
<b>PM</b>	Project Manager or Post Meridiem (after noon), as the context requires
<b>PMIS</b>	Pavement Management Information System
<b>PML</b>	Probable Maximum Loss
<b>PMOGS</b>	Plantmix Open Grading Surface
<b>PMP</b>	Project Management Plan
<b>PPM</b>	Pages Per Minute
<b>PROWAG</b>	Public Rights-of-Way Accessibility Guidelines
<b>PS&amp;E</b>	Plans, Specifications and Estimates
<b>psf</b>	Pounds per Square Foot
<b>psi</b>	Pounds per Square Inch
<b>PT</b>	Point of Tangency or Post-Tensioning, as context may require
<b>PTZ</b>	Pan, Tilt, and Zoom
<b>PVC</b>	Point of Vertical Curvature or Polyvinyl Chloride, as context may require
<b>PVI</b>	Point of Vertical Intersection
<b>PVT</b>	Point of Vertical Tangency
<b>QA</b>	Quality Assurance
<b>QC</b>	Quality Control
<b>QMP</b>	Quality Management Plan
<b>QP</b>	Qualified Professional
<b>QPL</b>	Qualified Products List
<b>RAP</b>	Repair Application Procedure
<b>RAM</b>	Random Access Memory
<b>RCB</b>	Reinforced Concrete Box
<b>RCP</b>	Reinforced Concrete Pipe
<b>RCRA</b>	Resource Conservation and Recovery Act
<b>RCU</b>	Remote Control Unit
<b>REC</b>	Recognized Environmental Condition
<b>RF</b>	Radio Frequency
<b>RFC</b>	Released for Construction



<b>RFI</b>	Request for Information
<b>RFP</b>	Request for Proposals
<b>RFQ</b>	Request for Qualifications
<b>RHMA-G</b>	Rubberized Hot Mix Asphalt (Gap Graded)
<b>RID</b>	Reference Information Document
<b>RIO</b>	Remote Input / Output
<b>RMS</b>	Root Mean-Square
<b>ROD</b>	Record of Decision
<b>ROW</b>	Right of Way
<b>ROW-s</b>	Right of Way Information System
<b>RP</b>	Reference Point
<b>RPLS</b>	Registered Professional Land Surveyor
<b>RPM</b>	Raised Pavement Marker
<b>RSP</b>	Recurring Special Provision
<b>RSS</b>	Reinforced Soil Slope
<b>RTM</b>	Real Time Monitor
<b>RWIS</b>	Road Weather Information System
<b>SAM</b>	Site Assessment and Management
<b>SAP</b>	Sampling and Analysis Plan
<b>SB</b>	Southbound
<b>SBE</b>	Small Business Enterprise
<b>SC</b>	Subscriber Connector
<b>SCADA</b>	Supervisory Control and Data Acquisition
<b>SD</b>	Secure Digital
<b>SF</b>	Square Foot
<b>SFEIS</b>	Supplemental Final Environmental Impact Statement
<b>SHPO</b>	State Historic Preservation Officer
<b>SI</b>	System Integrator
<b>SMA</b>	Stone Mix Asphalt
<b>SOV</b>	Schedule of Values
<b>SPC</b>	Seismic Performance Category
<b>SPCCP</b>	Spill Prevention, Control, and Counter-measure Plan
<b>SPT</b>	Standard Penetration Test
<b>SR</b>	State Route
<b>SSID</b>	Service Set Identification
<b>SSHP</b>	Site Safety and Health Plan
<b>SSP</b>	Standard Special Provisions
<b>SSTR</b>	Single Slope Traffic Railing
<b>STIP</b>	Statewide Transportation Improvement Program
<b>SUE</b>	Subsurface Utility Engineering
<b>SWM</b>	Storm Water Management
<b>SWPPP</b>	Storm Water Pollution Prevention Plan
<b>SWQM</b>	Storm Water Quality Manager

<b>TCE</b>	Temporary Construction Easement or Thermal Control Engineer, as context may require
<b>TCLP</b>	Toxicity Characteristic Leaching Procedure
<b>TCP</b>	Traffic Control Plan
<b>TCP/IP</b>	Transmission Control Center/Internet Protocol
<b>TCS</b>	Traffic Control Supervisor
<b>TEES</b>	Transportation Electrical Equipment Specification
<b>TGB</b>	Guardrail Transition Type TGB
<b>TIA</b>	Telecommunications Industry Association
<b>TIFF</b>	Tagged Image File Format
<b>TIM</b>	Traffic Incident Management
<b>TIMP</b>	Traffic Incident Management Plan
<b>TIP</b>	Transportation Improvement Program
<b>TMAP</b>	Traffic Modeling and Analysis Procedures
<b>TMC</b>	Traffic Management Center
<b>TMP</b>	Transportation or Traffic Management Plan
<b>TMS</b>	Transportation Management System
<b>TOC</b>	Traffic Operations Center
<b>TOP</b>	Traffic Operations Plan
<b>TP</b>	Technical Provisions
<b>TS</b>	Traffic Signal or Thermal Spray, as context may require
<b>TTCP</b>	Temporary Traffic Control Plan
<b>TQMP</b>	Traffic Quality Management Plan
<b>TVSS</b>	Transient Voltage Surge Suppressors
<b>TW</b>	Time Warner
<b>UC</b>	Undercrossing
<b>UCC</b>	Uniform Commercial Code
<b>UHPC</b>	Ultra-High Performance Concrete
<b>UNRS</b>	USDOT Number Recognition System
<b>UPS</b>	Un-Interruptible Power Supply
<b>US</b>	United States Highway
<b>USACE</b>	United States Army Corps of Engineers
<b>USB</b>	Universal Serial Bus
<b>USDOT</b>	United States Department of Transportation
<b>USEPA</b>	United States Environmental Protection Agency
<b>USFWS</b>	United States Fish and Wildlife Service
<b>USP</b>	Unique Special Provision
<b>USPAP</b>	Uniform Standard of Professional Appraisal Practices
<b>UST</b>	Underground Storage Tank
<b>UTACS</b>	Ultra-thin Asphalt Concrete Surface
<b>UTP</b>	Unshielded Twisted Pair
<b>UV</b>	Ultra Violet
<b>VBI</b>	Voice Break-In
<b>VECP</b>	Value Engineering Change Proposal

<b>VGA</b>	Video Graphics Array
<b>VLAN</b>	Virtual Local Area Network
<b>VoIP</b>	Voice Over Internet Protocol
<b>VPD</b>	Vehicles Per Day
<b>VPN</b>	Virtual Private Network
<b>VWS</b>	Virtual Weigh Station
<b>VWSG</b>	Vibrating Wire Strain Gauges
<b>W</b>	Watts, With, West, Waste Flow Rate, or Width, as context may require
<b>WAN</b>	Wide Area Network
<b>WAQTC</b>	Western Alliance for Quality Transportation Construction
<b>WB</b>	Westbound
<b>WBS</b>	Work Breakdown Structure
<b>WDR</b>	Waste Discharge Requirement
<b>WEAP</b>	Wave Equation Analysis Pile Driving
<b>WHPA</b>	Wellhead Protection Area
<b>WIM</b>	Weigh in Motion
<b>WLAN</b>	Wireless Local Area Network
<b>WOTUSR</b>	Waters of the United States Report

“**Acceleration Costs**” means those fully documented increased costs actually and reasonably incurred by Design-Build Contractor (that is, costs over and above what Design-Build Contractor would otherwise have incurred) which are directly and solely attributable to increasing the performance and production levels of the Work to complete necessary elements or segments of the Work earlier than otherwise anticipated, such as for additional equipment, additional crews, lost productivity, overtime and shift premiums, increased supervision and any unexpected material, equipment or crew movement necessary for resequencing in connection with accelerated efforts.

“**Act**” has the meaning given in the recitals.

“**Active Design Memoranda**” means those current design memoranda effective as of the Setting Date.

“**Activity**” has the meaning set forth in TP Attachment 1-1 (USP Critical Path Method Schedule).

“**Actual Knowledge**” means facts and information actually known to Design-Build Contractor or Design-Build Contractor’s Authorized Representative (in each case, as applicable), after due consultation with other personnel of such Person (including each DB-Related Entity), as applicable.

“**Additional Properties**” has the meaning set forth in Section 7.1.3.1 (*Additional Properties*).

“**Adjust**” means to perform a Utility Adjustment.

“**Adjustment**” means a Utility Adjustment.

“**Adjustment Standards**” means the standard specifications, standards of practice, and construction methods that a Utility Owner customarily applies to facilities (comparable to those being Adjusted on account of the Project) constructed by the Utility Owner (or for the Utility Owner by its contractors), at its own expense. Unless the context requires otherwise, references in the DBA Documents to a Utility Owner’s “applicable Adjustment Standards” refer to those that are applicable pursuant to Section 7.3 (*Utility Adjustments*).

“**Affidavit of Final Acceptance**” means the affidavit described in Section 22.4.2(a) (*Affidavit of Final Acceptance*).

“**Affiliate**” means:

- (a) any Person, at any tier, that directly or indirectly through one or more intermediaries’ controls, or is controlled by, or is under common control with (to include by way of joint venture or partnership), Design-Build Contractor or any of its members, partners or shareholders holding a 10% or greater interest in Design-Build Contractor; and
- (b) any Person for which 10% or more of the equity interest in such Person is held directly or indirectly, beneficially or of record by

- (i) Design-Build Contractor,
- (ii) any of Design-Build Contractor’s members, partners or 10% or greater shareholders, or
- (iii) any Affiliate of Design-Build Contractor under clause (a) of this definition.

For purposes of this definition the term “control” means the possession, directly or indirectly, of the power to cause the direction of the management of a Person, whether through voting securities, by contract, family relationship or otherwise. Work performed by Affiliates shall be deemed performed by Design-Build Contractor.

“**Allowance(s)**” means each of the Pavement Patching Allowance and the Fiber and Column Patching Allowance, individually or collectively, depending upon the context.

“**Alternative Technical Concept**” means a Deviation approved by INDOT attached hereto as Attachment 2 to Exhibit 7 (*Design-Build Contractor’s Proposal Commitments*).

“**Application for Final Payment**” means Design-Build Contractor’s written request for Final Payment of the Contract Price including reconciliation of all partial payments, Claims, changes or other proper adjustments, deductions and offsets pursuant to the DBA, as described in Section 13.4.1 (*Final Payment*).

“**Authorized Representative**” has the meaning set forth in Section 26.5.1 (*Designation of Representatives; Cooperation with Representatives*).

“**Baseline Schedule of Values**” means a detailed line item monetary valuation for all parts of the Work, which lists all SOV Line Items in the format and to the detail as described in Section 13 (*Payment for Services*) and Exhibit 5 (*Invoice and Invoice Certificate*) and TP Section 1.6.3 (Schedule of Values). The sum total of all line items must equal the Contract Price. The Baseline SOV is the Proposal SOV, NTP1 SOV, NTP2 Baseline SOV, and Revised Baseline SOV, each as corresponds with the then-current Project Baseline Schedule.

“**Betterment**” has, with respect to a given Utility being Adjusted, the meaning (if any) set forth in the Utility Agreement(s) applicable to the Utility; in all other cases, “Betterment” means any upgrading of the Utility in the course of such Utility Adjustment that is not attributable to the construction of the Project and is made solely for the benefit of and at the election of the Utility Owner, including an increase in the capacity, capability, level of service, efficiency, duration, or function of an Adjusted Utility over that which was provided by the existing Utility.

Notwithstanding the foregoing, the following are not considered Betterments unless otherwise provided in the applicable Utility Agreement(s):

- (c) Any upgrading which is required for accommodation of the Project;

- (d) Replacement devices or materials that are of equivalent standards although not identical;
- (e) Replacement of devices or materials no longer regularly manufactured with an equivalent or next higher grade or size;
- (f) Any upgrading required by applicable Governmental Rules;
- (g) Replacement devices or materials that are used for reasons of economy (e.g., non-stocked items may be uneconomical to purchase);
- (h) Any upgrading required by the Utility Owner’s applicable Adjustment Standards; and
- (i) Any discretionary decision by a Utility Owner that is contemplated within a particular standard described in clause (f) above.

With respect to any Replacement Utility Property Interest, “Betterment” has the meaning (if any) set forth in the applicable Utility Agreement(s). In all other cases, a Replacement Utility Property Interest shall be considered a Betterment, except to the extent that reinstallation of a Utility in the Replacement Utility Property Interest (i) is necessary in order to meet the requirements of the DBA Documents, or (ii) is called for by Design-Build Contractor in the interest of overall economy for the Project.

“**Books and Records**” means any and all documents, books, records, papers or other information of, or in the possession of, any DB-Related Entity or Affiliate relating to the Project, MOT Limits, Planned ROW Limits, Project ROW, Utility Adjustments or Work (including with respect to Change Orders, Relief Events, Compensation Events, Claims, and Disputes), including:

- (a) all Design Documents and Construction Documents (including drawings, specifications, Submittals, Subcontracts, invoices, schedules, meeting minutes, budgets, forecasts and change orders);
- (b) all budgets, certificates, claims, Claims, correspondence, daily time sheet and supervisor’s daily reports, data (including test data), cost accounting data, documents, expert analyses, facts, files, information, investigations, materials, notices, payroll documents, plans, projections, proposals, records, reports, requests, samples, schedules, settlements, statements, studies, surveys, tax returns and information, tests, test results, vehicular traffic information, operational information analyzed, categorized, characterized, created, collected, generated, maintained, processed, produced, prepared, provided, recorded, stored or used by any DB-Related Entity in connection with the Project;
- (c) union agreements;
- (d) insurance, welfare and benefits records;

- (e) payroll registers;
- (f) earnings records;
- (g) payroll tax forms;
- (h) material invoices and requisitions;
- (i) material cost distribution work sheet;
- (j) equipment records (list of company equipment, rates, etc.);
- (k) Subcontractors' (including Suppliers) invoices;
- (l) Subcontractors' and agents' payment certificates;
- (m) canceled checks;
- (n) job cost report;
- (o) job payroll ledger;
- (p) general ledger;
- (q) cash disbursements journal;
- (r) Project schedules (including any Project Schedule);
- (s) all documents that relate to each and every Claim and Dispute, together with all documents that support the amount of Losses that are the subject of each Claim or Dispute;
- (t) work sheets used to prepare the Claim or Dispute establishing the cost components for items of the Claim or Dispute, including labor, benefits and insurance, materials, equipment, Subcontractors, all documents that establish the time periods, individuals involved, the hours for the individuals, and the rates for the individuals;
- (u) email;
- (v) network servers, data storage devices, backup tapes/media;
- (w) letters and correspondence; and
- (x) with respect to all of the above, any information that is stored electronically or on computer-related media.

For purposes of the requirements of the DBA Documents to maintain Books and Records, the term “Books and Records” includes documents or information that are subject to the attorney-client privilege, but for purposes of requirements of the DBA Documents to provide access to Books and Records, the term specifically excludes documents or information that are subject to the attorney-client privilege and are identified in a privilege log as attorney-client privileged information.

“**Business Day**” means any day that is not a Saturday, Sunday, Holiday, or other day on which (a) INDOT is officially closed for business, or (b) banks located in Indiana are required or authorized by law or executed order to close.

“**Certificate of Final Acceptance**” means the formal written acknowledgment issued by INDOT to Design-Build Contractor that Design-Build Contractor has achieved Final Acceptance and all Work has been fully completed in accordance with the DBA Documents.

“**Certificate of Substantial Completion**” means the formal written acknowledgment issued by INDOT to Design-Build Contractor that Design-Build Contractor has achieved Substantial Completion.

“**Certified Worksite Traffic Supervisor**” has the meaning set forth in TP Section 9.2.1.2 (Certified Worksite Traffic Supervisor).

“**Change in Adjustment Standards**” means any change in Adjustment Standards after the Setting Date that directly affects the design or construction of Utility Adjustments and is:

- (a) necessary to conform to Governmental Rules or Change in Law, or
- (b) adopted by the applicable Utility Owner after the Setting Date, excluding any such changes in Adjustment Standards known to Design-Build Contractor as of the Setting Date.

A Change in Law that changes, adds to or replaces Adjustment Standards, as well as revisions to the Technical Provisions to conform to such Change in Law, shall be treated as a Change in Adjustment Standards rather than an INDOT-Directed Change to the Technical Provisions.

“**Change in Law**” means the enactment, adoption, modification, repeal or other change in any Governmental Rule that occurs after the Proposal Date (including any change in the judicial or administrative interpretation of any Governmental Rule, or adoption of any new Governmental Rule) which is materially inconsistent with Governmental Rules in effect on the Proposal Date, but excluding

- (a) Any change in or new Governmental Rule which was passed or adopted but not yet effective as of the Setting Date;
- (b) A change in a Project Standard or Utility Standard;
- (c) A change in the way a Governmental Rule is applied or interpreted as a result of:



- (i) The failure of any DB-Related Entity to comply with a Governmental Rule or any Governmental Approval; or
  - (ii) Any act or omission of any DB-Related Entity or any Design-Build Contractor Fault;
- (d) A change in any Governmental Rule relating to taxes; or
- (e) A change in Governmental Rule which was not in force at issuance of NTP2 but which (i) had been published as a draft bill or draft statutory instrument or otherwise specifically referred to prior to the issuance of NTP2; (ii) a party experienced and competent in the implementation of works or services similar to the Work would have reasonably foreseen or anticipated prior to the issuance of NTP2, including adoption of a national interoperability standard; or (iii) is substantially the same as a Governmental Rule in force prior to issuance of NTP2.

**“Change Notice”** means a Notice delivered by INDOT to Design-Build Contractor pursuant to Section 14.2.2.1 (Change Notice).

**“Change of Control”** means any assignment, sale, financing, grant of security interest, transfer of interest or other transaction of any type or description, including by or through voting securities, asset transfer, contract, merger, acquisition, succession, dissolution, liquidation or otherwise, that results, directly or indirectly, in a change in possession of the power to direct or control or cause the direction or control of the management of Design-Build Contractor or a material aspect of its business. A Change of Control of a shareholder, member, partner or joint venture member of Design-Build Contractor may constitute a Change of Control of Design-Build Contractor if such shareholder, member, partner or joint venture member possesses the power to direct or control or cause the direction or control of the management of Design-Build Contractor. Notwithstanding the foregoing, the following shall not constitute a Change of Control:

- (a) A change in possession of the power to direct or control the management of Design-Build Contractor or a material aspect of its business due solely to a bona fide transaction involving beneficial interests in the ultimate parent organization of a shareholder, member, partner or joint venture member of Design-Build Contractor, (but not if the shareholder, member, partner or joint venture member is the ultimate parent organization), unless the transferee in such transaction is at the time of the transaction suspended or debarred or subject to a proceeding to suspend or debar from bidding, proposing or contracting with any federal or State department or agency;
- (b) An upstream reorganization or transfer of direct or indirect interests in Design-Build Contractor so long as no change occurs in the entity with ultimate power to direct or control or cause the direction or control of the management of Design-Build Contractor;

- (c) A transfer of interests between managed funds that are under common ownership or control other than a change in the management or control of a fund that manages or controls Design-Build Contractor; or
- (d) The exercise of minority veto or voting rights (whether provided by Governmental Rules, by Design-Build Contractor’s organizational documents or by related member or shareholder agreements or similar agreements) over major business decisions of Design-Build Contractor, provided that if such minority veto or voting rights are provided by shareholder or similar agreements, INDOT has previously received copies of such agreements.

“**Change Order**” has the meaning set forth in Section 14.1(a) (*Definition of Changer Orders*).

“**Change Request**” or “**Design-Build Contractor Change Request**” means a Notice delivered pursuant to Section 14.5.3 (*Procedures*) in the form of Exhibit 9 (*Form of Design-Build Contractor Change Request*).

“**Claim**” means any separate claim, proceeding, action, cause of action, demand, judgment, investigation or suit (including by way of contribution or indemnity) made by a Party:

- (a) In connection with the DBA Documents, the Project or the Site;
- (b) Under Governmental Rules or in equity; or
- (c) For specific performance, restitution, payment of money (including damages or other Losses), a time extension, or any other form of relief.

Submission of a Change Request is not a Claim.

“**Compensation Amount**” means the amount of compensation to be paid to Design-Build Contractor for a Compensation Event as set forth and subject to the limitations in Section 15 (*Relief Events; Compensation Events*).

“**Compensation Event**” means the occurrence of any of the following events, subject to any limitations, claims submissions requirements, and other conditions set forth in the DBA, occurring following NTP2, and that (i) is beyond the reasonable control of Design-Build Contractor; (ii) actually, demonstrably, materially and adversely affects performance of Design-Build Contractor’s obligations (other than payment obligations) in accordance with the DBA Documents; and (iii) is not attributable to the negligence, reckless or willful misconduct, act or omission or breach or violation of applicable Governmental Rules, Governmental Approval, or contract (including any DBA Document) by a DB-Related Entity, provided that, in each case, such events (or the effects of such events) are not caused, and could not have been avoided by the exercise of caution, due diligence, or reasonable efforts by Design-Build Contractor or any DB-Related Entity:

- (a) Change in Law;

- (b) Actual, documented uncover costs incurred by Design-Build Contractor, without markup, with respect to Work that was not Nonconforming Work under Section 6.5.3 (*Obligation to Uncover Finished Work*);
- (c) INDOT-Caused Delay, other than with respect to INDOT’s failure to provide applicable responses as provided under clause (c) of the definition of “INDOT-Caused Delay”;
- (d) Unknown Hazardous Materials (subject to Section 15.6.2 (*Hazardous Materials Compensation/Relief*));
- (e) Issuance by a court in a legal proceeding of any preliminary or permanent injunction or temporary restraining order (or other similar order, legal restraint, or prohibition) that prohibits prosecution of any material portion of the Work, except if arising out of, related to, caused by, resulting from, or based on the wrongful act or wrongful omission of any DB-Related Entity;
- (f) Failure to obtain, or unreasonable and unjustified delay in obtaining or otherwise maintaining once issued, a Governmental Approval from any Governmental Entity, or the necessitation of a New Approval (subject to Section 15.7 (*New Approvals Compensation/Relief*)), except if such failure, delay, or necessity results from an (i) Error in the Work, or (ii) a failure by any DB-Related Entity to locate or design the Project or carry out the Work in accordance with any Governmental Approval;
- (g) INDOT’s (i) lack of good and sufficient title to any parcel in the Project ROW, to the extent it materially interferes with or materially and adversely affects performance of Work, or (ii) the existence at any time following issuance of the NTP2 of any title reservation, condition, easement or encumbrance on any parcel in the Project ROW, of record or not of record, to the extent it materially interferes with or materially and adversely affects performance of Work, except any title reservations, conditions, easements or encumbrances (A) concerning Utilities or (B) caused, permitted or suffered by a DB-Related Entity;
- (h) Type I/Type II Differing Site Conditions;
- (i) Any change in the design concept of the Project or any portion thereof resulting from judicial or administrative action taken with respect to a legal challenge to any NEPA Documents, except to the extent the change in design concept had already been incorporated into Design-Build Contractor’s design assumed in connection with the Contract Price;
- (j) Suspension or termination of any NEPA Documents, except to the extent that such suspension or termination results from failure by any DB-Related Entity to locate or design the Project or carry out the work in accordance with the NEPA Documents or other Governmental Approval (which failure may include (i)

modification by or on behalf of Design-Build Contractor of the design concept included in the NEPA Documents, (ii) means or methods used by any DB-Related Entity for carrying out the Work, or (iii) decision or action by or on behalf of Design-Build Contractor to use or acquire any additional Project ROW);

- (k) The cost for the design and Utility Adjustment directly resulting from any (i) Misidentified Utility, or (ii) Unidentified Utility discovered within the relevant time periods under, and subject to the terms and conditions of Section 7.4.2 (*Claims for Inaccuracies in Utility Information; Type 4 Utility Adjustments*) (solely to the extent any additional incurred costs are directly attributable to such lacking or inaccurate information);
- (l) [Reserved];
- (m) any Non-Indiana 811-Mapped Utility located within the MOT Limits and Planned ROW Limits that requires Adjustment, and such Utility is (i) an Unidentified Utility or a Misidentified Utility; (ii) not a Service Line; and (iii) not identified or reflected in whole or in part in the Utility Information or Design-Build Contractor's Utility Conflict Matrix (limited to material increases in Design-Build Contractor's actual direct costs of performing the Work that is directly attributable to Adjusting such Non-Indiana 811-Mapped Utility); provided, however, that any compensation granted shall be subject in all respects to Section 7.9 (*Utility-Related Claims; Additional Restrictions on Relief Events and Compensation Events Relating to Utility Adjustments*);
- (n) Utility Delay (subject to Section 7.8 (*Utility Delay*) and provided that any compensation granted shall be subject in all respects to Section 7.9 (*Utility-Related Claims; Additional Restrictions on Relief Events and Compensation Events Relating to Utility Adjustments*));
- (o) Except where specifically permitted hereunder, suspensions of the Work ordered by INDOT that do not arise out of, relate to, or result from any act or omission of any DB-Related Entity that is not required or permitted under the DBA Documents;
- (p) [Reserved];
- (q) Ultra vires enforcement of any inapplicable local law (or political subdivision thereof) by or on behalf of the local Governmental Entity;
- (r) Latent Defects discovered in the Existing Improvements to the extent affected or impacted by the Work and as and to the extent materially and adversely affecting the completion of Work (excluding any Existing Improvements located on parcels acquisition of which was proposed by Design-Build Contractor);
- (s) [Reserved];

- (t) [Reserved];
- (u) [Reserved];
- (v) a Third Party Release of Hazardous Materials that (i) occurs on or after the Setting Date, and, (ii) occurs at or on the Planned ROW, prior to NTP2, (iii) is required to be reported to a Governmental Entity, (iv) renders use of the roadway or construction area unsafe absent remediation Work; and (v) could not have been mitigated by Design-Build Contractor's use of Good Industry Practice with respect to its obligations under Section 11.1 (Site Security) or TP Section 13 (Maintenance of Traffic); and provided that any compensation payable to Design-Build Contractor shall be (A) in all respects contingent upon Design-Build Contractor's compliance with the notice and remediation requirements regarding Releases of Hazardous Materials set forth in Section 6.3 (Process To Be Followed Upon Discovery of Certain Site Conditions), Section 7.10 (Hazardous Materials Management), and Section 7.11 (Environmental Compliance, Mitigation and Approval Requirements); (B) in all respects subject to Section 15.6.2 (Hazardous Materials Compensation/Relief); and (C) without limiting Section 15.6.2 (Hazardous Materials Compensation/Relief), limited to 50% of Design-Build Contractor's actual costs of remediation;
- (w) INDOT-Directed Change; and
- (x) Any other event that the DBA Documents expressly state shall be treated as a Compensation Event.

**“Completion Deadline”** means the Substantial Completion Deadline or Final Acceptance Deadline, as the context may require.

**“Completion Milestone”** means Substantial Completion or Final Acceptance.

**“Conditions to Assistance”** has the meaning set forth in Section 7.7.2 (Failure of Utility Owners to Cooperate).

**“Conduit”** means any conduit, casing, sleeve, hanger, attachment, or blockout for installation or protection of Utilities attached to or installed through structures, or installed under rail or roadway crossings, and any associated pull-ropes for Utility cables.

**“Construction Documents”** means all Released for Construction Documents, Working Drawings and samples necessary for construction of the Project in accordance with the DBA Documents.

**“Construction Quality Management Plan”** means the plan described in TP Section 1.5.3.2 (Quality Management Plan).

**“Construction Manager”** has the meaning set forth in TP Section 1.5.1.1 (Key Personnel). The Construction Manager is one of the Key Personnel listed in Exhibit 3 (Key Personnel).

“**Construction Superintendent**” has the meaning set forth in TP Section 1.5.1.2 (Additional Personnel).

“**Construction Work**” means all Work to build or construct, reconstruct, rehabilitate, make, form, manufacture, furnish, install, integrate, supply, deliver or equip the Project or the Utility Adjustments.

“**Contaminated Groundwater**” means any extracted, pumped or ponded groundwater that contains Hazardous Materials.

“**Contract Price**” has the meaning set forth in Section 13.1.1 (*DBA Amount*).

“**Cost and Pricing Data**” means detailed back-up information regarding the basis for the cost estimates for development, design, construction, operations, and maintenance of the Project in the Proposal. Cost and Pricing Data shall include supporting data, technical memoranda, calculations, formulas, unit and materials prices (if applicable) and such other cost, charge and fee information used by or on behalf of Design-Build Contractor in the creation and derivation of the Proposal, including copies of all offers and all data and information received from all Subcontractors (at all tiers) identified in the Proposal and any other potential Subcontractors that provided data and information used as the basis for the Scope Proposal and the Contract Price.

“**Cost and Schedule Proposal**” means each submittal serving to identify price and schedule modifications associated with Change Orders issued pursuant to Section 14 (*Changes in the Work*), meeting all applicable requirements set forth in Section 14 (*Changes in the Work*).

“**Cost Liability**” means the obligation to bear the cost of a Utility Adjustment (as between INDOT and the Utility Owner), whether arising out of common or statutory law or contract, as determined by INDOT, in its sole discretion.

“**Critical Path**” means the critical path on the Project Baseline Schedule which ends on the Substantial Completion Deadline or the Final Acceptance Deadline, as applicable (i.e., the term shall apply only following consumption of all available Float in the schedule for Substantial Completion or Final Acceptance, as applicable). The lower case term “critical path” means the sequence of activities on the Project Baseline Schedule that must be completed on schedule to complete the Project within the minimum time needed for completion of the entire Project. This is the longest duration path (or “chain”), in terms of time, of logically connected activities of D&C Work on the Project Baseline Schedule (as such schedule is stated and updated in accordance with this DBA, which may include, pursuant to Section 15.1.4.3 (*Compensation Event Package or Relief Event Package*) a time impact analysis under Section 14.6.2.3 (*Delay Analysis*)) ending with the relevant deadline in respect thereof (ultimately, the Final Acceptance Date), corrected for any improper logic, improper activity durations, and errors.

“**CSGP**” means the Construction Stormwater General Permit regulation of the Indiana Department of Environmental Management, found at [https://www.in.gov/idem/stormwater/files/final\\_gen\\_permit\\_inra00000\\_construction.pdf](https://www.in.gov/idem/stormwater/files/final_gen_permit_inra00000_construction.pdf).

“**DBA**” means, depending on the context (as determined by INDOT), (a) the definition set forth in the recitals, or (b) collectively, the DBA Documents which establish the respective rights and obligations of INDOT and Design-Build Contractor.

“**DBA Documents**” has the meaning set forth in Section 1.2 (*DBA Documents*).

“**DBE Compliance Manager**” means the individual identified as such in the DBE Performance Plan that meets the requirements listed in TP Section 1.5.1.2 (Additional Personnel).

“**DBE Goal**” means the goal for percentage of work to be performed by the certified DBE that is established by INDOT and specified in Section 4.3.2 (*DBE Participation Goals*).

“**DBE Performance Plan**” means Design-Build Contractor’s plan for meeting the DBE goal as referenced in Section 4.3.3 (*DBE Performance Plan and EEO/Workforce Project Plan*).

“**DBE Performance Requirements**” has the meaning set forth in Section 4.3.1 (*General*).

“**DB-Related Entity(ies)**” means Design-Build Contractor, any Subcontractor, any Affiliate or any of their respective employees, agents, representatives, shareholders, directors or officers, or any other Person for whom Design-Build Contractor may be legally or contractually responsible.

“**Deductions**” means, each of the Noncompliance Event Deductions, Movement Charges, as well as any other Liquidated Damages, individually or collectively.

“**Design-Build Contractor**” has the meaning set forth in the preamble to this DBA.

“**Design-Build Contractor Change Request**” means a request made by Design-Build Contractor for approval of a change and issuance of a Change Order pursuant to DBA Section 14.5 (*Design-Build Contractor-Initiated Change Orders*).

“**Design-Build Contractor Default**” has the meaning set forth in Section 18.1.1 (*Default of Design-Build Contractor*).

“**Design-Build Contractor Fault**” means:

- (a) A breach by Design-Build Contractor of any of its obligations or any representation or warranty under the DBA Documents;
- (b) failure by Design-Build Contractor to submit or obtain approval from INDOT of any Submittal listed in Section 5.1.1 (*Time of Essence*), Section 5.4.1 (*Conditions to Commencement of Design*), Section 5.5.1 (*Construction Work Generally*), or Section 5.5.2 (*Utility Adjustment Work*);

- (c) A breach or violation by any DB-Related Entity of any Governmental Rule or Governmental Approval; or
- (d) Negligence, gross negligence, fraud, bad faith, recklessness, criminal conduct, intentional or willful misconduct, or any other negligent or culpable act or omission by any DB-Related Entity.

**“Design-Build Contractor Release of Hazardous Materials”** means

- (a) Release of Hazardous Materials attributable to any act or omission of any DB-Related Entity or any Design-Build Contractor Fault, provided that the removal of Hazardous Materials by any DB-Related Entity in accordance with the requirements of the DBA Documents shall not be a “Design-Build Contractor Release of Hazardous Material”;
- (b) Release of Hazardous Materials arranged to be brought onto the Site or elsewhere by any DB-Related Entity; regardless of cause; or
- (c) Use, containment, storage, management, handling, transport and disposal of any Hazardous Materials by any DB-Related Entity in violation of the requirements of the DBA Documents or any applicable Governmental Rule or Governmental Approval.

**“Design-Build Contractor’s Utility Conflict Matrix”** has the meaning set forth in Section 7.4.1 (Utility Information and Supplemental Utility Investigation).

**“Design Document”** means any drawing (including plan, elevation, section, detail and diagram), specification, report, calculation, record and submittal necessary for design of the Project in accordance with the DBA Documents, following approval thereof by INDOT and others as required by the DBA Documents.

**“Design Exception”** means formal written documentation for any exception to the controlling design criteria approved as described in Chapter 40-8.0 of the IDM that follows the process described in TP Section 3.6 (Design Exceptions), or the “Design Exceptions” set forth in TP Section 5.3.3 (INDOT-Provided Design Exceptions).

**“Design Manager”** has the meaning set forth in TP Section 1.5.1.1 (Key Personnel). The Design Manager is one of the Key Personnel listed in Exhibit 3 (Key Personnel).

**“Design Quality Management Plan”** means the plan described in TP Section 1.5.3.2 (Quality Management Plans).

**“Design Work”** means all Work of design, engineering, survey, geotechnical, architecture, landscape architecture, and aesthetics for the Project, Additional Properties acquisition, or Utility Adjustments.



**“Deviation”** means any change, deviation, modification or alteration from the technical requirements of the DBA Documents (excluding those of the DBA Documents listed in Section 1.3.1(a)(i) (*Order of Precedence*) and Section 1.3.1(a)(ii) (*Order of Precedence*)). For purposes of this definition, “Deviation” includes Design Exceptions.

**“Directive Letter”** means a letter issued by INDOT pursuant to Section 14.3.1 (*Issuance of Directive Letter*).

**“Disadvantaged Business Enterprise”** has the meaning set forth in 49 CFR § 26.5.

**“Dispute”** means a disagreement between the Parties as to the merits, amounts, or remedy arising out of an issue in controversy under this DBA, including a disagreement regarding a Claim.

**“Dispute Resolution Procedures”** means the procedures for resolving Disputes set forth in Section 21.2 (*Dispute Resolution Procedures*).

**“EEO/Workforce Project Plan”** has the meaning set forth in Section 4.3 (*DBE Performance Plan and EEO/Workforce Project Plan*).

**“Effective Date”** means the date of this DBA identified in the preamble of this DBA.

**“Electronic Document Management System”** or **“EDMS”** means the web-based project document management and submittal system used by INDOT to be utilized by Design-Build Contractor in accordance with TP Section 1.5.4 (Electronic Document Management System).

**“Eligible Surety”** means a Surety licensed in the State and listed on the U.S. Department of the Treasury’s “Listing and Approved Sureties” (found at <https://www.fiscal.treasury.gov/surety-bonds/list-certified-companies.html>, as such website or list may be updated from time to time), rated “A” or higher by at least two nationally-recognized rating agencies (Fitch Ratings, Moody’s Investor Service and Standard & Poor’s Ratings Services) or rated at least “A-/VII” or higher according to A.M. Best’s Financial Strength Rating and Financial Size

**“Environment”** means air, soils, submerged lands, surface waters, groundwaters, land, stream sediments, surface or subsurface strata, biological resources, including endangered, threatened and sensitive species, natural systems, including ecosystems, and historic, cultural, archaeological and paleontological resources or artifacts.

**“Environmental Approvals”** means all Governmental Approvals arising from or required by any Environmental Law in connection with development of the Project as applicable to the Project, including the NEPA Documents.

**“Environmental Compliance and Mitigation Plan”** means the plan described in TP Section 18.3.2.1 (Environmental Compliance).

**“Environmental Determination”** means the final disposition of the environmental assessment under NEPA, as articulated in the NEPA Documents.

**“Environmental Law”** means (1) any Governmental Rule applicable to the Project or the Work, now or hereafter in effect, regulating, relating to, or imposing liability or standards of conduct concerning the Environment or otherwise to generation, production, emissions, discharges, storage, use, handling, transportation, treatment, disposal, remediation, Release of Hazardous Materials or threatened Release of Hazardous Materials or other hazardous, toxic, or dangerous waste, pollutants, contaminants, substances, or materials in or into the Environment, including into the air, surface water, or groundwater, or onto land and (2) any requirement or standard that pertains to the protection of the Environment, or to the management of Hazardous Materials, or generation, production, emissions, discharges, storage, use, handling, transportation, treatment, disposal, remediation, Release of Hazardous Materials or threatened Release of Hazardous Materials or other hazardous, toxic, or dangerous waste, pollutants, contaminants, substances, or materials in or into the Environment, contamination of any type whatsoever, or health and safety matters with respect to Hazardous Materials, set forth in any Governmental Approval or other criteria or guidelines promulgated, pursuant to Governmental Rules applicable to the Project or Work, as each of the foregoing have been or are amended, modified, or supplemented from time to time (including any present and future amendments thereto and reauthorizations thereof) including those relating to:

- (a) The manufacture, processing, distribution, use, re-use, treatment, storage, disposal, transport or handling of Hazardous Materials or other hazardous, toxic, or dangerous waste, pollutants, contaminants, substances, or materials;
- (b) The protection of public health, public welfare, public safety or the Environment (including protection of nonhuman forms of life, the land, surface water, groundwater, and air);
- (c) Air, soil, surface and subsurface strata, stream sediments, surface water, and groundwater;
- (d) The Release of Hazardous Materials or other hazardous, toxic, or dangerous waste, pollutants, contaminants, substances, or materials;
- (e) Protection of wildlife, endangered, threatened, and sensitive species and / or designated critical habitat, wetlands, water courses and water bodies, parks and recreation lands, cultural, historical, archaeological, and paleontological resources or artifacts, and natural resources;
- (f) The operation and closure of underground or aboveground storage tanks;
- (g) Health and safety of employees and other persons with respect to Hazardous Materials or other hazardous, toxic, or dangerous waste, pollutants, contaminants, substances, or materials; and
- (h) Notification, documentation and record keeping requirements relating to the foregoing.

Without limiting the above, the term “Environmental Law” shall also include the following (all as amended):

- (i) The National Environmental Policy Act (42 U.S.C. §§ 4321 *et seq.*), as amended (“NEPA”);
- (ii) The Comprehensive Environmental Response, Compensation, and Liability Act, as amended by the Superfund Amendments and Reauthorization Act (42 U.S.C. §§ 9601 *et seq.*), as amended (“CERCLA”);
- (iii) The Solid Waste Disposal Act, as amended by the Resource Conservation and Recovery Act, as amended by the Hazardous and Solid Waste Amendments (42 U.S.C. §§ 6901 *et seq.*), as may be further amended;
- (iv) The Emergency Planning and Community Right to Know Act of 1986 (42 U.S.C. §§ 11001 *et seq.*), as amended;
- (v) The Clean Air Act, as amended by the Clean Air Act Amendments (42 U.S.C. §§ 7401 *et seq.*), as amended;
- (vi) The Water Pollution Control Act, as amended by the Clean Water Act (33 U.S.C. §§ 1251 *et seq.*), as amended;
- (vii) The Toxic Substances Control Act (15 U.S.C. §§ 2601 *et seq.*), as amended;
- (viii) The Hazardous Materials Transportation Act (49 U.S.C. §§ 1801 *et seq.*), as amended;
- (ix) The Oil Pollution Act (33 U.S.C. §§ 2701, *et seq.*), as amended;
- (x) The Insecticide, Fungicide and Rodenticide Act (7 U.S.C. §§ 136 *et seq.*), as amended;
- (xi) The Safe Drinking Water Act (42 U.S.C. §§ 300 *et seq.*), as amended;
- (xii) The Radon Gas and Indoor Air Quality Research Act (42 U.S.C. §§ 7401 *et seq.*), as amended;
- (xiii) The Occupational Safety and Health Act (29 U.S.C. §§ 651 *et seq.*), as amended;
- (xiv) The Endangered Species Act (16 U.S.C. §§ 1531 *et seq.*), as amended;
- (xv) The Fish and Wildlife Coordination Act (16 U.S.C. §§ 661 *et seq.*), as amended;

- (xvi) The National Historic Preservation Act (16 U.S.C. §§ 470 *et seq.*), as amended;
- (xvii) The Bald and Golden Eagle Protection Act (16 U.S.C. §§ 668 *et seq.*), as amended;
- (xviii) The Migratory Bird Treaty Act (16 U.S.C. §§ 703 *et seq.*), as amended;
- (xix) The Marine Mammal Protection Act (16 U.S.C. §§ 1361 *et seq.*), as amended;
- (xx) The Surface Mining Control and Reclamation Act (30 U.S.C. § 1201 *et seq.*), as amended; and
- (xxi) Section 4(f) of the U.S. Department of Transportation Act (49 U.S.C. § 303), as amended.

“**Environmental Management Plan**” means the plan described in TP Section 1.5.3 (Project Management Plan).

“**Equity Member**” means (i) each Person holding an equity interest in Design-Build Contractor (whether as a member, partner, joint venture member, or otherwise but excluding passive limited partners that have no management or operational role in Design-Build Contractor), and (ii) each Person that will hold a 10% or greater indirect interest in Design-Build Contractor.

“**Error**” means an error, omission, inconsistency, inaccuracy, deficiency or other defect.

“**Escrowed Proposal Documents**” means the one or more sealed container(s) labeled: “*[NTD: Insert name of Design-Build Contractor]*: Scope Proposal for the Safer Drive 65 Project – Escrowed Proposal Documents,” containing one set of the Cost and Pricing Data, delivered by Design-Build Contractor as a condition to the Effective Date.

“**Event of Default**” has the meaning set forth in Section 18.2.1 (*Remedies*).

“**Existing Improvement**” means the existing ITS and related improvements within the Project Right-of-Way as of the Setting Date.

“**Existing Utility Property Interest**” means any right, title or interest in real property (e.g., a fee or an easement) claimed by a Utility Owner as the source of its right to maintain an existing Utility in such real property, which is compensable in eminent domain.

“**Federal Requirements**” means the provisions required to be part of federal-aid construction contracts, including the provisions set forth in Exhibit 11 (*Federal Requirements*).

**“Fiber Wrap and Column Patching Allowance”** means the sum specified in Exhibit 8 (Allowances) that is available to pay Design-Builder for the cost of patching existing mainline asphalt paving in accordance with Section 13.1.3 (Allowances).

**“Field Design Change”** means any revision proposed by Design-Build Contractor deemed necessary to address any situation discovered after the Released for Construction Documents have been submitted to INDOT.

