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Part 1 - General Conditions : Farmingdale Route 201 Highway Reconstruction, Design-Build Project, April 2010

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MaineDOT

PART 1 – GENERAL CONDITIONS

DRAFT

**FARMINGDALE
ROUTE 201
HIGHWAY RECONSTRUCTION
DESIGN–BUILD PROJECT**

PROJECT NO. _____

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DESIGN-BUILD CONTRACT AGREEMENT

CONTRACT AGREEMENT made on the date last signed below, by and between the State of Maine, acting through and by its Department of Transportation (Department), an agency of state government with its principal administrative offices located at 24 Child, Augusta, Maine, with a mailing address at 16 State House Station, Augusta, Maine 04333-0016, and _____ a corporation or other legal entity organized under the laws of the State of Maine, with its principal place of business located at _____ (Design-Builder).

The Department and the Design-Builder, in consideration of the mutual promises set forth in the Contract Documents, hereby agree as follows:

A. The Work.

The Design-Builder shall be responsible for furnishing all supervision, labor, equipment, tools supplies, permanent materials and temporary materials required to perform the Work including design, construction, quality management including inspection, testing and documentation, all required documentation at the conclusion of the project, warranting its work, and performing all other work indicated in the Contract Documents.

The Department shall have the right to alter the nature and extent of the Work as provided in the Contract Documents; payment to be made as provided in the same.

1. Farmingdale, Route 201 Reconstruction Project

The Design-Builder agrees to complete all Work as specified or indicated in the Contract including Extra Work and Force Account in conformity with the Contract, PIN No. _____

_____ ,
for the _____ in the
town/city of _____, County of _____ ,
Maine. The Work includes design, construction, maintenance during construction, warranty as provided in the Contract Documents, and other incidental work.

B. Time.

The Design-Builder agrees to complete all Work, except warranty work, on or before _____, (date). Further, the Department may deduct from moneys otherwise due the Design-Builder, not as a penalty, but as Liquidated Damages in accordance with Sections 107.7 and 107.8 of the Design-Build General Conditions.

C. Price.

The Lump Sum Price shown on the Price Proposal Form (Form D), a Contract Document, will be used as the basis for determining the original Contract amount and for determining the amounts of the required Performance Surety Bond and Payment Surety Bond. The actual amount of the in lieu fee payment for mitigation will be deducted from the Lump Sum Price.

Except as otherwise specifically provided in the Contract (including provisions for Extra Work and Force Account Work), the Department agrees to pay, and the Design-Builder agrees to accept, the following Lump Sum Price as full and complete compensation for completion of all the Work.

1. Sibley Pond Bridge Replacement Project

Lump Sum Price: \$ _____

D. Contract.

The Contract, which may be amended, modified, or supplemented in writing only through a Contract Modification, consists of the following documents:

1. This Design-Build Contract Agreement;
2. The Design-Builder's Statement of Qualifications (SOQ);
3. All portions of the Request for Proposals (RFP), consisting of the Design-Build General Conditions, Project Requirements, Appendices, and Standard Specifications - Revision of December 2002, with Repair Specification;
4. The Design-Builder's Proposal consisting of its Technical Proposal, inclusive of the Proposal Letter (Form A), and its Price Proposal, inclusive of the Price Proposal Form (Form D);
5. Permits, if applicable;
6. Performance, payment, warranty, and other bonds;
7. All specifications, manuals, guides, laws and all other documents referenced in any of the above documents; and
8. Amendments Nos. 1 to ____ inclusive.

It is agreed and understood that the Contract will be governed by the documents listed above.

E. Certifications.

By signing below, the Design-Builder hereby certifies that to the best of the Design-Builder's knowledge and belief:

1. All of the statements, representations, covenants, and/or certifications required or set forth in the Proposal and the Proposal Documents, including those in Appendix A to the Design-Build General Conditions (Federal Contract Provisions

Supplement), and the Contract are still complete and accurate as of the date of this Contract Agreement.

2. The Design-Builder knows of no legal, contractual, or financial impediment to entering into this Contract.
3. The person signing below is legally authorized by the Design-Builder to sign this Contract Agreement on behalf of the Design-Builder and to legally bind the Design-Builder to the terms of this Contract Agreement.

F. Representations.

The undersigned, having carefully examined the site of work, the Project Requirements, RFP Plans, the Design-Build General Conditions, Standard Specifications - Revision of December 2002, Supplemental Specifications, Contract Agreement; and Contract Bonds contained herein for design and construction of:

State of Maine, on which proposals will be received until the time specified in the “Notice to Design-Builders” does hereby propose and offer to enter into the Contract to supply all the materials, tools, equipment and labor to construct the whole of the Work in strict accordance with the terms and conditions of the Contract and for the lump-sum price herein.