**“Final Acceptance”** means acceptance of the Project by INDOT as evidenced by issuance of a Certificate of Final Acceptance in accordance with Section 22.4 (Final Acceptance).

**“Final Acceptance Date”** means the date on which Final Acceptance occurs

**“Final Acceptance Deadline”** has the meaning set forth in Section 5.2.2 (Final Acceptance Deadline).

**“Final Payment”** means payment by INDOT of the final installment of the price under this DBA, but excluding payment for the Notice of Termination, unused amounts of the Allowances, and any other amounts that INDOT is authorized to withhold in accordance with the DBA Documents.

**“Final Schedule”** means the schedule described in TP Section 1.5.2.3 (Final Schedule) and TP Attachment 1-1 (USP: Critical Path Method Schedule).

**“Final Tracings Submission”** means all the Submittals for Final Tracings Submission described in Chapter 14-2.0 of the IDM, unless stated otherwise in the DBA Documents.

**“Float”** means the amount of time that any given activity or logically connected sequence of activities shown on the Project Baseline Schedule may be delayed before it will affect Design-Build Contractor’s ability to achieve a Completion Milestone by its applicable Completion Deadline. “Float” generally means the difference between early completion times and late completion times for activities as shown on the Project Baseline Schedule and shall include any float contained within an activity as well as any period containing an artificial activity (that is, one which is not encompassed within the meaning of the word “Work”).

**“Flood Event”** means the occurrence of a Flood as defined in TP Section 17 (Abbreviations and Definitions).

**“Force Majeure Event”** means any of the events listed in clauses (a) through (m) below, subject to the exclusions listed in clauses (i) through (vii) below, which materially and adversely directly affects Design-Build Contractor’s obligations, provided such events are beyond the control of the DB-Related Entities and are not due to any Design-Build Contractor Fault, and further provided that such events (or the effects of such events) could not have been avoided by the exercise of caution, due diligence, or reasonable efforts by any DB-Related Entity:

- (a) (i) Any Flood Event; (ii) any tornado, hurricane, fire, lightning; and (iii) any Seismic Event; in each case, directly impacting the physical improvements of the Project or performance of Work at the Site;
- (b) Any epidemic specifically in the State;
- (c) Any blockade, rebellion, war, riot, act of sabotage or civil commotion that causes direct physical damage to the Project; and
- (d) National, State, or local strikes not specific to Design-Build Contractor or the Project which, in any case, cannot be resolved by Design-Build Contractor.

The term “Force Majeure Event” shall be limited to the matters listed above and specifically excludes from its definition the following matters which might otherwise be considered a force majeure event:

- (i) any physical destruction or damage, or delays to the Project which occur by action of the elements, including, drought, rain, flood, snow, or storm, except as specified in clause (a) above;
- (ii) except as provided in clause (c) above, malicious or other acts intended to cause Losses or other similar occurrence, including vandalism or theft; or
- (iii) Any matters not caused by INDOT or beyond the control of INDOT or any other matter not listed in clauses (a) through (d) above.

**“Geotechnical Data Report”** means the following report included among the Reference Information Documents: Geotechnical Data Reports and Appendices prepared by Terracon Consultants, Inc. dated March 17, 2022, July 11, 2022, July 14, 2022, January 25, 2023, February 11, 2022, October 18, 2022, October 24, 2022, November 16, 2022, April 21, 2023, December 8, 2021, September 27, 2022, September 27, 2022, and August 9, 2021, collectively identified as RID Geotechnical Data Report.

**“Geotechnical Design Report”** means the report by Design-Build Contractor described in TP Section 11.3.2 (Geotechnical Design Reports).

**“Good Industry Practice”** means the exercise of the degree of skill, diligence, prudence and foresight that would reasonably and ordinarily be expected from a skilled and experienced designer, engineer, or constructor:

- (a) performing work substantively similar to the Work;
- (b) that seeks in good faith to comply with its contractual obligations (i.e., with respect to the Project, complying with the DBA Documents) and all applicable Governmental Rules and Governmental Approvals;

- (c) that:
  - (i) with respect to design or engineering matters, uses the skill, care, diligence, and professional standards ordinarily used by similarly-situated design or engineering professionals;
  - (ii) with respect to construction matters, uses the skill, care, diligence, and professional standards used by similarly-situated professional construction companies, and in either case, seeking to comply with professional standards in their respective disciplines that are accepted as the standards of the industry in the State; and
- (d) that seeks to perform such work in a manner commensurate with standards of safety, performance, dependability and efficiency, as would other skilled and experienced designers, engineers, constructors, as applicable, engaged in the same type of undertaking:
  - (i) in the United States;
  - (ii) under similar circumstances and conditions (including environmental conditions); and
  - (iii) as are generally considered prudent practices in the exercise of reasonable judgment and in light of facts then-known when a relevant decision was made or action was taken.

Good Industry Practice is not intended to be the optimum practices, methods, solutions, etc., to the exclusion of all others, but rather a spectrum of possible, but reasonable, practices, methods, solutions, etc., having due regard for, among other things, contractual and legal obligations as well as manufacturers' requirements and warranties.

Without limiting the foregoing, neither the existence of a particular design or construction practice, method, or solution on a completed State project, prior acceptance or approval by INDOT on any such other completed State project, nor contemporary acceptance or approval by INDOT on any other State project not yet completed shall be, nor shall be deemed to be, conclusive as to whether a particular design or construction practice or solution constitutes Good Industry Practice; provided, however, that any such prior acceptance or approval may be asserted as evidence of Good Industry Practice, it being understood and agreed by the Parties that such prior acceptances or approvals may have been given for reasons other than INDOT's assessment that such practices, methods, or solutions constituted Good Industry Practice.

**“Governmental Approval”** means any permit, license, consent, concession, grant, franchise, authorization, waiver, certification, exemption, filing, lease, registration or ruling, variance or other approval, guidance, protocol, mitigation agreement, agreement or memoranda of agreement/understanding, and any revision, modification, amendment, supplement, renewal or extension of any of the foregoing, required by or with any Governmental Entity in order to perform

the Work or any Utility Adjustment Work being performed by a Utility Owner, but excluding (a) any such approvals relating to the work to be performed by other contractors as specifically described in the DBA Documents and (b) any such approvals required by or with a Governmental Entity in its capacity as a Utility Owner. Governmental Approvals include Environmental Approvals. Other Approvals are not Governmental Approvals.

**“Governmental Entity”** means any federal, state, local or foreign government and any political subdivision or any governmental, quasi-governmental, judicial, public or statutory instrumentality, administrative agency, authority, body or entity other than INDOT.

**“Governmental Rule”** means any statute, law, regulation, ordinance, rule, judgment, order, executive order, decree, permit, concession, grant, franchise, license, agreement, directive, guideline, policy requirement or other governmental restriction or any similar form of decision of or determination by, or any interpretation or administration of any of the foregoing by, any Governmental Entity, which is applicable to the Work, the Project, the Site or any Utility Adjustment work being performed by a Utility Owner, whether now or hereafter in effect.

**“Guaranteed Obligations”** has the meaning set forth in the Guaranty. *[/NTD: To be conformed in execution version based on whether Design-Build Contractor is required to have a Guarantor]*

**“Guarantor”** means each Person providing a Guaranty as described in Section 9.3 (Guaranty). *[/NTD: To be conformed in execution version based on whether Design-Build Contractor is required to have a Guarantor]*

**“Guaranty”** means each guaranty executed by a Guarantor guaranteeing some or all of the obligations of Design-Build Contractor under the DBA Documents. *[/NTD: To be conformed in execution version based on whether Design-Build Contractor is required to have a Guarantor]*

**“Hazardous Materials”** means any element, chemical, compound, mixture, substance, product, waste or other material, whether solid, liquid or gaseous, which is or becomes defined, listed, classified, regulated, or addressed in any way under any Environmental Laws, or any other substances or conditions (including mold and other mycotoxins, fungi or fecal matter) which may create any unsafe or hazardous condition or pose any threat or harm to the environment or human health and safety. “Hazardous Materials” includes the following:

- (a) Any substance, product, waste or other material of any nature whatsoever which may give rise to liability under any Environmental Law or common law theory based on negligence, trespass, intentional tort, nuisance or strict liability or under any reported decisions of a state or federal court;
- (b) Hazardous waste, hazardous materials, hazardous substances, hazardous constituents, and toxic substances, ignitable, corrosive and reactive substances or related materials, whether solid, liquid or gas, including substances defined as or included in the definition of “hazardous substance,” “hazardous waste,” “hazardous



material,” “extremely hazardous waste,” “acutely hazardous waste,” “radioactive waste,” “radioactive materials,” “bio-hazardous waste,” “pollutant,” “toxic pollutant,” “contaminant,” “restricted hazardous waste,” “infectious waste,” “toxic substance,” “toxic waste,” “toxic material,” or any other term or expression intended to define, list or classify substances by reason of properties harmful to health, safety or the indoor or outdoor environment (including harmful properties such as ignitability, corrosivity, reactivity, carcinogenicity, toxicity, reproductive toxicity, “TCLP toxicity” or “EP toxicity” or words of similar import) under any applicable Environmental Law;

- (c) Any petroleum or crude oil and any fraction thereof, including any refined petroleum product or any additive thereto or fraction thereof, and any waste oil or waste petroleum byproduct or fraction thereof or additive thereto, but excluding petroleum and petroleum products contained within regularly operated motor vehicles;
- (d) Any solvent, solvent waste, including any refined solvent product, and any waste solvent or waste solvent byproduct, including any additive, byproduct or fraction of any of the foregoing;
- (e) Any drilling fluids, produced waters and other wastes associated with the exploration, development or production of crude oil, natural gas or geothermal resources;
- (f) Any flammable substances or explosives, including unexploded ordnance;
- (g) Any radioactive materials;
- (h) Any asbestos or asbestos-containing materials in structures and or other improvements on or in the Site (other than mineral asbestos naturally occurring in the ground);
- (i) Silica;
- (j) Any lead, cadmium, or lead-based paint or any other heavy metal-based paint or material, or any metal listed in or regulated by the Resource Conservation and Recovery Act (42 U.S.C. §§ 6901 *et seq.*);
- (k) Any radon or radon gas;
- (l) Any methane gas or similar or regulated gaseous materials;
- (m) Any urea formaldehyde foam insulation;
- (n) Electrical equipment and components which contain any oil or dielectric fluid containing polychlorinated biphenyls;

- (o) Pesticides, herbicides or fungicides;
- (p) Any other chemical, material or substance, exposure to which is prohibited, limited or regulated by any Governmental Entity or which may or could pose a hazard to the health and safety of any humans in the vicinity of the Project or to the environment; and
- (q) Soil, surface water or groundwater containing any of the Hazardous Materials as defined above.

**“Hazardous Materials Management”** means sampling, characterization, stock-piling, storage, backfilling in place, asphalt batching, recycling, treatment, collection, containment, clean-up, remediation, transportation, management in place or off-Site disposal of Hazardous Materials or Contaminated Groundwater, or Recognized Environmental Conditions, whichever is the most technically appropriate and cost-effective approach authorized under Governmental Rules, using Good Industry Practice.

**“Hazardous Materials Management Plan”** means the plan described in TP Section 14.3.3 (Hazardous Materials Management).

**“Hold Point”** means any mandatory verification point that requires Design-Build Contractor to submit items identified in TP Section 2.2.2 (Hold Points) to INDOT for review, comment, observation and examination. Additional Hold Points may be added by INDOT pursuant to TP Section 2.2.2 (Hold Points).

**“Holiday”** has the meaning set forth in Section 101.28 of the Standard Specifications, provided, however, that Sundays shall not, on their own, be considered Holidays.

**“IDEM Notice of Termination”** means the Notice that IDEM issues to close out their CSGP when construction of the Project has been completed and specific conditions have been met.

**“Incident”** means a localized disruption to the free flow of traffic or safety of users in or adjacent to the Site.

**“Incident Management Liaison”** means the individual designated by Design-Build Contractor as described in TP Section 9.2.1.3 (Incident Management Liaison) and TP Section 9.3.3 (Work Zone Incident Management).

**“Incidental Utility Work”** means all of the following work necessary for construction of the Project, including any necessary coordination with Utility Owners and property owners, furnishing design, performing construction, and obtaining and complying with Governmental Approvals:

- (a) Protection in Place of Utilities;
- (b) All work necessary to abandon in place any utility in accordance with proper procedures (e.g., flushing, capping, slurry backfill, etc.);

- (c) Traffic control for Utility Adjustment work;
- (d) Resurfacing and re-striping of streets; reconstruction of curbs, gutters and sidewalks; reinstallation of signage; and reinstallation or replacement of traffic signals;
- (e) Subsurface utility investigation, electronic detection, surveying and any other methods used to determine Utility locations and other material information concerning Utilities;
- (f) Adjustment of utility appurtenances (e.g., manholes, valve boxes, and vaults) for line and grade upon completion of roadway work;
- (g) Adjustment or Protection in Place of Service Lines; and
- (h) Temporary Adjustments.

“**Indemnified Claim**” has the meaning set forth in Section 20.1.1 (*Indemnification by Design-Build Contractor*).

“**Indemnified Parties**” means INDOT, the State, and each of their respective successors, assigns, officeholders, officers, directors, commissioners, agents, representatives, agents, consultants and employees.

“**Indiana Design Manual**” means the Indiana Design Manual 2013, the version currently in effect as of the Setting Date.

“**INDOT**” has the meaning set forth in the preamble to this DBA.

“**INDOT-Caused Delay**” means an unavoidable delay, to the extent that it directly affects both the Critical Path and a Completion Deadline, arising from any of the following matters and no other:

- (a) INDOT-Directed Change (subject to Section 14.2.4 (*INDOT-Directed Changes Under \$10,000*));
- (b) failure by INDOT to obtain an INDOT-Provided Approval prior to the dates set forth in TP Table [ ] (Environmental Commitments Summary) **[NTD: insert TP reference]**, obtain any New Approval which is the responsibility of INDOT as specified in Section 7.11.4.1 (*Approvals To Be Obtained at the Expense of INDOT*), or suspension, termination, interruption, denial, failure to obtain or non-renewal of any INDOT-Provided Approval or any New Approval which is the responsibility of INDOT as specified in Section 7.11.4.1 (*Approvals To Be Obtained at the Expense of INDOT*), except to the extent that such suspension, termination, interruption, denial or failure to obtain or non-renewal arises from failure by any DB-Related Entity to locate or design the Project or carry out the Work in

accordance with INDOT-Provided Approvals, New A or other Governmental Approval;

- (c) failure or inability of INDOT to provide responses to proposed schedules, plans, Design Documents, Construction Documents and other Submittals and matters for which affirmative response by INDOT is required, within the time periods indicated in the DBA Documents (subject in all respects to the requirements set forth in Section 3.2.2.7 (Time Periods));
- (d) physical damage to the Work directly caused by the gross negligence, recklessness or willful misconduct of INDOT;
- (e) any suspension for convenience by INDOT pursuant to and subject in respects to the limitations set forth in Section 16.1 (Suspension for Convenience);
- (f) Release of Hazardous Materials by INDOT or any Indemnified Party; and
- (g) failure or inability of INDOT to make the MOT Limits and Planned ROW Limits available by the time periods provided in Section 7.1.2 (Access to the MOT Limits, Planned ROW Limits, and Project ROW).

provided; however, that such occurrence or event (or the effects of such occurrence or event) could not have been avoided by the exercise of caution, due diligence, or reasonable efforts by any DB-Related Entity, and provided further that if a DB-Related Entity owns any real property or real property interests involved in the Project, then Design-Build Contractor shall not be entitled to assert a Claim for compensation, time or other relief associated with any alleged INDOT-Caused Delay under clause (i), above, associated with such real property or real property interests, including any delay or failure of obtaining or making available such real property or real property interests.

An INDOT-Caused Delay excludes:

- (i) any Utility Delay;
- (ii) the addition and implementation by INDOT of Hold Points in addition to those set forth in the lists set forth in TP Section 2.2.2 (Hold Points); and
- (iii) any events that are due to or arise out of any Design-Build Contractor Fault.

**“INDOT Contractor”** means any contractor or consultant, except any DB-Related Entity relating to the Project, that INDOT contracts to perform other or additional work on or near the Site.

**“INDOT-Directed Change”** means any change in the Work (including change in the Project Standards or other standard applicable to the Work) which INDOT has directed Design-Build Contractor to perform as described in Section 14 (Changes in the Work).

“**INDOT-Initiated VECP**” has the meaning set forth in Section 24.1 (General).

“**INDOT-Provided Approval**” means any Governmental Approval for the Project obtained or to be obtained by INDOT as specifically listed and identified as such in TP Table 14-1 (Governmental Approvals – Design-Build Contractor Responsibility) (incorporated into the DBA at Exhibit 2 (INDOT-Provided Approvals)). Refer also to Section 7.11.3 (INDOT-Provided Approvals).

“**INDOT’s Project Manager**” means the individual designated by INDOT to manage the Project.

“**INDOT’s Utility Accommodation Policy**” means the policy found at <https://www.in.gov/indot/3787.htm>.

“**Informal Resolution Procedures**” are the dispute resolution procedures described in Section 21.2.3 (Mandatory Information Resolution Procedures).

“**Intellectual Property**” means all current and future legal or equitable rights and interests in know-how, patents (including applications), copyrights (including moral rights), trademarks (registered and unregistered), service marks, trade names, trade secrets, trade secret rights, designs (registered and unregistered), design rights, utility models, circuit layouts, plant varieties, business and domain names, inventions, solutions embodied in technology, and other intellectual activity, and applications of or for any of the foregoing, subsisting in or relating to the Project, Project design data or Project traffic data. Intellectual Property includes toll-setting and traffic management algorithms, and software used in connection with the Project (including software used for management of traffic on the Project), and Source Code and Source Code Documentation. Intellectual Property is distinguished from physical construction and equipment itself and from data, sketches, charts, calculations, drawings, plans, depictions, specifications, layouts, depictions, manuals, electronic files, artwork, correspondence, other Submittals and other documentation that disclose Intellectual Property.

“**Interest**” means the lesser of (a) 10% per annum or (b) the maximum rate allowable under applicable Governmental Rules (i.e., the maximum non-usurious interest rate permitted by State law).

“**Interstate Closure Request**” means a request to close an Interstate Route movement, excluding traffic control for temporary traffic stoppage in accordance with Section 801.16(c) of the Standard Specifications.

“**Invoice Certificate**” means the certificate to be provided with each invoice in the form included in Exhibit 5 (Invoice and Invoice Certificate), as may be amended by the Parties (which amended Invoice Certificate shall be included at Exhibit 5 (Invoice and Invoice Certificate) without further action of the Parties).

“**Key Personnel**” means an/those individual(s) appointed by Design-Build Contractor and approved by INDOT from time to time to fill the respective “Key Personnel” position(s) identified in TP Section 1.5.1.1 (Key Personnel). The specific individuals appointed by Design-Build

Contractor and approved by INDOT initially to fill certain of the Key Personnel positions are identified in Exhibit 3 (Key Personnel). Key Personnel include those identified as such in the Proposal.

**“Known or Suspected Hazardous Materials”** means Hazardous Materials and Recognized Environmental Conditions that are known or reasonably suspected to exist as of the Setting Date from information or analysis contained in or referenced in the Reference Information Documents, or Hazardous Materials that would have become known to Design-Build Contractor by undertaking Reasonable Investigation prior to the Proposal Date.

**“Latent Defect”** means any hidden or concealed defect in an Existing Improvement which could not be discovered by reasonable and customary observation or inspection prior to the Setting Date (to the extent such access was provided by INDOT).

**“Lead Design Firm”** means the design consulting firm(s) with primary responsibility for the design of the Work.

**“Level 1 FDC”** means any Field Design Change that is a minor change in the field that does not require additional engineering analysis and calculations. Markups are sufficient to complete the Work and the item(s) shall be updated in the Record Drawings.

**“Level 2 FDC”** means any Field Design Change that is more substantive than a Level 1 FDC, requiring Plan revisions, but does not require additional engineering analysis and calculations.

**“Level 3 FDC”** means any Field Design Change that is significant requiring revised Plan sheets and engineering analysis and calculations.

**“Level One Design Exception”** means any of the Design Exceptions set forth in TP Section 5.3.3.1 (Level One Design Exceptions or any other Design Exception to the controlling design criteria described in Chapter 40-8.02(01) of the IDM.

**“Level Two Design Exception”** means any of the Design Exceptions set forth in TP Section 5.3.3.2 (Level Two Design Exceptions) or any other Design Exception to the controlling design criteria described in Chapter 40-8.02(02) of the IDM.

**“Lien”** means any pledge, lien, security interest, mortgage, deed of trust or other charge or encumbrance of any kind, or any other type of preferential arrangement (including any agreement to give any of the foregoing, any conditional sale or other title retention agreement, any lease in the nature of a security instrument and the filing of or agreement to file any financing statement under the Uniform Commercial Code of any jurisdiction).

**“Liquidated Damages”** means liquidated damages determined under (i) Section 8.2.6 (Key Personnel Liquidated Damages), (ii) Section 19.1 (Liquidated Damages for Late Opening to Traffic and Late Completion), (iii) Section 19.2 (Movement Closures and Movement Charges);

(iv) Section 19.3 (*Movement Charges for Prohibited Closures*); or (v) Section 19.4 (*Noncompliance Event Deductions*).

**“Local Agencies”** means the City of Scottsburg, Scott County, Clark County, and any other Governmental Entity, other than INDOT, owning property within the Site or with jurisdiction over any such property, or that otherwise has property that interfaces with the Project.

**“Long-Stop Date”** means the date that is 270 days after the Substantial Completion Deadline, or Extended Substantial Completion Deadline, as the context may require.

**“Losses”** includes any loss, damage, injury, liability, obligation, cost, response cost, expense (including attorneys’, accountants’ and expert witnesses’ fees and expenses (including those incurred in connection with the enforcement of any indemnity or other provision of the DBA Documents)), fee, charge, deductible or increased premium, demand, investigation, proceeding, action, suit, claim, Claim, judgment, penalty, fine or Third Party Claims, in each case whether actual, prospective, or contingent and whether or not currently ascertainable. “Injury” includes injury to or death of persons, damage or loss of property, harm or damage to natural resources, and loss of or damage to valuable papers and records.

**“Main or Trunkline Utility”** means an underground Utility, which is not a Service Line, and which relative to the particular system of which it is a part, (a) is a larger line serving as a main line to connecting tributary lines and (b) serves a larger area, all as determined by INDOT, in its sole discretion. In determining whether a facility should be considered a Main or Trunkline Utility, INDOT may refer to definitions in the relevant manual or code, if any, of the Utility Owner.

**“Major Subcontract”** means a Subcontract with any of the following:

- (a) the lead construction firm (if not Design-Build Contractor);
- (b) the lead engineering/design firm(s) (if not Design-Build Contractor);
- (c) any Subcontractor that will perform work valued at 10% or more of the Construction Work;
- (d) any Subcontractor that will perform 30% or more of the Design Work;
- (e) any team member that is required for Design-Build Contractor to satisfy the INDOT Prequalification Work Type Certification requirements; or
- (f) any Subcontractor for Construction Work or for special fabrication and installation of a portion of the Work with the value of such Subcontract or a combination of Subcontracts with such Subcontractor in excess of \$5 million.

**“Major Subcontractor”** means any Subcontractor that is a party to a Major Subcontract.

“**Misidentified Utility**” means a Main or Trunkline Utility, where the Utility Information specifically provided in TP Section 16 (Utilities) (as relates to Main or Trunkline Utilities only) does not identify the subject Main or Trunkline Utility within the boundary lines of the MOT Limits and Planned ROW Limits with Reasonable Accuracy.

“**Maintenance of Traffic Limits**” or “**MOT Limits**” are the boundaries of the real property identified in Attachment 1-3 INDOT made or will make available to Design-Build Contractor for temporary maintenance of traffic and maintenance work included in the Project.

“**Movement Charge**” means an amount payable to INDOT, as determined under either or both Section 19.2 (*Movement Closures and Movement Charge*) and Section 19.3 (*Movement Charges for Prohibited Closures*) for a Prohibited Closure.

“**Movement Closure**” means any full or partial closure by, on behalf of, or at the request of Design-Build Contractor, of any roadway lane within the Site that accommodates vehicular traffic for any duration during the term of the Project. A “Movement Closure” can be determined as either a Permitted Closure or Prohibited Closure.

“**NCE Notice**” means a Notice that INDOT delivers to Design-Build Contractor pursuant to the table within Table 10-4 (Noncompliance Event Deductions) of Exhibit 10 (*Liquidated Damages, Movement Charges, and Noncompliance Event Deductions*) and Section 19.4.5 (*Noncompliance Event Deductions Assessment Process*).

“**NEPA Documents**” means the document titled “Categorical Exclusion”, which covers the Project and was approved on [\_\_\_\_] **[NTD: insert date]**.

“**New Approval**” means either: (a) a new Governmental Approval of the same type as any INDOT-Provided Approval; or (b) a revision, modification, or amendment to any INDOT-Provided Approval.

“**New Utility**” means any Utility constructed or installed as a result of the Project for the purpose of providing service to the Project, either directly or indirectly.

“**Non-Indiana 811 Mapped Utility**” means a Utility owned or operated by a Utility Owner that is not a member of Indiana 811. “Non-Indiana 811 Mapped Utilities” are not “Misidentified Utilities.”

“**Noncompliance Event**” means those occurrences or events set forth in the “Noncompliance Event” column of Exhibit 10 (*Liquidated Damages, Movement Charges, and Noncompliance Event Deductions*).

“**Noncompliance Event Deduction**” means those deductions set forth in Table 10-4 (Noncompliance Event Deductions) of Exhibit 10 (*Liquidated Damages, Movement Charges, and Noncompliance Event Deductions*).



**“Nonconforming Work”** means any aspect of the Work that (a) does not comply with the requirements of the DBA Documents, the Governmental Approvals, applicable Governmental Rules, the Design Documents or the Construction Documents, or (b) is not consistent, or is incompatible with, its age, function, performance, and use when properly maintained in accordance with Good Industry Practice and the requirements of the DBA Documents, or both.

**“Notice”** means a written notice, request, demand, instruction, certificate, consent, explanation, agreement, approval, notification, correspondence, order or other communication given under the DBA Documents to a Party that complies with the prescriptions set forth in Section 26.11 (Notices and Communications).

**“Notice of Design Change”** means any change or revision proposed by Design-Build Contractor’s design team deemed necessary to address situations discovered after the Released for Construction Documents have been submitted.

**“Notice of Partial Termination for Convenience”** means Notice issued by INDOT to Design-Build Contractor terminating part of the Work of Design-Build Contractor for convenience.

**“Notice of Termination for Convenience”** means Notice issued by INDOT to Design-Build Contractor terminating the Work of Design-Build Contractor for convenience.

**“Notice to Proceed”** means a written authorization issued by INDOT pursuant to Section 5.1.2 (Notice to Proceed 1) or Section 5.1.3 (Notice to Proceed 2), or both, depending upon the context, that permits Design-Build Contractor to proceed with certain Work.

**“Notice of Termination”** means the IDEM Notice of Termination.

**“NTP1”** means a Notice to Proceed issued by INDOT to Design-Build Contractor authorizing Design-Build Contractor to proceed with the portion of the Work described in Section 5.1.2 (Notice to Proceed 1).

**“NTP1 Project Baseline Schedule”** has the meaning set forth in Section 5.3.1.2 (Project Baseline Schedule)

**“NTP1 Schedule of Values”** means the SOV provided by Design-Build Contractor to INDOT in accordance with Section 5.3.1.2 (Project Baseline Schedule).

**“NTP2”** means a Notice to Proceed issued by INDOT to Design-Build Contractor authorizing Design-Build Contractor to proceed with the portion of the Work described in Section 5.1.3 (Notice to Proceed 2).

**“NTP2 Baseline Schedule of Values”** means the SOV provided by Design-Build Contractor to INDOT in accordance with TP Section 1.6.3 (Schedule of Values).

**“Open Book Basis”** means providing INDOT all underlying assumptions, price quotes and data associated with pricing or compensation (whether of Design-Build Contractor or INDOT) or

adjustments thereto, including assumptions as to costs of the Work, schedule, composition of equipment spreads, equipment rates, labor rates, productivity, estimating factors, design and productivity allowance, contingency and indirect costs, risk pricing, discount rates, interest rates, and other items reasonably required by INDOT to satisfy itself as to the reasonableness of the amount.

**“Other Approval”** means any permit, license, consent, authorization, approval or similar document issued to Design-Build Contractor by, or agreement entered into between Design-Build Contractor and any Governmental Entity, Utility Owner, property owner or other third-party having regulatory jurisdiction over any aspect of the Project or Work or having any property interested affected by the Project or Work that is not a Governmental Approval.

**“Partial Termination for Convenience”** means a partial termination of this DBA pursuant to Section 17 (*Termination for Convenience*).

**“Party”** means Design-Build Contractor or INDOT, as the context may require, and “Parties” means Design-Build Contractor and INDOT, collectively.

**“Patching Allowance”** means each of the Pavement Patching Allowance and the Fiber and Column Patching Allowance, individually and collectively, depending upon the context.

**“Payment Bond”** means the Payment Bond described in Section 9.1.3 (*Provisions of Bonds*).

**“Performance Bond”** means the Performance Bond described in Section 9.1.2 (*Provisions of Bonds*).

**“Pavement Patching Allowance”** means the sum specified in Exhibit 8 (*Allowances*) that is available to pay Design-Builder for the cost of patching existing mainline asphalt paving in accordance with Section 13.1.3 (*Allowances*).

**“Permitted Closure”** means a Movement Closure that (a) does not exceed any of the maximum Movement Closure durations or periods in Exhibit 10 (*Liquidated Damages, Movement Charges, and Noncompliance Event Deductions*), or (b) is otherwise permitted under TP Section 9.3.8 (Restrictions for Construction Work), and where, in all cases of clauses (a) through (c), complies with the requirements of the DBA Documents, including TP Table 9-1 (Deliverables) and approvals, if any.

**“Person”** means any individual, corporation, joint venture, limited liability company, company, voluntary association, partnership, trust, unincorporated organization or Governmental Entity, as well as INDOT.

**“Plan”** means (only where capitalized) any plan, profile, typical cross-section, standard drawing, Working Drawing, and supplemental drawing or exact reproduction thereof which show the location, character, dimensions, and details of the Work.

“**Planned ROW Limits**” has the meaning set forth in Exh19-1.2 of Exhibit 19 (*Scope of Work*). The “Planned ROW Limits” are the boundaries of the real property that INDOT made or will make available to Design-Build Contractor for permanent improvements included in the Project.

“**Pothole**” means a roadway surface condition greater than 0.5 square feet in area and one inch in depth.

“**Preliminary Project Baseline Schedule**” means the schedule attached in Exhibit 15 (*Preliminary Project Baseline Schedule*).

“**Preliminary Schedule of Values**” means the Schedule of Values attached in Exhibit 15 (*Preliminary Project Baseline Schedule*).

“**Scope Proposal**” means the total quantity of the Work set forth in the Proposal documents to be performed for the Contract Price.

“**Professional Services**” means all Work performed under this DBA other than Construction Work, including the following services and Work: (a) design and engineering; (b) surveying; (c) Utility Adjustment design; (d) environmental permitting and compliance services; and (e) public involvement.

“**Progress Meeting**” has the meaning set forth in TP Section 1.2 (Progress Meetings).

“**Progress Report**” has the meaning set forth in TP Section 1.3 (Progress Reports).

“**Prohibited Closure**” means any Movement Closure that is not a Permitted Closure.

“**Project**” means the improvements to be designed and constructed by Design-Build Contractor and all other Work to be provided by Design-Build Contractor in accordance with the DBA Documents.

“**Project Administration Plan**” means the plan described in TP Section 1.5.3.1 (Project Administration Plan).

“**Project Baseline Schedule**” means the logic-based critical path schedule for all Work through Final Acceptance, as more particularly described in TP Section 1.5.2.1 (Project Baseline Schedule) and TP Attachment 1-1 (USP: Critical Path Method Schedule). The “Project Baseline Schedule” may refer to the Preliminary Project Baseline Schedule, the NTP1 Project Baseline Schedule, the NTP2 Project Baseline Schedule and any Revised Project Baseline Schedule, as and when any of the foregoing is the then-current Project Baseline Schedule.

“**Project Controls Lead**” has the meaning set forth in TP Section 1.5.1.1 (Key Personnel). The Project Controls Lead is one of the Key Personnel listed in Exhibit 3 (*Key Personnel*).

“**Project Manager**” means Design-Build Contractor’s Project Manager, except as context may otherwise require (e.g., reference to INDOT’s Project Manager), and has the meaning set forth in

TP Section 1.5.1.1 (Key Personnel). The Project Manager is one of the Key Personnel listed in Exhibit 3 (Key Personnel).

“**Project Management Plan**” means the document, including approved changes and revisions, prepared by Design-Build Contractor and approved by INDOT describing quality assurance, quality control and other activities necessary to manage the development, design and construction of the Project, containing component parts approved by INDOT, plans and documentation, as described in TP Section 1.5.3 (Project Management Plan).

“**Project Right of Way**” or “**Project ROW**” means the Planned ROW Limits plus the Additional Properties, excluding therefrom any portion of the Planned ROW Limits eliminated from the Project by a Change Order.

“**Project ROW Availability Table**” means the table set forth in Exhibit 17 (Project ROW Acquisition Table).

“**Project-Specific Locations**” means areas in which Design-Build Contractor proposes temporary Project-specific activities in connection with the Construction Work outside the MOT Limits and Project ROW, such as construction work sites, temporary work areas, lay down areas, staging areas, storage areas, stockpiling areas, earth work material borrow sites, equipment parking areas, and similar areas.

“**Project Schedule**” means one or more, as applicable, of the logic-based critical path schedules (any then-applicable Project Baseline Schedule, any Project Status Schedule, and any Recovery Schedule) for all Work leading up to and including Substantial Completion and Final Acceptance, and for tracking the performance of such Work, as the same may be approved by INDOT, revised and updated from time to time in accordance with TP Section 1.5.2.4 (Revisions).

“**Project Scope**” means all of the Work required to complete the improvements specified in Exhibit 19 (Scope of Work).

“**Project Standards**” has the meaning set forth in TP Table 18-1 (Standards and References).

“**Project Status Schedule**” means a Submittal provided by Design-Build Contractor showing Work progress information through a given update interval and forecasts Design-Build Contractor’s remaining plan to complete the Work in accordance with TP Section 1.5.2.2 (Project Status Schedule) and TP Attachment 1-1 (USP: Critical Path Method Schedule).

“**Proposal**” means the written offer of Design-Build Contractor submitted in response to the Request for Proposals, as it may have been supplemented or amended.

“**Proposal Commitments**” has the meaning set forth in Attachment 1 to Exhibit 7 (Proposal Commitments).

“**Proposal Date**” means [\_\_\_\_][**NTD: insert date**].

**“Proprietary Intellectual Property”** means Intellectual Property created, used, applied or reduced to practice in connection with the Project or the Work that derives commercial value from its protection as a trade secret under applicable Governmental Rules or from its protection under patent law.

**“Protected Characteristics”** has the meaning set forth in Section 4.4.1 (Nondiscrimination).

**“Protection in Place” or “Protect in Place”** means any activity undertaken to avoid damaging a Utility which does not involve removing or Adjusting that Utility, including staking the location of a Utility, avoidance of a Utility’s location by construction equipment, installing steel plating or concrete slabs, encasement in concrete, temporarily de-energizing power lines, and installing physical barriers. For example, temporarily lifting power lines without cutting them would be considered Protection in Place; whereas temporarily moving power lines to another location after cutting them would be considered a Temporary Adjustment. The term “Protection in Place” includes both temporary measures and permanent installations meeting the foregoing definition.

**“Public Information Coordinator”** has the meaning set forth in TP Section 1.5.1.2 (Key Personnel).

**“Public Involvement Plan”** means the plan described in TP Section 19.3.1 (General PIP Requirements).

**“Public Involvement Program”** means the program described in TP Section 19.2 (INDOT Public Involvement Plan Responsibilities).

**“Public Records Act”** means IC § 5-14-3 and relevant provisions of the Act, as amended from time to time.

**“Punch List”** means the list of Work that remains to be completed after achievement of Substantial Completion or as a condition of Final Acceptance, and shall be limited to minor incidental items of Work necessary to correct imperfections which by virtue of not being completed, will not, individually or collectively, have any adverse effect on the safety, use or operability of the Project. Work required to comply with all applicable Governmental Rules or Governmental Approvals is not “Punch List Work.”

**“Quality Management Plan”** means the plan described in TP Section 1.5.3.2 (Quality Management Plan).

**“Reasonable Accuracy”** means with respect to the description or identification of a Utility in the Utility Information:

- (a) The Utility’s actual centerline location is located at or less than five feet distant from the horizontal centerline location indicated therefor in the Utility Information (without regard to vertical location);
- (b) The Utility Information shows an active and existent Utility as not abandoned;

- (c) The Utility Information shows a non-existent or inactive Utility as abandoned; or
- (d) The Utility has an actual nominal diameter (excluding casings and any other appurtenances) greater than 12 inches, and its actual nominal diameter is either greater than or less than the diameter shown in the Utility Information by 25% or less of the diameter shown in the Utility Information.

Any other inaccuracies in the Utility Information (e.g., as to type of material or encasement status) shall have no impact on “reasonable accuracy” of its identification and shall not result in a determination that the Utility was not identified with “reasonable accuracy.” If there is any discrepancy between any of the components of the Utility Information, only the most accurate information shall be relevant for purposes of determination of “reasonable accuracy.”

“**Reasonable Investigation**” means the following activities by appropriate, qualified professionals:

- (a) Visit and visual inspection of the Site and adjacent locations, except areas to which access rights have not been made available by the Setting Date;
- (b) Review and analysis of all Reference Information Documents;
- (c) Review and analysis of INDOT-Provided Approvals available prior to the Setting Date;
- (d) Reasonable inquiry with Utility Owners, including request for and review of Utility information provided by Utility Owners;
- (e) Review and analysis of material Governmental Rules applicable to the Project or the Work as of the Setting Date;
- (f) Performance, review and analysis of corings, borings and other investigations within the MOT Limits and Project ROW; and
- (g) Other review, analytical and investigative activities consistent with Good Industry Practice that are sufficient to familiarize Design-Build Contractor with surface and subsurface conditions, including the presence of Utilities, Hazardous Materials, archaeological, paleontological and cultural resources or artifacts, and species listed as threatened or endangered under any federal or State endangered species Governmental Rule, affecting the Site or surrounding locations;

except that none of the foregoing activities includes original research of private records not contained or referenced in this DBA, Reference Information Documents or Technical Provisions.

“**Recognized Environmental Condition**” has the meaning set forth in ASTM 1527-13.

“**Record Drawings**” has the meaning set forth in TP Section 2.3.4 (Record Drawings).

“**Recovery Schedule**” means the schedule Design-Build Contractor is required to provide under Section 5.6 (*Recovery Schedule*).

“**Recurring Special Provisions**” means approved additions or revisions to the Standard Specifications with the intent to be used on multiple contracts.

“**Reference Information Documents**” means the documents and information included in Volume [III] of the RFP, and as located at [\_\_\_\_] **[NTD: complete section reference and link as applicable]**.

“**Registered Professional Engineer**” means a person who is duly licensed and registered by the State to engage in the practice of engineering and, if applicable, is duly licensed and registered in the state where the engineering work is being performed.

“**Registered Professional Land Surveyor**” means a person who is duly licensed and registered by the State to engage in the practice of boundary or property surveying or other similar professional practices in the state where such services are being performed.

“**Regulations**” means regulations relative to nondiscrimination in federally-assisted programs of the Department of Transportation, Title 49 CFR Part 21, as they may be amended from time to time.

“**Release of Hazardous Materials**” means any spill, leak, emission, release, discharge, injection, escape, leaching, dumping or disposal of Hazardous Materials into the soil, air, water, groundwater or environment, including any exacerbation or disturbance of an existing release or condition involving Hazardous Materials, including off-Site migration or deposition.

“**Released for Construction Documents**” means the final documents for construction signed and stamped by a Registered Professional Engineer and certified by the Design-Quality Manager and appropriate personnel, as described in TP Section 2.3 (Submittal and Electronic Posting Requirements) and TP Section 3.1 (General Design Requirements).

“**Relief Event**” means the occurrence of any of the following events, subject to any limitations, claims submissions requirements, and other conditions set forth in the DBA, occurring following NTP2, and that (i) is beyond the reasonable control of Design-Build Contractor; (ii) actually, demonstrably, materially and adversely affects performance of Design-Build Contractor’s obligations (other than payment obligations) in accordance with the DBA Documents; and (iii) is not attributable to the negligence, reckless or willful misconduct, act or omission or breach or violation of applicable Governmental Rules, Governmental Approval, or contract (including any DBA Document) by a DB-Related Entity, provided that, in each case, such events (or the effects of such events) are not caused, and could not have been avoided by the exercise of caution, due diligence, or reasonable efforts by Design-Build Contractor or any DB-Related Entity:

- (a) Force Majeure Event;

- (b) Change in Law;
- (c) Actual delay (and only delay) suffered by Design-Build Contractor with respect to Work that was not Nonconforming Work under Section 6.5.3 (*Obligation to Uncover Finished Work*);
- (d) INDOT-Caused Delay;
- (e) Performance of work within the Project ROW by INDOT Contractors that directly disrupts the Work or other documented delays to the Critical Path of the Work directly caused by such INDOT Contractor, in each case excluding any Utility Adjustment by a Utility Owner;
- (f) Unknown Hazardous Materials (subject to Section 15.6.2 (*Hazardous Materials Compensation/Relief*));
- (g) Issuance by a court in a legal proceeding of any preliminary or permanent injunction or temporary restraining order (or other similar order, legal restraint, or prohibition) that prohibits prosecution of any material portion of the Work, except if arising out of, related to, caused by, resulting from, or based on the wrongful act or wrongful omission of any DB-Related Entity;
- (h) Failure to obtain, or unreasonable and unjustified delay in obtaining or otherwise maintaining once issued, a Governmental Approval from any Governmental Entity, or the necessitation of a New Approval (subject to Section 15.7 (*New Approvals Compensation/Relief*)), except if such failure, delay, or necessity results from an (i) Error in the Work, or (ii) a failure by any DB-Related Entity to locate or design the Project or carry out the Work in accordance with any Governmental Approval;
- (i) INDOT's (i) lack of good and sufficient title to any parcel in the Project ROW, to the extent it materially interferes with or materially and adversely affects performance of Work, or (ii) the existence at any time following issuance of the NTP2 of any title reservation, condition, easement or encumbrance on any parcel in the Project ROW, of record or not of record, to the extent it materially interferes with or materially and adversely affects performance of Work, except any title reservations, conditions, easements or encumbrances (A) concerning Utilities, or (B) caused, permitted or suffered by a DB-Related Entity;
- (j) Type I/Type II Differing Site Conditions;
- (k) Any change in the design concept of the Project or any portion thereof resulting from judicial or administrative action taken with respect to a legal challenge to any NEPA Documents, except to the extent the change in design concept had already been incorporated into Design-Build Contractor's design assumed in connection with the Contract Price;



- (l) Suspension or termination of any NEPA Documents, except to the extent that such suspension or termination results from failure by any DB-Related Entity to locate or design the Project or carry out the work in accordance with the NEPA Documents or other Governmental Approval (which failure may include (i) modification by or on behalf of Design-Build Contractor of the design concept included in the NEPA Documents, (ii) means or methods used by any DB-Related Entity for carrying out the Work, or (iii) decision or action by or on behalf of Design-Build Contractor to use or acquire any additional Project ROW);
- (m) Delays relating to design and Utility Adjustment directly resulting from any (i) Misidentified Utility, or (ii) Unidentified Utility discovered within the relevant time periods under, and subject to the terms and conditions of Section 7.4.2 (*Claims for Inaccuracies in Utility Information; Type 4 Utility Adjustments*) (solely to the extent any additional delays are directly attributable to such lacking or inaccurate information);
- (n) Utility Delay (subject to Section 7.8 (*Utility Delays*) and provided that any relief granted shall be subject in all respects to Section 7.9 (*Utility-Related Claims; Additional Restrictions on Relief Events and Compensation Events Relating to Utility Adjustments*));
- (o) any Non-Indiana 811-Mapped Utility located within the MOT Limits and Planned ROW Limits that requires Adjustment, and such Utility is (i) an Unidentified Utility or a Misidentified Utility; (ii) not a Service Line; and (iii) not identified or reflected in whole or in part in the Utility Information or Design-Build Contractor's Utility Conflict Matrix, provided, however, that any relief granted shall be subject in all respects to Section 7.9 (*Utility-Related Claims; Additional Restrictions on Relief Events and Compensation Events Relating to Utility Adjustments*);
- (p) Except where specifically permitted hereunder, suspensions of the Work ordered by INDOT that do not arise out of, relate to, or result from any act or omission of any DB-Related Entity that is not required or permitted under the DBA Documents;
- (q) *Ultra vires* enforcement of any inapplicable local law (or political subdivision thereof) by or on behalf of the local Governmental Entity;
- (r) Latent Defects discovered in the Existing Improvements to the extent affected or impacted by the Work and as and to the extent materially and adversely affecting the completion of Work (excluding any Existing Improvements located on parcels acquisition of which was proposed by Design-Build Contractor);
- (s) a Third Party Release of Hazardous Materials that (i) occurs on or after the Setting Date, and, (ii) occurs at or on the Planned ROW, prior to commencement of Construction Work, (iii) is required to be reported to a Governmental Entity, (iv) renders use of the roadway or construction area unsafe absent remediation Work;

and (v) could not have been mitigated by Design-Build Contractor’s use of Good Industry Practice with respect to its obligations under Section 11.1 (Site Security) or TP Section 13 (Maintenance of Traffic); and provided that any relief granted hereunder shall be in all respects (A) contingent upon Design-Build Contractor’s compliance with the notice and remediation requirements regarding Releases of Hazardous Materials set forth in Section 6.3 (Process To Be Followed Upon Discovery of Certain Site Conditions), Section 7.10 (Hazardous Materials Management), and Section 7.11 (Environmental Compliance, Mitigation and Approval Requirements); and (B) subject to Section 15.6.2 (Hazardous Materials Compensation/Relief); and

- (t) any other event that the DBA Documents expressly state shall be treated as a Relief Event.

**“Replacement Utility Property Interest”** means any permanent right, title or interest in real property outside of the MOT Limits and Planned ROW Limits (e.g., a fee or an easement) which is acquired for a Utility being reinstalled in a new location as a part of the Utility Adjustment Work. The term specifically excludes any statutory right of occupancy or permit granted by a Governmental Entity for occupancy of its real property by a Utility.

**“Request for Proposals”** means the Request for Proposals regarding the Project issued by INDOT on July 19, 2024, as amended, including all addenda thereto, and all attachments thereto.

**“Questionnaire”** means the submission by or on behalf of Design-Build Contractor entitled “Form C – Questionnaire” in the Proposal.

**“Revised Schedule of Values”** means the modified SOV provided by Design-Build Contractor in accordance with TP Section 1.6.3 (Schedule of Values) when substantial changes are made to Design-Build Contractor’s price breakdown structure of the Contract Price or changes are made to the Contract Price itself.

**“RFP Documents”** means the documents issued as part of the RFP, including all addenda.

**“Roadway Design Lead”** has the meaning set forth in TP Section 1.5.1.1 (Key Personnel). The Roadway Design Lead is one of the Key Personnel listed in [Exhibit 3](#) (Key Personnel).

**“ROW Certification”** means written certification that (a) all residential occupants have been relocated to decent, safe and sanitary housing, commercial and non-profit businesses and improvements have been relocated out of the portion of the Project ROW or Project-Specific Location being certified, and (b) the Project ROW or Project-Specific Location being certified was acquired in accordance with FHWA directives.

**“Safety Manager”** has the meaning set forth in TP Section 1.5.1.1 (Key Personnel). The Safety Manager is one of the Key Personnel listed in [Exhibit 3](#) (Key Personnel).

“**Safety Plan**” means the plan described in TP Section 1.3.3.4 (Safety Management Plan).

“**Safety Standards**” means those provisions of the Technical Provisions that INDOT, FHWA or AASHTO considers being important measures to protect public safety, worker safety or the safety of property. As a matter of clarification, provisions of Technical Provisions primarily directed at durability of materials or equipment, where the durability is primarily a matter of life cycle cost rather than protecting public or worker safety, are not Safety Standards.

“**Schedule of Values**” means the estimated cost/planned value for 100% of the Work, which documents the WBS and approved Project Baseline Schedule, as it may be updated from time to time, in accordance with Section 13.2.1 (Schedule of Values) and TP Section 1.6.3 (Schedule of Values). The Schedule of Values may also refer to the Preliminary Schedule of Values, NTP1 Schedule of Values, and any Revised Schedule of Values, as and when any of the foregoing corresponds with then-current Project Baseline Schedule.

“**Scope of Work**” means the Scope of Work in DBA Exhibit 19 (Scope of Work).

“**Seismic Event**” means the trembling or shaking movement of the earth’s surface that produces ground motions at the Site that, if prior to the Final Acceptance Date, directly impacts, and causes damage to, temporary or permanent works of the Project.

“**Service Line**” (also referred to as a service lateral or lateral) means (a) any Utility line, the function of which is to directly connect the improvements on an individual property (e.g., a single family residence or an industrial warehouse) to another Utility line located off such property, which other Utility line connects more than one such individual line to a larger system, and (b) any cable or Conduit that supplies an active feed from a Utility Owner’s facilities to activate or energize a Local Agency’s lighting and electrical systems, traffic signal systems, traffic control systems, copper or fiber communication systems or irrigation systems. The term also includes any Utility on public or private property that services structures located on such property.

“**Setting Date**” means September 30, 2024.

“**Site**” means the Temporary ROW Limits, MOT Limits and Project ROW, together with those areas designated in writing by INDOT for performance of the Work and such additional areas as may, from time to time, be designated in writing by INDOT for Design-Build Contractor’s use in performance of the Work. For purposes of insurance (subject to any notification and other requirements imposed by the insurer(s) for approval), indemnification, safety and security requirements, Indiana’s Common Construction Wage Act requirements, and payment for use of equipment, the term “Site” shall also include (a) the field office sites, (b) any property used for bonded storage of material for the Project approved by INDOT under Section 13.3.2.1 (Unincorporated Materials), (c) staging areas dedicated to the Project, and (d) areas where activities incidental to the Project are being performed by Design-Build Contractor or Subcontractors covered by the worker’s compensation policy included in the insurance described in Exhibit 18 (Insurance Coverage Requirements), but excluding any permanent locations of Design-Build Contractor or such covered Subcontractors.

“**Source Code**” and “**Source Code Documentation**” means software written in programming languages, such as C and Fortran, including all comments and procedural code, such as job control language statements, in a form intelligible to trained programmers and capable of being translated into object or machine readable code for operation on computer equipment through assembly or compiling, and accompanied by documentation, including flow charts, schematics, statements of principles of operations, architectural standards, and commentary, explanations and instructions for compiling, describing the data flows, data structures, and control logic of the software in sufficient detail to enable a trained programmer through study of such documentation to maintain or modify the software without undue experimentation. Source Code and Source Code Documentation also include all modifications, revisions, additions, substitutions, replacements, updates, upgrades and corrections made to the foregoing items.

“**SOV Line Item**” means those numbered line items on the Schedule of Values corresponding to those portions of the Work or charges, each with an associated dollar value and in total equal to the Contract Price as it may be adjusted in accordance with this DBA.

“**SOV Update**” means an update to the SOV provided by Design-Build Contractor in accordance with TP Section 1.6.3 after the Proposal SOV, NTP1 SOV, or Revised SOV is accepted that shows updated price information for each line item on an earned value basis through a given update interval and forecasts the balance to finish.

“**Special Provisions**” means the Unique Special Provisions or Recurring Special Provisions that revise the Standard Specifications.

“**Spill Prevention, Control and Counter-measure Plan**” means the plan required in TP Table 14-4 (Deliverables).

“**Stage 1 Review Submission**” means the Submittal review stage described as Stage 1 in Chapter 14-2.0 of the IDM, unless stated otherwise in the DBA Documents.

“**Stage 3 Review Submission**” means the Submittal review stage described as Stage 3 in Chapter 14-2.0 of the IDM, unless stated otherwise in the DBA Documents.

“**Standard Specifications**” means INDOT’s 2024 Standard Specifications effective as of the Setting Date, excluding Division 100 (except for (a) any definitions or abbreviations within Section 101 of Division 100 as applied to the balance of the then-applicable Standard Specifications; and (b) any section of Division 100 specifically referenced as applicable within this Agreement), with any references within the balance of the then-applicable Standard Specifications to provisions within such Division 100 being deemed to be to analogous provisions within this Agreement, or otherwise as agreed by the Parties.

“**State**” means the State of Indiana.

“**Statement of Qualifications**” means the Statement of Qualifications submitted by Proposer in response to INDOT’s Request for Qualifications issued on May 8, 2024, as amended.

**“Storm Water Quality Manager”** has the meaning set forth in TP Section 14.2 (Environmental Personnel).

**“Subbase”** means all materials that are part of the pavement Section or design that are not the Subgrade.

**“Subcontract”** means an agreement between Design-Build Contractor and one or more third parties providing for such third-party to perform any part of the Work or provide any materials, equipment, labor or supplies for any part of the Work, or any such agreement between a Subcontractor and its lower tier Subcontractor or a Supplier and its lower tier Supplier, at any tier.

**“Subcontractor”** means any Person with whom Design-Build Contractor has entered into any Subcontract and any other Person with whom any Subcontractor has further subcontracted any part of the Work, at any tier.

**“Subgrade”** has the meaning given in the Standard Specifications.

**“Submittal”** means any package, document, work product, deliverable, or other written or electronic end product or item required under the DBA Documents to be delivered or submitted to INDOT. Refer to TP Section 3 (Design Requirements) for further information defining, and restrictions relating to, a design “Submittal”.

**“Substantial Completion”** means the date, as determined by INDOT, when the Project has satisfied the conditions set forth in Section 22.1.1.2 (Requirements).

**“Substantial Completion Date”** means the date on which Substantial Completion occurs.

**“Substantial Completion Deadline”** has the meaning set forth in Section 5.2.1 (*Substantial Completion Deadline*).

**“Supplier”** means any Subcontractor that supplies machinery, equipment, materials or systems to Design-Build Contractor or any Subcontractor in connection with the performance of the Work and that does not perform Work at the Site. Persons, who merely transport, pick up, deliver or carry materials, personnel, parts or equipment or any other items or persons to or from the Site shall not be deemed to be performing Work at the Site. The term “Supplier” includes fabricators and material dealers.

**“Surety”** means each properly licensed surety company, insurance company or other Person approved by INDOT and authorized to do business in the State, which has issued the Payment Bond or the Performance Bond in accordance with the DBA Documents.

**“Technical Provisions”** means the DBA Documents identified as Technical Provisions, including exhibits and attachments.

**“Temporary Adjustment”** means (a) any interim Adjustment of a Utility (i.e. the installation, removal and disposal of the interim facility) pending installation of the permanent facility in the

same or a new location, and (b) any removal and reinstallation of a Utility in the same location with or without an interim Adjustment.

**“Temporary Traffic Control Plan”** means the plan described in TP Section 9.3.2 (Temporary Traffic Control Plan).

**“Termination for Convenience”** has the meaning set forth in Section 17.1 (*Termination for Convenience*).

**“Third Party Claims”** means any and all claims, disputes, disagreements, causes of action, demands, suits, actions, judgments, investigations or legal or administrative proceedings brought by a Person that is not a Party (or INDOT) with respect to Losses (including attorneys’, accountants’ and expert witnesses’ fees and expenses) sustained or incurred by such Person.

**“Third Party Release of Hazardous Materials”** means a Release of Hazardous Materials directly by a Person that is not an Indemnified Party or a DB-Related Entity or acting in the capacity of an Indemnified Party or a DB-Related Entity. For the avoidance of doubt, no Release of Hazardous Materials with respect to which any DB-Related Entity has contributed to any liability or responsibility shall be deemed a “Third Party Release of Hazardous Materials”.

**“Time and Materials Change Order”** has the meaning set forth in Section 14.8 (*Time and Materials Change Orders*).

**“Time and Materials Work”** means Work performed pursuant to a Time and Materials Change Order.

**“TMP Team”** has the meaning set forth in TP Section 9.2.2 (TMP Team Meetings).

**“Traffic Incident Management Plan”** means Design-Build Contractor’s plan for detection and response to Incidents, as part of the PMP, as described in TP Section 9.3.3.1 (Traffic Incident Management Plan).

**“Traffic Management Center”** means the Indiana Department of Transportation Traffic Management Center (in Indianapolis, Indiana), where information about the State transportation network is collected and combined with other operational and control data to manage the State transportation network and to produce traveler information.

**“Transportation Management Plan”** means the plan described in TP Section 9.3.1 (Transportation Management Plan).

**“Type 1 Utility Adjustment”** means a Utility Adjustment for which INDOT is responsible for negotiating and entering into a Utility Agreement, developing Utility Work Plans, and completing (or causing the completion of) the Utility Adjustment Work.

**“Type 2 Utility Adjustment”** means a Utility Adjustment for which INDOT is responsible for negotiating and entering into a Utility Agreement and developing Utility Work Plans, and Design-Build Contractor is responsible for completing or causing the completion of the Utility Adjustment Work.

**“Type 3 Utility Adjustment”** means any Utility Adjustment, other than a Type 1 Utility Adjustment, Type 2 Utility Adjustment, or Type 4 Utility Adjustment that is required for a reason other than as a direct result of a Relief Event or a Compensation Event, for which Design-Build Contractor is responsible for negotiating the Utility Agreement for INDOT, developing Utility Work Plans, and completing or causing the completion of the Utility Adjustment Work, as more particularly set forth in the DBA Documents and the applicable Utility Agreement and Utility Work Plans.

**“Type 4 Utility Adjustment”** means any Utility Adjustment that is required for an Unidentified Utility or Misidentified Utility, for which INDOT is responsible for negotiating and entering into a Utility Agreement and Design-Build Contractor is responsible for developing the Utility Work Plans and completing or causing the completion of the Utility Adjustment Work, as more particularly set forth in the DBA Documents and the applicable Utility Agreement and Utility Work Plans.

**“Type I/Type II Differing Site Condition”** means: a subsurface or latent physical condition encountered at the Planned ROW Limits that either:

- (a) differs materially from the conditions indicated in the DBA Documents;
- (b) is of an unusual nature differing materially from those ordinarily encountered on and generally recognized as inherent in work of the character provided for in the DBA.

provided, however, in all cases, that Design-Build Contractor had no actual or constructive knowledge of such conditions as of the Proposal Date and such conditions would not have become known to Design-Build Contractor by undertaking Reasonable Investigation prior to the Proposal Date. For purposes of this definition, and as relates to the pavement for the Project, “subsurface” means conditions at or below the Subgrade and excludes conditions in the Subbase.

The term “Type I/Type II Differing Site Condition” specifically excludes (1) Utilities, (2) Hazardous Materials, (3) field tiles, (4) moving groundwater, and (5) any differences in groundwater depth, flow or location from the depths, flows and locations noted in the Reference Information Documents or otherwise.

The term “Type I/Type II Differing Site Condition” specifically includes discovery of the following within the Planned ROW Limits (excluding any temporary interests):

- (i) any archaeological, paleontological, biological or cultural resource or artifact; provided, however, that the existence of such resource was not disclosed in the RFP Documents, was not otherwise known to Design-Build

Contractor prior to the Proposal Date and would not have become known to Design-Build Contractor by undertaking Reasonable Investigation prior to the Proposal Date; and

- (ii) any species listed as threatened or endangered under any federal or State endangered species Governmental Rule or such species' designated critical habitat, except to the extent that INDOT-Provided Approvals provide for mitigation measures to be undertaken with respect thereto (regardless of whether the species is listed as threatened or endangered as of the Proposal Date), and also subject to the risk allocation provisions contained in Section 7.11 (*Environmental Compliance, Mitigation and Approval Requirements*) (relating to Design-Build Contractor's obligation to obtain environmental approvals under certain circumstances).

**“Unidentified Utility”** means a Main or Trunkline Utility, where the Utility Information specifically provided in TP Section 16 (Utilities) (as relates to Main or Trunkline Utilities only) incorrectly indicates that the subject Main or Trunkline Utility does not exist anywhere within the boundary lines of the MOT Limits and Project ROW.

**“Unique Special Provisions”** means additions or revisions to the Standard Specifications that pertain only to a specific situation on a contract that is not covered by an existing Recurring Special Provision or other standard contract document, and is intended only for a single use in a specific contract.

**“Unknown Hazardous Materials”** means:

(a) Hazardous Materials that meet all of the following criteria:

- (i) The Hazardous Materials are in, on or under (i) the MOT Limits, or (ii) parcels added to the MOT Limits due to a Relief Event or a Compensation Event, in each case, as of the date that INDOT makes available the affected parcel to Design-Build Contractor;
- (ii) The Hazardous Materials are not Known or Suspected Hazardous Materials; and
- (iii) The Hazardous Materials are not required to be removed and disposed of due to a Design-Build Contractor Release of Hazardous Materials; or

(b) Hazardous Materials other than Design-Build Contractor Release of Hazardous Materials on any parcels added to the Project ROW due to a Relief Event or a Compensation Event.

For purposes of this definition, “makes available” means (i) the Effective Date for parcels acquired as of the Effective Date, or (ii) as to parcels not yet acquired as of the Effective Date, the date Design-Build Contractor first receives access to the parcel in accordance with the DBA



Documents. Hazardous Materials at the Potential Hazardous Materials Sites shall not be considered Unknown Hazardous Materials.

**“Uniform Act”** means the federal Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, § 42 U.S.C. 4601, *et seq.*, as amended, 49 CFR Part 24, and all associated regulations and policies.

**“Utility”** means a privately, publicly, or cooperatively owned line, facility or system (including municipal or government lines, facilities and systems) for transmitting or distributing communications, cable television, power, electricity, gas, oil, crude products, water, steam, waste, or any other similar commodity, including any irrigation system and any fire or police signal system as well as streetlights. The necessary appurtenances to each Utility facility (including fire hydrants as appurtenances to water lines) shall be considered part of such Utility. Any Service Line connecting directly to a Utility shall be considered an appurtenance to that Utility, regardless of the ownership of such Service Line.

**“Utility Adjustment”** means the relocation (temporary or permanent), abandonment and or dormancy, Protection in Place, removal (of previously abandoned Utilities as well as of newly abandoned Utilities), replacement, reinstallation, or modification of existing Utilities necessary to accommodate construction, operation, maintenance or use of the Project (each a separate “type” of Utility Adjustment). For any Utility crossing the MOT Limits and Project ROW, the Work associated with the Utility Adjustment for each crossing of the MOT Limits and Project ROW by that Utility shall be considered a separate Utility Adjustment. For any Utility installed longitudinally within the MOT Limits and Project ROW, the Utility Adjustment Work for each continuous segment of that Utility located within the MOT Limits and Project ROW shall be considered a separate Utility Adjustment.

**“Utility Adjustment Plans”** means the plans, specifications, and cost estimates furnished for a particular Utility Adjustment.

**“Utility Adjustment Work”** means all efforts and costs necessary to accomplish the required Utility Adjustment, including negotiating and entering into all applicable Utility Agreements, coordination, design, design review, permitting, construction, inspection, maintenance of records, relinquishment of Existing Utility Property Interests, preparation of Utility Joint Use Acknowledgements, and acquisition of Replacement Utility Property Interests, whether provided by Design-Build Contractor or by the Utility Owners. The term also includes any reimbursement of Utility Owners that is Design-Build Contractor’s responsibility pursuant to Section 7.4 (Updating Utility Information; Supplemental Utility Investigation by Design-Build Contractor). Any Utility Adjustment Work furnished or performed by Design-Build Contractor is part of the Work; any Utility Adjustment Work furnished or performed by a Utility Owner is not part of the Work.

**“Utility Agreement”** means an agreement, as may be amended from time to time, between either (a) INDOT or INDOT and a Utility Owner, or (b) Design-Build Contractor (or a Major Subcontractor) and a Utility Owner, in either case, providing specific details for the Adjustment

of one or more particular Utilities. A document is a Utility Agreement if it meets the foregoing definition, without regard to the title or form of the document.

**“Utility Coordination Manager”** has the meaning set forth in TP Section 1.5.1.2 (Additional Personnel).

**“Utility Delay”** has the meaning set forth in Section 7.8.1 (*Definition of Utility Delay*).

**“Utility Easement”** means a permanent replacement easement or other interest in real property (excluding a franchise) located outside of the MOT Limits that is necessary for an Adjustment.

**“Utility Enhancement”** has the meaning set forth in Section 7.6 (*Utility Enhancements*).

**“Utility Information”** means certain information as provided in the Reference Information Documents and, with respect to Main or Trunkline Utilities, in TP Section 16 (Utilities) as well as subsequent information as collected by Design-Build Contractor in Design-Build Contractor’s Utility Conflict Matrix.

**“Utility Owner”** means any private entity or public body (including city, county, state, public corporation or public district) that owns or operates a Utility, including cooperative utilities.

**“Utility Owner Project”** means the design and construction by or at the direction of a Utility Owner of a new Utility other than as part of an Adjustment. Utility Owner Projects shall be entirely the financial obligation of the Utility Owner.

**“Utility Plan”** means the final installation details and construction documents that are prepared for Utilities being Adjusted to accommodate the Project in compliance with INDOT’s Utility Accommodation Policy.

**“Utility Work Plan”** means a signed agreement documenting the scope of Utility Adjustment Work to carry out one or more Utility Adjustments to accommodate the Project, as further described in 105 IAC 13 and INDOT’s Utility Accommodation Policy.

**“Value Engineering Change Proposal”** has the meaning set forth in Section 24 (*Value Engineering*).

**“Warranty Period”** has the meaning set forth in Section 12.1.2 (*Warranty Period*).

**“Witness Point”** means any point that requires Design-Build Contractor to submit items identified in TP Section 2.2.1 (Witness Point) to INDOT for review, comment, observation and examination. Additional Witness Points may be added by INDOT pursuant to TP Section 2.2.1 (Witness Point).

**“Work”** means all of the administrative, design, engineering, real property acquisition support services, Utility Adjustment, other Utility relocation and support services, procurement, legal, professional, manufacturing, supply, installation, construction, environmental mitigation and management, supervision, management, testing, verification, labor, materials, equipment,

maintenance, documentation and other duties, services and cost reimbursements to be furnished and provided by Design-Build Contractor as required by the DBA Documents, including all efforts necessary or appropriate to achieve Final Acceptance of the Project except for those efforts which the DBA Documents expressly specify will be performed by INDOT or other Persons. In certain cases, as determined by INDOT, the term is also used to mean the products of the Work.

**“Working Drawing”** means any stress sheet, shop drawing, erection plan, falsework plan, framework plan, cofferdam plan, bending diagram for reinforcement, or any other supplementary plan, detailed drawing, design drawing, NDC, FDC, or similar data that Design-Build Contractor is required to submit for review and comment, except as may be designated as a Hold Point.

**“Written Release”** means all comments from INDOT have been addressed on a Submittal to the satisfaction of INDOT, and INDOT releases the Submittal by means of a letter, e-mail delivered by or on behalf of INDOT’s Project Manager, or through INDOT’s documents sharing system.

**EXHIBIT 2**

**INDOT-PROVIDED APPROVALS**

Those Governmental Approvals set forth in TP Table 18-1 (INDOT-Provided Approvals)

**EXHIBIT 3**

**KEY PERSONNEL**

***[NAMES OF APPROVED KEY PERSONNEL TO BE INSERTED PRIOR TO EXECUTION]***

Key Personnel Position:

Individual's Name:

Project Manager

[\_\_\_\_\_]

Design Manager

[\_\_\_\_\_]

Roadway Design Lead

[\_\_\_\_\_]

Construction Manager

[\_\_\_\_\_]

Safety Manager

[\_\_\_\_\_]

Project Controls Lead

[\_\_\_\_\_]

**EXHIBIT 4**

**BONDS**

4-A FORM OF PERFORMANCE BOND

4-B FORM OF PAYMENT (LABOR AND MATERIAL) BOND

**EXHIBIT 4-A**

**FORM OF PERFORMANCE BOND**

Bond No. \_\_\_\_\_

For

**SAFER DRIVE 65 PROJECT through a FIXED-PRICE BEST DESIGN PUBLIC –  
PRIVATE AGREEMENT (DESIGN-BUILD DELIVERY)**

**KNOW ALL WHO SHALL SEE THESE PRESENTS:**

**THAT WHEREAS**, the Indiana Department of Transportation, an agency of the State of Indiana (“INDOT” or “Obligee”) has awarded to [\_\_\_\_\_] **[NTD: INSERT DESIGN-BUILD CONTRACTOR’S NAME]** (the “Design-Build Contractor” or “Principal”), a Public-Private Agreement (Design-Build Delivery) (as amended from time to time, the “Agreement”), which Agreement is specifically incorporated by reference in this Bond, for the design and construction of the Safer Drive 65 Project (the “Project”);

**AND WHEREAS**, as a condition issuance of NTP2, Principal is required to furnish a bond (this “Bond”);

**NOW THEREFORE**, We the undersigned Principal and [\_\_\_\_\_] (the “Surety” or “Co-Sureties”) are firmly bound and held unto the Obligee, in the penal sum of Two Hundred Nine Million Two Hundred Thousand Dollars (\$209,200,000.00) good and lawful money of the United States of America for the payment whereof, well and truly to be paid to the Obligee, we bind ourselves, our heirs, successors, executors, administrators, and assigns, jointly and severally, firmly by these presents.

**THE CONDITION OF THE FOREGOING OBLIGATION IS SUCH THAT:**

1. If the Principal shall in all things stand to and abide by and well and truly keep, perform and complete all covenants, conditions, agreements, obligations and work under the Agreement, including any and all amendments, supplements, and alterations made to the Agreement as therein provided, on the Principal’s part to be kept and performed at the time and in the manner therein specified, if the Principal shall indemnify and save harmless the Obligee, its directors, officers and agents, as therein stipulated, and if the Principal shall reimburse upon demand of the Obligee any sums paid the Principal which exceed the final payment determined to be due upon completion of the Project, then these presents shall become null and void; otherwise they shall remain in full force and effect.
2. The obligations covered by this Bond specifically include liability for liquidated damages and warranties as specified in the Agreement, but not to exceed the bonded sum.
3. The Surety (or Co-Sureties) agree(s) that no change, extension of time, alterations, additions, omissions or other modifications of the terms of the Agreement, or in the work to be

performed with respect to the Project, or in the specifications or plans, or any change or modification of any terms of payment or extension of time for any payment pertaining or relating to the Agreement, or any conditions precedent or subsequent in this Bond attempting to limit the right of recovery of claimants otherwise entitled to recover under this Bond, or any fraud practiced by any other person other than the claimant seeking to recover this Bond, shall in any way affect its obligations on this Bond, and it does hereby waive notice of such changes, extension of time, alterations, additions, omissions or other modifications.

4. The Surety (or Co-Sureties) agree(s) that payments made to contractors and suppliers to satisfy claims on the payment bond do not reduce the Surety's legal obligations under this Bond. Payments made to contractors or suppliers under any agreement where the Surety has arranged for completion of the work to satisfy this Bond will not be considered payment bond claims.

5. Whenever the Principal shall be, and is declared by INDOT to be, in default under the Agreement, provided that INDOT is not then in material default thereunder, the Surety (or Co-Sureties) shall promptly:

- a. remedy such default, or
- b. complete the work covered by this Bond in accordance with the terms and conditions of the Agreement then in effect, or
- c. select a contractor or contractors to complete all work covered by this Bond in accordance with the terms and conditions of the Agreement then in effect, using a contractor or contractors approved by INDOT as required by the Agreement (provided, however, that the Surety may not select the Principal or any affiliate of the Principal to complete the work for and on behalf of the Surety without INDOT's express written consent), arrange for a contract meeting the requirements of the Agreement between such contractor or contractors and INDOT, and make available as work progresses (even though there should be a default or a succession of defaults under such contract or contracts of completion arranged under this paragraph) sufficient funds to pay the cost of completion less the unpaid balance of the contract price; but not exceeding, including other costs and damages for which Surety (or Co-Sureties) is (are) liable hereunder, the bonded sum.

6. ***[Use in case of multiple or co-sureties]*** The Co-Sureties agree to empower a single representative with authority to act on behalf of all of the Co-Sureties with respect to this Bond, so that the Obligee and claimants will have no obligation to deal with multiple sureties hereunder. All correspondence from the Obligee or claimants to the Co-Sureties and all claims under this Bond shall be sent to such designated representative. The designated representative may be changed only by delivery of written notice (by personal delivery or by certified mail, return receipt requested) to the Obligee designating a single new representative, signed by all of the Co-Sureties. The initial representative shall be [\_\_\_\_\_].



IN WITNESS WHEREOF, we have hereunto set our hands and seals on this at \_\_\_\_\_ on this \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_.

**Principal (full legal name):** \_\_\_\_\_

\_\_\_\_\_  
**Address:** \_\_\_\_\_

\_\_\_\_\_  
**By:** \_\_\_\_\_

**Contact Name:** \_\_\_\_\_

**Phone: ( )** \_\_\_\_\_

**Surety (full legal name):** \_\_\_\_\_

**Address:** \_\_\_\_\_

**By:** \_\_\_\_\_

**Contact Name:** \_\_\_\_\_

**Phone: ( )** \_\_\_\_\_

[Note: If more than one surety, then add appropriate number of lines to signature block.]

[Note: The bond shall be signed by authorized persons. Where such persons are signing in a representative capacity (e.g., an attorney-in-fact), but is not a member of the firm, partnership, or joint venture, or an officer of the legal entity involved, evidence of authority must be furnished.]

**EXHIBIT 4-B**

**FORM OF PAYMENT BOND**

Bond No. \_\_\_\_\_

For

**SAFER DRIVE 65 PROJECT**

**KNOW ALL WHO SHALL SEE THESE PRESENTS:**

**THAT WHEREAS**, the Indiana Department of Transportation, an agency of the State of Indiana (“INDOT” or Obligee”) has awarded to [\_\_\_\_\_] **[NTD: INSERT DESIGN-BUILD CONTRACTOR’S NAME]** (the “Design-Build Contractor” or “Principal”), a Public-Private Agreement (Design-Build Delivery) (as amended from time to time, the “Agreement”), which Agreement is specifically incorporated by reference in this Bond, for the design and construction of the Safer Drive 65 Project (the “Project”);

**AND WHEREAS**, as a condition issuance of NTP2, Principal is required to furnish a bond (this “Bond”);

**NOW THEREFORE**, We the undersigned Principal and [\_\_\_\_\_] (the “Surety” or “Co-Sureties”) are firmly bound and held unto the Obligee, in the penal sum of Two Hundred Nine Million Two Hundred Thousand Dollars (\$209,200,000.00) good and lawful money of the United States of America for the payment whereof, well and truly to be paid to the Obligee, we bind ourselves, our heirs, successors, executors, administrators, and assigns, jointly and severally, firmly by these presents.

**THE CONDITION OF THE FOREGOING OBLIGATION IS SUCH THAT:**

- 1.If the Principal shall comply with all requirements of law and pay, as they become due, all just claims for labor performed and materials and supplies furnished upon or for the work under the Agreement, whether said labor be performed and said materials and supplies be furnished under the original Agreement, any subcontract, or any and all duly authorized modifications thereto, then these presents shall become null and void; otherwise they shall remain in full force and effect.
- 2.The Surety (or Co-Sureties) agree(s) that no change, extension of time, alterations, additions, omissions or other modifications of the terms of the Agreement, or in the work to be performed with respect to the Project, or in the specifications or plans, or any change or modification of any terms of payment or extension of time for any payment pertaining or relating to the Agreement, or any conditions precedent or subsequent in this Bond attempting to limit the right of recovery of claimants otherwise entitled to recover under this Bond, or any fraud practiced by any other person other than the claimant seeking to recover this Bond, shall in any way affect its obligations on this Bond, and it does hereby waive notice of such changes, extension of time, alterations, additions, omissions or other modifications.

3. *[Use in case of multiple or co-sureties]* The Co-Sureties agree to empower a single representative with authority to act on behalf of all of the Co-Sureties with respect to this Bond, so that the Obligee and claimants will have no obligation to deal with multiple sureties hereunder. All correspondence from the Obligee or claimants to the Co-Sureties and all claims under this Bond shall be sent to such designated representative. The designated representative may be changed only by delivery of written notice (by personal delivery or by certified mail, return receipt requested) to the Obligee designating a single new representative, signed by all of the Co-Sureties. The initial representative shall be [\_\_\_\_\_].

IN WITNESS WHEREOF, we have hereunto set our hands and seals on this at \_\_\_\_\_ on this \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_.

**Principal (full legal name):** \_\_\_\_\_

Address: \_\_\_\_\_

By: \_\_\_\_\_

Contact Name: \_\_\_\_\_

Phone: ( ) \_\_\_\_\_

**Surety (full legal name):** \_\_\_\_\_

Address: \_\_\_\_\_

By: \_\_\_\_\_

Contact Name: \_\_\_\_\_

Phone: ( ) \_\_\_\_\_

[Note: If more than one surety, then add appropriate number of lines to signature block.]

[Note: The bond shall be signed by authorized persons. Where such persons are signing in a representative capacity (e.g., an attorney-in-fact), but is not a member of the firm, partnership, or joint venture, or an officer of the legal entity involved, evidence of authority must be furnished.]

**EXHIBIT 5**

**INVOICE AND INVOICE CERTIFICATE**

<b>Design-Build Contractor logo, address, phone number, fax number and website</b>
--

Indiana Department of Transportation

Date: xx/xx/xxxx

100 N. Senate Ave., Room N758-MPD  
Indianapolis, IN 47274

**Attention:**

**Project: Safer Drive 65 Project**  
**Agreement Number: Pxxx-xx-xxx**  
**Purchase Order Number: xxxxxx**  
**Invoice Number: xx**

---

For professional, technical, and construction services rendered in connection with the Safer Drive 65 Project, Agreement No. Pxxx-xx-xxx

Invoice Period Covered is \_\_\_\_\_, 20xx through \_\_\_\_\_, 20xx

ORIGINAL CONTRACT PRICE:	\$
TOTAL COMPENSATION EVENT CHANGE ORDERS \$	\$
TOTAL OTHER AUTHORIZED CHANGES/CHANGE ORDERS:	\$
TOTAL CONTRACT PRICE:	\$
TOTAL INVOICED THROUGH LAST PERIOD	\$
CURRENT INVOICE AMOUNT	\$
TOTAL INVOICED TO DATE	\$
PERCENT INVOICED	%

REMAINING ALLOWANCES (TOTAL)	\$ (TOTAL)
[PAVEMENT PATCHING ALLOWANCE]	\$ (subtotal)
[FIBER AND COLUMN PATCHING ALLOWANCE]	\$ (subtotal)
TOTAL AMOUNT PAID TO DATE	\$
ADJUSTMENT TO PREVIOUS PERIOD INVOICE:	\$
<b>ADJUSTED TOTAL PREVIOUSLY BILLED:</b>	\$
AMOUNTS WITHHELD/OFFSET	\$
BALANCE OF CONTRACT PRICE REMAINING:	\$
<b>NET AMOUNT DUE INVOICE #XXX</b>	\$

\_\_\_\_\_  
Submitted by:

\_\_\_\_\_  
Name (Position)

\_\_\_\_\_  
Date

\_\_\_\_\_  
Approved by:

\_\_\_\_\_  
Name (Position)

\_\_\_\_\_  
Date

Note: The following form of Invoice Certificate will be subject to revision by the Parties following the Effective Date and review of the Schedule of Values, and the revised invoice certificate shall be the form of Invoice Certificate used under the DBA.

<b>DEDUCTIONS</b>	<b>PREVIOUSLY</b>	<b>CURRENT DEDUCTIONS</b>
<i>Liquidated Damages under Section 8.2.6.1 (Key Personnel Liquidated Damages) (collectively)</i>		
<i>Liquidated Damages under Section 19.1 (Liquidated Damages for Late Opening to Traffic and Late Completion)</i>		
<i>Movement Charges under Section 19.3 (Movement Charges for Prohibited Closures)</i>		
<i>Noncompliance Event Deductions under Section 19.4 (Other Liquidated Damages) (collectively)</i>		
<i>Flagging Services Reimbursement</i>		
<i>Etc.</i>		
<b>SUBTOTALS</b>		

**TOTAL DUE THIS INVOICE:** \$

**Project Manager Assurance Certificate for Payment and Invoice** In accordance with the DBA Documents, based on on-site observations and the data comprising the above application and invoice, the Project Manager certifies to INDOT that to the best of Design-Build Contractor's knowledge, information and belief the Work has progressed as indicated, the quality of the Work is in accordance with the DBA Documents, and Design-Build Contractor is entitled to payment of the invoice.

\_\_\_\_\_  
**[Project Manager]**

**Date:** \_\_\_\_\_

The undersigned Design-Build Contractor certifies that the Work covered by this invoice has been completed in accordance with the DBA Documents, that all amounts have been paid by Design-Build Contractor for Work for which previous invoices were issued and payments received from INDOT, and that current payment shown herein is now due. All current DB-Related Entities' and suppliers' invoices are included in this payment request and invoice.

\_\_\_\_\_  
**Design-Build Contractor Authorized Representative**

**Date:** \_\_\_\_\_



## **EXHIBIT 6**

### **DESIGNATION OF INITIAL AUTHORIZED REPRESENTATIVES**

#### **INDOT Representative(s):**

- Kyanna Wheeler, Major Projects Senior Project Manager
- Jeff Clanton, Major Projects Delivery Director

#### **Design-Build Contractor Representative:**

- **[NTD: DESIGN-BUILD CONTRACTOR REPRESENTATIVE(S) TO BE ADDED PRIOR TO EXECUTION]**

**EXHIBIT 7**

**DESIGN-BUILD CONTRACTOR'S  
PROPOSAL COMMITMENTS, CLARIFICATIONS AND APPROVED DEVIATIONS  
VIA THE ATC PROCESS**

- |               |  |
|---------------|--|
| Attachment 1: | Proposal Commitments & Clarifications  |
| Attachment 2: | Deviations expressly approved pursuant to the ATC process during procurement |

**ATTACHMENT 1 TO EXHIBIT 7**

**PROPOSAL COMMITMENTS**

*[NTD: Pursuant to Section 5.11 of the ITP, negotiations will include the negotiations of this Attachment 1 to Exhibit 7 of the DBA concerning Proposal Commitments. INDOT will prepare the initial draft of this attachment, which is intended to reflect elements of the Proposal that were relevant, in the sole judgment of INDOT, to INDOT’s evaluation of the Proposal and that exceed the requirements of the DBA Documents, including the Technical Provisions.]*

The following pages summarize certain commitments made by Design-Build Contractor in its Proposal submitted for the Project, which Design-Build Contractor agrees either meet or exceed the applicable requirements of the DBA Documents. The commitments set forth herein are included in the Work as “Proposal Commitments”. This summary is an overview of certain Design-Build Contractor commitments and is not intended to be an exhaustive list of commitments made in the Proposal that meet or exceed the requirements of the DBA Documents. Nothing contained herein shall limit, modify, discharge, eliminate or reduce the requirements of the DBA Documents listed in Section 1.3 (Order of Precedence) or Design-Build Contractor’s obligations under Section 1.3.2 (Order of Precedence). Inclusion of a commitment in this Exhibit 7 (Design-Build Contractor’s Proposal Commitments and Approved Deviations via the ATC Process) shall not form the basis of any Claim against INDOT or shift to INDOT the risk of, or liability for, any site condition, event, approval or consent that has otherwise been allocated to Design-Build Contractor under the DBA Documents.

<b>Commitment No.</b>	<b>Proposal Location</b>	<b>Proposal Commitment</b>
1.		
2.		
3.		
4.		
5.		
* * *		
N		

**ATTACHMENT 2 TO EXHIBIT 7**

**APPROVED DEVIATIONS VIA THE ATC PROCESS**

The following table lists Design-Build Contractor’s approved Deviations that were expressly approved pursuant to the Alternative Technical Concepts (ATCs) process during the procurement. The approved Deviations are described in further detail in the respective ATC submittals, which Design-Build Contractor may incorporate into the Project. The Deviations specifically identified in the approved ATC submittals listed below, other than Design Exceptions, are approved by INDOT subject to satisfaction of any conditions set forth in the letters from INDOT to Design-Build Contractor. Such Deviations, subject to satisfaction of any listed conditions, expressly supersede any conflicting provisions in the Technical Provisions to the extent of the conflict, as provided in Section 1.3.2 (Order of Precedence) of the DBA. These approved Deviations, to the extent utilized by Design-Build Contractor, shall otherwise meet all requirements of the conditions set forth in the INDOT approval letters included with the approved Deviations listed below, Technical Provisions and other DBA Documents.

ATC	No. [ ]	[NTD – INSERT TITLE OF CORRESPONDING ATC]
ATC	No. [ ]	NTD – INSERT TITLE OF CORRESPONDING ATC

[see attached]

**[APPROVED ATCS AND INDOT APPROVAL LETTERS TO BE INSERTED AS PART OF THIS ATTACHMENT 2 TO EXHIBIT 7 IN EXECUTION VERSION]**

**EXHIBIT 8**  
**ALLOWANCES**

Pavement Patching Allowance*	\$2,150,000
Fiberwrap and Column Patching Allowance	\$90,000
Total of All Allowances	\$2,240,000

\* Available for mainline asphalt patching only

**EXHIBIT 9**

**FORM OF DESIGN-BUILD CONTRACTOR CHANGE REQUEST**

**SAFER DRIVE 65 PROJECT**

**CHANGE REQUEST NO.** \_\_\_\_\_

**CONTRACT NO.** \_\_\_\_\_

**SECTION I**

Name: \_\_\_\_\_

Date: \_\_\_\_\_

Title: \_\_\_\_\_

Description:

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Additions/Deletions/Modifications to Contract requirements:

Contract Requirement

Addition/Deletion/Modification

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Scope:

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Reason for Design-Build Contractor Change Request:

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Is this Change Request for an INDOT-Directed Change?

Yes       No

Please Explain:

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Is this Change Request for a Relief Event other than an INDOT-Directed Change

Yes       No

Please identify the specific Relief Event and applicable section of the Contract, including start date, duration, and explain circumstances and mitigation efforts. Attach additional pages as necessary:

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Is this Change Request for a Compensation Event other than an INDOT-Directed Change

Yes       No

Please identify the specific Compensation Event and applicable section of the Contract, including start date, duration, and explain circumstances and mitigation efforts. Attach additional pages as necessary:

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Does this Change Request involve less than \$10,000 in additional direct costs?

Yes       No

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**Design-Build Contractor Project Manager**  
**Date:**



**SECTION II: Cost Estimate**

The total cost estimate of this Change Order is \$\_\_\_\_\_. Documentation supporting this Change Request is attached as Exhibits\_\_\_\_\_ through \_\_\_\_\_.

Payment Schedule Items Added/Deducted:

<u>Activity No.</u>	<u>Description</u>	<u>Amount</u>
_____	_____	_____

This Change Request is for (check the applicable categories below):

- A lump sum, negotiated price Change Order (provide information in Section IIA below)
- A unit price/quantities Change Order (provide information in Section IIB below)
- A Time and Materials Change Order (provide information in Section IIC below)

**Section II-A**

Lump sum price is \$\_\_\_\_\_

**Section II-B**

UNIT PRICE ITEM	UNIT PRICE <sup>1</sup>	QUANTITY	PRICE (Unit Price x Quantity)

\*For patching unit prices, refer to Section 13.1.3 (Allowances) of the DBA.

Total of all items in above Table: \$\_\_\_\_\_

**Section II-C (Reference \_\_\_\_\_)**

Summary of Change Request by Categories: [Additives/(Credits)]

A.	Design-Build Contractor Labor (construction)	
1.	Wages	\$ _____
2.	Labor benefits	\$ _____
3.	Subsistence and travel for craft labor	\$ _____
4.	Employer payment to supervisors	\$ _____
B.	Design-Build Contractor and Subcontractor Labor (professional services)	
1.	Wages (Raw)	\$ _____
2.	Labor benefits	\$ _____
3.	Off-duty peace officers and patrol cruisers	\$ _____
C.	Materials (with taxes, freight and discounts)	\$ _____
D.	Equipment <sup>1</sup>	\$ _____
E.	Subcontracts (Time and Materials cost)	\$ _____
F.	Utility Direct Costs, if applicable	\$ _____
G.	Overhead and Profit	
1.	Labor (20% of A)	\$ _____
2.	Materials (12% of C)	\$ _____
3.	Equipment (12% of D)	\$ _____
4.	Subcontracts (7% of E)	\$ _____
5.	Utility Direct Costs (7% of F)	\$ _____
H.	Bonds and Insurance	\$ _____
I.	Grand Total	\$ _____

<sup>1</sup> Equipment Costs (estimated or actual) based on Blue Book Equipment Rental Rates calculated in accordance with Section 109.05(b)4 of the Standard Specifications

Subcontractor quotes are attached as Attachments [\_\_\_\_] through [\_\_\_\_] in accordance with Section 14.6.2.2 (Cost Estimate) of the DBA. ***[To be provided to the extent work is to be performed by Subcontractors.]***

**SECTION III: Delay Analysis**

The status of Substantial Completion is as follows:

- Unaffected by this Change Request
  - Affected by (increasing) (decreasing) the date of Substantial Completion by \_\_\_\_\_ calendar days.
  - Affected by (increasing) (decreasing) the \_\_\_\_\_ Float by \_\_\_\_\_ calendar days.

The status of Final Acceptance is as follows:

- Unaffected by this Change Request
  - Affected by (increasing) (decreasing) the date of Final Acceptance by \_\_\_\_\_ calendar days.
  - Affected by (increasing) (decreasing) the \_\_\_\_\_ Float by \_\_\_\_\_ calendar days.

Accordingly, the summary of the dates of Substantial Completion, Final Acceptance, and Float are as follows:

1. Substantial Completion: \_\_\_\_\_
2. Final Acceptance: \_\_\_\_\_
3. Number of days of Project Float \_\_\_\_\_

A Delay Analysis Report is attached as Exhibit \_\_\_\_\_ in accordance with Section 14.6.2.3 (*Delay Analysis*) of the DBA. ***[To be provided to the extent that Design-Build Contractor is claiming an event, situation or change affects the Critical Path.]***

**SECTION IV: Justification**

Justification for this Change Request with reference to the DBA:

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**SECTION V: Certification**

Each Change Request shall contain the following certification:

I, \_\_\_\_\_, the Authorized Representative of Design-Build Contractor, hereby certify under penalty of perjury that the above four sections represent a true, accurate and

complete summary of all aspects of this Change Request, and that (a) the amount of time or compensation requested is justified as to entitlement and amount, (b) Design-Build Contractor has independently investigated the Change Request and determined it to be justified as to entitlement and amount, (c) the amount of time or compensation requested includes all known and anticipated impacts or amounts, direct, indirect and consequential, which have been or may be incurred as a result of the event, occurrence or matter giving rise to the proposed change (and includes all Subcontractor and Supplier amounts), and (d) the cost and pricing data forming the basis for this Change Request is complete, accurate and current.

If the foregoing Change Request includes claims of Subcontractors or Suppliers, the undersigned certifies that I have reviewed such claims and have determined in good faith that the claims are justified as to both entitlement and amount, and that any Subcontractor pricing data required to be provided has been provided in accordance with Section 23.2 (*Subcontractor Pricing Documents*) of the DBA.

\_\_\_\_\_  
**Design-Build Contractor Authorized Representative**

**Date:** \_\_\_\_\_

Any pricing data provided by a Subcontractor in connection with a Change Request shall include the certification required to be provided by Subcontractor under Section 23.2 (*Subcontractor Pricing Documents*) of the DBA.

**SECTION VI (Reviewed by INDOT)**

\_\_\_\_\_  
**INDOT Seymour District Area Engineer**

**Date:** \_\_\_\_\_

\_\_\_\_\_  
**INDOT Seymour District Construction Director**

**Date:** \_\_\_\_\_

\_\_\_\_\_  
**INDOT Authorized Representative**

**Date:** \_\_\_\_\_

**Comments:**

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

**FORM OF CHANGE ORDER**

CHANGE ORDER NO. \_\_\_\_\_ CONTRACT NO. \_\_\_\_\_

**SECTION I**

Originator: \_\_\_\_\_ Date: \_\_\_\_\_

- Title: \_\_\_\_\_

Contract No: \_\_\_\_\_

- Company Name: \_\_\_\_\_

**DESCRIPTION:**

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**SCOPE:**

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\_\_\_\_\_  
**Design-Build Contractor Project Manager**

**Date:** \_\_\_\_\_

**SECTION II**

The total amount of this Change Order is \$ \_\_\_\_\_. Documentation supporting the Change Order is attached as Exhibits \_\_\_\_\_ through \_\_\_\_\_.

Payment Schedule Items Added/Deducted:

<u>Activity No.</u>	<u>Description</u>	<u>Amount</u>
_____	_____	_____

This Change Request is for (check the applicable categories below):

- \_\_\_\_\_ A lump sum, negotiated price Change Order (provide information in Section IIA below)
- \_\_\_\_\_ A unit price/quantities Change Order (provide information in Section IIB below)
- \_\_\_\_\_ A Time and Materials Change Order (provide information in Section IIC below)

**Section II-A**

Lump sum price is \$ \_\_\_\_\_

**Section II-B**

UNIT PRICE ITEM	UNIT PRICE*	QUANTITY	PRICE (Unit Price x Quantity)

Total of all items in above Table: \$ \_\_\_\_\_

**Section II-C**

Summary of Change Request by Categories: [Additives/(Credits)]

- A. Design-Build Contractor Labor (construction)
  - 1. Wages \$ \_\_\_\_\_
  - 2. Labor benefits \$ \_\_\_\_\_
  - 3. Subsistence and travel for craft labor \$ \_\_\_\_\_
  - 4. Employer payment to supervisors \$ \_\_\_\_\_
- B. Design-Build Contractor and Subcontractor Labor (professional services)

1. Wages (Raw)	\$	_____
2. Labor benefits	\$	_____
3. Off-duty peace officers and patrol cruisers	\$	_____
C. Materials (with taxes, freight and discounts)	\$	_____
D. Equipment <sup>1</sup>	\$	_____
E. Subcontracts (Time and Materials cost)	\$	_____
F. Utility Direct Costs, if applicable	\$	_____
G. Overhead and Profit		
1. Labor (20% of A.1)	\$	_____
2. Materials (12% of C)	\$	_____
3. Equipment (12% of D)	\$	_____
4. Subcontracts (7% of E)	\$	_____
5. Utility Direct Costs (7% of F)	\$	_____
H. Bonds and Insurance	\$	_____
I. Grand Total	\$	_____

<sup>1</sup> Equipment Costs (estimated or actual) based on Blue Book Equipment Rental Rates calculated in accordance with Section 109.05(b)4 of the Standard Specifications.

Subcontractor quotes are attached as Exhibits \_\_\_\_\_ through \_\_\_\_\_ in accordance with Section 14.6.2.2 (Cost Estimate) of the DBA. ***[To be provided to the extent work is to be performed by Subcontractors.]***

**SECTION III: Delay Analysis**

The status of Substantial Completion is as follows:

- Unaffected by this Change Request
  - Affected by (increasing) (decreasing) the date of Substantial Completion by \_\_\_\_\_ calendar days.
  - Affected by (increasing) (decreasing) the \_\_\_\_\_ Float by \_\_\_\_\_ calendar days.

The status of Final Acceptance is as follows:

- Unaffected by this Change Request
  - Affected by (increasing) (decreasing) the date of Final Acceptance by \_\_\_\_\_ calendar days.



Affected by (increasing) (decreasing) the \_\_\_\_\_ Float by \_\_\_\_\_ calendar days.

Accordingly, the summary of the dates of Substantial Completion, Final Acceptance, and Float are as follows:

1. Substantial Completion: \_\_\_\_\_
2. Final Acceptance: \_\_\_\_\_
3. Number of days of Project Float \_\_\_\_\_

A Delay Analysis Report is attached as Exhibit \_\_\_\_\_ in accordance with Section 14.6.2.3 (Delay Analysis) of the DBA. ***[To be provided to the extent that Design-Build Contractor is claiming an event, situation or change affects the Critical Path.]***

**SECTION IV**

Justification for this Change Request with reference to the DBA:

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**SECTION V: Certification**

I, \_\_\_\_\_, the Authorized Representative of Design-Build Contractor, hereby certify under penalty of perjury that the above four sections represent a true, accurate and complete summary of all aspects of this Change Request, and that (a) the amount of time or compensation requested is justified as to entitlement and amount, (b) Design-Build Contractor has independently investigated the Change Request and determined it to be justified as to entitlement and amount, (c) the amount of time or compensation requested includes all known and anticipated impacts or amounts, direct, indirect and consequential, which have been or may be incurred as a result of the event, occurrence or matter giving rise to the proposed change (and includes all Subcontractor and Supplier amounts), and (d) the cost and pricing data forming the basis for this Change Request is complete, accurate and current.

If the foregoing Change Request includes claims of Subcontractors or Suppliers, the undersigned certifies that I have reviewed such claims and have determined in good faith that the claims are justified as to both entitlement and amount, and that any Subcontractor pricing data required to be provided has been provided in accordance with Section 23.2 (Subcontractor Pricing Documents) of the DBA

\_\_\_\_\_  
**Design-Build Contractor Authorized Representative**

**Date:** \_\_\_\_\_

**SECTION VI (Reviewed by INDOT)**

\_\_\_\_\_  
**INDOT Seymour District Area Engineer**

**Date:** \_\_\_\_\_

\_\_\_\_\_  
**INDOT Seymour District Construction Director**

**Date:** \_\_\_\_\_

\_\_\_\_\_  
**INDOT Authorized Representative**

**Date:** \_\_\_\_\_

**Comments:**

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

**EXHIBIT 10**

**LIQUIDATED DAMAGES, MOVEMENT CHARGES, AND NONCOMPLIANCE  
EVENT DEDUCTIONS**

**[NOTE: TABLES 10-1-01 AND 10-1-02 ARE INDICATIVE ONLY PENDING  
APPROVAL OF IHCP EXCEPTIONS AND ANY EXCEPTIONS PROPOSED AND  
APPROVED THROUGH THE ATC PROCESS]**

<b>Table 10-1-01 Allowable Mainline Interstate Movement Closures – Exceptions to IHCP</b>			
<b>Phase</b>	<b>Length of Project in Scope</b>	<b>Maximum Movement Closures</b>	<b>Duration</b>
Pre-Phase Construction	RP 16+27 to RP 20+27 (4 miles)	<b>Single-lane northbound closure for temporary shoulder strengthening</b>  <ul style="list-style-type: none"> <li>○ Northbound Anytime                             <ul style="list-style-type: none"> <li>- Weekday – 12 AM to 11:59PM</li> <li>- Sat-Sun – 12AM to 11:59PM</li> </ul> </li> </ul>	35 calendar days
Pre-Phase Construction	RP 18+19 to RP 18+73 (0.5 mile)	<b>Single-lane southbound closure for temporary shoulder strengthening</b>  <ul style="list-style-type: none"> <li>- Monday 12AM to Thursday 11:59PM</li> <li>- No lane closure Friday 12AM to Sunday 11:59PM</li> <li>- Closure may occur concurrent to single-lane northbound closure for shoulder strengthening, but shall not be closed for full duration of northbound closure</li> </ul>	7 calendar days
Pre-Phase Construction	RP 20+27 up to RP 21+77 (1.5 miles)	<b>Single-lane northbound closure for temporary shoulder strengthening</b>  <ul style="list-style-type: none"> <li>○ Northbound Anytime                             <ul style="list-style-type: none"> <li>- Weekday – 12 AM to 11:59PM</li> <li>- Sat-Sun – 12AM to 11:59PM</li> </ul> </li> </ul>	7 calendar days

<b>Table 10-1-01</b>			
<b>Allowable Mainline Interstate Movement Closures – Exceptions to IHCP</b>			
<b>Phase</b>	<b>Length of Project in Scope</b>	<b>Maximum Movement Closures</b>	<b>Duration</b>
		<ul style="list-style-type: none"> <li>○ Extension of time for single-lane northbound closure from RP 16+27 to 20+27 (total max closure 6 weeks)</li> </ul>	
Pre-Phase Construction	Any length north of RP 21+77	<p><b>Single-lane northbound closure for temporary shoulder strengthening</b></p> <ul style="list-style-type: none"> <li>○ Northbound Anytime               <ul style="list-style-type: none"> <li>- Weekday – 12 AM to 11:59PM</li> <li>- Sat-Sun – 12AM to 11:59PM</li> </ul> </li> <li>○ Extension of time for single-lane northbound closure from RP 16+27 to 21+77 (total max closure 7 weeks)</li> </ul>	7 calendar days
Any Phase	As determined by Design-Build Contractor	<p><b>Single-lane closure southbound for temporary pavement construction at three (3) locations:</b></p> <ul style="list-style-type: none"> <li>○ Construction of crossover at north end of reconstruction with added travel lanes (variable location)               <ul style="list-style-type: none"> <li>- Monday 12AM to Thursday 11:59 PM per location</li> <li>- No lane closure Friday 12AM to Sunday 11:59 PM per location</li> </ul> </li> <li>○ SR 160 ramps               <ul style="list-style-type: none"> <li>- Monday 12AM to Thursday 11:59 PM per location</li> </ul> </li> </ul>	7 calendar days per location

<b>Table 10-1-01 Allowable Mainline Interstate Movement Closures – Exceptions to IHCP</b>			
<b>Phase</b>	<b>Length of Project in Scope</b>	<b>Maximum Movement Closures</b>	<b>Duration</b>
		<ul style="list-style-type: none"> <li>- No lane closure Friday 12AM to Sunday 11:59 PM per location</li> <li>o SR 56 ramps</li> <li>- Monday 12AM to Thursday 11:59 PM per location</li> <li>- No lane closure Friday 12AM to Sunday 11:59 PM per location</li> </ul>	
Any Phase	Any Project Length	<p><b>Two (2) northbound lanes and two (2) southbound lanes with shoulder restrictions (shoulder width varies between 2’ – 10’)</b></p> <ul style="list-style-type: none"> <li>o Anytime <ul style="list-style-type: none"> <li>- Weekday – 12 AM to 11:59PM</li> <li>- Sat-Sun – 12AM to 11:59PM</li> </ul> </li> <li>o May include contraflow lanes as determined by Design-Build Contractor</li> </ul>	As determined by Design-Build Contractor
Rolling Slowdown for Bridge Rehabilitation	I-65 at County Line Road, or as determined necessary by Design-Build Contractor	<ul style="list-style-type: none"> <li>o 10 mph pacing speed for I-65 northbound and southbound work for a duration of 30-minutes after the passage of chase vehicle</li> <li>o Rolling slowdown to occur during the following hours (other than holidays) <ul style="list-style-type: none"> <li>- Sunday 11PM to Monday 4AM (I-65 NB), 5AM (I-65 SB)</li> <li>- Tues – Thurs – 12AM to 4AM (I-65 NB), 12AM to 5AM (I-65 SB)</li> </ul> </li> </ul>	As determined by Design-Build Contractor

<b>Table 10-1-01 Allowable Mainline Interstate Movement Closures – Exceptions to IHCP</b>			
<b>Phase</b>	<b>Length of Project in Scope</b>	<b>Maximum Movement Closures</b>	<b>Duration</b>
		<ul style="list-style-type: none"> <li>- Friday 12AM to 4AM (I-65 NB &amp; SB)</li> <li>- Saturday 1AM to 6AM (I-65 NB), 1AM – 5AM (I-65 SB)</li> <li>- Sunday 12 AM to 7 AM (I-65 NB &amp; SB)</li> </ul>	
Roadway Reconstruction – Pavement Marking Operations	Limits of reconstruction with added travel lanes, as determined by Design-Build Contractor	<ul style="list-style-type: none"> <li>o Minimum one (1) lane OPEN at all times in each direction (I-65 NB &amp; SB); inside shoulder closure allowed for left lane closure, outside shoulder closure allowed for right lane closure</li> <li>- Single mainline lane closure allowed weekday and Weekend, 7 PM to 7 AM</li> <li>- Two (2) lanes OPEN all other times</li> </ul>	As determined by Design-Build Contractor
Roadway Rehabilitation	Limits of mill and asphalt overlay between terminus of added travel lanes reconstruction and SR 56 (RP 29+34), as determined by Design-Build Contractor	<ul style="list-style-type: none"> <li>o Minimum one (1) lane OPEN at all times in each direction (I-65 NB &amp; SB); inside shoulder closure allowed for left lane closure, outside shoulder closure allowed for right lane closure</li> <li>- Single mainline lane closure allowed weekday and Weekend, 7 PM to 7 AM</li> <li>- Two (2) lanes OPEN all other times</li> </ul>	As determined by Design-Build Contractor
Henryville Rest Area	Northbound and South Bound Exit Ramps	<p>Full closure one-time each (auxiliary travel lanes only)</p> <ul style="list-style-type: none"> <li>- Two (2) mainline travel lanes OPEN at all times, except as</li> </ul>	Maximum 180 consecutive days

<b>Table 10-1-01</b>			
<b>Allowable Mainline Interstate Movement Closures – Exceptions to IHCP</b>			
<b>Phase</b>	<b>Length of Project in Scope</b>	<b>Maximum Movement Closures</b>	<b>Duration</b>
		otherwise allowed in Table 10-1-1	

<b>Table 10-1-2  Movement Charges for Prohibited Closures -- Exceeding Maximum Movement  Closure Durations for Allowable Movement Closures</b>			
<b>Phase</b>	<b>Minimum Open Lanes</b>	<b>Unit of Measure for Assessment</b>	<b>\$ Amount per Unit</b>
<b>Pre-Phase I</b>	<b>I-65 northbound</b> ○ One (1) lane OPEN between limits of reconstruction with added travel lanes, as determined by Design-Build Contractor during times permitted by IHCP referenced in Table 10-1-1  Two lanes OPEN all other locations	Per day	Liquidated damages assessed pursuant to <u>DBA Section 19.1.1(a)</u>
<b>Pre-Phase I</b>	<b>I-65 southbound</b> One (1) lane OPEN between RP 18+19 to RP 18+73 during times permitted by IHCP referenced in Table 10-1-1  Two (2) lanes OPEN all other locations	Per day	Liquidated damages assessed pursuant to <u>DBA Section 19.1.1(a)</u>
<b>Any Phase</b>	<b>I-65 Southbound</b> One (1) lane OPEN during construction of temporary pavement only at three (3) locations during times permitted by IHCP referenced in Table 10-1-1:  - crossover at north end of added travel lanes construction -SR 160 ramps - SR 56 ramps  Two (2) lanes OPEN all other times	(a) Number of days late in opening two (2) lanes to traffic following expiration of IHCP exception duration noted in Table 10-1-1	(a)Liquidated damages assessed pursuant to <u>DBA Section 19.1.1(a)</u>



<p><b>Any Phase</b></p>	<p><b>I-65 Northbound</b> Two (2) lanes OPEN; shoulder restrictions (min. 2ft.)</p> <p><b>I-65 Southbound</b> Two (2) lanes OPEN; shoulder restrictions (min. 2ft.)</p>	<p>Every 15 minutes per closed lane that exceeds maximum number of closed lanes permitted or fails to meet allowed shoulder restrictions</p>	<p>\$1,000</p>
<p><b>Rolling Slowdown for Bridge Work on County Line Road (CR 600S)</b></p>	<ul style="list-style-type: none"> <li>o All travel lanes and inside shoulders slowed to 10 mph travel speed</li> <li>o Outside shoulder for I-65 northbound and southbound closed</li> <li>o Northbound entrance ramps from SR 160/I-65 interchange and Henryville Rest Area Closed during northbound RSD</li> <li>o Southbound entrance ramps for SR 56/I-65 interchange closed during southbound RSD</li> </ul> <p>Median crossovers (if any) between starting points and work site will be closed</p>	<p>(a) Per rolling slowdown at locations as listed during times other than those permitted by the IHCP exception listed in Table 10-1-1.</p> <p>(b) Every additional 5 minutes in excess of 30 minutes per rolling slowdown duration</p>	<p>(a) \$7,500</p> <p>(b) \$1,000</p>

<p><b>Roadway Reconstruction – Pavement Marking Operations</b></p>	<p><b>I-65 Northbound and Southbound</b></p> <p>One (1) lane OPEN during pavement marking operations; inside shoulder restrictions for left lane closure, outside shoulder restrictions for right lane closure at times permitted by IHCP exception in Table 10-1-1</p> <p>Two (2) lanes OPEN all other times</p>	<p>Every 15 minutes per closed lane that exceeds maximum number of closed lanes permitted or fails to meet inside shoulder restrictions</p>	<p>\$1,000</p>
<p><b>Roadway Rehabilitation</b></p>	<p><b>I-65 Northbound and Southbound</b></p> <p>One (1) lane OPEN during milling and paving operations, including partial depth patching; inside shoulder restrictions for left lane closure, outside shoulder restrictions for right lane closure at times permitted by IHCP exception in Table 10-1-1</p> <p>Two (2) lanes OPEN all other times</p>	<p>Every 15 minutes per closed lane that exceeds maximum number of closed lanes permitted or fails to meet inside shoulder restrictions</p>	<p>\$1,000</p>
<p><b>Henryville Rest Area</b></p>	<p><b>Northbound and Southbound Exit Ramps Each</b></p> <p>One-time closure for maximum 180 consecutive days each</p>	<p>(a) Per day for every day that the total number of days of ramp closure exceeds 180 consecutive days</p> <p>(b) Per day of closure for any closure in excess of one-time</p>	<p>(a) \$7,500</p> <p>(b) \$7,500</p>

Notes to Table 10-1-2:

1. Each measure of time will be rounded up to the next 15 minutes. As an example, if a particular lane closure occurs for 15 minutes and one second, with the unit increment of 15 minutes, the lane closure will be counted as two 15-minute closures and twice the amount will be payable.
2. Single lane prohibited closures will be measured on the basis of direction and lane. A closure of more than one lane will result in a Movement Charge for each affected lane”
3. The closure will commence as of the event, and no Notice is required nor cure period allowed.
4. No Movement Charge under Table 10-1-2 will be assessed for any emergency or urgent situation, as described in TP Section 9.3.8.1 (*Interstate, Highway, State or Local Road Movement Closures*), unless such emergency or urgent situation was caused, in whole or in part, by the acts or omissions of a DB-Related Entity or a Design-Build Contractor Fault.
5. No Movement Charge under Table 10-1-2 will be assessed for any temporary traffic stoppage under Section 801.16(c) of the Standard Specifications; unless such Movement Closure was caused, in whole or in part, by the acts or omissions of any DB-Related Entity or any Design-Build Contractor Fault.

Other than as described in clauses (4) and (5) above, as permitted during the periods reflected in Table 10-1-1 or resulting solely due to a Relief Event or a Compensation Event, any Movement Closure will be considered a Prohibited Closure and subject to assessment of the Movement Charges set forth in Table 10-1-2.

<b>Table 10-4</b>			
<b>Noncompliance Event Deductions</b>			
<b>NCE Number</b>	<b>Noncompliance Event</b>	<b>NCE Deduction Amount</b>	<b>NCE Notice</b>
1.	<p>Faulty temporary pavement:</p> <p>For each period of non-conformance with the requirements of TP 6.4.5.2 (Temporary Pavement Alternate 2 (Performance-Based)) lasting 24 hours after the earlier of (a) notification by INDOT, and (b) Design-Build Contractor's Actual Knowledge thereof, without full cure.</p>	<p>\$15,000 per 24 hour period or portion thereof for instance or instances of faults (in either case as described in TP Section 6.4.5.2 (Temporary Pavement Alternate 2 (Performance-Based)) that occur(s) within any one mile length of roadway, measured separately per direction of traffic, and measured in one mile segments from the beginning of the work zone until corrected.</p>	[No] NCE Notice
2.	<p>Failure to maintain existing ITS, facilities within the limits of the Project other than facilities to be replaced as part of the Project, including but not limited to CCTV towers and dynamic message sign structures. Maintaining ITS facilities includes any functionality or infrastructure problem preventing operational use of the facility.</p> <p>(a) For each camera outage and loss of functionality at a location lasting 4 hours, or</p>	<p>(a) – (c) \$7500 per day per location until corrected</p>	[No] NCE Notice

	<p>portion thereof, after the earlier of notification by INDOT, and (b) Design-Build Contractor's Actual Knowledge thereof, without full cure</p> <p>(b) For each period of non-conformance with the Technical Provisions for broken or cut fiber and functionality lasting 1 hour, or portion thereof, after the earlier of (a) notification by INDOT, and (b) Design-Build Contractor's Actual Knowledge thereof, without full cure</p> <p>(c) For each period of non-conformance with the Technical Provisions for all other ITS equipment and functionality lasting 48 hours, or portion thereof, after the earlier of (a) notification by INDOT, and (b) Design-Build Contractor's Actual Knowledge thereof, without full cure</p>		
3.	<p>Failure to continuously maintaining required traffic control devices or markings, except for construction warning lights, at all times during performance of the Work, in compliance with the Technical Provisions:</p>	<p>\$40 per day for each non-compliant unit within a device or marking until corrected</p>	<p>No NCE Notice</p>

	For each 24 hour period, or portion thereof, during which a type of traffic control device or marking is in non-compliance		
4.	<p>Failure to correct any Immediate Deficiency, as defined in Standard Specification 205.08, within 24 hours after the earlier of (a) notification by INDOT, and (b) Design-Build Contractor's Actual Knowledge thereof, including:</p> <p>(a) Failure to comply with the conditions and commitments of the contract stormwater and waterway permits and regulations;</p> <p>(b) Beginning land-disturbing activities without the Engineer's acceptance of a submitted SWQCP or prior to the pre-disturbance meeting, if not waived by written permission;</p> <p>(c) Leakage from a fueling facility that contaminates soil or a water resource;</p> <p>(d) Failure to perform a site inspection as required by Standard Provision Section 205.03(b) and CGSP</p>	\$200 per day (or part thereof) for each Immediate Deficiency until corrected	[No] NCE Notice
5.	Failure to correct any BMP Deficiency, as defined in Standard Specification 205.08, within 48 hours after the earlier	(a) \$200 per day or portion thereof per affected BMP until corrected;	[No] NCE Notice

	<p>of (a) notification by INDOT, and (b) Design-Build Contractor’s Actual Knowledge thereof, including:</p> <p>(a) Failure to install, construct, or maintain BMPs as shown on the plans or the accepted SWQCP;</p> <p>(b) Failure of permit postings to meet the requirements of the permitting agency or the requirements in Standard specification 205.03;</p> <p>(c) Fence material has a cut or tear exceeding 1 foot in length, or a seam has separated, or the retained sediment exceeds ½ of the height of the fence, or the fence is not installed as shown on the standard drawings;</p> <p>(d) A contiguous 50 ft. section, or portion thereof, of filter sock is not installed and maintained in accordance with the standard drawings and the manufacturer’s recommendations;</p> <p>(e) Stormwater circumvents the measure, or the retained sediment exceeds ½ the design volume, of any dam, sediment basin, or sediment trap, or they are not installed in accordance with the accepted SWQCP as shown on the plans, or the Project’s Site Plan:</p> <p>(f) Stormwater circumvents the measure of a manufactured</p>	<p>(b) \$200 per day or portion thereof, per affected permit posting until corrected;</p> <p>(c) \$200 per day or portion thereof, per listed defect in the affected fence until corrected;</p> <p>(d) \$200 per day or portion thereof, per affected 50 ft. contiguous section of fence until corrected;</p> <p>(e) \$200 per day or portion thereof, per affected dam, sediment basin, or sediment trap until corrected;</p> <p>(f) \$200 per day or portion thereof, per affected manufactured BMP until corrected;</p> <p>(g) \$200 per day or portion thereof, per BMP installed incorrectly, and per BMP improperly maintained until corrected.</p>	
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	<p>BMP, or a manufactured BMP is not installed and maintained in accordance with the manufacturer’s recommendations;</p> <p>(g) any other BMPs are not installed in accordance with the accepted SWQCP, as shown on the plans, the Project Site Plan, or the other BMP is not maintained adequately to perform its intended function</p>		
6.	<p>Illicit discharge of wastewater, soap, detergent, solvents, fuel, oi, or other pollutants into a drainage structure, jurisdictional waterway, or similar environmental resource, or use of cationic polymers.</p>	\$500 per illicit discharge	No NCE Notice
7.	<p>Failure to perform maintenance that Design-Build Contractor is required to perform pursuant to TP 04 (Construction Requirements) for the following Maintenance Priority Levels within the following specified timeframes:</p> <p>(a) Maintenance Priority Level 1 no later than 12 hours after (i) notification by INDOT, and (ii) Design-Build Contractor’s Actual Knowledge thereof;</p> <p>(b) Maintenance Priority Level 2 no later than 24 hours after (i) notification by INDOT, and (ii) Design-</p>	<p>(a) \$5,000 per hour that response is later than 12 hours;</p> <p>(b) \$2,500 per hour that response is later than 24 hours;</p> <p>(c) no liquidated damages</p>	[No] NCE Notice



	<p>Build Contractor’s Actual Knowledge thereof; and</p> <p>(c) Maintenance Priority Level 3 no later than 24 hours after (i) notification by INDOT, and (ii) Design-Build Contractor’s Actual Knowledge thereof.</p>		
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Notes to Table 10-4 (Noncompliance Event Deductions) of Exhibit 10 (*Liquidated Damages, Movement Charges, and Noncompliance Event Deductions*):

1. Each measure of time will be rounded up to the next unit (e.g., single hour, four hours, or 24 hours, etc.). For instance, if (i) a noncompliance of maintaining pavement occurs and lasts for 25 hours after the expiration of the initial 24 hour notification period, it will be considered to be two instances and twice the amount will be payable.
2. With respect to Maintaining ITS camera outages and functionality, liquidated damages will be assessed for the initial failure to cure within four hours and for each day thereafter (e.g., the first assessment will occur one second after the expiration of the four hour cure period without full cure; the second assessment will occur one second after the expiration of the next 24 hour period without full cure; subsequent assessments will occur for each 24 hour period, or any increment thereof) until the repairs are made.
3. With respect to Maintaining ITS broken or cut fiber and functionality, liquidated damages will be assessed for the initial failure to cure within one hour and for each day thereafter (e.g., the first assessment will occur one second after the expiration of the one hour cure period without full cure; the second assessment will occur one second after the expiration of the next 24 hour period without full cure; subsequent assessments will occur for each 24 hour period, or any increment thereof) until the repairs are made.
4. With respect to Maintaining ITS for all other ITS equipment and functionality, liquidated damages will be assessed for the initial failure to cure within 48 hours and for each 24 hour period thereafter (e.g., the first assessment will occur one second after the expiration of the 48 hour cure period without full cure; the second assessment will occur one second after the expiration of the next 24 hour period without full cure; subsequent assessments will occur for each 24 hour period, or any increment thereof) until the repairs are made.

**EXHIBIT 11**

**FEDERAL REQUIREMENTS**

	<b><u>Exhibit Description</u></b>	<b><u>No. of Pages</u></b>
Attachment 1	Federal Requirements for Federal-Aid Construction Projects	3
Attachment 2	FHWA Form 1273	12
Attachment 3	Federal Prevailing Wage Rates	[ ]
Attachment 4	Equal Employment Opportunity	9
Attachment 5	Affirmative Action	4
Attachment 6	Certification Regarding Use of Contract Funds for Lobbying	2
Attachment 7	Compliance with Buy America Requirements	6
Attachment 8	INDOT's OJT Program & Partnership Agreement	10

## ATTACHMENT 1 TO EXHIBIT 11

### FEDERAL REQUIREMENTS FOR FEDERAL-AID CONSTRUCTION CONTRACTS

#### GENERAL.

The work herein proposed will be financed in whole or in part with federal funds, and therefore all of the statutes, rules and regulations promulgated by the federal government and applicable to work financed in whole or in part with federal funds will apply to such work. The “Required Contract Provisions, Federal-Aid Construction Contracts, Form FHWA-1273,” are included in Attachment 2 to Exhibit 11 (*Federal Requirements*) of this DBA. Whenever in said required contract provisions references are made to:

(a) “contractor,” “prime contractor,” “bidder” or “prospective primary participant,” such references shall be construed to mean Design-Build Contractor or its authorized representative or other members of Design-Build Contractor, as applicable, or their respective authorized representatives, as may be appropriate under the circumstances;

(b) “contract” or “prime contract,” such references shall be construed to mean the DBA;

(c) “subcontractor,” “supplier,” “vendor,” “prospective lower tier participant” or “lower tier subcontractor,” such references shall be construed to mean, as appropriate, contractors other than Design-Build Contractor; and

(d) “department,” “agency” or “department or agency entering into this transaction,” such references shall be construed to mean INDOT, except where a different department or agency is specified.

#### NON-COLLUSION PROVISION.

The provisions in this section are applicable to all contracts except contracts for Federal Aid Secondary Projects. Title 23, United States Code, Section 112, requires as a condition precedent to approval by the Federal Highway Administrator of the contract for this work that each bidder file a sworn statement executed by, or on behalf of, the person, firm, association, or corporation to whom such contract is to be awarded, certifying that such person, firm, association, or corporation has not, either directly or indirectly, entered into any agreement, participated in any collusion, or otherwise taken any action in restraint of free competitive bidding in connection with the submitted bid. A form to make the non-collusion affidavit statement required by 23 U.S.C. § 112 as a certification under penalty of perjury rather than as a sworn statement as permitted by 28 U.S.C. § 1746, is included in the Proposal.

#### RECOVERED MATERIALS

Design-Build Contractor and its contractors (at all tiers) shall comply with Section 6002 of the Solid Waste Disposal Act, as amended by the Resource Conservation and Recovery Act (RCRA), including the regulatory provisions of 40 C.F.R., Part 247, and Executive Order 12873, as they apply to the procurement of the items designated in Subpart B of 40 C.F.R., Part 247. The requirements of Section 6002 include procuring only items designated in guidelines of the Environmental Protection Agency (EPA) at 40 C.F.R., Part 247 that contain the highest percentage of recovered materials practicable, consistent with maintaining a satisfactory level of competition, where the purchase price of the item exceeds \$10,000 or the value of the quantity acquired during the preceding fiscal year exceeded \$10,000; procuring solid waste management services in a manner that maximizes energy and resource recovery; and establishing an affirmative procurement program for procurement of recovered materials identified in the EPA guidelines.

**ATTACHMENT 2 TO EXHIBIT 11**

**FHWA FORM 1273**

[See attached - **Revised October 23, 2023**]

## REQUIRED CONTRACT PROVISIONS FEDERAL-AID CONSTRUCTION CONTRACTS

- I. General
- II. Nondiscrimination
- III. Non-segregated Facilities
- IV. Davis-Bacon and Related Act Provisions
- V. Contract Work Hours and Safety Standards Act Provisions
- VI. Subletting or Assigning the Contract
- VII. Safety: Accident Prevention
- VIII. False Statements Concerning Highway Projects
- IX. Implementation of Clean Air Act and Federal Water Pollution Control Act
- X. Certification Regarding Debarment, Suspension, Ineligibility and Voluntary Exclusion
- XI. Certification Regarding Use of Contract Funds for Lobbying
- XII. Use of United States-Flag Vessels:

### ATTACHMENTS

- A. Employment and Materials Preference for Appalachian Development Highway System or Appalachian Local Access Road Contracts (included in Appalachian contracts only)

#### I. GENERAL

1. Form FHWA-1273 must be physically incorporated in each construction contract funded under title 23, United States Code, as required in 23 CFR 633.102(b) (excluding emergency contracts solely intended for debris removal). The contractor (or subcontractor) must insert this form in each subcontract and further require its inclusion in all lower tier subcontracts (excluding purchase orders, rental agreements and other agreements for supplies or services). 23 CFR 633.102(e).

The applicable requirements of Form FHWA-1273 are incorporated by reference for work done under any purchase order, rental agreement or agreement for other services. The prime contractor shall be responsible for compliance by any subcontractor, lower-tier subcontractor or service provider. 23 CFR 633.102(e).

Form FHWA-1273 must be included in all Federal-aid design-build contracts, in all subcontracts and in lower tier subcontracts (excluding subcontracts for design services, purchase orders, rental agreements and other agreements for supplies or services) in accordance with 23 CFR 633.102. Design-Build Contractor shall be responsible for compliance by any subcontractor, lower-tier subcontractor or service provider.

Contracting agencies may reference Form FHWA-1273 in solicitation-for-bids or request-for-proposals documents, however, the Form FHWA-1273 must be physically incorporated (not referenced) in all contracts, subcontracts and lower-tier subcontracts (excluding purchase orders, rental agreements and other agreements for supplies or services related to a construction contract). 23 CFR 633.102(b).

2. Subject to the applicability criteria noted in the following sections, these contract provisions shall apply to all work performed on the contract by the contractor's own organization and with the assistance of workers under the contractor's immediate superintendence and to all work performed on the contract by piecework, station work, or by subcontract. 23 CFR 633.102(d).

3. A breach of any of the stipulations contained in these Required Contract Provisions may be sufficient grounds for withholding of progress payments, withholding of final payment, termination of the

contract, suspension / debarment or any other action determined to be appropriate by the contracting agency and FHWA.

4. Selection of Labor: During the performance of this contract, the contractor shall not use convict labor for any purpose within the limits of a construction project on a Federal-aid highway unless it is labor performed by convicts who are on parole, supervised release, or probation. 23 U.S.C. 114(b). The term Federal-aid highway does not include roadways functionally classified as local roads or rural minor collectors. 23 U.S.C. 101(a).

#### II. NONDISCRIMINATION (23 CFR 230.107(a); 23 CFR Part 230, Subpart A, Appendix A; EO 11246)

The provisions of this section related to 23 CFR Part 230, Subpart A, Appendix A are applicable to all Federal-aid construction contracts and to all related construction subcontracts of \$10,000 or more. The provisions of 23 CFR Part 230 are not applicable to material supply, engineering, or architectural service contracts.

In addition, the contractor and all subcontractors must comply with the following policies: Executive Order 11246, 41 CFR Part 60, 29 CFR Parts 1625-1627, 23 U.S.C. 140, Section 504 of the Rehabilitation Act of 1973, as amended (29 U.S.C. 794), Title VI of the Civil Rights Act of 1964, as amended (42 U.S.C. 2000d et seq.), and related regulations including 49 CFR Parts 21, 26, and 27; and 23 CFR Parts 200, 230, and 633.

The contractor and all subcontractors must comply with: the requirements of the Equal Opportunity Clause in 41 CFR 601.4(b) and, for all construction contracts exceeding \$10,000, the Standard Federal Equal Employment Opportunity Construction Contract Specifications in 41 CFR 60-4.3.

Note: The U.S. Department of Labor has exclusive authority to determine compliance with Executive Order 11246 and the policies of the Secretary of Labor including 41 CFR Part 60, and 29 CFR Parts 1625-1627. The contracting agency and the FHWA have the authority and the responsibility to ensure compliance with 23 U.S.C. 140, Section 504 of the Rehabilitation Act of 1973, as amended (29 U.S.C. 794), and Title VI of the Civil Rights Act of 1964, as amended (42 U.S.C. 2000d et seq.), and related regulations including 49 CFR Parts 21, 26, and 27; and 23 CFR Parts 200, 230, and 633.

The following provision is adopted from 23 CFR Part 230, Subpart A, Appendix A, with appropriate revisions to conform to the U.S. Department of Labor (US DOL) and FHWA requirements.

**1. Equal Employment Opportunity:** Equal Employment Opportunity (EEO) requirements not to discriminate and to take affirmative action to assure equal opportunity as set forth under laws, executive orders, rules, regulations (*see* 28 CFR Part 35, 29 CFR Part 1630, 29 CFR Parts 1625-1627, 41 CFR Part 60 and 49 CFR Part 27) and orders of the Secretary of Labor as modified by the provisions prescribed herein, and imposed pursuant to 23 U.S.C. 140, shall constitute the EEO and specific affirmative action standards for the contractor's project activities under this contract. The provisions of the Americans with Disabilities Act of 1990 (42 U.S.C. 12101 et seq.) set forth under 28 CFR Part 35 and 29 CFR Part 1630 are incorporated by reference in this contract. In the

execution of this contract, the contractor agrees to comply with the following minimum specific requirement activities of EEO:

a. The contractor will work with the contracting agency and the Federal Government to ensure that it has made every good faith effort to provide equal opportunity with respect to all of its terms and conditions of employment and in their review of activities under the contract. 23 CFR 230.409 (g)(4) & (5).

b. The contractor will accept as its operating policy the following statement:

“It is the policy of this Company to assure that applicants are employed, and that employees are treated during employment, without regard to their race, religion, sex, sexual orientation, gender identity, color, national origin, age or disability. Such action shall include: employment, upgrading, demotion, or transfer; recruitment or recruitment advertising; layoff or termination; rates of pay or other forms of compensation; and selection for training, including apprenticeship, pre-apprenticeship, or on-the-job training.”

**2. EEO Officer:** The contractor will designate and make known to the contracting officers an EEO Officer who will have the responsibility for and must be capable of effectively administering and promoting an active EEO program and who must be assigned adequate authority and responsibility to do so.

**3. Dissemination of Policy:** All members of the contractor's staff who are authorized to hire, supervise, promote, and discharge employees, or who recommend such action or are substantially involved in such action, will be made fully cognizant of and will implement the contractor's EEO policy and contractual responsibilities to provide EEO in each grade and classification of employment. To ensure that the above agreement will be met, the following actions will be taken as a minimum:

a. Periodic meetings of supervisory and personnel office employees will be conducted before the start of work and then not less often than once every six months, at which time the contractor's EEO policy and its implementation will be reviewed and explained. The meetings will be conducted by the EEO Officer or other knowledgeable company official.

b. All new supervisory or personnel office employees will be given a thorough indoctrination by the EEO Officer, covering all major aspects of the contractor's EEO obligations within thirty days following their reporting for duty with the contractor.

c. All personnel who are engaged in direct recruitment for the project will be instructed by the EEO Officer in the contractor's procedures for locating and hiring minorities and women.

d. Notices and posters setting forth the contractor's EEO policy will be placed in areas readily accessible to employees, applicants for employment and potential employees.

e. The contractor's EEO policy and the procedures to implement such policy will be brought to the attention of employees by means of meetings, employee handbooks, or other appropriate means.

**4. Recruitment:** When advertising for employees, the contractor will include in all advertisements for employees the notation: “An Equal Opportunity Employer.” All such advertisements will be placed in publications having a large circulation among minorities and women in the area from which the project work force would normally be derived.

a. The contractor will, unless precluded by a valid bargaining agreement, conduct systematic and direct recruitment through public and private employee referral sources likely to yield qualified minorities and women. To meet this requirement, the contractor will identify sources of potential minority group employees and establish with such identified sources procedures whereby minority and women applicants may be referred to the contractor for employment consideration.

b. In the event the contractor has a valid bargaining agreement providing for exclusive hiring hall referrals, the contractor is expected to observe the provisions of that agreement to the extent that the system meets the contractor's compliance with EEO contract provisions. Where implementation of such an agreement has the effect of discriminating against minorities or women, or obligates the contractor to do the same, such implementation violates Federal nondiscrimination provisions.

c. The contractor will encourage its present employees to refer minorities and women as applicants for employment. Information and procedures with regard to referring such applicants will be discussed with employees.

**5. Personnel Actions:** Wages, working conditions, and employee benefits shall be established and administered, and personnel actions of every type, including hiring, upgrading, promotion, transfer, demotion, layoff, and termination, shall be taken without regard to race, color, religion, sex, sexual orientation, gender identity, national origin, age or disability. The following procedures shall be followed:

a. The contractor will conduct periodic inspections of project sites to ensure that working conditions and employee facilities do not indicate discriminatory treatment of project site personnel.

b. The contractor will periodically evaluate the spread of wages paid within each classification to determine any evidence of discriminatory wage practices.

c. The contractor will periodically review selected personnel actions in depth to determine whether there is evidence of discrimination. Where evidence is found, the contractor will promptly take corrective action. If the review indicates that the discrimination may extend beyond the actions reviewed, such corrective action shall include all affected persons.

d. The contractor will promptly investigate all complaints of alleged discrimination made to the contractor in connection with its obligations under this contract, will attempt to resolve such complaints, and will take appropriate corrective action within a reasonable time. If the investigation indicates that the discrimination may affect persons other than the complainant, such corrective action shall include such other persons. Upon completion of each investigation, the contractor will inform every complainant of all of their avenues of appeal.

**6. Training and Promotion:**

a. The contractor will assist in locating, qualifying, and increasing the skills of minorities and women who are applicants for employment or current employees. Such efforts should be aimed at developing full journey level status employees in the type of trade or job classification involved.

b. Consistent with the contractor's work force requirements and as permissible under Federal and State regulations, the contractor shall make full use of training programs (i.e., apprenticeship and on-the-

job training programs for the geographical area of contract performance). In the event a special provision for training is provided under this contract, this subparagraph will be superseded as indicated in the special provision. The contracting agency may reserve training positions for persons who receive welfare assistance in accordance with 23 U.S.C. 140(a).

c. The contractor will advise employees and applicants for employment of available training programs and entrance requirements for each.

d. The contractor will periodically review the training and promotion potential of employees who are minorities and women and will encourage eligible employees to apply for such training and promotion.

**7. Unions:** If the contractor relies in whole or in part upon unions as a source of employees, the contractor will use good faith efforts to obtain the cooperation of such unions to increase opportunities for minorities and women. 23 CFR 230.409. Actions by the contractor, either directly or through a contractor's association acting as agent, will include the procedures set forth below:

a. The contractor will use good faith efforts to develop, in cooperation with the unions, joint training programs aimed toward qualifying more minorities and women for membership in the unions and increasing the skills of minorities and women so that they may qualify for higher paying employment.

b. The contractor will use good faith efforts to incorporate an EEO clause into each union agreement to the end that such union will be contractually bound to refer applicants without regard to their race, color, religion, sex, sexual orientation, gender identity, national origin, age, or disability.

c. The contractor is to obtain information as to the referral practices and policies of the labor union except that to the extent such information is within the exclusive possession of the labor union and such labor union refuses to furnish such information to the contractor, the contractor shall so certify to the contracting agency and shall set forth what efforts have been made to obtain such information.

d. In the event the union is unable to provide the contractor with a reasonable flow of referrals within the time limit set forth in the collective bargaining agreement, the contractor will, through independent recruitment efforts, fill the employment vacancies without regard to race, color, religion, sex, sexual orientation, gender identity, national origin, age, or disability; making full efforts to obtain qualified or qualifiable minorities and women. The failure of a union to provide sufficient referrals (even though it is obligated to provide exclusive referrals under the terms of a collective bargaining agreement) does not relieve the contractor from the requirements of this paragraph. In the event the union referral practice prevents the contractor from meeting the obligations pursuant to Executive Order 11246, as amended, and these special provisions, such contractor shall immediately notify the contracting agency.

**8. Reasonable Accommodation for Applicants / Employees with Disabilities:** The contractor must be familiar with the requirements for and comply with the Americans with Disabilities Act and all rules and regulations established thereunder. Employers must provide reasonable accommodation in all employment activities unless to do so would cause an undue hardship.

**9. Selection of Subcontractors, Procurement of Materials and Leasing of Equipment:** The contractor shall not discriminate on the

grounds of race, color, religion, sex, sexual orientation, gender identity, national origin, age, or disability in the selection and retention of subcontractors, including procurement of materials and leases of equipment. The contractor shall take all necessary and reasonable steps to ensure nondiscrimination in the administration of this contract.

a. The contractor shall notify all potential subcontractors, suppliers, and lessors of their EEO obligations under this contract.

b. The contractor will use good faith efforts to ensure subcontractor compliance with their EEO obligations.

**10. Assurances Required:**

a. The requirements of 49 CFR Part 26 and the State DOT's FHWA-approved Disadvantaged Business Enterprise (DBE) program are incorporated by reference.

b. The contractor, subrecipient or subcontractor shall not discriminate on the basis of race, color, national origin, or sex in the performance of this contract. The contractor shall carry out applicable requirements of 49 CFR part 26 in the award and administration of DOT-assisted contracts. Failure by the contractor to carry out these requirements is a material breach of this contract, which may result in the termination of this contract or such other remedy as the recipient deems appropriate, which may include, but is not limited to:

- (1) Withholding monthly progress payments;
- (2) Assessing sanctions;
- (3) Liquidating damages; or
- (4) Disqualifying the contractor from future bidding as non-responsible.

c. The Title VI and nondiscrimination provisions of U.S. DOT Order 1050.2A at Appendixes A and E are incorporated by reference. 49 CFR Part 21.

**11. Records and Reports:** The contractor shall keep such records as necessary to document compliance with the EEO requirements. Such records shall be retained for a period of three years following the date of the final payment to the contractor for all contract work and shall be available at reasonable times and places for inspection by authorized representatives of the contracting agency and the FHWA.

a. The records kept by the contractor shall document the following:

- (1) The number and work hours of minority and non-minority group members and women employed in each work classification on the project;
- (2) The progress and efforts being made in cooperation with unions, when applicable, to increase employment opportunities for minorities and women; and
- (3) The progress and efforts being made in locating, hiring, training, qualifying, and upgrading minorities and women.

b. The contractors and subcontractors will submit an annual report to the contracting agency each July for the duration of the project indicating the number of minority, women, and non-minority group employees currently engaged in each work classification required by the contract work. This information is to be reported on [Form FHWA-1391](#). The staffing data should represent the project work force on board in all or any part of the last payroll period preceding the end of July. If on-the-job training is being required by special

provision, the contractor will be required to collect and report training data. The employment data should reflect the work force on board during all or any part of the last payroll period preceding the end of July.

### III. NONSEGREGATED FACILITIES

This provision is applicable to all Federal-aid construction contracts and to all related construction subcontracts of more than \$10,000. 41 CFR 60-1.5.

As prescribed by 41 CFR 60-1.8, the contractor must ensure that facilities provided for employees are provided in such a manner that segregation on the basis of race, color, religion, sex, sexual orientation, gender identity, or national origin cannot result. The contractor may neither require such segregated use by written or oral policies nor tolerate such use by employee custom. The contractor's obligation extends further to ensure that its employees are not assigned to perform their services at any location under the contractor's control where the facilities are segregated. The term "facilities" includes waiting rooms, work areas, restaurants and other eating areas, time clocks, restrooms, washrooms, locker rooms and other storage or dressing areas, parking lots, drinking fountains, recreation or entertainment areas, transportation, and housing provided for employees. The contractor shall provide separate or single-user restrooms and necessary dressing or sleeping areas to assure privacy between sexes.

### IV. DAVIS-BACON AND RELATED ACT PROVISIONS

This section is applicable to all Federal-aid construction projects exceeding \$2,000 and to all related subcontracts and lower-tier subcontracts (regardless of subcontract size), in accordance with 29 CFR 5.5. The requirements apply to all projects located within the right-of-way of a roadway that is functionally classified as Federal-aid highway. 23 U.S.C. 113. This excludes roadways functionally classified as local roads or rural minor collectors, which are exempt. 23 U.S.C. 101. Where applicable law requires that projects be treated as a project on a Federal-aid highway, the provisions of this subpart will apply regardless of the location of the project. Examples include: Surface Transportation Block Grant Program projects funded under 23 U.S.C. 133 [excluding recreational trails projects], the Nationally Significant Freight and Highway

Projects funded under 23 U.S.C. 117, and National Highway Freight Program projects funded under 23 U.S.C. 167.

The following provisions are from the U.S. Department of Labor regulations in 29 CFR 5.5 "Contract provisions and related matters" with minor revisions to conform to the FHWA-1273 format and FHWA program requirements.

#### 1. Minimum wages (29 CFR 5.5)

*a. Wage rates and fringe benefits.* All laborers and mechanics employed or working upon the site of the work (or otherwise working in construction or development of the project under a development statute), will be paid unconditionally and not less often than once a week, and without subsequent deduction or rebate on any account (except such payroll deductions as are permitted by regulations issued by the Secretary of Labor under the Copeland Act (29 CFR part 3)), the full amount of basic hourly wages and bona fide fringe benefits (or cash equivalents thereof) due at time of payment computed at rates not less than those contained in the wage determination of the Secretary of Labor which is attached hereto and made a part hereof, regardless of any contractual relationship which may be alleged to exist between the contractor and such laborers and mechanics. As provided in paragraphs (d) and (e) of 29 CFR 5.5, the appropriate wage determinations are effective by operation of

law even if they have not been attached to the contract. Contributions made or costs reasonably anticipated for bona fide fringe benefits under the Davis-Bacon Act (40 U.S.C. 3141(2)(B)) on behalf of laborers or mechanics are considered wages paid to such laborers or mechanics, subject to the provisions of paragraph 1.e. of this section; also, regular contributions made or costs incurred for more than a weekly period (but not less often than quarterly) under plans, funds, or programs which cover the particular weekly period, are deemed to be constructively made or incurred during such weekly period. Such laborers and mechanics must be paid the appropriate wage rate and fringe benefits on the wage determination for the classification(s) of work actually performed, without regard to skill, except as provided in paragraph 4. of this section. Laborers or mechanics performing work in more than one classification may be compensated at the rate specified for each classification for the time actually worked therein: *Provided*, That the employer's payroll records accurately set forth the time spent in each classification in which work is performed. The wage determination (including any additional classifications and wage rates conformed under paragraph 1.c. of this section) and the Davis-Bacon poster (WH-1321) must be posted at all times by the contractor and its subcontractors at the site of the work in a prominent and accessible place where it can be easily seen by the workers.

*b. Frequently recurring classifications.* (1) In addition to wage and fringe benefit rates that have been determined to be prevailing under the procedures set forth in 29 CFR part 1, a wage determination may contain, pursuant to § 1.3(f), wage and fringe benefit rates for classifications of laborers and mechanics for which conformance requests are regularly submitted pursuant to paragraph 1.c. of this section, provided that:

- (i) The work performed by the classification is not performed by a classification in the wage determination for which a prevailing wage rate has been determined;
- (ii) The classification is used in the area by the construction industry; and
- (iii) The wage rate for the classification bears a reasonable relationship to the prevailing wage rates contained in the wage determination.

(2) The Administrator will establish wage rates for such classifications in accordance with paragraph 1.c.(1)(iii) of this section. Work performed in such a classification must be paid at no less than the wage and fringe benefit rate listed on the wage determination for such classification.

*c. Conformance.* (1) The contracting officer must require that any class of laborers or mechanics, including helpers, which is not listed in the wage determination and which is to be employed under the contract be classified in conformance with the wage determination. Conformance of an additional classification and wage rate and fringe benefits is appropriate only when the following criteria have been met:

- (i) The work to be performed by the classification requested is not performed by a classification in the wage determination; and
- (ii) The classification is used in the area by the construction industry; and
- (iii) The proposed wage rate, including any bona fide fringe benefits, bears a reasonable relationship to the wage rates contained in the wage determination.



(2) The conformance process may not be used to split, subdivide, or otherwise avoid application of classifications listed in the wage determination.

(3) If the contractor and the laborers and mechanics to be employed in the classification (if known), or their representatives, and the contracting officer agree on the classification and wage rate (including the amount designated for fringe benefits where appropriate), a report of the action taken will be sent by the contracting officer by email to [DBAconformance@dol.gov](mailto:DBAconformance@dol.gov). The Administrator, or an authorized representative, will approve, modify, or disapprove every additional classification action within 30 days of receipt and so advise the contracting officer or will notify the contracting officer within the 30-day period that additional time is necessary.

(4) In the event the contractor, the laborers or mechanics to be employed in the classification or their representatives, and the contracting officer do not agree on the proposed classification and wage rate (including the amount designated for fringe benefits, where appropriate), the contracting officer will, by email to [DBAconformance@dol.gov](mailto:DBAconformance@dol.gov), refer the questions, including the views of all interested parties and the recommendation of the contracting officer, to the Administrator for determination. The Administrator, or an authorized representative, will issue a determination within 30 days of receipt and so advise the contracting officer or will notify the contracting officer within the 30-day period that additional time is necessary.

(5) The contracting officer must promptly notify the contractor of the action taken by the Wage and Hour Division under paragraphs 1.c.(3) and (4) of this section. The contractor must furnish a written copy of such determination to each affected worker or it must be posted as a part of the wage determination. The wage rate (including fringe benefits where appropriate) determined pursuant to paragraph 1.c.(3) or (4) of this section must be paid to all workers performing work in the classification under this contract from the first day on which work is performed in the classification.

*d. Fringe benefits not expressed as an hourly rate.* Whenever the minimum wage rate prescribed in the contract for a class of laborers or mechanics includes a fringe benefit which is not expressed as an hourly rate, the contractor may either pay the benefit as stated in the wage determination or may pay another bona fide fringe benefit or an hourly cash equivalent thereof.

*e. Unfunded plans.* If the contractor does not make payments to a trustee or other third person, the contractor may consider as part of the wages of any laborer or mechanic the amount of any costs reasonably anticipated in providing bona fide fringe benefits under a plan or program, *Provided*, That the Secretary of Labor has found, upon the written request of the contractor, in accordance with the criteria set forth in § 5.28, that the applicable standards of the Davis-Bacon Act have been met. The Secretary of Labor may require the contractor to set aside in a separate account assets for the meeting of obligations under the plan or program.

*f. Interest.* In the event of a failure to pay all or part of the wages required by the contract, the contractor will be required to pay interest on any underpayment of wages.

## 2. Withholding (29 CFR 5.5)

*a. Withholding requirements.* The contracting agency may, upon its own action, or must, upon written request of an authorized representative of the Department of Labor, withhold or cause to be withheld from the contractor so much of the accrued payments or advances as may be considered necessary to satisfy the liabilities of

the prime contractor or any subcontractor for the full amount of wages and monetary relief, including interest, required by the clauses set forth in this section for violations of this contract, or to satisfy any such liabilities required by any other Federal contract, or federally assisted contract subject to Davis-Bacon labor standards, that is held by the same prime contractor (as defined in § 5.2). The necessary funds may be withheld from the contractor under this contract, any other Federal contract with the same prime contractor, or any other federally assisted contract that is subject to Davis-Bacon labor standards requirements and is held by the same prime contractor, regardless of whether the other contract was awarded or assisted by the same agency, and such funds may be used to satisfy the contractor liability for which the funds were withheld. In the event of a contractor's failure to pay any laborer or mechanic, including any apprentice or helper working on the site of the work all or part of the wages required by the contract, or upon the contractor's failure to submit the required records as discussed in paragraph 3.d. of this section, the contracting agency may on its own initiative and after written notice to the contractor, take such action as may be necessary to cause the suspension of any further payment, advance, or guarantee of funds until such violations have ceased.

*b. Priority to withheld funds.* The Department has priority to funds withheld or to be withheld in accordance with paragraph 2.a. of this section or Section V, paragraph 3.a., or both, over claims to those funds by:

(1) A contractor's surety(ies), including without limitation performance bond sureties and payment bond sureties;

(2) A contracting agency for its procurement costs;

(3) A trustee(s) (either a court-appointed trustee or a U.S. trustee, or both) in bankruptcy of a contractor, or a contractor's bankruptcy estate;

(4) A contractor's assignee(s);

(5) A contractor's successor(s); or

(6) A claim asserted under the Prompt Payment Act, [31 U.S.C. 3901–3907](#).

## 3. Records and certified payrolls (29 CFR 5.5)

*a. Basic record requirements (1) Length of record retention.* All regular payrolls and other basic records must be maintained by the contractor and any subcontractor during the course of the work and preserved for all laborers and mechanics working at the site of the work (or otherwise working in construction or development of the project under a development statute) for a period of at least 3 years after all the work on the prime contract is completed.

(2) *Information required.* Such records must contain the name; Social Security number; last known address, telephone number, and email address of each such worker; each worker's correct classification(s) of work actually performed; hourly rates of wages paid (including rates of contributions or costs anticipated for bona fide fringe benefits or cash equivalents thereof of the types described in [40 U.S.C. 3141\(2\)\(B\)](#) of the Davis-Bacon Act); daily and weekly number of hours actually worked in total and on each covered contract; deductions made; and actual wages paid.

(3) *Additional records relating to fringe benefits.* Whenever the Secretary of Labor has found under paragraph 1.e. of this section that the wages of any laborer or mechanic include the amount of any costs reasonably anticipated in providing benefits under a plan or

program described in [40 U.S.C. 3141\(2\)\(B\)](#) of the Davis-Bacon Act, the contractor must maintain records which show that the commitment to provide such benefits is enforceable, that the plan or program is financially responsible, and that the plan or program has been communicated in writing to the laborers or mechanics affected, and records which show the costs anticipated or the actual cost incurred in providing such benefits.

(4) *Additional records relating to apprenticeship.* Contractors with apprentices working under approved programs must maintain written evidence of the registration of apprenticeship programs, the registration of the apprentices, and the ratios and wage rates prescribed in the applicable programs.

b. *Certified payroll requirements (1) Frequency and method of submission.* The contractor or subcontractor must submit weekly, for each week in which any DBA- or Related Acts-covered work is performed, certified payrolls to the contracting agency. The prime contractor is responsible for the submission of all certified payrolls by all subcontractors. A contracting agency or prime contractor may permit or require contractors to submit certified payrolls through an electronic system, as long as the electronic system requires a legally valid electronic signature; the system allows the contractor, the contracting agency, and the Department of Labor to access the certified payrolls upon request for at least 3 years after the work on the prime contract has been completed; and the contracting agency or prime contractor permits other methods of submission in situations where the contractor is unable or limited in its ability to use or access the electronic system.

(2) *Information required.* The certified payrolls submitted must set out accurately and completely all of the information required to be maintained under paragraph 3.a.(2) of this section, except that full Social Security numbers and last known addresses, telephone numbers, and email addresses must not be included on weekly transmittals. Instead, the certified payrolls need only include an individually identifying number for each worker ( e.g., the last four digits of the worker's Social Security number). The required weekly certified payroll information may be submitted using Optional Form WH-347 or in any other format desired. Optional Form WH-347 is available for this purpose from the Wage and Hour Division website at <https://www.dol.gov/sites/dolgov/files/WHD/legacy/files/wh347.pdf> or its successor website. It is not a violation of this section for a prime contractor to require a subcontractor to provide full Social Security numbers and last known addresses, telephone numbers, and email addresses to the prime contractor for its own records, without weekly submission by the subcontractor to the contracting agency.

(3) *Statement of Compliance.* Each certified payroll submitted must be accompanied by a "Statement of Compliance," signed by the contractor or subcontractor, or the contractor's or subcontractor's agent who pays or supervises the payment of the persons working on the contract, and must certify the following:

(i) That the certified payroll for the payroll period contains the information required to be provided under paragraph 3.b. of this section, the appropriate information and basic records are being maintained under paragraph 3.a. of this section, and such information and records are correct and complete;

(ii) That each laborer or mechanic (including each helper and apprentice) working on the contract during the payroll period has been paid the full weekly wages earned, without rebate, either directly or indirectly, and that no deductions have been made either directly or indirectly from the full wages earned, other than permissible deductions as set forth in [29 CFR part 3](#); and

(iii) That each laborer or mechanic has been paid not less than the applicable wage rates and fringe benefits or cash equivalents for the classification(s) of work actually performed, as specified in the applicable wage determination incorporated into the contract.

(4) *Use of Optional Form WH-347.* The weekly submission of a properly executed certification set forth on the reverse side of Optional Form WH-347 will satisfy the requirement for submission of the "Statement of Compliance" required by paragraph 3.b.(3) of this section.

(5) *Signature.* The signature by the contractor, subcontractor, or the contractor's or subcontractor's agent must be an original handwritten signature or a legally valid electronic signature.

(6) *Falsification.* The falsification of any of the above certifications may subject the contractor or subcontractor to civil or criminal prosecution under [18 U.S.C. 1001](#) and [31 U.S.C. 3729](#).

(7) *Length of certified payroll retention.* The contractor or subcontractor must preserve all certified payrolls during the course of the work and for a period of 3 years after all the work on the prime contract is completed.

c. *Contracts, subcontracts, and related documents.* The contractor or subcontractor must maintain this contract or subcontract and related documents including, without limitation, bids, proposals, amendments, modifications, and extensions. The contractor or subcontractor must preserve these contracts, subcontracts, and related documents during the course of the work and for a period of 3 years after all the work on the prime contract is completed.

d. *Required disclosures and access (1) Required record disclosures and access to workers.* The contractor or subcontractor must make the records required under paragraphs 3.a. through 3.c. of this section, and any other documents that the contracting agency, the State DOT, the FHWA, or the Department of Labor deems necessary to determine compliance with the labor standards provisions of any of the applicable statutes referenced by § 5.1, available for inspection, copying, or transcription by authorized representatives of the contracting agency, the State DOT, the FHWA, or the Department of Labor, and must permit such representatives to interview workers during working hours on the job.

(2) *Sanctions for non-compliance with records and worker access requirements.* If the contractor or subcontractor fails to submit the required records or to make them available, or refuses to permit worker interviews during working hours on the job, the Federal agency may, after written notice to the contractor, sponsor, applicant, owner, or other entity, as the case may be, that maintains such records or that employs such workers, take such action as may be necessary to cause the suspension of any further payment, advance, or guarantee of funds. Furthermore, failure to submit the required records upon request or to make such records available, or to permit worker interviews during working hours on the job, may be grounds for debarment action pursuant to § 5.12. In addition, any contractor or other person that fails to submit the required records or make those records available to WHD within the time WHD requests that the records be produced will be precluded from introducing as evidence in an administrative proceeding under [29 CFR part 6](#) any of the required records that were not provided or made available to WHD. WHD will take into consideration a reasonable request from the contractor or person for an extension of the time for submission of records. WHD will determine the

reasonableness of the request and may consider, among other things, the location of the records and the volume of production.

(3) *Required information disclosures.* Contractors and subcontractors must maintain the full Social Security number and last known address, telephone number, and email address of each covered worker, and must provide them upon request to the contracting agency, the State DOT, the FHWA, the contractor, or the Wage and Hour Division of the Department of Labor for purposes of an investigation or other compliance action.

#### 4. Apprentices and equal employment opportunity (29 CFR 5.5)

a. *Apprentices (1) Rate of pay.* Apprentices will be permitted to work at less than the predetermined rate for the work they perform when they are employed pursuant to and individually registered in a bona fide apprenticeship program registered with the U.S. Department of Labor, Employment and Training Administration, Office of Apprenticeship (OA), or with a State Apprenticeship Agency recognized by the OA. A person who is not individually registered in the program, but who has been certified by the OA or a State Apprenticeship Agency (where appropriate) to be eligible for probationary employment as an apprentice, will be permitted to work at less than the predetermined rate for the work they perform in the first 90 days of probationary employment as an apprentice in such a program. In the event the OA or a State Apprenticeship Agency recognized by the OA withdraws approval of an apprenticeship program, the contractor will no longer be permitted to use apprentices at less than the applicable predetermined rate for the work performed until an acceptable program is approved.

(2) *Fringe benefits.* Apprentices must be paid fringe benefits in accordance with the provisions of the apprenticeship program. If the apprenticeship program does not specify fringe benefits, apprentices must be paid the full amount of fringe benefits listed on the wage determination for the applicable classification. If the Administrator determines that a different practice prevails for the applicable apprentice classification, fringe benefits must be paid in accordance with that determination.

(3) *Apprenticeship ratio.* The allowable ratio of apprentices to journeyworkers on the job site in any craft classification must not be greater than the ratio permitted to the contractor as to the entire work force under the registered program or the ratio applicable to the locality of the project pursuant to paragraph 4.a.(4) of this section. Any worker listed on a payroll at an apprentice wage rate, who is not registered or otherwise employed as stated in paragraph 4.a.(1) of this section, must be paid not less than the applicable wage rate on the wage determination for the classification of work actually performed. In addition, any apprentice performing work on the job site in excess of the ratio permitted under this section must be paid not less than the applicable wage rate on the wage determination for the work actually performed.

(4) *Reciprocity of ratios and wage rates.* Where a contractor is performing construction on a project in a locality other than the locality in which its program is registered, the ratios and wage rates (expressed in percentages of the journeyworker's hourly rate) applicable within the locality in which the construction is being performed must be observed. If there is no applicable ratio or wage rate for the locality of the project, the ratio and wage rate specified in the contractor's registered program must be observed.

b. *Equal employment opportunity.* The use of apprentices and journeyworkers under this part must be in conformity with the equal employment opportunity requirements of Executive Order 11246, as amended, and [29 CFR part 30](#).

c. *Apprentices and Trainees (programs of the U.S. DOT).*

Apprentices and trainees working under apprenticeship and skill training programs which have been certified by the Secretary of Transportation as promoting EEO in connection with Federal-aid highway construction programs are not subject to the requirements of paragraph 4 of this Section IV. 23 CFR 230.111(e)(2). The straight time hourly wage rates for apprentices and trainees under such programs will be established by the particular programs. The ratio of apprentices and trainees to journeyworkers shall not be greater than permitted by the terms of the particular program.

5. **Compliance with Copeland Act requirements.** The contractor shall comply with the requirements of 29 CFR part 3, which are incorporated by reference in this contract as provided in 29 CFR 5.5.

6. **Subcontracts.** The contractor or subcontractor must insert FHWA-1273 in any subcontracts, along with the applicable wage determination(s) and such other clauses or contract modifications as the contracting agency may by appropriate instructions require, and a clause requiring the subcontractors to include these clauses and wage determination(s) in any lower tier subcontracts. The prime contractor is responsible for the compliance by any subcontractor or lower tier subcontractor with all the contract clauses in this section. In the event of any violations of these clauses, the prime contractor and any subcontractor(s) responsible will be liable for any unpaid wages and monetary relief, including interest from the date of the underpayment or loss, due to any workers of lower-tier subcontractors, and may be subject to debarment, as appropriate. 29 CFR 5.5.

7. **Contract termination: debarment.** A breach of the contract clauses in 29 CFR 5.5 may be grounds for termination of the contract, and for debarment as a contractor and a subcontractor as provided in 29 CFR 5.12.

8. **Compliance with Davis-Bacon and Related Act requirements.** All rulings and interpretations of the Davis-Bacon and Related Acts contained in 29 CFR parts 1, 3, and 5 are herein incorporated by reference in this contract as provided in 29 CFR 5.5.

9. **Disputes concerning labor standards.** As provided in 29 CFR 5.5, disputes arising out of the labor standards provisions of this contract shall not be subject to the general disputes clause of this contract. Such disputes shall be resolved in accordance with the procedures of the Department of Labor set forth in 29 CFR parts 5, 6, and 7. Disputes within the meaning of this clause include disputes between the contractor (or any of its subcontractors) and the contracting agency, the U.S. Department of Labor, or the employees or their representatives.

10. **Certification of eligibility.** a. By entering into this contract, the contractor certifies that neither it nor any person or firm who has an interest in the contractor's firm is a person or firm ineligible to be awarded Government contracts by virtue of [40 U.S.C. 3144\(b\)](#) or § 5.12(a).

b. No part of this contract shall be subcontracted to any person or firm ineligible for award of a Government contract by virtue of [40 U.S.C. 3144\(b\)](#) or § 5.12(a).

c. The penalty for making false statements is prescribed in the U.S. Code, Title 18 Crimes and Criminal Procedure, [18 U.S.C. 1001](#).

11. **Anti-retaliation.** It is unlawful for any person to discharge, demote, intimidate, threaten, restrain, coerce, blacklist, harass, or in any other manner discriminate against, or to cause any person to discharge, demote, intimidate, threaten, restrain, coerce, blacklist,

harass, or in any other manner discriminate against, any worker or job applicant for:

a. Notifying any contractor of any conduct which the worker reasonably believes constitutes a violation of the DBA, Related Acts, this part, or [29 CFR part 1 or 3](#);

b. Filing any complaint, initiating or causing to be initiated any proceeding, or otherwise asserting or seeking to assert on behalf of themselves or others any right or protection under the DBA, Related Acts, this part, or [29 CFR part 1 or 3](#);

c. Cooperating in any investigation or other compliance action, or testifying in any proceeding under the DBA, Related Acts, this part, or [29 CFR part 1 or 3](#); or

d. Informing any other person about their rights under the DBA, Related Acts, this part, or [29 CFR part 1 or 3](#).

## V. CONTRACT WORK HOURS AND SAFETY STANDARDS ACT

Pursuant to 29 CFR 5.5(b), the following clauses apply to any Federal-aid construction contract in an amount in excess of \$100,000 and subject to the overtime provisions of the Contract Work Hours and Safety Standards Act. These clauses shall be inserted in addition to the clauses required by 29 CFR 5.5(a) or 29 CFR 4.6. As used in this paragraph, the terms laborers and mechanics include watchpersons and guards.

**1.Overtime requirements.** No contractor or subcontractor contracting for any part of the contract work which may require or involve the employment of laborers or mechanics shall require or permit any such laborer or mechanic in any workweek in which he or she is employed on such work to work in excess of forty hours in such workweek unless such laborer or mechanic receives compensation at a rate not less than one and one-half times the basic rate of pay for all hours worked in excess of forty hours in such workweek. 29 CFR 5.5.

**2.Violation; liability for unpaid wages; liquidated damages.** In the event of any violation of the clause set forth in paragraph 1. of this section the contractor and any subcontractor responsible therefor shall be liable for the unpaid wages and interest from the date of the underpayment. In addition, such contractor and subcontractor shall be liable to the United States (in the case of work done under contract for the District of Columbia or a territory, to such District or to such territory), for liquidated damages. Such liquidated damages shall be computed with respect to each individual laborer or mechanic, including watchpersons and guards, employed in violation of the clause set forth in paragraph 1. of this section, in the sum currently provided in 29 CFR 5.5(b)(2)\* for each calendar day on which such individual was required or permitted to work in excess of the standard workweek of forty hours without payment of the overtime wages required by the clause set forth in paragraph 1. of this section.

\* \$31 as of January 15, 2023 (See 88 FR 88 FR 2210) as may be adjusted annually by the Department of Labor, pursuant to the Federal Civil Penalties Inflation Adjustment Act of 1990.

### 3.Withholding for unpaid wages and liquidated damages

a. *Withholding process.* The FHWA or the contracting agency may, upon its own action, or must, upon written request of an authorized representative of the Department of Labor, withhold or cause to be withheld from the contractor so much of the accrued payments or advances as may be considered necessary to satisfy the liabilities of the prime contractor or any subcontractor for any

unpaid wages; monetary relief, including interest; and liquidated damages required by the clauses set forth in this section on this contract, any other Federal contract with the same prime contractor, or any other federally assisted contract subject to the Contract Work Hours and Safety Standards Act that is held by the same prime contractor (as defined in § 5.2). The necessary funds may be withheld from the contractor under this contract, any other Federal contract with the same prime contractor, or any other federally assisted contract that is subject to the Contract Work Hours and Safety Standards Act and is held by the same prime contractor, regardless of whether the other contract was awarded or assisted by the same agency, and such funds may be used to satisfy the contractor liability for which the funds were withheld.

b. *Priority to withheld funds.* The Department has priority to funds withheld or to be withheld in accordance with Section IV paragraph 2.a. or paragraph 3.a. of this section, or both, over claims to those funds by:

(1) A contractor's surety(ies), including without limitation performance bond sureties and payment bond sureties;

(2) A contracting agency for its reprourement costs;

(3) A trustee(s) (either a court-appointed trustee or a U.S. trustee, or both) in bankruptcy of a contractor, or a contractor's bankruptcy estate;

(4) A contractor's assignee(s);

(5) A contractor's successor(s); or

(6) A claim asserted under the Prompt Payment Act, [31 U.S.C. 3901–3907](#).

**4.Subcontracts.** The contractor or subcontractor must insert in any subcontracts the clauses set forth in paragraphs 1. through 5. of this section and a clause requiring the subcontractors to include these clauses in any lower tier subcontracts. The prime contractor is responsible for compliance by any subcontractor or lower tier subcontractor with the clauses set forth in paragraphs 1. through 5. In the event of any violations of these clauses, the prime contractor and any subcontractor(s) responsible will be liable for any unpaid wages and monetary relief, including interest from the date of the underpayment or loss, due to any workers of lower-tier subcontractors, and associated liquidated damages and may be subject to debarment, as appropriate.

**5.Anti-retaliation.** It is unlawful for any person to discharge, demote, intimidate, threaten, restrain, coerce, blacklist, harass, or in any other manner discriminate against, or to cause any person to discharge, demote, intimidate, threaten, restrain, coerce, blacklist, harass, or in any other manner discriminate against, any worker or job applicant for:

a. Notifying any contractor of any conduct which the worker reasonably believes constitutes a violation of the Contract Work Hours and Safety Standards Act (CWHSSA) or its implementing regulations in this part;

b. Filing any complaint, initiating or causing to be initiated any proceeding, or otherwise asserting or seeking to assert on behalf of themselves or others any right or protection under CWHSSA or this part;

c. Cooperating in any investigation or other compliance action, or testifying in any proceeding under CWHSSA or this part; or

d. Informing any other person about their rights under CWHSSA or this part.

#### **VI. SUBLETTING OR ASSIGNING THE CONTRACT**

This provision is applicable to all Federal-aid construction contracts on the National Highway System pursuant to 23 CFR 635.116.

1. The contractor shall perform with its own organization contract work amounting to not less than 30 percent (or a greater percentage if specified elsewhere in the contract) of the total original contract price, excluding any specialty items designated by the contracting agency. Specialty items may be performed by subcontract and the amount of any such specialty items performed may be deducted from the total original contract price before computing the amount of work required to be performed by the contractor's own organization (23 CFR 635.116).

a. The term "perform work with its own organization" in paragraph 1 of Section VI refers to workers employed or leased by the prime contractor, and equipment owned or rented by the prime contractor, with or without operators. Such term does not include employees or equipment of a subcontractor or lower tier subcontractor, agents of the prime contractor, or any other assignees. The term may include payments for the costs of hiring leased employees from an employee leasing firm meeting all relevant Federal and State regulatory requirements. Leased employees may only be included in this term if the prime contractor meets all of the following conditions: (based on longstanding interpretation)

(1) the prime contractor maintains control over the supervision of the day-to-day activities of the leased employees;

(2) the prime contractor remains responsible for the quality of the work of the leased employees;

(3) the prime contractor retains all power to accept or exclude individual employees from work on the project; and

(4) the prime contractor remains ultimately responsible for the payment of predetermined minimum wages, the submission of payrolls, statements of compliance and all other Federal regulatory requirements.

b. "Specialty Items" shall be construed to be limited to work that requires highly specialized knowledge, abilities, or equipment not ordinarily available in the type of contracting organizations qualified and expected to bid or propose on the contract as a whole and in general are to be limited to minor components of the overall contract. 23 CFR 635.102.

2. Pursuant to 23 CFR 635.116(a), the contract amount upon which the requirements set forth in paragraph (1) of Section VI is computed includes the cost of material and manufactured products which are to be purchased or produced by the contractor under the contract provisions.

3. Pursuant to 23 CFR 635.116(c), the contractor shall furnish (a) a competent superintendent or supervisor who is employed by the firm, has full authority to direct performance of the work in accordance with the contract requirements, and is in charge of all construction operations (regardless of who performs the work) and (b) such other of its own organizational resources (supervision, management, and engineering services) as the contracting officer determines is necessary to assure the performance of the contract.

4. No portion of the contract shall be sublet, assigned or otherwise disposed of except with the written consent of the contracting

officer, or authorized representative, and such consent when given shall not be construed to relieve the contractor of any responsibility for the fulfillment of the contract. Written consent will be given only after the contracting agency has assured that each subcontract is evidenced in writing and that it contains all pertinent provisions and requirements of the prime contract. (based on longstanding interpretation of 23 CFR 635.116).

5. The 30-percent self-performance requirement of paragraph (1) is not applicable to design-build contracts; however, contracting agencies may establish their own self-performance requirements. 23 CFR 635.116(d).

#### **VII. SAFETY: ACCIDENT PREVENTION**

This provision is applicable to all Federal-aid construction contracts and to all related subcontracts.

1. In the performance of this contract the contractor shall comply with all applicable Federal, State, and local laws governing safety, health, and sanitation (23 CFR Part 635). The contractor shall provide all safeguards, safety devices and protective equipment and take any other needed actions as it determines, or as the contracting officer may determine, to be reasonably necessary to protect the life and health of employees on the job and the safety of the public and to protect property in connection with the performance of the work covered by the contract. 23 CFR 635.108.

2. It is a condition of this contract, and shall be made a condition of each subcontract, which the contractor enters into pursuant to this contract, that the contractor and any subcontractor shall not permit any employee, in performance of the contract, to work in surroundings or under conditions which are unsanitary, hazardous or dangerous to his/her health or safety, as determined under construction safety and health standards (29 CFR Part 1926) promulgated by the Secretary of Labor, in accordance with Section 107 of the Contract Work Hours and Safety Standards Act (40 U.S.C. 3704). 29 CFR 1926.10.

3. Pursuant to 29 CFR 1926.3, it is a condition of this contract that the Secretary of Labor or authorized representative thereof, shall have right of entry to any site of contract performance to inspect or investigate the matter of compliance with the construction safety and health standards and to carry out the duties of the Secretary under Section 107 of the Contract Work Hours and Safety Standards Act (40 U.S.C. 3704).

#### **VIII. FALSE STATEMENTS CONCERNING HIGHWAY PROJECTS**

This provision is applicable to all Federal-aid construction contracts and to all related subcontracts.

In order to assure high quality and durable construction in conformity with approved plans and specifications and a high degree of reliability on statements and representations made by engineers, contractors, suppliers, and workers on Federal-aid highway projects, it is essential that all persons concerned with the project perform their functions as carefully, thoroughly, and honestly as possible. Willful falsification, distortion, or misrepresentation with respect to any facts related to the project is a violation of Federal law. To prevent any misunderstanding regarding the seriousness of these and similar acts, Form FHWA-1022 shall be posted on each Federal-aid highway project (23 CFR Part 635) in one or more places where it is readily available to all persons concerned with the project:

18 U.S.C. 1020 reads as follows:

“Whoever, being an officer, agent, or employee of the United States, or of any State or Territory, or whoever, whether a person, association, firm, or corporation, knowingly makes any false statement, false representation, or false report as to the character, quality, quantity, or cost of the material used or to be used, or the quantity or quality of the work performed or to be performed, or the cost thereof in connection with the submission of plans, maps, specifications, contracts, or costs of construction on any highway or related project submitted for approval to the Secretary of Transportation; or

Whoever knowingly makes any false statement, false representation, false report or false claim with respect to the character, quality, quantity, or cost of any work performed or to be performed, or materials furnished or to be furnished, in connection with the construction of any highway or related project approved by the Secretary of Transportation; or

Whoever knowingly makes any false statement or false representation as to material fact in any statement, certificate, or report submitted pursuant to provisions of the Federal-aid Roads Act approved July 11, 1916, (39 Stat. 355), as amended and supplemented;

Shall be fined under this title or imprisoned not more than 5 years or both.”

#### **IX. IMPLEMENTATION OF CLEAN AIR ACT AND FEDERAL WATER POLLUTION CONTROL ACT (42 U.S.C. 7606; 2 CFR 200.88; EO 11738)**

This provision is applicable to all Federal-aid construction contracts in excess of \$150,000 and to all related subcontracts. 48 CFR 2.101; 2 CFR 200.327.

By submission of this bid/proposal or the execution of this contract or subcontract, as appropriate, the bidder, proposer, Federal-aid construction contractor, subcontractor, supplier, or vendor agrees to comply with all applicable standards, orders or regulations issued pursuant to the Clean Air Act (42 U.S.C. 7401-7671q) and the Federal Water Pollution Control Act, as amended (33 U.S.C. 1251-1387). Violations must be reported to the Federal Highway Administration and the Regional Office of the Environmental Protection Agency. 2 CFR Part 200, Appendix II.

The contractor agrees to include or cause to be included the requirements of this Section in every subcontract, and further agrees to take such action as the contracting agency may direct as a means of enforcing such requirements. 2 CFR 200.327.

#### **X. CERTIFICATION REGARDING DEBARMENT, SUSPENSION, INELIGIBILITY AND VOLUNTARY EXCLUSION**

This provision is applicable to all Federal-aid construction contracts, design-build contracts, subcontracts, lower-tier subcontracts, purchase orders, lease agreements, consultant contracts or any other covered transaction requiring FHWA approval or that is estimated to cost \$25,000 or more – as defined in 2 CFR Parts 180 and 1200. 2 CFR 180.220 and 1200.220.

##### **1. Instructions for Certification – First Tier Participants:**

a. By signing and submitting this proposal, the prospective first tier participant is providing the certification set out below.

b. The inability of a person to provide the certification set out below will not necessarily result in denial of participation in this covered transaction. The prospective first tier participant shall submit an explanation of why it cannot provide the certification set out below. The certification or explanation will be considered in connection with the department or agency's determination whether to enter into this transaction. However, failure of the prospective first tier participant to furnish a certification or an explanation shall disqualify such a person from participation in this transaction. 2 CFR 180.320.

c. The certification in this clause is a material representation of fact upon which reliance was placed when the contracting agency determined to enter into this transaction. If it is later determined that the prospective participant knowingly rendered an erroneous certification, in addition to other remedies available to the Federal Government, the contracting agency may terminate this transaction for cause of default. 2 CFR 180.325.

d. The prospective first tier participant shall provide immediate written notice to the contracting agency to whom this proposal is submitted if any time the prospective first tier participant learns that its certification was erroneous when submitted or has become erroneous by reason of changed circumstances. 2 CFR 180.345 and 180.350.

e. The terms “covered transaction,” “debarred,” “suspended,” “ineligible,” “participant,” “person,” “principal,” and “voluntarily excluded,” as used in this clause, are defined in 2 CFR Parts 180, Subpart I, 180.900-180.1020, and 1200. “First Tier Covered Transactions” refers to any covered transaction between a recipient or subrecipient of Federal funds and a participant (such as the prime or general contract). “Lower Tier Covered Transactions” refers to any covered transaction under a First Tier Covered Transaction (such as subcontracts). “First Tier Participant” refers to the participant who has entered into a covered transaction with a recipient or subrecipient of Federal funds (such as the prime or general contractor). “Lower Tier Participant” refers any participant who has entered into a covered transaction with a First Tier Participant or other Lower Tier Participants (such as subcontractors and suppliers).

f. The prospective first tier participant agrees by submitting this proposal that, should the proposed covered transaction be entered into, it shall not knowingly enter into any lower tier covered transaction with a person who is debarred, suspended, declared ineligible, or voluntarily excluded from participation in this covered transaction, unless authorized by the department or agency entering into this transaction. 2 CFR 180.330.

g. The prospective first tier participant further agrees by submitting this proposal that it will include the clause titled “Certification Regarding Debarment, Suspension, Ineligibility and Voluntary Exclusion-Lower Tier Covered Transactions,” provided by the department or contracting agency, entering into this covered transaction, without modification, in all lower tier covered transactions and in all solicitations for lower tier covered transactions exceeding the \$25,000 threshold. 2 CFR 180.220 and 180.300.

h. A participant in a covered transaction may rely upon a certification of a prospective participant in a lower tier covered transaction that is not debarred, suspended, ineligible, or voluntarily excluded from the covered transaction, unless it knows that the certification is erroneous. 2 CFR 180.300; 180.320, and 180.325.

A participant is responsible for ensuring that its principals are not suspended, debarred, or otherwise ineligible to participate in covered transactions. 2 CFR 180.335. To verify the eligibility of its principals, as well as the eligibility of any lower tier prospective participants, each participant may, but is not required to, check the System for Award Management website (<https://www.sam.gov/>). 2 CFR 180.300, 180.320, and 180.325.

i. Nothing contained in the foregoing shall be construed to require the establishment of a system of records in order to render in good faith the certification required by this clause. The knowledge and information of the prospective participant is not required to exceed that which is normally possessed by a prudent person in the ordinary course of business dealings.

j. Except for transactions authorized under paragraph (f) of these instructions, if a participant in a covered transaction knowingly enters into a lower tier covered transaction with a person who is suspended, debarred, ineligible, or voluntarily excluded from participation in this transaction, in addition to other remedies available to the Federal Government, the department or agency may terminate this transaction for cause or default. 2 CFR 180.325.

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## **2. Certification Regarding Debarment, Suspension, Ineligibility and Voluntary Exclusion – First Tier Participants:**

a. The prospective first tier participant certifies to the best of its knowledge and belief, that it and its principals:

(1) Are not presently debarred, suspended, proposed for debarment, declared ineligible, or voluntarily excluded from participating in covered transactions by any Federal department or agency, 2 CFR 180.335;

(2) Have not within a three-year period preceding this proposal been convicted of or had a civil judgment rendered against them for commission of fraud or a criminal offense in connection with obtaining, attempting to obtain, or performing a public (Federal, State, or local) transaction or contract under a public transaction; violation of Federal or State antitrust statutes or commission of embezzlement, theft, forgery, bribery, falsification or destruction of records, making false statements, or receiving stolen property, 2 CFR 180.800;

(3) Are not presently indicted for or otherwise criminally or civilly charged by a governmental entity (Federal, State or local) with commission of any of the offenses enumerated in paragraph (a)(2) of this certification, 2 CFR 180.700 and 180.800; and

(4) Have not within a three-year period preceding this application/proposal had one or more public transactions (Federal, State or local) terminated for cause or default. 2 CFR 180.335(d).

(5) Are not a corporation that has been convicted of a felony violation under any Federal law within the two-year period preceding this proposal (USDOT Order 4200.6 implementing appropriations act requirements); and

(6) Are not a corporation with any unpaid Federal tax liability that has been assessed, for which all judicial and administrative remedies have been exhausted, or have lapsed, and that is not being paid in a timely manner pursuant to an agreement with the authority responsible for collecting the tax liability (USDOT Order 4200.6 implementing appropriations act requirements).

b. Where the prospective participant is unable to certify to any of the statements in this certification, such prospective participant should attach an explanation to this proposal. 2 CFR 180.335 and 180.340.

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## **3. Instructions for Certification - Lower Tier Participants:**

(Applicable to all subcontracts, purchase orders, and other lower tier transactions requiring prior FHWA approval or estimated to cost \$25,000 or more - 2 CFR Parts 180 and 1200). 2 CFR 180.220 and 1200.220.

a. By signing and submitting this proposal, the prospective lower tier participant is providing the certification set out below.

b. The certification in this clause is a material representation of fact upon which reliance was placed when this transaction was entered into. If it is later determined that the prospective lower tier participant knowingly rendered an erroneous certification, in addition to other remedies available to the Federal Government, the department, or agency with which this transaction originated may pursue available remedies, including suspension or debarment.

c. The prospective lower tier participant shall provide immediate written notice to the person to which this proposal is submitted if at any time the prospective lower tier participant learns that its certification was erroneous by reason of changed circumstances. 2 CFR 180.365.

d. The terms “covered transaction,” “debarred,” “suspended,” “ineligible,” “participant,” “person,” “principal,” and “voluntarily excluded,” as used in this clause, are defined in 2 CFR Parts 180, Subpart I, 180.900 – 180.1020, and 1200. You may contact the person to which this proposal is submitted for assistance in obtaining a copy of those regulations. “First Tier Covered Transactions” refers to any covered transaction between a recipient or subrecipient of Federal funds and a participant (such as the prime or general contract). “Lower Tier Covered Transactions” refers to any covered transaction under a First Tier Covered Transaction (such as subcontracts). “First Tier Participant” refers to the participant who has entered into a covered transaction with a recipient or subrecipient of Federal funds (such as the prime or general contractor). “Lower Tier Participant” refers any participant who has entered into a covered transaction with a First Tier Participant or other Lower Tier Participants (such as subcontractors and suppliers).

e. The prospective lower tier participant agrees by submitting this proposal that, should the proposed covered transaction be entered into, it shall not knowingly enter into any lower tier covered transaction with a person who is debarred, suspended, declared ineligible, or voluntarily excluded from participation in this covered transaction, unless authorized by the department or agency with which this transaction originated. 2 CFR 1200.220 and 1200.332.

f. The prospective lower tier participant further agrees by submitting this proposal that it will include this clause titled “Certification Regarding Debarment, Suspension, Ineligibility and Voluntary Exclusion-Lower Tier Covered Transaction,” without modification, in all lower tier covered transactions and in all solicitations for lower tier covered transactions exceeding the \$25,000 threshold. 2 CFR 180.220 and 1200.220.

g. A participant in a covered transaction may rely upon a certification of a prospective participant in a lower tier covered transaction that is not debarred, suspended, ineligible, or voluntarily

excluded from the covered transaction, unless it knows that the certification is erroneous. A participant is responsible for ensuring that its principals are not suspended, debarred, or otherwise ineligible to participate in covered transactions. To verify the eligibility of its principals, as well as the eligibility of any lower tier prospective participants, each participant may, but is not required to, check the System for Award Management website (<https://www.sam.gov/>), which is compiled by the General Services Administration. 2 CFR 180.300, 180.320, 180.330, and 180.335.

h. Nothing contained in the foregoing shall be construed to require establishment of a system of records in order to render in good faith the certification required by this clause. The knowledge and information of participant is not required to exceed that which is normally possessed by a prudent person in the ordinary course of business dealings.

i. Except for transactions authorized under paragraph e of these instructions, if a participant in a covered transaction knowingly enters into a lower tier covered transaction with a person who is suspended, debarred, ineligible, or voluntarily excluded from participation in this transaction, in addition to other remedies available to the Federal Government, the department or agency with which this transaction originated may pursue available remedies, including suspension or debarment. 2 CFR 180.325.

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#### **4. Certification Regarding Debarment, Suspension, Ineligibility and Voluntary Exclusion--Lower Tier Participants:**

a. The prospective lower tier participant certifies, by submission of this proposal, that neither it nor its principals:

(1) is presently debarred, suspended, proposed for debarment, declared ineligible, or voluntarily excluded from participating in covered transactions by any Federal department or agency, 2 CFR 180.355;

(2) is a corporation that has been convicted of a felony violation under any Federal law within the two-year period preceding this proposal (USDOT Order 4200.6 implementing appropriations act requirements); and

(3) is a corporation with any unpaid Federal tax liability that has been assessed, for which all judicial and administrative remedies have been exhausted, or have lapsed, and that is not being paid in a timely manner pursuant to an agreement with the authority responsible for collecting the tax liability. (USDOT Order 4200.6 implementing appropriations act requirements)

b. Where the prospective lower tier participant is unable to certify to any of the statements in this certification, such prospective participant should attach an explanation to this proposal.

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#### **XI. CERTIFICATION REGARDING USE OF CONTRACT FUNDS FOR LOBBYING**

This provision is applicable to all Federal-aid construction contracts and to all related subcontracts which exceed \$100,000. 49 CFR Part 20, App. A.

1. The prospective participant certifies, by signing and submitting this bid or proposal, to the best of his or her knowledge and belief, that:

a. No Federal appropriated funds have been paid or will be paid, by or on behalf of the undersigned, to any person for influencing or attempting to influence an officer or employee of any Federal agency, a Member of Congress, an officer or employee of Congress, or an employee of a Member of Congress in connection with the awarding of any Federal contract, the making of any Federal grant, the making of any Federal loan, the entering into of any cooperative agreement, and the extension, continuation, renewal, amendment, or modification of any Federal contract, grant, loan, or cooperative agreement.

b. If any funds other than Federal appropriated funds have been paid or will be paid to any person for influencing or attempting to influence an officer or employee of any Federal agency, a Member of Congress, an officer or employee of Congress, or an employee of a Member of Congress in connection with this Federal contract, grant, loan, or cooperative agreement, the undersigned shall complete and submit Standard Form-LLL, "Disclosure Form to Report Lobbying," in accordance with its instructions.

2. This certification is a material representation of fact upon which reliance was placed when this transaction was made or entered into. Submission of this certification is a prerequisite for making or entering into this transaction imposed by 31 U.S.C. 1352. Any person who fails to file the required certification shall be subject to a civil penalty of not less than \$10,000 and not more than \$100,000 for each such failure.

3. The prospective participant also agrees by submitting its bid or proposal that the participant shall require that the language of this certification be included in all lower tier subcontracts, which exceed \$100,000 and that all such recipients shall certify and disclose accordingly.

#### **XII. USE OF UNITED STATES-FLAG VESSELS:**

This provision is applicable to all Federal-aid construction contracts, design-build contracts, subcontracts, lower-tier subcontracts, purchase orders, lease agreements, or any other covered transaction. 46 CFR Part 381.

This requirement applies to material or equipment that is acquired for a specific Federal-aid highway project. 46 CFR 381.7. It is not applicable to goods or materials that come into inventories independent of an FHWA funded-contract.

When oceanic shipments (or shipments across the Great Lakes) are necessary for materials or equipment acquired for a specific Federal-aid construction project, the bidder, proposer, contractor, subcontractor, or vendor agrees:

1. To utilize privately owned United States-flag commercial vessels to ship at least 50 percent of the gross tonnage (computed separately for dry bulk carriers, dry cargo liners, and tankers) involved, whenever shipping any equipment, material, or commodities pursuant to this contract, to the extent such vessels are available at fair and reasonable rates for United States-flag commercial vessels. 46 CFR 381.7.

2. To furnish within 20 days following the date of loading for shipments originating within the United States or within 30 working days following the date of loading for shipments originating outside the United States, a legible copy of a rated, 'on-board' commercial ocean bill-of-lading in English for each shipment of cargo described in paragraph (b)(1) of this section to both the Contracting Officer (through the prime contractor in the case of subcontractor bills-of-lading) and to the Office of Cargo and Commercial Sealift (MAR-620), Maritime Administration, Washington, DC 20590. (MARAD requires copies of the ocean carrier's (master) bills of lading,



certified onboard, dated, with rates and charges. These bills of lading may contain business sensitive information and therefore may be submitted directly to MARAD by the Ocean Transportation Intermediary on behalf of the contractor). 46 CFR 381.7.

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**ATTACHMENT A - EMPLOYMENT AND MATERIALS PREFERENCE FOR APPALACHIAN DEVELOPMENT HIGHWAY SYSTEM OR APPALACHIAN LOCAL ACCESS ROAD CONTRACTS (23 CFR 633, Subpart B, Appendix B)**

This provision is applicable to all Federal-aid projects funded under the Appalachian Regional Development Act of 1965.

1. During the performance of this contract, the contractor undertaking to do work which is, or reasonably may be, done as on-site work, shall give preference to qualified persons who regularly reside in the labor area as designated by the DOL wherein the contract work is situated, or the subregion, or the Appalachian counties of the State wherein the contract work is situated, except:

a. To the extent that qualified persons regularly residing in the area are not available.

b. For the reasonable needs of the contractor to employ supervisory or specially experienced personnel necessary to assure an efficient execution of the contract work.

c. For the obligation of the contractor to offer employment to present or former employees as the result of a lawful collective bargaining contract, provided that the number of nonresident persons employed under this subparagraph (1c) shall not exceed 20 percent of the total number of employees employed by the contractor on the contract work, except as provided in subparagraph (4) below.

2. The contractor shall place a job order with the State Employment Service indicating (a) the classifications of the laborers, mechanics and other employees required to perform the contract work, (b) the number of employees required in each classification, (c) the date on which the participant estimates such employees will be required, and

(d) any other pertinent information required by the State Employment Service to complete the job order form. The job order may be placed with the State Employment Service in writing or by telephone. If during the course of the contract work, the information submitted by the contractor in the original job order is substantially modified, the participant shall promptly notify the State Employment Service.

3. The contractor shall give full consideration to all qualified job applicants referred to him by the State Employment Service. The contractor is not required to grant employment to any job applicants who, in his opinion, are not qualified to perform the classification of work required.

4. If, within one week following the placing of a job order by the contractor with the State Employment Service, the State Employment Service is unable to refer any qualified job applicants to the contractor, or less than the number requested, the State Employment Service will forward a certificate to the contractor indicating the unavailability of applicants. Such certificate shall be made a part of the contractor's permanent project records. Upon receipt of this certificate, the contractor may employ persons who do not normally reside in the labor area to fill positions covered by the certificate, notwithstanding the provisions of subparagraph (1c) above.

5. The provisions of 23 CFR 633.207(e) allow the contracting agency to provide a contractual preference for the use of mineral resource materials native to the Appalachian region.

6. The contractor shall include the provisions of Sections 1 through 4 of this Attachment A in every subcontract for work which is, or reasonably may be, done as on-site work.

**ATTACHMENT 3 TO EXHIBIT 11**

**FEDERAL PREVAILING WAGE RATE**

The federal prevailing wage rates for the Work through Final Acceptance shall be those set forth under the general wage decision for highway construction projects in Clark County, Indiana and Scott County, Indiana as published on the Davis-Bacon wage determination website on the date that is 10 days before the Proposal Due Date.

*[NTD: Wage decision, pulled from <https://sam.gov/content/wage-determinations>, to be added in Final RFP as Attachment 3 and updated 10 days before Proposal Date.]*

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**ATTACHMENT 4 TO EXHIBIT 11**

**EQUAL EMPLOYMENT OPPORTUNITY**

**SPECIAL PROVISION**

**000---005**

**Standard Federal Equal Employment Opportunity  
Construction Contract Specifications (Executive Order 11246)**

7. As used in these specifications:
- a. “Covered area” means the geographical area described in the solicitation from which this contract resulted;
  - b. “Director” means Director, Office of Federal Contract Compliance Programs, United States Department of Labor, or any person to whom the Director delegates authority;
  - c. “Employer identification number” means the Federal Social Security number used on the Employer’s Quarterly Federal Tax Return, U.S. Treasury Department Form 941.
  - d. “Minority” includes:
    - (i) Black (all persons having origins in any of the Black African racial groups not of Hispanic origin);
    - (ii) Hispanic (all persons of Mexican, Puerto Rican, Cuban, Central or South American or other Spanish Culture or origin, regardless of race);
    - (iii) Asian and Pacific Islander (all persons having origins in any of the original peoples of the Far East, Southeast Asia, the Indian Subcontinent, or the Pacific Islands); and
    - (iv) American Indian or Alaskan Native (all persons having origins in any of the original peoples of North America and maintaining identifiable tribal affiliations through membership and participation or community identification).
8. Whenever the Contractor, or any Subcontractor at any tier, subcontracts a portion of the work involving any construction trade, it shall physically include in each subcontract in excess of \$10,000 the provisions of these specifications and the Notice which contains the applicable goals for minority and female participation and which is set forth in the solicitations from which this contract resulted.
9. If the Contractor is participating (pursuant to 41 CFR 60-4.5) in a Hometown Plan approved by the U.S. Department of Labor in the covered area either individually or through an

association, its affirmative action obligations on all work in the Plan area (including goals and timetables) shall be in accordance with that Plan for those trades which have unions participating in the Plan. Contractors must be able to demonstrate their participation in and compliance with the provisions of any such Hometown Plan. Each Contractor or Subcontractor participating in an approved Plan is individually required to comply with its obligations under the Equal Opportunity Clause (section below), and to make a good faith effort to achieve each goal under the Plan in each trade in which it has employees. The overall good faith performance by other Contractors or Subcontractors toward a goal in an approved Plan does not excuse any covered Contractor's or Subcontractor's failure to take good faith efforts to achieve the Plan goals and timetables.

10. The Contractor shall implement the specific affirmative action standards provided in paragraphs 7 a through p of these specifications. The goals set forth in the solicitation from which this contract resulted are expressed as percentages of the total hours of employment and training of minority and female utilization the Contractor should reasonably be able to achieve in each construction trade in which it has employees in the covered area. Covered Construction contractors performing construction work in geographical areas where they do not have a Federal or federally assisted construction contract shall apply the minority and female goals established for the geographical area where the work is being performed. Goals are published periodically in the Federal Register in notice form, and such notices may be obtained from any Office of Federal Contract Compliance Programs office or from Federal procurement contracting officers. The Contractor is expected to make substantially uniform progress in meeting its goals in each craft during the period specified.

11. Neither the provisions of any collective bargaining agreement, nor the failure by a union with whom the Contractor has a collective bargaining agreement, to refer either minorities or women shall excuse the Contractor's obligations under these specifications, Executive Order 11246, or the regulations promulgated pursuant thereto.

12. In order for the nonworking training hours of apprentices and trainees to be counted in meeting the goals, such apprentices and trainees must be employed by the Contractor during the training period, and the Contractor must have made a commitment to employ the apprentices and trainees at the completion of their training, subject to the availability of employment opportunities. Trainees must be trained pursuant to training programs approved by the U.S. Department of Labor.

13. The Contractor shall take specific affirmative actions to ensure equal employment opportunity. The evaluation of the Contractor's compliance with these specifications shall be based upon its effort to achieve maximum results from its actions. The Contractor shall document these efforts fully, and shall implement affirmative action steps at least as extensive as the following:

- a. Ensure and maintain a working environment free of harassment, intimidation, and coercion at all sites, and in all facilities at which the Contractor's employees are assigned to work. The Contractor, where possible, will assign two or more women to each construction project. The Contractor shall specifically ensure that all foremen, superintendents, and other on-site supervisory personnel are aware of and carry out the Contractor's obligation to maintain such a working environment, with

specific attention to minority or female individuals working at such sites or in such facilities.

- b. Establish and maintain a current list of minority and female recruitment sources, provide written notification to minority and female recruitment sources and to community organizations when the Contractor or its unions have employment opportunities available, and maintain a record of the organizations' responses.
- c. Maintain a current file of the names, addresses and telephone numbers of each minority and female off-the-street applicant and minority or female referral from a union, a recruitment source or community organization and of what action was taken with respect to each such individual. If such individual was sent to the union hiring hall for referral and was not referred back to the Contractor by the union or, if referred, not employed by the Contractor, this shall be documented in the file with the reason therefore, along with whatever additional actions the Contractor may have taken.
- d. Provide immediate written notification to the Director when the union or unions with which the Contractor has a collective bargaining agreement has not referred to the Contractor a minority person or woman sent by the Contractor, or when the Contractor has other information that the union referral process has impeded the Contractor's efforts to meet its obligations.
- e. Develop on-the-job training opportunities or participate in training programs for the area which expressly include minorities and women, including upgrading programs and apprenticeship and trainee programs relevant to the Contractor's employment needs, especially those programs funded or approved by the Department of Labor. The Contractor shall provide notice of these programs to the sources compiled under 7b above.
- f. Disseminate the Contractor's EEO policy by providing notice of the policy to unions and training programs and requesting their cooperation in assisting the Contractor in meeting its EEO obligations; by including it in any policy manual and collective bargaining agreement; by publicizing it in the company newspaper, annual report, etc.; by specific review of the policy with all management personnel and with all minority and female employees at least once a year; and by posting the company EEO policy on bulletin boards accessible to all employees at each location where construction work is performed.
- g. Review, at least annually, the company's EEO policy and affirmative action obligations under these specifications with all employees having any responsibility for hiring, assignment, layoff, termination or other employment decisions including specific review of these items with onsite supervisory personnel such as Superintendents, General Foremen, etc., prior to the initiation of construction work at any job site. A written record shall be made and maintained identifying the time

and place of these meetings, persons attending, subject matter discussed, and disposition of the subject matter.

- h. Disseminate the Contractor's EEO policy externally by including it in any advertising in the news media, specifically including minority and female news media, and providing written notification to and discussing the Contractor's EEO policy with other Contractors and Subcontractors with whom the Contractor does or anticipates doing business.
- i. Direct its recruitment efforts, both oral and written, to minority, female and community organizations, to schools with minority and female students and to minority and female recruitment and training organizations serving the Contractor's recruitment area and employment needs. Not later than one month prior to the date for the acceptance of applications for apprenticeship or other training by any recruitment source, the Contractor shall send written notification to organizations such as the above, describing the openings, screening procedures, and tests to be used in the selection process.
- j. Encourage present minority and female employees to recruit other minority persons and women and, where reasonable, provide after school, summer and vacation employment to minority and female youth both on the site and in other areas of a Contractor's work force.
- k. Validate all tests and other selection requirements where there is an obligation to do so under 41 CFR Part 60-3.
- l. Conduct, at least annually, an inventory and evaluation at least of all minority and female personnel for promotional opportunities and encourage these employees to seek or to prepare for, through appropriate training, etc., such opportunities.
- m. Ensure that seniority practices, job classifications, work assignments and other personnel practices, do not have a discriminatory effect by continually monitoring all personnel and employment related activities to ensure that the EEO policy and the Contractor's obligations under these specifications are being carried out.
- n. Ensure that all facilities and company activities are non-segregated except that separate or single-user toilet and necessary changing facilities shall be provided to assure privacy between the sexes.
- o. Document and maintain a record of all solicitations of offers for subcontracts from minority and female construction contractors and suppliers, including circulation of solicitations to minority and female contractor associations and other business associations.

- p. Conduct a review, at least annually, of all supervisors' adherence to and performance under the Contractor's EEO policies and affirmative action obligations.

14. Contractors are encouraged to participate in voluntary associations which assist in fulfilling one or more of their affirmative action obligations (7a through p). The efforts of a contractor association, joint contractor-union, contractor-community, or other similar group of which the contractor is a member and participant, may be asserted as fulfilling any one or more of its obligations under 7a through p of these Specifications provided that the contractor actively participates in the group, makes every effort to assure that the group has a positive impact on the employment of minorities and women in the industry, ensures that the concrete benefits of the program are reflected in the Contractor's minority and female workforce participation, makes a good faith effort to meet its individual goals and timetables, and can provide access to documentation which demonstrates the effectiveness of actions taken on behalf of the Contractor. The obligation to comply, however, is the Contractor's and failure of such a group to fulfill an obligation shall not be a defense for the Contractor's noncompliance.

15. A single goal for minorities and a separate single goal for women have been established. The Contractor, however, is required to provide equal employment opportunity and to take affirmative action for all minority groups, both male and female, and all women, both minority and non-minority. Consequently, the Contractor may be in violation of the Executive Order if a particular group is employed in a substantially disparate manner (for example, even though the Contractor has achieved its goals for women generally, the Contractor may be in violation of the Executive Order if a specific minority group of women is underutilized).

16. The Contractor shall not use the goals and timetables or affirmative action standards to discriminate against any person because of race, color, religion, sex, or national origin.

17. The Contractor shall not enter into any Subcontract with any person or firm debarred from Government contracts pursuant to Executive Order 11246.

18. The Contractor shall carry out such sanctions and penalties for violation of these specifications and of the Equal Opportunity Clause (section below), including suspension, termination and cancellation of existing subcontracts as may be imposed or ordered pursuant to Executive Order 11246, as amended, and its implementing regulations, by the Office of Federal Contract Compliance Programs. Any Contractor who fails to carry out such sanctions and penalties shall be in violation of these specifications and Executive Order 11246, as amended.

19. The Contractor, in fulfilling its obligations under these specifications, shall implement specific affirmative action steps, at least as extensive as those standards prescribed in paragraph 7 of these specifications, so as to achieve maximum results from its efforts to ensure equal employment opportunity. If the Contractor fails to comply with the requirements of the Executive Order, the implementing regulations, or these specifications, the Director shall proceed in accordance with 41 CFR 604.8.



20. The Contractor shall designate a responsible official to monitor all employment related activity to ensure that the company EEO policy is being carried out, to submit reports relating to the provisions hereof as may be required by the Government and to keep records. Records shall at least include for each employee the name, address, telephone numbers, construction trade, union affiliation if any, employee identification number when assigned, social security number, race, sex, status (e.g., mechanic, apprentice trainee, helper, or laborer), dates of changes in status, hours worked per week in the indicated trade, rate of pay, and locations at which the work was performed. Records shall be maintained in an easily understandable and retrievable form; however, to the degree that existing records satisfy this requirement, contractors shall not be required to maintain separate records.

21. Nothing herein provided shall be construed as a limitation upon the application of other laws which establish different standards of compliance or upon the application of requirements for the hiring of local or other area residents (e.g., those under the Public Works Employment Act of 1977 and the Community Development Block Grant Program).

### **Equal Opportunity Clause**

The applicant hereby agrees that it will incorporate or cause to be incorporated into any contract for construction work, or modification thereof, as defined in the regulations of the Secretary of Labor at 41 CFR Chapter 60, which is paid for in whole or in part with funds obtained from the Federal Government or borrowed on the credit of the Federal Government pursuant to a grant, contract, loan insurance, or guarantee, or undertaken pursuant to any Federal program involving such grant, contract, loan, insurance, or guarantee, the following equal opportunity clause:

During the performance of this contract, the contractor agrees as follows:

(1) The contractor will not discriminate against any employee or applicant for employment because of race, color, religion, sex, sexual orientation, gender identity, or national origin. The contractor will take affirmative action to ensure that applicants are employed, and that employees are treated during employment without regard to their race, color, religion, sex, sexual orientation, gender identity, or national origin. Such action shall include, but not be limited to the following:

Employment, upgrading, demotion, or transfer; recruitment or recruitment advertising; layoff or termination; rates of pay or other forms of compensation; and selection for training, including apprenticeship. The contractor agrees to post in conspicuous places, available to employees and applicants for employment, notices to be provided setting forth the provisions of this nondiscrimination clause.

(2) The contractor will, in all solicitations or advertisements for employees placed by or on behalf of the contractor, state that all qualified applicants will receive considerations for employment without regard to race, color, religion, sex, sexual orientation, gender identity, or national origin.

(3) The contractor will not discharge or in any other manner discriminate against any employee or applicant for employment because such employee or applicant has inquired about, discussed, or

disclosed the compensation of the employee or applicant or another employee or applicant. This provision shall not apply to instances in which an employee who has access to the compensation information of other employees or applicants as a part of such employee's essential job functions discloses the compensation of such other employees or applicants to individuals who do not otherwise have access to such information, unless such disclosure is in response to a formal complaint or charge, in furtherance of an investigation, proceeding, hearing or action, including an investigation conducted by the employer, or is consistent with the contractor's legal duty to furnish information.

(4) The contractor will send to each laborer union or representative of workers with which he has a collective bargaining agreement or other contract or understanding, a notice to be provided advising the said labor union or workers' representatives of the contractor's commitments under this section, and shall post copies of the notice in conspicuous places available to employees and applicants for employment.

(5) The contractor will comply with all provisions of Executive Order 11246 of September 24, 1965, and of the rules, regulations, and relevant orders of the Secretary of Labor.

(6) The contractor will furnish all information and reports required by Executive Order 11246 of September 24, 1965, and by rules, regulations, and orders of the Secretary of Labor, or pursuant thereto, and will permit access to his books, records, and accounts by the administering agency and the Secretary of Labor for purposes of investigation to ascertain compliance with such rules, regulations, and orders.

(7) In the event of the contractor's noncompliance with the nondiscrimination clauses of this contract or with any of the said rules, regulations, or orders, this contract may be canceled, terminated, or suspended in whole or in part and the contractor may be declared ineligible for further Government contracts or federally assisted construction contracts in accordance with procedures authorized in Executive Order 11246 of September 24, 1965, and such other sanctions may be imposed and remedies invoked as provided in Executive Order 11246 of September 24, 1965, or by rule, regulation, or order of the Secretary of Labor, or as otherwise provided by law.

(8) The contractor will include the portion of the sentence immediately preceding paragraph (1) and the provisions of paragraphs (1) through (8) in every subcontract or purchase order unless exempted by rules, regulations, or orders of the Secretary of Labor issued pursuant to section 204 of Executive Order 11246 of September 24, 1965, so that such provisions will be binding upon each Subcontractor or vendor. The contractor will take such action with respect to any subcontract or purchase order as the administering agency may direct as a means of enforcing such provisions, including sanctions for noncompliance:

Provided, however, that in the event a contractor becomes involved in, or is threatened with, litigation with a Subcontractor or vendor as a result of such direction by the administering agency, the contractor may request the United States to enter into such litigation to protect the interests of the United States.

The applicant further agrees that it will be bound by the above equal opportunity clause with respect to its own employment practices when it participates in federally assisted construction work: Provided, that if the applicant so participating is a State or local government, the above equal opportunity clause is not applicable to any agency, instrumentality or subdivision of such government which does not participate in work on or under the contract.

The applicant agrees that it will assist and cooperate actively with the administering agency and the Secretary of Labor in obtaining the compliance of contractors and Subcontractors with the equal opportunity clause and the rules, regulations, and relevant orders of the Secretary of Labor, that it will furnish the administering agency and the Secretary of Labor such information as they may require for the supervision of such compliance, and that it will otherwise assist the administering agency in the discharge of the agency's primary responsibility for securing compliance.

The applicant further agrees that it will refrain from entering into any contract or contract modification subject to Executive Order 11246 of September 24, 1965, with a contractor debarred from, or who has not demonstrated eligibility for, Government contracts and federally assisted construction contracts pursuant to the Executive Order and will carry out such sanctions and penalties for violation of the equal opportunity clause as may be imposed upon contractors and Subcontractors by the administering agency or the Secretary of Labor pursuant Part II, Subpart D of the Executive Order. In addition, the applicant agrees that if it fails or refuses to comply with these undertakings, the administering agency may take any or all of the following actions: Cancel, terminate, or suspend in whole or in part this grant (contract, loan, insurance, or guarantee); refrain from extending any further assistance to the applicant under the program with respect to which the failure or refund occurred until satisfaction assurance of future compliance has been received from such applicant; and refer the case to the Department of Justice for appropriate legal proceedings.

**ATTACHMENT 5 TO EXHIBIT 11**

**SPECIAL PROVISION**

**000—0004**

**Notice of Requirement for Affirmative Action to  
Ensure Equal Employment Opportunity (Executive Order 11246)**

**1. General.**

In addition to the affirmative action requirements of the Special Provision titled “Standard Federal Equal Employment Opportunity Construction Contract Specifications” as set forth in Attachment 5 to Exhibit 11 (Federal Requirements), the contractor’s attention is directed to the specific requirements for utilization of minorities and females as set forth below.

**2. Goals.**

- a. Goals for minority and female participation are hereby established in accordance with 41 CFR 60-4.
- b. The goals for minority and female participation expressed in percentage terms for the contractor’s aggregate work force in each trade on all construction work in the covered area, are as follows:

<b>Goals for minority participation in each trade (percent)</b>	<b>Goals for female participation in each trade (percent)</b>
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See <u>Table 1</u>	[ ]%
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- c. These goals are applicable to all the Contractor’s construction work (whether or not it is Federal or federally assisted) performed in the covered area. If the contractor performs construction work in a geographical area located outside of the covered area, it shall apply the goals established for such geographical area where the work is actually performed. With regard to this second area, the contractor also is subject to the goals for both its federally involved and non-federally involved construction. The Contractor’s compliance with the Executive Order and the regulations in 41 CFR Part 60-4 shall be based on its implementation of the Equal Opportunity Clause, specific affirmative action obligations required by the specifications set forth in 41 CFR 60-4.3(a), and its efforts to meet the goals. The hours of minority and female employment and training must be substantially uniform throughout the length of the contract, and in each trade, and the contractor shall make a good faith effort to employ minorities and women evenly on each of its projects. The transfer of minority or female employees or trainees from Contractor to Contractor or from project to project for the sole purpose of meeting the Contractor’s goals shall be a violation of the contract, the Executive Order and the regulations in 41 CFR Part

60-4. Compliance with the goals will be measured against the total work hours performed.

**3. Subcontracting.**

The contractor shall provide written notification to INDOT within 14 days after award of any construction subcontract in excess of \$10,000 at any tier for construction work under the contract resulting from this solicitation pending concurrence of INDOT in the award. The notification shall list the names, address and telephone number of the Subcontractor; employer identification number; estimated dollar amount of the subcontract; estimated starting and completion dates of the subcontract; and the geographical area in which the contract is to be performed.

**4. Covered area.**

As used in this special provision, and in the contract resulting from this solicitation, the geographical area covered by these goals for female participation is the State of Indiana. The geographical area covered by these goals for other minorities are the boroughs or other geographic areas in the State of Indiana and the Commonwealth of Kentucky as indicated in Table 1 of Attachment 5 to Exhibit 11 (Federal Requirements).

**5. Reports.**

The contractor is hereby notified that he may be subject to the Office of Federal Contract Compliance Programs (OFCCP) reporting and record keeping requirements as provided for under Executive Order 11246 as amended. OFCCP will provide direct notice to the contractor as to the specific reporting requirements that he will be expected to fulfill.

**Table 1**

<b>Borough or Other Geographic Area</b>	<b>Goals for Minority Participation</b>	<b>County</b>
Project Area	[ ]%	Clark County, Indiana and Scott County, Indiana

**ATTACHMENT 6 TO EXHIBIT 11**

**CERTIFICATION REGARDING USE OF CONTRACT FUNDS FOR LOBBYING**

Design-Build Contractor/Subcontractor certifies, to the best of its knowledge and belief that Design-Build Contractor/Subcontractor has complied with Section 1352, Title 31, U.S. Code, and specifically, that:

1. Design-Build Contractor/Subcontractor certifies, to the best of its knowledge and belief, that:

No federal appropriated funds have been paid or will be paid, by or on behalf of Design-Build Contractor/Subcontractor, to any person for influencing or attempting to influence an officer or employee of any federal agency, a Member of Congress, an officer or employee of Congress, or an employee of a Member of Congress in connection with the awarding of any federal agreements, the making of any federal grant, the making of any federal loan, the entering into of any cooperative agreement, and the extension, continuation, renewal, amendment, or modification of any federal agreement, grant, loan, or cooperative agreement.

If any funds other than federal appropriated funds have been paid or will be paid to any person for influencing or attempting to influence an officer or employee of any federal agency, a Member of Congress, an officer or employee of Congress, or an employee of a Member of Congress in connection with such federal agreement, grant, loan, or cooperative agreement, the undersigned shall complete and submit Standard Form-LLL "Disclosure Form to Report Lobbying," in accordance with its instructions.

Design-Build Contractor/Subcontractor also agrees by signing this certification that it shall require that the language of this certification be included in all contractor agreements including lower tier subcontracts, which exceed \$100,000, and that all such sub recipients shall certify and disclose accordingly. Any person who fails to sign or file this required certification shall be subject to a civil penalty of not less than \$10,000 and not more than \$100,000 for each failure.

## ATTACHMENT 7 TO EXHIBIT 11

### COMPLIANCE WITH BUY AMERICA AND BUILD AMERICA, BUY AMERICA REQUIREMENTS

Design-Build Contractor shall comply with the requirements of 23 U.S.C. § 313 as amended by the Build America, Buy America Act (under the Infrastructure Investment and Jobs Act/Bipartisan Infrastructure Law, Pub. L. No. 117-58, Nov. 15, 2021), and the federal regulations under 23 C.F.R. § 635.410, 2 C.F.R. § 200.322(c), and 2 C.F.R. § 184. Capitalized terms used, but not defined, have the meanings ascribed in the DBA by and between the Indiana Department of Transportation and [●], dated as of [●], 202[●]. [NTD: **insert counterparty name and date of execution**]

23 C.F.R. § 635.410 permits federal financial assistance in the DBA only if (a) all iron and steel used in the Project is produced in the United States (i.e., all manufacturing processes, from the initial melting stage through the application of coatings, to occur in the United States); (b) all manufactured products<sup>1</sup> used in the Project are produced in the United States (i.e., the manufactured product was manufactured in the United States; and the cost of the components of the manufactured product that are mined, produced, or manufactured in the United States is greater than 55 percent of the total cost of all components of the manufactured product<sup>2</sup>, unless another standard for determining the minimum amount of domestic content of the manufactured product has been established under applicable law or regulation); and (c) all construction materials<sup>3</sup> are manufactured in the United States (i.e., all manufacturing processes for the construction material occurred in the United States and satisfy the material-specific requirements set forth in 2 C.F.R. § 184.6); provided, however, that the following exceptions shall apply:

- (i) iron and steel where all manufacturing processes did not occur in the United States may be used so long as the cumulative cost of such steel and iron materials as they are delivered to the Project does not exceed 0.1% of the total contract amount, or \$2,500, whichever is greater;
- (ii) construction materials and manufactured products not meeting the requirements set forth in clauses (b) and (c) above may be used so long as no more than the lesser of (A) \$1,000,000, or (B) 5% of total applicable costs for the Project (defined as the total cost of iron and steel, manufactured products, and construction materials used in the Project, whether or not within the scope of an existing waiver);<sup>4</sup>and

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<sup>1</sup> “Manufactured products” is as defined in 2 C.F.R. § 184.3.

<sup>2</sup> To be calculated in accordance with 2 C.F.R. § 184.5.

<sup>3</sup> “Construction materials” is defined in 2 C.F.R. § 184.3 (as affected by section 70917(c)(1) of the Infrastructure Investment and Jobs Act).

<sup>4</sup> Pursuant to the public interest waiver granted under U.S. Department of Transportation “Waiver of Buy America Requirements for De Minimis Costs and Small Grants” issued August 16, 2023. See

- (iii) no domestic preference requirements under the statutes and regulations covered by this certification shall be applicable where the total amount of Federal financial assistance applied to the project, through awards or subawards, is below \$500,000.<sup>5</sup>

The Buy America preference only applies to articles, materials, and supplies that are consumed in, incorporated into, or affixed to an infrastructure project. As such, it does not apply to tools, equipment, and supplies, such as temporary scaffolding, brought to the construction site and removed at or before the completion of the infrastructure Project. The Buy America preference also does not apply to equipment and furnishings, such as movable chairs, desks, and portable computer equipment, which are used at or within the finished infrastructure Project, but are not an integral part of the structure or permanently affixed to the infrastructure Project.

Concurrently with execution, Design-Build Contractor has completed and submitted, or shall complete and submit, to the Department a Buy America Certificate and a Build America, Buy America Certificate, each in the format below. After submittal, Design-Build Contractor is bound by its original certifications.

A false certification is a criminal act in violation of 18 U.S.C. § 1001. Should the Agreement be investigated, Design-Build Contractor has the burden of proof to establish that it is in compliance.

At Design-Build Contractor's request, INDOT may, but is not obligated to, seek a waiver of Buy America requirements if grounds for the waiver exist pursuant to 23 C.F.R. § 635.410(c), as amended by the Build America, Buy America Act (under the Infrastructure Investment and Jobs Act/Bipartisan Infrastructure Law, Pub. L. No. 117-58, Nov. 15, 2021) and 2 C.F.R. § 184.7. However, Design-Build Contractor certifies that it will comply with the applicable Buy America requirements if a waiver of those requirements is not available or not pursued by INDOT.

Capitalized terms used, but not otherwise defined in this Attachment 7 to Exhibit 11 (*Federal Requirements*) of the DBA have the meanings ascribed in Exhibit 1 (*Abbreviations and Definitions*) to the DBA.

A certificate of compliance, substantially in the form required under Section 916.03(a) of the Standard Specifications, and in such other forms as INDOT may require, in its sole discretion, shall be furnished for steel and iron materials. The certificates, in addition to certifying that the materials comply with the specifications, shall specifically certify that all manufacturing processes for the materials occurred in the United States, except as for the above exception.

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<https://www.federalregister.gov/documents/2023/08/16/2023-17602/waiver-of-buy-america-requirements-for-de-minimis-costs-and-small-grants/> for more information.

<sup>5</sup>Pursuant to the public interest waiver granted under U.S. Department of Transportation "Waiver of Buy America Requirements for De Minimis Costs and Small Grants" issued August 16, 2023. See <https://www.federalregister.gov/documents/2023/08/16/2023-17602/waiver-of-buy-america-requirements-for-de-minimis-costs-and-small-grants/> for more information.



**BUY AMERICA CERTIFICATE**

**Certificate of Compliance**

Design-Build Contractor hereby certifies, on behalf of itself and all Subcontractors (at all tiers), that it is in compliance with the requirements of 23 U.S.C. § 313 as amended by the Build America, Buy America Act (under the Infrastructure Investment and Jobs Act/Bipartisan Infrastructure Law, Pub. L. No. 117-58, Nov. 15, 2021), and the Federal regulations under 23 C.F.R. § 635.410, 2 C.F.R. § 200.322(c), and 2 C.F.R. § 184 for this Project.

PROJECT DESCRIPTION: Safer Drive 65 design-build best value project, Indiana Department of Transportation. The Project involves reconstruction of added travel lanes along I-65 in Clark and Scott Counties. The Project includes added travel lanes and pavement reconstruction or pavement rehabilitation of I-65 from 0.5 mile north of the Blue Lick Road Interchange (RP 16+27) in Clark County to SR 56 (RP 29+10) in Scott County.

CLARK AND SCOTT COUNTIES, INDIANA

Design-Build Contractor further certifies that as required, Design-Build Contractor will maintain all records and documents pertinent to the Buy America requirement, for not less than three years from the date of Final Acceptance. These files will be available for inspection and verification by INDOT and/or the Federal Highway Administration.

Date: \_\_\_\_\_

Signature: \_\_\_\_\_

Design-Build Contractor's Name: \_\_\_\_\_

Title: \_\_\_\_\_

**Certificate for Noncompliance**

Design-Build Contractor hereby certifies that it cannot comply with the requirements of 23 U.S.C. § 313, as amended by the Build America, Buy America Act (under the Infrastructure Investment and Jobs Act/Bipartisan Infrastructure Law, Pub. L. No. 117-58, Nov. 15, 2021), and the applicable regulations in 23 C.F.R. § 635.410, 2 C.F.R. § 200.322(c), and 2 C.F.R. § 184, but may qualify for a waiver to these requirement(s) pursuant to the foregoing statutes and regulations, and that Design-Build Contractor has submitted or will submit, within 15 days after the date of this certificate, a detailed request and rationale for such a waiver.

Design-Build Contractor acknowledges, agrees, and further certifies that if the foregoing waiver of requirements sought via submission of a timely detailed request and rationale for such a waiver is not available or not pursued by INDOT, then Design-Build Contractor shall comply with, and cause all Subcontractors of any tier to comply with, the applicable Buy America requirements within the foregoing statutes and regulations and submit, and cause to be submitted, promptly following notice from INDOT to Design-Build Contractor of such unavailability or intent not to pursue such waiver, a Certificate of Compliance in form and substance under this Attachment 7 to Exhibit 11 (Federal Requirements) of the DBA.

References to sections, exhibits, and attachments thereto are to the “Public-Private Agreement (Design-Build Delivery)”, by and between INDOT and Design-Build Contractor, with respect to the foregoing Project.

Date: \_\_\_\_\_

Signature: \_\_\_\_\_

Design-Build Contractor’s Name: \_\_\_\_\_

Title: \_\_\_\_\_

**BUILD AMERICA, BUY AMERICA CERTIFICATE OF COMPLIANCE FOR  
CONSTRUCTION MATERIALS**

Design-Build Contractor certifies that it is in compliance with the “BUILD AMERICA, BUY AMERICA” (“BABA”) requirements of the Infrastructure Investment and Jobs Act (“IIJA”), as set forth under Pub. L. No. 117-58, §§ 70901-52, and that all construction materials as defined under BABA furnished for the Project will have been produced in the United States of America.

PROJECT DESCRIPTION: Safer Drive 65 design-build best value project, Indiana Department of Transportation. The Project involves reconstruction of added travel lanes along I-65 in Clark and Scott Counties. The includes added travel lanes and pavement reconstruction or pavement rehabilitation of I-65 from 0.5 mile north of the Blue Lick Road Interchange (RP 16+27) in Clark County to SR 56 (RP 29+10) in Scott County.

CLARK AND SCOTT COUNTIES, INDIANA

Design-Build Contractor further certifies that as required, Design-Build Contractor will maintain all records and documents pertinent to the BABA requirements, at the address given below, for not less than three years from the date of Final Acceptance. These files will be available for inspection and verification by INDOT and/or FHWA.

Date: \_\_\_\_\_

Signature: \_\_\_\_\_

Design-Build Contractor’s Name: \_\_\_\_\_

Title: \_\_\_\_\_

Address: \_\_\_\_\_

**ATTACHMENT 8 TO EXHIBIT 11**

INDIANA DEPARTMENT OF  
TRANSPORTATION



ON-THE-JOB TRAINING PROGRAM & PARTNERSHIP AGREEMENT

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## 1.1 Definitions

**Contractor** means “prime” contractor.

**Disadvantaged Person** means an individual or family that meets the Department of Health and Human Services poverty guidelines. These guidelines are updated at least annually and will be utilized as the eligibility criterion for the On-the-Job Training (OJT) Program.

**Division Administrator** means the chief Federal Highway Administration (FHWA) official assigned to conduct FHWA business in a particular State.

**DOT** means the U.S. Department of Transportation, including FHWA.

**Federal-Aid Contract** is any contract between the Indiana Department of Transportation (INDOT) and a contractor that is paid for in whole or in part with DOT assistance.

**Journeyman** means a person who is capable of performing all the duties within a given job classification or craft.

**Minorities** mean the following categories for reporting data on race and ethnicity: American Indian or Alaska Native, Asian, Black or African American, Hispanic or Latino, Native Hawaiian or Other Pacific Islander.

**Supportive Services** means those services provided in connection with approved on-the-job training programs for highway construction workers and highway contractors which are designed to increase the overall effectiveness of training programs through the performance of various functions necessary to the program, but which are not generally considered part of the actual on-the-job training.

**Trainee** means a person who received on-the-job training through an approved on-the-job training program.

**Training Program** means any training or apprentice program that meets the standards set forth in 23 CFR 230 and has been approved by either the FHWA Division Administrator or U.S. Department of Labor.

## 1.2 Policy Statement

It is the policy of INDOT to require full utilization of all available training and skill-improvement opportunities to assure the increased participation of minorities, women, and disadvantaged persons in all phases of the highway construction industry.

## 1.3 Nondiscrimination in Programs and Activities

**Title VI of the Civil Rights Act of 1964** – Title VI of the Civil Rights Act of 1964 prohibits discrimination based on race, color or national origin in programs or activities which receive federal financial assistance.

**Title VII of the Civil Rights Act of 1964** – Title VII of the Civil Rights of 1964 prohibits discrimination in employment and was passed to bring equality in hiring, transfers, promotions, compensation, access to training, and other employment-related decisions.

**Form FHWA 1273** – Section II (Nondiscrimination) of Form FHWA-1273 sets forth a contractor’s minimum Equal Employment Opportunity requirements. These include acceptance of a general operating policy that prohibits discrimination based on race, color, religion, sex, national origin, age, or disability.

**23 CFR 230** – The provisions of 23 CFR 230 are applicable to all state highway agencies that receive federal financial assistance in connection with highway construction projects.

#### **1.4 Program Objective**

The primary objective of the OJT Program is to offer equal opportunity for the training and upgrading of minorities, women, and disadvantaged persons toward journeymen status in the highway construction trades. The OJT Program has been developed in accordance with 23 CFR 230, Appendix B to Subpart A (Training Special Provisions) and is administered by INDOT’s Economic Opportunity Division.

#### **1.5 Program Summary**

INDOT’s OJT Program fulfills its objective by implementing a program that is dynamic and addresses constraints through the following elements:

- The program is contractor-based and affords each contractor flexibility in selecting which projects trainees can be utilized.
- Encourages contractors to select individual trainees who can become members of the contractor’s regular workforce upon completion of their program.
- Emphasizes training in skilled-craft classifications using approved apprenticeship programs and other training programs approved by FHWA.
- Monitors the quality of training each individual receives.
- Assists contractors with addressing their EEO goals through training of minorities, women, and disadvantaged individuals.
- Partners with the industry and community-based organizations capable of providing OJT supportive services to trainees.
- Encourages systematic and direct recruitment of trainees through a variety of referral sources.

## **1.6 Goal Methodology**

The Department will establish an annual training goal each year in which the contractor is working on a federal-aid contract in the State of Indiana. This annual training commitment will be calculated by multiplying the current three-year average number of hours worked in the highway construction trades on federal-aid contracts in the State of Indiana (as a prime or subcontractor) by five percent (5%). If a contractor does not have a current 3-year history, INDOT will establish the annual training goal at the time the contractor is awarded its first contract for that year.

## **1.7 Trainee Eligibility**

No individual will be employed as a trainee in any classification in which he/she has successfully completed a training program or in which he/she has been employed as a journeyman.

## **1.8 Trainee Selection Procedures**

The contractor shall make every effort to enroll minorities, women, and disadvantaged persons into their training programs by conducting systematic and direct recruitment through public and private sources (e.g., partnerships with trade groups, minority and women organizations, community-based organizations, and employment agencies) to the extent that such persons are available within a reasonable area of recruitment. The contractor will be responsible for demonstrating the steps taken in pursuance thereof, prior to a determination as to whether the contractor is in compliance with the Training Special Provisions. This training commitment is not intended, and shall not be used, to discriminate against any applicant for training, whether a member of a minority group or not.

## **1.9 Trainee Wage Rates**

Trainees will be paid at the appropriate percentage of the journeyman's rate specified in the federal-aid contract for the job classification involved.

## **1.10 Training Goal Credit**

INDOT strongly encourages contractors to utilize trainees on all of their projects. Training credit will be allowed for each eligible trainee employed on any project within the State of Indiana (i.e., federal-aid, municipality, private, etc.). Training may be provided by a subcontractor, provided the contractor retains the primary responsibility for meeting the training requirements.

## **1.11 Contractor Responsibilities**

Contractor responsibilities in implementing the Training Special Provisions include the following:

- The number of trainees shall be distributed among the work classifications on the basis of the contractor's needs and the availability of journeymen in the various classifications within a reasonable area of recruitment.



- The ratio of trainees to journeymen shall not be greater than permitted by the terms of the approved training program.
- The contractor will periodically review the training and promotional opportunities for minorities, women, and disadvantaged employees and will encourage eligible employees to apply for such opportunities.
- The contractor will advise employees and applicants for employment of available training programs and entrance requirements.
- The contractor shall furnish each trainee with a copy of the training program he/she is enrolled.
- If a trainee is terminated, the contractor is required to make good faith efforts to replace the trainee.
- Contractors are required to have an approved training program prior to working on a federal-aid contract.

### **1.12 Good Faith Efforts**

If a contractor does not or cannot achieve its annual training goal, it must provide adequate Good Faith Efforts documentation. Good Faith Efforts are those efforts designed to achieve equal opportunity through positive, aggressive, and continuous result-oriented measures. Good Faith Efforts should be taken as new trainee opportunities become available.

INDOT will consider all contractors' documentation of Good Faith Efforts on a case-by-case basis. Consideration will be given to the following:

- Availability of minorities, females, and disadvantaged persons for training opportunities.
- The potential for effective training.
- Dollar value and length of contract.
- Total workforce that the average bidder could be expected to use.
- Geographic location.
- Type of work.
- The need for journey-level individuals in the area.

Good Faith Efforts may include, but are not limited to:

- Contact minority and female employees to gain referrals on other minority and female applicants.
- Contact minority and female recruitment sources when hiring opportunities arise.
- Upgrade minority and female unskilled workers into the skilled classifications when possible.
- Review and follow up on previously received applications from minorities and females when hiring opportunities arise.
- Maintain documentation of efforts made to achieve diversity in the workforce.

### **1.13 Program Monitoring and Sanctions for Noncompliance**

INDOT will continuously monitor contractor compliance with the goal and objectives outlined in the OJT Program. If a contractor can demonstrate that it achieved its annual training goal or that it made adequate Good Faith Efforts to do so, then INDOT will make the determination that the contractor is in compliance with the OJT program.

Where a contractor has neither achieved its training goal nor submitted adequate Good Faith Efforts documentation, INDOT will issue a Show Cause Notice for noncompliance and require the contractor to explain the deficiency or submit a written Corrective Action Plan outlining the actions it will undertake to prevent future recurrence. If a contractor fails or refuses to submit a Corrective Action Plan within 30 calendar days of receiving the Show Cause Notice, INDOT may impose administrative sanctions. Administrative sanctions for noncompliance may include: liquidated damages, withholding of progress payments, termination or cancellation of contracts, and removal of prequalification status or inability to bid on future contracting opportunities.

### **1.14 Contractor Reporting Requirements**

**OJT Trainee Introduction Form** – must be submitted to INDOT at time of hire for approval into OJT Program.

**OJT Trainee Termination/Completion Form** – must be submitted to INDOT whenever a trainee is terminated or successfully completes their training program.

**Monthly OJT Trainee Report** – reflects the number of training hours acquired by the trainee for a given month. The report must be submitted to INDOT by the 10th day of each month following the month being reported. For example, March reports are due by April 10th.

**Monthly Project Report** – provides a monthly listing of all projects (i.e., federal-aid, state, and private) the contractor is employed. The report must be submitted to INDOT by the 10th day of each month following the month being reported. For example, March reports are due by April 10th.

**Quarterly OJT Trainee Evaluation Form** – provides a quarterly assessment of the trainee. The report must be submitted to INDOT by the 10th day of each month following the quarter being reported. For example, first quarter (January-March) reports are due by April 10th.

**Annual OJT Training Report** – provides an annual summary of the contractors OJT performance. The report must be submitted to INDOT by January 10th.

**REPORTS ARE DUE AS INDICATED ABOVE REGARDLESS OF ACTIVITY.**

**1.15 Records**

The contractor shall retain all training and reporting records relating to its annual training commitment for a period of three years. Such records shall be available at reasonable times and places for inspection by authorized representatives of INDOT and FHWA.

**1.16 Annual Training Goal Calculation and Partnership Agreement**

**Step 1:** Determine the total number of hours worked in the highway construction trades on **INDOT federal-aid contracts** (either as a prime contractor or subcontractor) during the past three years. Do not include hours worked on state-funded and private work.

**Step 2:** Add the total number of hours from each year and divide by three (3):

$$\begin{array}{ccccccc} \boxed{\phantom{00000}} & + & \boxed{\phantom{00000}} & + & \boxed{\phantom{00000}} & = & \boxed{\phantom{00000}} \div 3 = \boxed{\phantom{00000}} \\ 202[\phantom{0}] & & 202[\phantom{0}] & & 202[\phantom{0}] & & \text{Average} \\ & & & & & & \text{Hours} \end{array}$$

**Step 3:** Multiply the “Average Hours” by five percent (5%):

$$\begin{array}{ccccccc} \boxed{\phantom{00000}} & \times & \boxed{\phantom{00000}} & = & \boxed{\phantom{00000}} \\ \text{Average Hours} & & .05 & & \text{Annual Training} \\ & & & & \text{Goal} \end{array}$$

I hereby agree to all of the terms and conditions contained herein and affirm under penalty and perjury that the information stated above is true and accurate.

<b>HOURS WORKED DURING</b>	<b>202[_] HOURS</b>	<b>202[_] HOURS</b>	<b>202[_] HOURS</b>
<b>TOTAL</b>			

<b>FOR CONTRACTOR USE</b>	<b>FOR DEPARTMENT USE</b>	
Company Name	Authorized Signature	Date
Authorized Signature	Date	Printed Name and Title
Printed Name and Title		
Telephone Number		
Email Address		

*Please detach this annual training goal calculation and return to INDOT c/o Katie Daniels at [kdaniels2@indot.in.gov](mailto:kdaniels2@indot.in.gov)*

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**FOR MORE INFORMATION CONTACT**

Indiana Department of Transportation  
Economic Opportunity Division  
100 North Senate Avenue  
N-750  
Indianapolis, IN 46204

Katie Daniels  
Contract Compliance Specialist / On-the-Job Training Program Lead  
317-233-2412  
[kdaniels2@indot.in.gov](mailto:kdaniels2@indot.in.gov)

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**EXHIBIT 12**

**DESIGN-BUILD CONTRACTOR'S DBE CERTIFICATION**

*[insert completed Form 1 from Proposal]*

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## EXHIBIT 13

### FORM OF DRUG-FREE WORKPLACE CERTIFICATION

As required by Executive Order No. 90-5, dated April 12, 1990, issued by the Governor of the State of Indiana, Design-Build Contractor hereby covenants and agrees to make a good faith effort to provide and maintain a drug-free workplace. Design-Build Contractor will give written notice to INDOT within ten (10) days after receiving actual notice that Design-Build Contractor or an employee of Design-Build Contractor in the State of Indiana has been convicted of a criminal drug violation occurring in the workplace. False certification or violation of this certification may result in sanctions including, but not limited to, suspension of contract payments, termination of the DBA or debarment of contracting opportunities with the State of Indiana for up to three (3) years.

In addition to the provisions of the above paragraphs, if the total amount set forth in the DBA is in excess of \$25,000.00, Design-Build Contractor certifies and agrees that it will provide a drug-free workplace by:

- A. Publishing and providing to all of its employees a statement notifying them that the unlawful manufacture, distribution, dispensing, possession or use of a controlled substance is prohibited in Design-Build Contractor's workplace, and specifying the actions that will be taken against employees for violations of such prohibition;
- B. Establishing a drug-free awareness program to inform its employees of (1) the dangers of drug abuse in the workplace; (2) Design-Build Contractor's policy of maintaining a drug-free workplace; (3) any available drug counseling, rehabilitation, and employee assistance programs; and (4) the penalties that may be imposed upon an employee for drug abuse violations occurring in the workplace;
- C. Notifying all employees in the statement required by subparagraph (A) above that as a condition of continued employment, the employee will (1) abide by the terms of the statement; and (2) notify Design-Build Contractor of any criminal drug statute conviction for a violation occurring in the workplace no later than five days after such conviction;
- D. Notifying INDOT and the Indiana Department of Administration in writing within 10 days after receiving notice from an employee under subdivision (C)(2) above, or otherwise receiving actual notice of such conviction;
- E. Within 30 days after receiving notice under subdivision (C)(2) above of a conviction, imposing the following sanctions or remedial measures on any employee who is convicted of drug abuse violations occurring in the workplace: (1) taking appropriate personnel action against the employee, up to and including termination; or (2) requiring such employee to satisfactorily participate in a drug abuse assistance or rehabilitation program approved for such purposes by a federal, state or local health, law enforcement, or other appropriate agency; and
- F. Making a good faith effort to maintain a drug-free workplace through the implementation of subparagraphs (A) through (E) above.



The undersigned affirms, under penalty of perjury that he or she is authorized to execute this Certification on behalf of Design-Build Contractor.

Dated \_\_\_\_\_

**Design-Build Contractor**

By: \_\_\_\_\_  
Name:  
Title:

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**EXHIBIT 14**

**FORM OF GUARANTY**

**[NTD: to be conformed in execution version based on whether a guarantor is used]**

**[EXECUTED COPIES OF GUARANTEES TO REPLACE THIS FORM PRIOR TO EXECUTION OF THE DBA]**

**GUARANTY**

This Guaranty (the “Guaranty”) is made by [REDACTED], a [REDACTED] organized under the laws of [REDACTED] (“Guarantor”), in favor of the Indiana Department of Transportation, an agency of the State of Indiana (“INDOT”).

WHEREAS, [REDACTED], as Design-Build Contractor (“Design-Build Contractor”), and INDOT are parties to that certain Public-Private Agreement (Design-Build Delivery) (the “DBA”) pursuant to which Design-Build Contractor has agreed to develop, design, and construct the Project. Unless the context otherwise requires, capitalized terms used but not separately defined in this Guaranty will have the meaning given to them in the DBA.

To induce INDOT to (i) enter into the DBA; and (ii) consummate the transactions contemplated thereby, Guarantor has agreed to enter into this Guaranty.

Design-Build Contractor is a [REDACTED]. The Guarantor is a [REDACTED]/entity]. The execution of the DBA by INDOT and the consummation of the transactions contemplated by the DBA will materially benefit Guarantor. Without this Guaranty, INDOT would not have entered into the DBA with Design-Build Contractor. In consideration of INDOT’s execution of the DBA and consummation of the transactions contemplated by the DBA, Guarantor has agreed to execute this Guaranty.

**NOW, THEREFORE**, in consideration of the foregoing Recitals, and for other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, Guarantor agrees as follows:

**1. Guaranty.**

a. Guarantor guarantees to INDOT and its successors and assigns the full and prompt payment and performance when due of all of the obligations of Design-Build Contractor arising out of, in connection with, under or related to the DBA (including, without limitation, Design-Build Contractor’s obligation to make payment to INDOT for Liquidated Damages, stipulated damages, Lane Charges, and indemnity). The obligations guaranteed pursuant to this Guaranty are collectively referred to in this Guaranty as the “Guaranteed Obligations.”

b. Guarantor covenants to INDOT that if at any time Design-Build Contractor should default in the performance when due of, observance when due of, or should commit a breach of,

any of the Guaranteed Obligations, Guarantor shall promptly, upon written notice by INDOT, perform or pay the Guaranteed Obligations or cause the performance or payment of the Guaranteed Obligations.

c. Guarantor agrees that, to the extent Guarantor's obligations under this Guaranty relate to obligations of Design-Build Contractor which require performance other than the payment of money, INDOT may proceed against Guarantor to effect specific performance of such obligations (to the extent that such relief is available). Guarantor agrees to assume or to procure the assumption of the DBA, and to perform or to procure the performance of all of the terms and conditions under the DBA should the DBA be disaffirmed or rejected by a trustee or court in a bankruptcy proceeding involving Design-Build Contractor, or, at the option of INDOT, Guarantor shall, in the event of Design-Build Contractor's bankruptcy, make and enter into or have made and entered into, by one or more entities reasonably satisfactory to INDOT, new DBA Documents for the balance of the term of the DBA, which new DBA Documents shall be in form and substance identical to the replaced DBA.

**2. Unconditional Obligations.** This Guaranty is a guaranty of payment and performance and not of collection. Except as provided in Section 21, this Guaranty is an absolute, unconditional and irrevocable guarantee of the full and prompt payment and performance when due of all of the Guaranteed Obligations, whether or not from time to time reduced or extinguished or hereafter increased or incurred, and whether or not enforceable against Design-Build Contractor. If any payment made by Design-Build Contractor or any other Person and applied to the Guaranteed Obligations is at any time annulled, set aside, rescinded, invalidated, declared to be fraudulent or preferential or otherwise required to be repaid or refunded, then, to the extent of such payment or repayment, the liability of Guarantor will be and remain in full force and effect as fully as if such payment had never been made. Guarantor covenants that this Guaranty will not be fulfilled or discharged, except by the complete payment and performance of the Guaranteed Obligations, whether by the primary obligor or Guarantor under this Guaranty. Without limiting the generality of the foregoing, Guarantor's obligations under this Guaranty will not be released, discharged or otherwise affected by:

a. except as to applicable statutes of limitation, failure, omission, delay, waiver or refusal by Design-Build Contractor to exercise, in whole or in part, any right or remedy held by Design-Build Contractor with respect to the DBA or any transaction under the DBA;

b. any change in the DBA or the obligations under the DBA, any change in the existence, structure or ownership of Guarantor or Design-Build Contractor, or any dissolution, winding up, liquidation, insolvency, bankruptcy, reorganization or similar proceeding affecting Design-Build Contractor, Guarantor or their respective assets or any defense that may arise in connection with or as a result of such dissolution, winding up, liquidation, insolvency, bankruptcy, reorganization or other proceeding;

c. the existence of any Claim or set-off which Design-Build Contractor has or Guarantor may have against INDOT, whether in connection with this Guaranty or any unrelated transaction, provided that nothing in this Guaranty will be deemed a waiver by Guarantor of any Claim or prevent the assertion of any Claim by separate suit;

- d. any release of Design-Build Contractor from any liability with respect to the DBA;
- e. any failure of consideration or lack of authority of Design-Build Contractor, any lack of validity or enforceability, illegality or defect or deficiency, or any other defense to formation of the DBA (or any term, condition or covenant thereof);
- f. any change in the time, manner, terms, place of payment of, or any other term of all or any of the Guaranteed Obligations, or any other amendment, waiver of, or any consent to departure from any DBA executed in connection therewith;
- g. the incapacity or lack of power or authority of, or dissolution or change in, the members or shareholders of Design-Build Contractor;
- h. any release or subordination of any collateral then held by INDOT as security for the performance by Design-Build Contractor of the Guaranteed Obligations; or
- i. any other circumstance that might otherwise constitute a defense available to, or a discharge of, Guarantor with respect to the Guaranteed Obligations, other than performance or payment in full of the Guaranteed Obligations.

This Guaranty will in all respects be a continuing, absolute, and unconditional guaranty irrespective of the genuineness, validity, regularity or enforceability of the DBA, Guaranteed Obligations or any part thereof or any instrument or agreement evidencing any of the Guaranteed Obligations or relating thereto, or the existence, validity, enforceability, perfection, or extent of any collateral therefor or any other circumstances relating to the Guaranteed Obligations, except as provided in Section 21, which applies to all of the subsections in this Section 2.

**3. Independent Obligations.** Guarantor agrees that the Guaranteed Obligations are independent of the obligations of Design-Build Contractor and if any default occurs under this Guaranty, a separate action or actions may be brought and prosecuted against Guarantor whether or not Design-Build Contractor is joined therein. INDOT may maintain successive actions for other defaults of Guarantor. INDOT's rights under this Guaranty will not be exhausted by the exercise of any of its rights or remedies or by any such action or by any number of successive actions until and unless all Guaranteed Obligations have been indefeasibly paid and fully performed.

a. Guarantor agrees that INDOT may enforce this Guaranty, at any time and from time to time, without the necessity of resorting to or exhausting any security or collateral and without the necessity of proceeding against Design-Build Contractor. Guarantor waives the right to require INDOT to proceed against Design-Build Contractor, to exercise any right or remedy under any of the DBA or to pursue any other remedy or to enforce any other right.

b. Guarantor will continue to be subject to this Guaranty notwithstanding: (i) any modification, agreement or stipulation between Design-Build Contractor and INDOT or their respective successors and assigns, with respect to any of the DBA or the Guaranteed Obligations; (ii) any waiver of or failure to enforce the Guaranteed Obligations or any of the terms, covenants or conditions contained in any of the DBA or any modification thereof; (iii) subject to Section 21,

any release of Design-Build Contractor from any liability with respect to any of the DBA; or (iv) any release or subordination of any collateral then held by INDOT as security for the performance by Design-Build Contractor of the Guaranteed Obligations.

c. The Guaranteed Obligations are not conditional or contingent upon the genuineness, validity, regularity or enforceability of any of the DBA or the pursuit by INDOT of any remedies which INDOT either now has or may hereafter have with respect thereto under any of the DBA.

d. Design-Build Contractor and Guarantor acknowledge and agree that Guarantor's obligations and undertakings under this Guaranty are derivative of, and not in excess of, the Guaranteed Obligations and Guarantor shall be entitled to all rights and defenses of Design-Build Contractor except as previously waived or disclaimed in this Guaranty. Notwithstanding any other term or provision of this Guaranty, if Design-Build Contractor's obligations have been changed by any modification, agreement or stipulation between Design-Build Contractor and INDOT or their respective successors or assigns, then the term "Guaranteed Obligations" as used in this Guaranty shall mean the Guaranteed Obligations as so changed, except that the Guaranteed Obligations shall be determined without regard to the effect of any such modification, agreement or stipulation in the context of a bankruptcy or insolvency proceeding in which Design-Build Contractor is the debtor, unless otherwise specified in the modification, agreement or stipulation.

#### **4. Liability of Guarantor.**

a. INDOT may enforce this Guaranty upon the occurrence of a breach by Design-Build Contractor of any of the Guaranteed Obligations, notwithstanding the existence of any dispute between INDOT and Design-Build Contractor with respect to the existence of such a breach.

b. Guarantor's performance of some, but not all, of the Guaranteed Obligations will in no way limit, affect, modify or abridge Guarantor's liability for those Guaranteed Obligations that have not been performed.

c. INDOT, upon such terms as it deems appropriate, without notice or demand and without affecting the validity or enforceability of this Guaranty or giving rise to any reduction, limitation, impairment, discharge or termination of Guarantor's liability under this Guaranty, from time to time may (i) with respect to the financial obligations of Design-Build Contractor, if and as permitted by the DBA, renew, extend, accelerate, increase the rate of interest on, or otherwise change the time, place, manner or terms of payment of financial obligations that are Guaranteed Obligations, or subordinate the payment of the same to the payment of any other obligations, (ii) settle, compromise, release or discharge, or accept or refuse any offer of performance with respect to, or substitutions for, the Guaranteed Obligations or any agreement relating thereto, (iii) request and accept other guarantees of the Guaranteed Obligations and take and hold security for the payment and performance of this Guaranty or the Guaranteed Obligations, (iv) release, surrender, exchange, substitute, compromise, settle, rescind, waive, alter, subordinate or modify, with or without consideration, any security for performance of the Guaranteed Obligations, any other guarantees of the Guaranteed Obligations, or any other obligation of any Person with respect to the Guaranteed Obligations, (v) enforce and apply any security hereafter held by or for the benefit of INDOT in respect of this Guaranty or the Guaranteed Obligations and direct the order or manner

of sale thereof, or exercise any other right or remedy that INDOT may have against any such security, as INDOT in its discretion may determine, and (vi) exercise any other rights available to it under the DBA.

d. This Guaranty and the obligations of Guarantor under this Guaranty will be valid and enforceable and will not be subject to any reduction, limitation, impairment, discharge or termination for any reason (other than infeasible performance in full of the Guaranteed Obligations), including without limitation the occurrence of any of the following, whether or not Guarantor will have had notice or knowledge of any of them: (i) any failure or omission to assert or enforce an agreement or election not to assert or enforce, or the stay or enjoining, by order of court, by operation of law or otherwise, of the exercise or enforcement of, any Claim or demand or any right, power or remedy (whether arising under the DBA, at law, in equity or otherwise) with respect to the Guaranteed Obligations or any agreement or instrument relating thereto; (ii) any rescission, waiver, amendment or modification of, or any consent to departure from, any of the terms or provisions (including without limitation provisions relating to events of default) of the DBA or any agreement or instrument executed pursuant thereto; (iii) INDOT's knowledge of or consent to the change, reorganization or termination of the corporate structure or existence of Design-Build Contractor; (iv) any defenses, set-offs or counterclaims that Design-Build Contractor may allege or assert against INDOT in respect of the Guaranteed Obligations, except as provided in Section 21.

**5. Waivers.** To the fullest extent permitted by law, Guarantor hereby waives and agrees not to assert or take advantage of:

a. any right to require INDOT to proceed against Design-Build Contractor or any other Person or to proceed against or exhaust any security held by INDOT at any time or to pursue any right or remedy under any of the DBA or any other remedy in INDOT's power before proceeding against Guarantor;

b. any defense that may arise by reason of the incapacity, lack of authority, death or disability of, or revocation hereby by Guarantor, Design-Build Contractor or any other Person or the failure of INDOT to file or enforce a claim against the estate (either in administration, bankruptcy or any other proceeding) of any such Person;

c. any defense that may arise by reason of any presentment, demand for payment or performance or otherwise, protest or notice of any other kind or lack thereof;

d. any right or defense arising out of an election of remedies by INDOT even though the election of remedies, such as non-judicial foreclosure with respect to any security for the Guaranteed Obligations, has destroyed the Guarantor's rights of subrogation and reimbursement against Design-Build Contractor;

e. all notices to Guarantor or to any other Person, including, but not limited to, notices of the acceptance of this Guaranty or the creation, renewal, extension, modification, accrual of any of the obligations of Design-Build Contractor under any of the DBA, or of default in the payment

or performance of any such obligations, enforcement of any right or remedy with respect thereto or notice of any other matters relating thereto;

f. any defense based upon any act or omission of INDOT which directly or indirectly results in or aids the discharge or release of Design-Build Contractor, Guarantor or any security given or held by INDOT in connection with the Guaranteed Obligations;

g. any duty on the part of INDOT to disclose to Guarantor any facts INDOT may now or hereafter know about Design-Build Contractor, regardless of whether INDOT has reason to believe that any such facts materially increase the risk beyond that which Guarantor intends to assume, has reason to believe that such facts are unknown to Guarantor, or has a reasonable opportunity to communicate such facts to Guarantor. Guarantor acknowledges that it is fully responsible for being and keeping informed of the financial condition of Design-Build Contractor and of all circumstances bearing on the risk of non-payment of any Guaranteed Obligations;

h. [the fact that Guarantor may at any time in the future dispose of all or part of its direct or indirect ownership or economic interests in Design-Build Contractor]; and

i. any and all suretyship defenses under applicable law.

**6. Waiver of Subrogation and Rights of Reimbursement.** Until the Guaranteed Obligations have been indefeasibly paid in full, Guarantor waives any claim, right or remedy which it may now have or may hereafter acquire against Design-Build Contractor that arises from the performance of Guarantor under this Guaranty, including, without limitation, any claim, right or remedy of subrogation, reimbursement, exoneration, contribution, or indemnification, or participation in any claim, right or remedy of INDOT against Design-Build Contractor, or any other security or collateral that INDOT now has or hereafter acquires, whether or not such claim, right or remedy arises in equity, under contract, by statute, under common law or otherwise. All existing or future indebtedness of Design-Build Contractor or any shareholders, partners, members, joint venturers of Design-Build Contractor to Guarantor is subordinated to all of the Guaranteed Obligations until such time as all Guaranteed Obligations shall have been indefeasibly paid in full. Whenever and for so long as Design-Build Contractor shall be in default in the performance of a Guaranteed Obligation, no payments with respect to any such indebtedness shall be made by Design-Build Contractor or any shareholders, partners, members, joint venturers of Design-Build Contractor to Guarantor without the prior written consent of INDOT. Any payment by Design-Build Contractor or any shareholders, partners, members, joint venturers of Design-Build Contractor to Guarantor in violation of this provision shall be deemed to have been received by Guarantor as trustee for INDOT.

**7. Cumulative Rights.** All rights, powers and remedies of INDOT under this Guaranty will be in addition to and not in lieu of all other rights, powers and remedies given to INDOT, whether at law, in equity or otherwise.

**8. Representations and Warranties.** In addition to the representations and warranties with respect to solvency set forth in Section 18, Guarantor represents and warrants that:

a. it is a corporation duly organized, validly existing, and in good standing under the laws of the State of *[NTD: to be inserted based on Guarantor entity]* and qualified to do business and is in good standing under the laws of the State of Indiana;

b. it has all requisite organizational power, right, and authority to execute, deliver and perform this Guaranty;

c. the execution, delivery, and performance by Guarantor of this Guaranty have been duly authorized by all necessary corporate action on the part of Guarantor and proof of such authorization will be provided with the execution of this Guaranty;

d. this Guaranty has been duly executed and delivered and constitutes the legal, valid and binding obligation of Guarantor, enforceable against Guarantor in accordance with its terms;

e. neither the execution nor delivery of this Guaranty nor compliance with or fulfillment of the terms, conditions, and provisions hereof, will conflict with, result in a material breach or violation of the terms, conditions, or provisions of, or constitute a material default, an event of default, or an event creating rights of acceleration, termination, or cancellation, or a loss of rights under: (1) the certificate of incorporation or by-laws of Guarantor, (2) any judgment, decree, order, contract, agreement, indenture, instrument, note, mortgage, lease, governmental permit, or other authorization, right, restriction, or obligation to which Guarantor is a party or any of its property is subject or by which Guarantor is bound, or (3) any federal, state, or local law, statute, ordinance, rule or regulation applicable to Guarantor;

f. it now has and will continue to have full and complete access to any and all information concerning the transactions contemplated by the DBA or referred to therein, the financial status of Design-Build Contractor and the ability of Design-Build Contractor to pay and perform the Guaranteed Obligations;

g. it has reviewed and approved copies of the DBA and is fully informed of the remedies INDOT may pursue, with or without notice to Design-Build Contractor or any other Person, in the event of default of any of the Guaranteed Obligations;

h. it has made and so long as the Guaranteed Obligations (or any portion thereof) remain unsatisfied, it will make its own credit analysis of Design-Build Contractor and will keep itself fully informed as to all aspects of the financial condition of Design-Build Contractor, the performance of the Guaranteed Obligations and of all circumstances bearing upon the risk of nonpayment or nonperformance of the Guaranteed Obligations. Guarantor hereby waives and relinquishes any duty on the part of INDOT to disclose any matter, fact or thing relating to the business, operations or conditions of Design-Build Contractor now known or hereafter known by INDOT;



i. no consent, authorization, approval, order, license, certificate, or permit or act of or from, or declaration or filing with, any governmental authority or any party to any contract, agreement, instrument, lease, or license to which Guarantor is a party or by which Guarantor is bound, is required for the execution, delivery, or compliance with the terms hereof by Guarantor, except as have been obtained prior to the date of this Guaranty;

j. there is no pending or, to the best of its knowledge, threatened action, suit, proceeding, arbitration, litigation, or investigation of or before any Governmental Entity which challenges the validity or enforceability of this Guaranty;

k. it is not subject to any outstanding judgment, rule, writ, injunction or decree of any Governmental Entity that adversely affects its ability to perform its obligations under this Guaranty; and

l. it derives a substantial direct or indirect economic benefit from the DBA.

**9. Governing Law.** This Guaranty shall be governed by and construed in accordance with the law of the State of Indiana, without regard to conflict of law principles. The venue of any court, judicial or referee proceeding under this DBA shall be in Clark County, Indiana or Scott County, Indiana, unless changed by the judicial officer.

**10. Entire Agreement.** This Guaranty contains the entire understanding of the parties with respect to the subject matter hereof and supersedes all prior agreements, understandings, statements, representations and negotiations between the parties with respect to their subject matter.

**11. Amendments.** No amendment of this Guaranty shall be effective unless in writing and signed by Guarantor and INDOT. No waiver of any provision of this Guaranty nor consent to any departure by Guarantor therefrom shall in any event be effective unless such waiver shall be in writing and signed by INDOT. Any such waiver shall be effective only in the specific instance and for the specific purpose for which it was given.

**12. Severability.** If any clause, provision, section or part of this Guaranty is ruled invalid (including invalid due to Change in Law) by a court having proper jurisdiction, it will be adjusted rather than voided, to achieve the intent of the parties. The invalidity or unenforceability of any such clause, provision, section or part shall not affect the validity or enforceability of the balance of this Guaranty, which shall be construed and enforced as if this Guaranty did not contain such invalid or unenforceable clause, provision, section or part.

**13. Notices.** Any communication, notice or demand of any kind whatsoever under this Guaranty shall be in writing and delivered by personal service (including express or courier service), by electronic communication (if confirmed in writing sent by registered or certified mail, postage prepaid, return receipt requested), or by registered or certified mail, postage prepaid, return receipt requested, addressed as follows:

If to INDOT:

Indiana Department of Transportation  
[ ]  
[ ]  
[ ]

With copies to:

[ ]  
[ ]  
[ ]

If to Guarantor:

Indiana Department of Transportation  
[ ]  
[ ]  
[ ]

Attention:  
Telephone:  
Email:

Either Guarantor or INDOT may from time to time change its address for the purpose of notices by a similar notice specifying a new address, but no such change is effective until it is actually received by the party sought to be charged with its contents.

All notices and other communications required or permitted under this Guaranty which are addressed as provided in this Section 13 (*Payment for Services*) are effective upon delivery, if delivered personally or by overnight mail, and, are effective five days following deposit in the United States mail, postage prepaid if delivered by mail.

**14. Captions.** The captions in this Guaranty are for convenience only and shall not be deemed part of this Guaranty or considered in construing this Guaranty.

**15. Assignability.** This Guaranty is binding upon and inures to the benefit of the successors and assigns of Guarantor and INDOT, but is not assignable by Guarantor without the prior written consent of INDOT, which consent may be granted or withheld in INDOT's sole discretion. Any assignment by Guarantor effected in accordance with this Section 15 will not relieve Guarantor of its obligations and liabilities under this Guaranty.

**16. Construction of Agreement.** Ambiguities or uncertainties in the wording of this Guaranty will not be construed for or against any party, but will be construed in the manner that most accurately reflects the parties' intent as of the date hereof.

**17. No Waiver.** Any forbearance or failure to exercise, and any delay by INDOT in exercising, any right, power or remedy under this Guaranty will not impair any such right, power or remedy

or be construed to be a waiver thereof, nor will it preclude the further exercise of any such right, power or remedy.

**18. Bankruptcy; Post-Petition Interest; Reinstatement of Guaranty; Solvency.**

a. The obligations of Guarantor under this Guaranty will not be reduced, limited, impaired, discharged, deferred, suspended or terminated by any proceeding, voluntary or involuntary, involving the bankruptcy, insolvency, receivership, reorganization, liquidation or arrangement of Design-Build Contractor or by any defense which Design-Build Contractor may have by reason of the order, decree or decision of any court or administrative body resulting from any such proceeding. INDOT is not obligated to file any claim relating to the Guaranteed Obligations if Design-Build Contractor becomes subject to a bankruptcy, reorganization, or similar proceeding, and the failure of INDOT so to file will not affect Guarantor's obligations under this Guaranty.

b. Guarantor acknowledges and agrees that any interest on any portion of the Guaranteed Obligations which accrues after the commencement of any proceeding referred to in clause (a) above (or, if interest on any portion of the Guaranteed Obligations ceases to accrue by operation of law by reason of the commencement of said proceeding, such interest as would have accrued on such portion of the Guaranteed Obligations if said proceedings had not been commenced) will be included in the Guaranteed Obligations because it is the intention of Guarantor and INDOT that the Guaranteed Obligations should be determined without regard to any rule of law or order which may relieve Design-Build Contractor of any portion of such Guaranteed Obligations. Guarantor will permit any trustee in bankruptcy, receiver, debtor in possession, assignee for the benefit of creditors or any similar person to pay INDOT, or allow the claim of INDOT in respect of, any such interest accruing after the date on which such proceeding is commenced.

**19. Attorneys' Fees.** Guarantor agrees to pay to INDOT without demand reasonable attorneys' fees and all costs and other expenses (whether by lawsuit or otherwise, and including such fees and costs of litigation, arbitration and bankruptcy, and including appeals) incurred by INDOT in enforcing, collecting or compromising any Guaranteed Obligation or enforcing or collecting this Guaranty against Guarantor or in attempting to do any or all of the foregoing.

**20. Joint and Several Liability.** If the Guarantor is comprised of more than one individual or entity, such individuals or entities, as applicable, shall be jointly and severally liable for the Guaranteed Obligations. If more than one guaranty is executed with respect to Design-Build Contractor and the Project, each guarantor under such a guaranty shall be jointly and severally liable with the other guarantors with respect to the obligations guaranteed under such guaranties.

**21. Defenses.** Notwithstanding any other provision to the contrary, Guarantor shall be entitled to the benefit of all defenses available to Design-Build Contractor under the DBA except (a) those expressly waived in this Guaranty, (b) failure of consideration, lack of authority of Design-Build Contractor and any other defense to formation of the DBA, and (c) defenses available to Design-Build Contractor under any federal or state law respecting bankruptcy, arrangement, reorganization or similar relief of debtors. Action against Guarantor under this Guaranty shall be subject to no prior notice or demand.

**22. Additional Guarantor Waivers and Acknowledgements.**

a. Guarantor hereby waives any and all defenses it might have that liquidated damages or stipulated damages constitute a penalty or that they do not bear a reasonable relation to the actual damages.

b. GUARANTOR ACKNOWLEDGES HAVING READ ALL OF THE PROVISIONS OF THIS GUARANTY AND AGREES TO ITS TERMS. IN ADDITION, GUARANTOR UNDERSTANDS THAT THIS GUARANTY IS EFFECTIVE UPON EXECUTION OF THIS GUARANTY. NO FORMAL ACCEPTANCE BY INDOT IS NECESSARY TO MAKE THIS GUARANTY EFFECTIVE. THIS GUARANTY IS EFFECTIVE AS OF THE DATE HEREOF.

[SIGNATURES ON NEXT PAGE]

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IN WITNESS WHEREOF, Guarantor has caused this Guaranty to be duly executed and delivered by its duly authorized officer effective as of this [ ] day of [ ] 202[ ].

\_\_\_\_\_  
\_\_\_\_\_

[ ]

By: \_\_\_\_\_

Name: \_\_\_\_\_

Title: \_\_\_\_\_

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**EXHIBIT 15**

**PRELIMINARY PROJECT BASELINE SCHEDULE**

*[NTD: TO BE INSERTED FROM DESIGN-BUILD CONTRACTOR'S PROPOSAL  
SUBJECT TO NEGOTIATIONS]*

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## EXHIBIT 16

### INDOT CONFLICT OF INTEREST POLICY

September 2013

#### A. Introduction

In order to provide guidance to potential Consultants (as defined below) participating in the Indiana Department of Transportation ("INDOT") and Indiana Finance Authority ("IFA") Public-Private Partnership Program ("P3 Program"). These Guidelines ("Guidelines") were developed concerning actual or potential conflicts of interest in connection with a P3 Program project as defined in IC 8-15.7-2-14 ("Project").

These guidelines are intended to accomplish the following goals:

- Promote the integrity, competitiveness and fairness of the P3 Program its procurement processes;
- Prevent P3 proposers and Consultants from obtaining or appearing to obtain an unfair competitive advantage;
- Provide guidance to enable Consultants to make informed business decisions concerning participation in the P3 Program;
- Permit Consultants to compete fairly to either work for INDOT/IFA or as part of a P3 Program proposer;
- Protect INDOT's and IFA's interests, especially confidential and sensitive Project-specific and programmatic information;
- Permit Consultants to work without actual or apparent conflict of interest; and
- Ensure that there is sufficient Consultant talent available for both INDOT/IFA and potential P3 Program proposers to successfully implement the P3 Program.

In general, INDOT/IFA prefers that the Consultants engaged by INDOT/IFA in connection with a P3 Project are dedicated to providing their services to INDOT. Except in limited circumstances, as described in these Guidelines, Consultants may not participate on a P3 proposer team on any P3 Project in which they are currently performing or have performed services to INDOT/IFA. A Consultant's participation on P3 Program proposer teams or in performing work for INDOT/IFA on future Projects will generally be permitted unless INDOT/IFA determines, in its sole discretion, that such participation raises an actual or potential conflict of interest, as set forth in these Guidelines.

INDOT/IFA recognizes that, given the complexity of the P3 Program, there will be situations in which there is a potential or actual conflict of interest but the strict application of these Guidelines may not further the goals set forth above or that there will be tension between some of such goals. The factors INDOT/IFA may examine in relation to a Consultant's potential or actual conflict of interest and their eligibility to perform services for INDOT/IFA or as part of a P3 Program proposer include:

- Type of consulting services required;
- Particular circumstances of the Project;
- INDOT's and IFA's need for specialized expertise to implement a Project;
- INDOT's and IFA's past, present, or future working relationship with the Consultant;
- Time frame between the potential or actual conflict of interest situation and the Project; and
- Other factors deemed relevant by INDOT.

INDOT/IFA also recognize that any conflict of interest issue must be balanced with the necessity to ensure that an adequate number of Consultants are available not only to INDOT/IFA for the P3 Program, but also to P3 proposer teams on a Project.

These Guidelines do not attempt to address every conflict situation that may arise in the context of the P3 Program. These Guidelines do not mandate INDOT/IFA to make a particular decision or determination when facts similar to those given as examples in these Guidelines occur during a Project. INDOT/IFA has the authority in its sole discretion, to determine on a case-by-case basis whether a material conflict of interest exists, what are the best interests of INDOT/IFA, the specific Project and the P3 Program generally, and what actions may be appropriate.

#### B. Federal Legislation

For federal-aid P3 projects, INDOT must comply with the Federal Highway Administration's ("FHWA") organizational conflict of interest rules found as 23 CFR § 636.116 and all other applicable federal laws and regulations (e.g., National environmental Policy Act ("NEPA") rules and regulations) (collectively, "Federal Rules"). INDOT will examine each situation to ensure compliance with the Federal Rules and will utilize the Federal Rules in examining any actual or potential issues that arise in the P3 Program. Furthermore, nothing in these Guidelines is intended to limit, modify supersede or otherwise alter the effect of the Federal Rules.

#### C. Other Regulations, Statutes and Rules

These Guidelines are not intended to limit, modify, supersede, or otherwise alter the applicability or effect of other relevant Indiana, or local regulations, statutes and rules (e.g., ethical rules pertaining to Legal Services (as defined below), and state laws concerning state employee and consultant ethics.)

#### D. Definitions

1. "Affiliate" means any entity which directly or indirectly controls, or is controlled by, or is under common control, with the business entity.
2. "Conflict of Interest" means an actual or potential circumstance arising out of a Consultant's existing or past activities, business interests, contractual relationships or organizational structure (i.e., parent entities, subsidiaries, Affiliates, etc.) wherein the Consultant is, or may be, unable to render impartial assistance or advice to



INDOT/IFA; the Consultant's objectivity is, or may be, impaired in performing the scope of work INDOT/IFA desires; the Consultant has an unfair competitive advantage; the Consultant's services to INDOT/IFA may create or actually creates an unfair competitive advantage to a third party; or there is a perception or appearance of impropriety or unfair competitive advantage benefiting the Consultant or a third party as a result of Consultant's participation in a Project.

3. "Consultant" means any person or business entity (including any division of such entity and any Affiliate of such entity) retained by INDOT/IFA to provide professional consulting services including, without limitation, architectural and engineering, right-of-way acquisition, environmental, procurement assistance, traffic c and revenue projections, project oversight services, financial services (including financial advisory and banking services), and legal services in connection with a Project, including sub-consultants.
4. "Financial or Other Interest" means any known benefit other than enhancement of professional reputation, and includes a promise of future work on a Project as well as any indirect benefit of which a Consultant is aware.
5. "Operator" means a person or business entity that has entered into a public-private agreement with INDOT for the development, design, construction, operation, maintenance, planning or financing of a project.
6. "Sub-consultant" includes those that have performed or will perform work on behalf of a Consultant to INDOT/IFA in the performance of the consultant's work for INDOT/IFA.
7. "Proposer" means any person or business entity (including any division of such entity and any Affiliate of such entity) that submits a statement of qualifications, solicited proposal, unsolicited proposal, or other submission in order to participate in the Project for the development, design, construction, financing, operation or maintenance of a Project.

Capitalized terms that are not defined in these Guidelines shall have the meanings provided in either the Federal Rules, or Indiana Code 8-15.7-2.

#### E. Scope of Guidelines

With these guidelines, INDOT/IFA addresses eight categories of Consultant services that may be utilized in the context of a Project:

1. Preliminary engineering and architectural services ("PE Services");
2. Procurement services ("Procurement Services");
3. Environmental and planning services ("E&P Services");

4. Traffic and revenue services ("T&R Services");
5. Project oversight services ("PO Services");
6. Financial services ("Financial Services");
7. Legal services ("Legal Services"); and
8. Other consulting services ("Other Services").

The foregoing enumerated services are collectively the "Services." Because of the different considerations and concerns applicable to each of these categories of services, separate guidelines are appropriate. If a Consultant is providing more than one category of Services to INDOT, and there are differences in the standards, restrictions and limitations applicable to those categories, INDOT may, in its sole discretion, apply the more stringent standards, restrictions and limitations.

#### F. Application of Guidelines to Individuals Employed by the Consultant

If, in INDOT's determination, the performance of the Services described in these Guidelines, raises a potential or actual Conflict of Interest for a Consultant, such Conflict of Interest shall apply individually and independently to any employee of such Consultant that has participated in a material way in the performance of the Services on a specific Project. If such individual leaves the Consultant's employment, the potential or actual Conflict of Interest shall continue to apply to such individual in the same manner as it applies to the Consultant (e.g., for a period of one (1) year from the termination of the individual's services to INDOT) for Projects other than those in which the individual was materially involved while employed by Consultant.

The potential or actual Conflict of Interest and prohibition with respect to the individual employee will not apply to the individual's new employer. In such an instance, if the new employer is otherwise eligible to perform certain Consultant services under these Guidelines, such new employer will remain eligible despite the employment of such individual, provided that, the employee will be subject to the limitations described in Section 6 below.

#### G. Time Period in which a Potential or Actual Conflict of Interest applies.

If, in INDOT/IFA's determination, the performance of the Consultant services described in Section 8 below raises a potential or actual Conflict of Interest, such Conflict of Interest shall be deemed to exist for the firm for a period of one (1) year and, for the individuals performing such work, for a period of one (1) year, whether or not such individual remains employed with the firm at which the individual was employed when the potential Conflict of Interest occurred. Following the expiration of the applicable period, the restrictions on eligibility set forth in the applicable subsections of Article VIII below shall no longer apply absent a determination by INDOT/IFA, in its discretion, that the potential or actual Conflict of Interest remains applicable.

#### H. Conflict of Interest Rules

1. Preliminary Engineering and Architectural Services

- a. PE Services consist of some or all of the following services provided to INDOT with respect to a Project:
  - i. Preparation of preliminary design and architectural documents and reports that will be incorporated by others into P3 solicitation documents (e.g., Request for Qualifications or Request for Proposals);
  - ii. Utility and right-of-way mapping and provision of similar technical documents that will be incorporated by others into P3 solicitation documents.
- b. PE Services do not include:
  - i. Evaluation or selection of alignments in connection with the development of NEPA documents,
  - ii. Assistance with development of solicitation documents, Operator scope of work/technical provisions, evaluation criteria for a Project or
  - iii. Other items that would fall under the E&P Services or Procurement
- c. A Consultant actively engaged in providing PE Services or which has previously provided PE Services to INDOT with respect to a Project, maybe a Proposer or participate as an equity owner, team member, and consultant or sub-consultant of, or to, a Proposer or have a Financial or Other Interest in any of the foregoing entities with respect to that Project provided that INDOT is satisfied that:
  - i. The Consultant will not, or in the case of past performance of PE Services did not have access to or obtain knowledge of confidential or sensitive information, procedures, policies and processes that could provide an unfair competitive advantage with respect to the procurement for that Project;
  - ii. The data and information provided to the Consultant in the performance of the PE Services is either irrelevant to the procurement for the Project or available on an equal and timely basis to all Proposers; and
  - iii. The work products from the Consultant incorporated into or relevant to the procurement for that Project are available on an equal and timely basis to all Proposers.
- d. Consultants performing PE Services for INDOT on a Project may participate in a different Project as a Proposer or participating as an equity owner, team

member, consultant or sub-consultant of, or to, a Proposer for the Project or have a Financial or Other Interest in any of the foregoing entities with respect to that Project. However, INDOT reserves the right to restrict the ability of a Consultant to participate in different Projects if in INDOT's judgment; the Consultant has, in the course of performing the PE Services for INDOT, obtained access to or the ability to gain knowledge of confidential or sensitive information, procedures, policies and processes that could provide an unfair competitive advantage with respect to the procurement of the other Project or otherwise has a Conflict of Interest.

- e. A Consultant participating with respect to a Project as a Proposer or Operator or as an equity owner, team member, consultant or sub consultant of or to a Proposer or Operator or having a Financial or Other interest in any of the foregoing entities, is eligible to pursue PE Services work from INDOT for a different Project (provided that, once such Consultant is retained to perform PE Services for INDOT, Section 1(b) above shall apply).

## 2. Procurement Services

- a. Procurement Services consist of soil or all of the following services provided to INDOT/IFA with respect to a Project:
  - i. Development of procurement strategy;
  - ii. Development and preparation of the solicitation documents, Operator scope of work/technical provisions or Public-Private Agreements;
  - iii. Implementation and administration of the solicitation;
  - iv. Preparation or implementation of any evaluation criteria, process or procedures;
  - v. Evaluation of Proposer submission (e.g., qualification submittals, proposals, etc.);
  - vi. Negotiation of the Public-Private Agreement; or such other activities determined by INDOT/IFA as related to a P3 Procurement.
- b. Consultant actively engaged and providing Procurement Services to INDOT/IFA for a Project may not participate as an equity owner, team member, sub-consultant or consultant of or to a Proposer, on any Project arising during the term of the Consultant's engagement with INDOT/IFA or have a Financial or Other Interest in any of the foregoing entities on any Project.
- c. A Consultant that performed Procurement Services on behalf of INDOT/IFA for a Project and completed such services may be a Proposer or participate as

an equity owner, team member, sub-consultant or consultant of, or to, a Proposer on a different Project or have a Financial or Other Interest in any of the foregoing entities with respect to a different Project, provided that INDOT/IFA is satisfied that:

- i. The Consultant did not have access to or obtain knowledge of confidential or sensitive information, procedures, policies and processes that could provide an unfair competitive advantage to the Consultant or a Proposer with respect to the different Project; and
  - ii. The data and information provided to the Consultant in the performance of the Procurement Services was either irrelevant to the procurement for the other Project or available on an equal and timely basis to all Proposers on that Project. In such instances where INDOT/IFA is satisfied in the manner described above, INDOT/IFA may still, in its discretion, restrict the scope of Procurement Services for which the Consultant may be eligible to perform in order to further the intent and goals of these Guidelines.
- d. Consultant participating in a Project as a Proposer or as an equity owner, team member, consultant or sub-consultant of or to a Proposer or having a Financial or Other Interest in any of the foregoing entities, may not perform Procurement Services for INDOT/IFA for another Project at the same time. To the extent that INDOT seeks to retain a Consultant to perform a scope of work that includes both Procurement Services and other work described in these Guidelines (such as PE Services), the Consultant is not generally eligible for the work.
- e. A Consultant participating as an Operator or as part of an Operator team for a Project is eligible, after the completion of the procurement for such Project, to perform Procurement Services for INDOT/IFA for another Project (provided that once such Consultant is retained to perform Procurement Services for INDOT/IFA, Sections 2 (b) and 2 (c) above shall apply).

### 3. Environmental and Planning Services

- a. E&P Services consist of some of or all of the following services provided to INDOT with respect to a Project:
  - i. The study and evaluation of alternatives and potential environmental impacts of the proposed Project;
  - ii. Preparation of environmental analysis and impact documents relating to the project including facility and corridor analysis and draft and final environmental impact statements.

- iii. Planning associated with the NEPA approval, permitting and clearance process for the project; and
  - iv. Planning associated with other (non-NEPA) environmental approvals, permitting and clearance for the project.
- b. A Consultant actively engaged and providing E&P Services described in Section 3 (a) (i-iii) above, with respect to a Project may not:
- i. Participate as an equity owner, team member, consultant or sub-consultant of or to a Proposer for the Project or have a Financial or Other Interest in any of the foregoing entities with respect to that Project, or
  - ii. Have a Financial or Other Interest in the Project at the time that the Consultant is providing the services identified in Section 3 (a) (i-iii).
- c. A Consultant actively engaged and providing E&P Services described in Section 3 (a) (iv) above with respect to a Project may be a Proposer or participate as an equity owner, team member, consultant or sub-consultant of or to a Proposer for the Project or have a Financial or Other Interest in any of the foregoing entities with respect to that Project, provided that INDOT is satisfied that:
- i. The Consultant will not have access to or obtain knowledge of confidential or sensitive information, procedures, policies and processes that could provide an unfair competitive advantage with respect to the procurement for the Project;
  - ii. The data and information provided to the Consultant in the performance of the E&P Services is either irrelevant to the procurement for that Project or available on an equal and timely basis to all Proposers; and
  - iii. The work products from the Consultant incorporated into or relevant to the procurement for that Project are available on an equal and timely basis to all Proposers.
- d. A Consultant previously engaged to provide E&P Services to INDOT for a Project and which has completed such E&P Services may be a Proposer or participate as an equity owner of, team members of consultant or sub-consultant to a Proposer for that Project or have a Financial or Other Interest in any of the foregoing entities provided that FHWA has issued a Record of Decision (ROD), a Categorical Exclusion (CE) or a Finding of No Significant Impact (FONSI) for the Project; and that INDOT is satisfied that:
- i. The Consultant did not have access to or obtain knowledge of confidential or sensitive information, procedures, policies and processes

that could provide an unfair competitive advantage with respect to the procurement for that Project;

- ii. The data and information provided to the Consultant in the performance of the E&P Services is either irrelevant to the procurement for the Project or available on an equal and timely basis to all Proposers; and
  - iii. The work products from the Consultant incorporated into or relevant to the procurement for that Project are available on an equal and timely basis to all Proposers.
- e. A Consultant performing E&P Services on behalf of INDOT for a Project may participate in a different Project as a Proposer or participating as equity owner, team member, consultant or sub-consultant of or to a Proposer for a different Project or having a Financial or Other Interest in any of the foregoing entities with respect to that different Project. However, INDOT reserves the right to restrict the ability of a Consultant to participate in such manner on a different Project if, in INDOT's judgment, the Consultant has, in the course of performing E&P Services for INDOT, obtained access to or knowledge of confidential or sensitive information, procedures, policies and processes that could provide for an unfair competitive advantage with respect to the procurement of that different Project or otherwise has a Conflict of Interest.
- f. A Consultant participating with respect to a Project as a Proposer or Operator or as an equity owner, team member, consultant or sub-consultant of or to a Proposer or Operator or having a Financial or Other Interest in any of the foregoing entities, is eligible to pursue E&P Services work from INDOT for another Project (provided that, once such Consultant is retained to perform E&P Services for INDOT, Sections 3 (b) and 3 (b) above shall apply).

#### 4. Traffic and Revenue Services

- a. T&R Services consist of some or all of the following services provided to INDOT:
  - i. Conducting draft and investment grade traffic and revenue studies, toll elasticity studies, toll feasibility studies, toll pricing studies, origin and destination surveys and studies or studies or analyses of a similar nature, including "peer review" studies or
  - ii. Data mining and preparation of reports, analyses and projections in connection with the traffic and projected revenues.
- b. A Consultant actively engaged and providing T&R Services to INDOT may not participate as an equity owner, team member, sub-consultant or consultant of

or to a Proposer for that Project or have a Financial or Other Interest in any of the foregoing entities with respect to that Project.

- c. A Consultant previously engaged to provide T&R Services to INDOT with respect to a Project and which has completed such services may be a Proposer or participate as in equity owner, team member, consultant or sub-consultant of, or to, a Proposer for the Project provided that INDOT is satisfied that:
  - i. The Consultant did not have access to or obtain knowledge of confidential or sensitive information, procedures, policies and processes that could provide an unfair competitive advantage with respect to the procurement for that Project;
  - ii. The data and information provided to the Consultant in the performance of the T&R Services is either irrelevant to the procurement for that Project or available on an equal and timely basis to all proposers;
  - iii. The work products from the Consultant incorporated into or relevant to the procurement for that project are available on an equal and timely basis to all Proposers; and
  - iv. There will be no impact on that Project's plan of finance, including the ability to obtain and close funding and potential sources of funding.
- d. Consultants performing T&R Services may participate on a different Project as a Proposer, or participate as an equity owner, team member, consultant or sub-consultant of or to a Proposer for the different Project, or have a Financial or Other Interest in any of the foregoing entities with respect to that different Project. However, INDOT reserves the right to restrict the ability of a Consultant to participate in such manner on a different Project if, in INDOT's judgment, the Consultant has, in the course of performing the T&R Services for INDOT, obtained access to or knowledge of confidential or sensitive information, procedures, policies and processes that could provide an unfair competitive advantage with respect to the procurement of that different Project or otherwise has a Conflict of Interest.
- e. A Consultant participating with respect to a Project as a Proposer or Operator or as an equity owner, team member, consultant or sub-consultant of or to a Proposer or Operator or having Financial or Other Interest in any of the foregoing entities, is eligible to pursue T&R Services work from INDOT for another Project (provided that, once such Consultant is retained to perform T&R Services for INDOT, Section 4 (b) above shall apply).

## 5. Financial Services

- a. Financial Services consist of some or all of the following services:



- i. Acting in the capacity of Financial Advisor ("FA") to INDOT/IFA by providing advice on finance-related issues, including development of short-term or long-term finance strategy and plans of finance for a Project, and the development of financial aspects of the solicitation documents and public-private agreement;
  - ii. Identifying and pursuing sources of funds; or
  - iii. Acting as underwriter (either lead or co-lead) for a revenue bond issuance, a TIFIA instrument private activity bond issuance on a Project, but excluding underwriters for bonds that are not related to any Project.
- b. A Consultant actively engaged and providing Financial Services to INDOT/IFA for a Project may not participate as an equity owner, team member, financial consultant, sub-consultant or banker for a Proposer, on any Project arising during the term of the Consultant's engagement with INDOT/IFA or have a Financial or Other Interest in any of the foregoing entities with respect to any Project.
- c. A Consultant previously engaged to provide Financial Services to INDOT/IFA on a Project and which has completed such services may be a Proposer or may participate as an equity owner, team member, consultant or sub-consultant of or to a Proposer for another Project, or have a Financial or Other Interest in any of the foregoing entities with respect to such other Project, provided that INDOT is satisfied:
- i. The Consultant did not have access to or obtain knowledge of confidential or sensitive information, procedures, policies and processes that could provide an unfair competitive advantage with respect to the procurement for that Project;
  - ii. The data and information provided to the Consultant in the performance of the Financial Services is either irrelevant to the procurement for that Project or available on an equal and timely basis to all Proposers;
  - iii. The work products from the Consultant incorporated into or relevant to the procurement for that Project are available on an equal and timely basis to all Proposers.
- d. Generally, Consultants participating with respect to a Project as a Proposer or Operator or as an equity owner, team member financial consultant/advisor/banker, consultant or sub-consultant of or to a Proposer or Operator or having a Financial or Other Interest in any of the foregoing entities, shall be eligible to pursue Financial Services from INDOT/IFA for a different Project (provided that once such Consultant retained to perform Financial Services for INDOT, Section 5(b) and 5(c) above shall apply).

## 6. Project Oversight Services

- a. Project Oversight (PO) Services consist of some or all of the following services:
  - i. Design review;
  - ii. Construction oversight and inspections;
  - iii. Quality control and quality assurance;
  - iv. Project management and overview;
  - v. Contract administration;
  - vi. Claims management;
  - vii. Public relations and community outreach;
  - viii. Right-of-way acquisition services; or
  - ix. Appraisal, legal description, condemnation package or utility assembly review.
- b. A Consultant shall be not eligible to perform PO Services on behalf of INDOT for a Project in which the Consultant is acting as the Operator or is part of an Operator team, or has a Financial or Other Interest in any of the foregoing entities with respect to that Project.
- c. Generally, a Consultant performing PO Services on behalf of INDOT may participate on a different Project as a Proposer or participating as an equity owner, team member, consultant or sub-consultant of or to a Proposer for the different Project or having a Financial or Other Interest in any of the foregoing entities with respect to that different Project. However, INDOT reserves the right to restrict the ability of a Consultant to participate in such manner on a different Project if, in INDOT's judgment, the Consultant has, in the course of performing the PO Services for INDOT, obtained access to confidential or sensitive information, procedures, policies and processes that could provide an unfair competitive advantage with respect to the procurement of that different Project or otherwise has a Conflict of Interest.
- d. Generally, a Consultant participating with respect to a Project as a Proposer or Operator or as an equity owner, team member, consultant or sub-consultant of or to a Proposer or Operator or having a Financial or Other Interest in any of the foregoing entities is eligible to pursue PO Services work from INDOT for a different Project (provided that, once such Consultant is retained to perform PO Services for INDOT, Section 6(b) above shall apply).

## 7. Legal Services

- a. Legal Services consist of some or all of the following services:
  - i. Providing advice on legal issues and strategies relating to project environmental approvals, planning, procurement, financing, contract administration, risk management and disputes/claims/litigation; and
  - ii. Reviewing, drafting and negotiating procurement documents, project contracts and other documents.
- b. A Consultant who is providing or has provided Legal Services to INDOT/IFA with respect to a Project may not provide Legal Services for a Proposer, an equity owner, team member, consultant or sub-consultant of or to a Proposer for that Project, or have a Financial or Other-Interest in any of the foregoing entities with respect to that Project.
- c. A Consultant that was previously engaged to provide Legal Services to INDOT/IFA with respect to a Project and completed such services may be a Proposer or participate as an equity owner, team member, legal advisor, sub-consultant or consultant of or to a Proposer on a different Project, or have a Financial or Other Interest in any of the foregoing entities with respect to a different project, provided that INDOT/IFA is satisfied that (1) the Consultant did not have access to or obtain knowledge of confidential or sensitive information, procedures, policies and processes that could provide an unfair competitive advantage to the Consultant or a Proposer with respect to the different Project: and (2) the data and information provided to the Consultant in the performance of the Legal Services is either irrelevant to the procurement for the other Project or available on an equal and timely basis to all Proposers on that-Project. In such instances where INDOT is satisfied in the manner described above, INDOT/IFA may still, in its discretion, restrict the scope of Legal Services for which the Consultant shall be eligible to perform in order to further the intent and goals of these Guidelines.
- d. Generally, a Consultant participating with respect to a Project as a Proposer or as an equity owner, team member, legal advisor, consultant or sub-consultant of or to a Proposer or having a Financial or Other Interest in any of the foregoing entities, is not eligible to be hired to perform Legal Services for INDOT/IFA for another Project at the same time. However, once the procurement process is completed for the Project in which the Consultant is participating as a Proposer or as an equity owner, team member, legal advisor, consultant or sub-consultant of or to a Proposer or a Potentially Adverse Agency, the Consultant will be eligible to be retained by INDOT/IFA to perform Legal Services for a different Project (provided that, once such Consultant is retained to perform Legal Services for INDOT/IFA, Sections 7 (b) and 7 (c) above shall apply).

## 8. Other Services

Professional engineering, financial, legal and consulting services utilized from time to time by INDOT/IFA with respect to a Project that do not fall within any of the categories described above will be analyzed by INDOT/IFA on a case-by-case basis, applying the principles and goals set forth in these Guidelines.

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**EXHIBIT 17**

**PROJECT ROW AVAILABILITY TABLE**

<b>Project ROW Description</b>	<b>Project ROW Availability Date</b>
Within Exist. LA R/W	N/A

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## EXHIBIT 18

### INSURANCE COVERAGE REQUIREMENTS

The following minimum insurance requirements shall apply and supplement the requirements as set forth in Section 10 (Insurance) of the DBA. Except as otherwise expressly indicated herein, minimum coverages and limits shall be provided on a project-specific, project term, basis.

#### 1. Builder's Risk Insurance During Construction

At all times during the period from NTP2 (or such earlier time as may be required with respect to the Work, including Utility Adjustment Work, until the Substantial Completion Date, Design-Build Contractor shall procure and maintain, or cause to be procured and maintained, a policy of builder's risk insurance as specified below.

(a) The policy shall provide coverage for "all risks" of direct physical loss or damage to the portions or elements of the Project under construction, including terrorism (certified by the Secretary of the Treasury pursuant to the Terrorism Risk Insurance Act, Pub. L. No. 107-297, as amended by the Terrorism Risk Insurance Program Reauthorization Act of 2015, Pub. L. No. 114-1, as further amended by the Terrorism Risk Insurance Program Reauthorization Act of 2019, Pub. L. No. 116-94, as may be further amended), the perils of earthquake, earth movement, flood, storm, tempest, windstorm, hurricane, and tornado and subsidence; shall contain extensions of coverage that are typical for a project of the nature of the Project; and shall contain only those exclusions that are typical for a project of the nature of the Project.

(b) The policy shall cover all property, roads, buildings, structures, fixtures, materials, supplies, foundations, pilings, machinery, and equipment that are part of or related to the parts of the Work or portions of the Project under construction, and the works of improvement, including permanent works and temporary works, and including goods intended for incorporation into the works located at the Site, in storage or in the course of inland transit on land to the Site, and existing roadway structures and improvements that are within the Construction Work zone or are or will be incorporated into the Construction Work.

(c) The policy shall provide coverage per occurrence up to the replacement value of the Project, subject to commercially reasonable sublimits for flood, earth movement and named storm and as further outlined clause 1(g) below.

(d) Design-Build Contractor, the State, INDOT, and Subcontractors of every tier shall each be the insureds on the policy as their respective interests appear. INDOT will be named as "Loss Payee" under the policy.

(e) The policy shall include coverage for (i) foundations, including pilings, but excluding normal settling, shrinkage, or expansion, (ii) physical damage resulting from machinery accidents but excluding normal and natural wear and tear, corrosion, erosion, inherent vice, or latent defect in the machinery, (iii) plans, blueprints, and specifications, (iv) demolition and debris removal

coverage, (v) the increased replacement cost due to any change in applicable codes or other Governmental Rules, (vi) expense to reduce loss, (vii) building ordinance compliance, with the building ordinance exclusion deleted, and (viii) soft cost expense” (including costs of Governmental Approvals, mitigation costs, attorneys’ fees, and other fees and costs associated with such damage or loss or replacement thereof).

(f) Subject to commercial market availability, the policy shall be endorsed with LEG3 (defective work endorsement) or DE5 (1995) (defects exclusions) language or such other endorsement as approved by INDOT effecting the same result, in any case with a sublimit of no less than 25% of the overall policy limit.

(g) Such policy shall include the following minimum coverage sublimits:

<i>Sublimit</i>	
(i) for off-site storage and in-transit;	\$5,000,000
(ii) plans, blueprints, and specifications;	\$250,000
(iii) demolition and debris removal coverage;	\$5,000,000
(iv) increased replacement cost due to any change in applicable codes or other Governmental Rules or building ordinance compliance (with building ordinance exclusion deleted);	\$5,000,000
(v) expense to reduce loss;	\$1,000,000
(vi) “Soft cost expense” (including costs of Governmental Approvals, mitigation costs, attorneys’ fees, and other fees and costs associated with such delay resulting from damage or loss or replacement thereof) such soft cost limit must be disclosed to and approved by INDOT; and	
(vii) damage to adjacent roadway and structures within the Site to be incorporated into the Construction Work which are damaged as a result of an insured loss.	\$1,000,000

#### Commercial General Liability Insurance

At all times from the Effective Date until the Final Acceptance Date, Design-Build Contractor shall procure and maintain, or cause to be procured and maintained, commercial general liability insurance as specified below.

(a) The policy shall be in form reasonably acceptable to INDOT, and shall be an occurrence form. The policy shall contain extensions of coverage that are typical for a project of the nature of this Project, and shall contain only those exclusions that are typical for a project of the nature of this Project.

(b) The policy shall include, but not be limited to, the following coverages:

- (i) contractual liability;
- (ii) premises/operations;
- (iii) separation of insureds;
- (iv) products and completed operations;
- (v) terrorism (to the extent available);
- (vi) underground, explosion and collapse;
- (vii) defense (in addition to liability limits);
- (viii) fellow employee exclusion deleted; and
- (ix) professional services exclusion with an exception for construction management, means and methods.

(c) The insurance policy shall cover liability arising out of the acts or omissions of Design-Build Contractor's employees and any other contractors or other business engaged in the Work.

(d) Design-Build Contractor shall be a named insured on the policy and the policy shall have minimum limits of \$1,000,000 per occurrence and \$2,000,000 in the aggregate with a general aggregate applicable on a per-project basis for bodily injury, personal injury, and property damage liability. The policy need not be project-specific, provided the per project aggregate limit is applicable per above. Coverage shall be continued for a period of eight years after the Substantial Completion Date or, if a project-specific policy, include a completed operations/extended reporting period for eight years after the Substantial Completion Date.

(e) The Indemnified Parties shall each be additional insureds on a primary and non-contributory basis on either ISO CG 10 20 04 13 or ISO 10 37 04 13.

## 2. Automobile Liability Insurance

At all times from the Effective Date until the Final Acceptance Date, Design-Build Contractor procure and maintain automobile liability insurance with policy limits of \$1,000,000 combined single limit for bodily injury and property damage.

(a) Each policy shall cover accidental death, bodily injury, and property damage liability arising from the ownership, maintenance, or use of all owned (if any), non-owned and hired vehicles connected with performance of the Work, including loading and unloading.

(b) The Indemnified Parties shall each be included as additional insureds on a primary, non-contributory basis.



(c) Automobile liability insurance coverage need not be provided on a project-specific, project term, basis.

(d) If Design-Build Contractor's or any Subcontractor's activities involve transportation of Hazardous Materials, the automobile liability insurance policy for Design-Build Contractor or such Subcontractor shall be endorsed to include for private, non-commercial vehicles Motor Carrier Act Endorsement-Hazardous Materials Clean up (MCS-90).

### 3. Umbrella/Excess Liability Insurance

The policy shall include each of the Indemnified Parties as additional insureds on a primary, non-contributory basis. Coverage shall be continued for a period of eight years after the Substantial Completion Date or, if a project-specific policy, include a completed operations/extended reporting period for eight years after the Final Acceptance Date.

### 4. Pollution Liability Insurance

At all times from NTP2 until the Final Acceptance Date, Design-Build Contractor shall procure and maintain, or cause to be procured and maintained, contractor's pollution liability insurance as specified below.

(a) The policy shall cover sums that the insured becomes liable to pay (i) to a third party, (ii) as or for clean-up costs, or (iii) as costs that are incurred by the order of a regulatory body consequent upon a pollution incident, subject to the policy terms and conditions. Such policy shall cover claims related to pollution conditions to the extent such are caused by the performance of Work that occur on the Project including coverage for transportation, disposal at non-owned off-site locations, clean-up and emergency response.

(b) Design-Build Contractor shall be a named insured on the policy. Each of the Indemnified Parties shall be additional insureds under such policy. The policy shall include standard separation of insureds language providing that the interests and protections of each additional insured shall not be affected by any misrepresentation, act or omission of another named insured, or any breach by a named insured of any provision in the policy which would otherwise result in forfeiture or reduction of coverage for the other insureds on the policy. The policy shall have no exclusions that limit pollution liability claims and actions by any Indemnified Party against Design-Build Contractor.

(c) The policy shall have a limit of \$3,000,000 per claim and in the aggregate. Such coverage need not be project-specific.

### 5. Contractor's Professional Liability Insurance

At all times during term of the DBA, Design-Build Contractor will procure and maintain a contractor's professional liability insurance policy with Design-Build Contractor as the named insured in a form acceptable to INDOT with a limit, in each case per claim and in the aggregate, of \$5,000,000. Coverages shall be maintained for the duration of the Work and shall be maintained for a minimum of five years after all work is complete. Such coverage need not be project-specific

and may include Contractor's Protective Professional Indemnity (CPPI) insurance protection as part of the coverage.

#### 6. Professional Liability Insurance

(a) At all times that professional services are rendered respecting design and construction of the Project until the first to occur of (i) five years after the professional services have concluded for the Project or (ii) expiration of all applicable statutes of limitation and repose applicable to professional services performed for the Project, Design-Build Contractor shall require the Lead Design Firm, to procure and maintain professional liability insurance with minimum limits, in each case per claim and in the aggregate, of not less than \$5,000,000. Such coverage need not be project-specific.

(b) Each such policy shall insure the party performing the professional services for liability arising out of any negligent act, error, or omission in the performance of the professional services or activities for the Project. Such additional policies need not be Project-specific. If any coverage is written on a claims-made basis, the retroactive date applicable to coverage under the policy must precede the effective date of the design Subcontract.

#### 7. Workers' Compensation/Employer's Liability Insurance

Design-Build Contractor shall procure and maintain from the Effective Date through the Final Acceptance Date a policy (or policies) of workers' compensation insurance for those employees in conformance with applicable Governmental Rule. The insurance policy (or policies) shall provide statutory workers' compensation benefits and minimum employer's liability limits of \$1,000,000 per accident or disease.

The workers' compensation insurance policy (or policies as required by Governmental Rule) need not be project-specific and shall contain the following endorsements:

- (a) a voluntary compensation endorsement; and
- (b) coverage will be extended, if needed, to cover any claims under the United States Longshore and Harbor Workers' Compensation Act (33 U.S.C. §§ 901-950 and the Jones Act (46 U.S.C. § 30104).

#### 8. Aircraft Liability Insurance

Design-Build Contractor shall ensure that proper insurance is obtained and kept in effect for any Work undertaken via use of UAS or other aircraft. If UASs are utilized during the course of the Project, Design-Build Contractor shall evidence coverage either through a stand-alone unmanned aircraft systems policy or by endorsement (CG 24 50 or equivalent) to the commercial general liability policy.

Minimum limits for aviation insurance shall be typical for such work being undertaken on a project such as this Project. In no event shall such limits be less than \$5,000,000 per occurrence and in the aggregate for bodily injury and property damage liability, excepting that with regard to

UASs, the limit of liability shall not be less than \$1,000,000 per occurrence with a \$1,000,000 annual aggregate.

#### 9. Marine Protection & Indemnity Insurance

Should any Work undertaken on the Project be on, over or adjacent to navigable waters, Design-Build Contractor shall require that any such entity undertaking such work procure and maintain appropriate marine protection & indemnity insurance protecting against bodily injury or damage to property of others arising from such marine activities. Such coverage shall have a minimum limit of \$1,000,000 million per occurrence and aggregate and include the Indemnified Parties as additional insureds on a primary and non-contributory basis. Such coverage need not be project specific.

#### 10. Network Security/Cyber Liability Insurance

Design-Build Contractor shall carry and maintain cyber liability insurance with a minimum limit of \$2,000,000 per occurrence and \$2,000,000 in the aggregate for third-party network security, privacy and media liability claims as well as first-party coverage for losses related to notification, credit monitoring, breach management and response costs, regulatory/legal compliance, ransomware/extortion, damage, destruction or alteration of electronic information, forensics, business income interruption and extra expense and regulatory fines and penalties as well as coverage for loss of revenue, infringement of intellectual property, information theft, . Coverage need not be project-specific and the Department and Indemnitees shall be additional insureds as regards third-party claims arising from network security, privacy liability or other such incidents.

#### 11. Umbrella and Excess Policies

Except as expressly stated otherwise herein, Design-Build Contractor shall have the right to satisfy the requisite insurance coverage amounts for liability insurance through a combination of primary policies and umbrella or excess policies. Umbrella and excess policies shall be “following-form” and comply with all insurance requirements, terms, and provisions set forth in this Agreement for the applicable type of coverage.

#### 12. Contractor and Subcontractor Insurance

Except to the extent that a Subcontractor is covered as a named insured under a policy maintained by Design-Build Contractor, each such Subcontractor shall be required to provide proof of the following minimum insurance coverages:

(a) Workers’ Compensation and Employer’s Liability Insurance with statutory workers’ compensation (Coverage A) limits and employer’s liability (Coverage B) limits of \$500,000 bodily injury by accident, each accident, and \$500,000 bodily injury by disease, each employee, and aggregate. Coverage will be extended, if needed, to cover any claims under the United States Longshore and Harbor Workers’ Compensation Act (33 U.S.C. §§ 901-950) and the Jones Act (46 U.S.C. § 30104).

(b) Commercial General Liability Insurance including coverage for premises and operations, independent contractors, personal injury, product and completed operations, explosion, collapse and underground, and contractual liability. Minimum limits shall be no less than \$1,000,000 per occurrence and in the aggregate annually with the annual aggregate applicable on a per project basis.

(c) Automobile Liability Insurance with a limit of at least \$500,000 combined single limit for bodily injury and property damage covering all owned (if any), non-owned, hired, or borrowed vehicles on site or off.

(d) Umbrella/Excess Liability Insurance in excess of the underlying limits noted above for employer's liability, commercial general liability, and automobile liability for contracts valued at more than \$1,000,000, coverage shall be in the amount of \$1,000,000 per occurrence and in the aggregate and for projects with Contract Prices at or in excess of \$5,000,000 (as of the Effective Date), coverage shall be in the amount of \$4,000,000 per occurrence and in the aggregate.

The Indemnified Parties shall be included as additional insureds on a primary, non-contributory basis for the coverages set forth in clauses (b), (c), and (d) just above, and a waiver of subrogation shall apply to the Indemnified Parties under all policies listed in clauses (a) through (d), inclusive, as well as under any professional liability insurance policies required under clause 5. Design-Build Contractor shall attach the waiver of subrogation endorsement to the certificate of insurance when providing evidence of insurance to INDOT. Except for professional liability and cyber liability insurance policies, each insurance policy required herein shall include a waiver of subrogation or the insurer's consent to the insured's waiver of recovery in advance of loss. This provision shall also apply to insurance policies required of Subcontractors hereunder

Should Design-Build Contractor implement a contractor-controlled insurance program (CCIP) providing compliant insurance for all participants with regard to on-site activities, all construction Subcontractors enrolled in the CCIP shall still be responsible for procuring and maintaining automobile liability insurance and the other insurance coverages noted above with regard to off-site work with the Indemnified Parties as additional insureds on a primary, non-contributory basis for the applicable insurance coverages set forth in clauses (b), (c), and (d) above.

## EXHIBIT 19

### SCOPE OF WORK

## Exh19-1. SCOPE OF WORK

### Exh19-1.1 General

Design-Builder Contractor shall perform all Work in accordance with the DBA Documents, including Project Standards, this Exhibit 19 and its RSPs and USPs; Government Approvals; and Government Rules.

### Exh19-1.2 Project Description

#### Exh19-1.2.1 Project Limits

The Project is in Scott and Clark County, Indiana and includes the design and construction of I-65, beginning 0.50 mile north of the I-65/Blue Lick Road interchange (MM 16+27) in Clark County and ending 0.40 mile south of the I-65/SR 56 interchange (MM 28+91).

#### Exh19-1.2.2 Project Scope of Work – Base Bid Elements

Project limits will vary depending on the extent of construction activities that are included in the Project scope by the Apparent Best Value Proposer. Proposer shall include, at a minimum, the following Base Bid Elements with the Project.

- Added Travel Lanes with Total Pavement Reconstruction (Lead Des. 1700135, RP 16+27, Sta 391+10.00 “Q” to RP 20+27, Sta. 600+00.00 “PR-Q”)
- NBI: 034850 – I-65 over Blue Lick Creek NB – Superstructure replacement and widening for Added Travel Lane (Des. 1600744, Bridge No I65- 016-04220)
- NBI: 034860 – I-65 over Blue Lick Creek SB – Superstructure replacement and widening for Added Travel Lane (Des. 1600750, Bridge No I65- 016-04220)
- NBI: 034880 – I-65 over Caney Fork NB – Superstructure replacement and widening for Added Travel Lane (Des. 1600729, Bridge No I65-016- 04222)
- NBI: 034890 – I-65 over Caney Fork SB – Superstructure replacement and widening for Added Travel Lane (Des. 1600733, Bridge No I65-016- 04222)
- CV I65-010-18.35 – Small structure replacement of existing 66” CMP (Des. 2001599, Sta. 501+27 “PR-Q”)

- CV I65-010-19.90 – Small structure replacement of existing 102” CMP (Des. 2001598, Sta. 582+14 “PR-Q”)
- CV I65-010-22.77 – Replacement of existing small structure end sections, unless rendered unnecessary by structure replacement work in additional project elements (Lead Des. 1700135, Sta. 732+56 “Q”)
- NBI: 034940 – I-65 over Pigeon Roost Creek NB – Bridge Deck Overlay with semi-integral end bents, reinforced concrete bridge approach replacements, and minor fiber wrapping of beams near abutments (Des. 2001604, Bridge No. I65-024-04229)
- NBI: 034950 – I-65 over Pigeon Roost Creek SB – Bridge Deck Overlay with semi-integral end bents, reinforced concrete bridge approach replacements, and minor fiber wrapping of beams near abutments (Des. 2001605, Bridge No. I65-024-04229)
- Roadway Rehabilitation, 2-inch Mill and Asphalt Overlay (Lead Des. 1700135, from Terminus of Added Travel Lanes Reconstruction to RP 29+10, Sta. 1105+77 “Q”)
- Roadway Rehabilitation, 2-inch Mill and Asphalt Overlay (Lead Des. 1700135, all ramps at interchange of I-65 and SR 160, RP 19+26, Sta. 546+00 “PR-Q”)existing
- Noise Barrier Wall Construction – I-65 NB (Lead Des. 1700135, Sta. 504+45 “PR-Q to 518+49 “PR-Q”)
- Intelligent Transportation System Construction – I-65 NB/SB, (Lead Des. 1700135, RP 19+80, Sta. 573+50 “PR-Q”)

### **Exh19-1.2.3 Project Scope of Work – Additional Elements**

Proposer shall include the following Additional Project Elements with the Project, as included with the submitted proposal.

**[TBD as provided from Form I-2 as completed by Design-Build Contractor]**