The Design-Builder agrees to perform the work required at the price specified above and in accordance with the terms of the Contract, and to provide the appropriate insurance and bonds if this offer is accepted by the Department in writing.

As Design-Builder also agrees:

First: To do any extra work, which may be ordered by the Department Project Manager, and to accept as full compensation the amount determined as provided in Section 109.5 of the Design-Build General Conditions and as addressed in the Contract Documents.

Second: That the proposal guaranty at five percent (5%) of the proposal amount payable to the Treasurer of the State of Maine and accompanying this proposal, shall be forfeited, as Liquidated Damages, if in case this Proposal is accepted, and the undersigned shall fail to abide by the terms and conditions of the offer, and fail to furnish satisfactory insurance and Contract bonds under the conditions stipulated in the Design-Build General Conditions within ten (10) Days of notice of intent to award the Contract.

Third: To begin the Work on the date specified in the Project Requirements and complete the Work within the time limits given in the Contract.

Fourth: That the Lump Sum Price shall remain open for thirty (30) Calendar Days after the date of Price Proposal Opening.

IN WITNESS WHEREOF, the Design-Builder, for itself, its successors and assigns, hereby execute three duplicate originals of this Agreement and thereby binds itself to all covenants, terms, and obligations contained in this Contract.

DESIGN-BUILDER

Date

Witness

(Name and Title Printed)

G. Award.

Your offer is hereby accepted for (see checked boxes):

Item 1 ☒

Contract Amount: _____

Execution by the Department consummates the Contract, and the documents referenced herein.

MAINE DEPARTMENT OF TRANSPORTATION

Date

Commissioner

Part 1 - General Requirements

DIVISION 100 - DESIGN-BUILD GENERAL CONDITIONS

100.1 Replacement of General Conditions of the Standard Specifications and Standard Details. This version of the Maine Department of Transportation's General Conditions of the Standard Specifications and Standard Details for Highways and Bridges, was drafted and adopted by the Department pursuant to the authority granted by 23 MRSA §753-A. These General Conditions supersede the General Conditions of the Standard Specifications and Standard Details for Highways and Bridges, and pertain to the Department's Design-Build Projects, unless otherwise noted in the Project Requirements. References in these Design-Build General Conditions relating to the Standard Specifications also refers to Division 200 forward of the Supplemental Specification (Repair Spec) dated August 18, 2008 which is located at http://www.state.me.us/mdot/contractor-consultant-information/ss_standard_specification_2002.php.

SECTION 101 - CONTRACT INTERPRETATION

Scope of Section. This Section consists of abbreviations, definitions, and general rules of interpretation.

101.1 Abbreviations. Abbreviations are defined in the following list. Abbreviations not defined in this Section or otherwise in the Contract shall have the meaning that is commonly accepted in the Engineering and construction industry.

AAN	American Association of Nurserymen, Incorporated
AAR	Association of American Railroads
AASHTO	American Association of State Highway and Transportation Officials
ACI	American Concrete Institute
ADA	Americans with Disabilities Act
AGC	Associated General Design-Builders of America
AIA	American Institute of Architects
AISC	American Institute of Steel Construction
ANSI	American National Standards Institute
ARA	American Railway Association
AREMA	American Railway Engineering and Maintenance-of-way Association
ARTBA	American Road & Transportation Builders Association
ASCE	American Society of Civil Engineers
ASLA	American Society of Landscape Architects
ASME	American Society of Mechanical Engineers
ASTM	American Society for Testing and Materials
ATSSA	American Traffic Safety Services Association
AWWA	American Water Works Association
AWPA	American Wood Preservers' Association
AWS	American Welding Society
BMP	The Department's "Best Management Practices for Erosion and Sediment Control"
CFR	Code of Federal Regulations

CQCP	DBE Disadvantaged Business Enterprise
DREW	Daily Reports of Extra Work
DRB	Dispute Review Board
DQMP	Design Quality Management Plan
EIA	Electronic Industries Association
EEO	Equal Employment Opportunity
EMS	Emergency Medical Service
FAA	Federal Aviation Administration
FERC	Federal Energy Regulatory Commission
FHWA	Federal Highway Administration
FRA	Federal Railroad Administration
FSS	Federal Specifications and Standards, General Services Administration
IES	Illuminating Engineering Society
IMSA	International Municipal Signal Association
IPCEA	Insulated Power Cable Engineers Association
ISEE	International Society of Explosives Engineers
ISO	Insurance Services Office
ITE	Institute of Transportation Engineers
LURC	Land Use Regulation Commission - Maine
MaineDOT	Maine Department of Transportation
MCTCB	Maine Concrete Technician Certification Board
MDEP	Maine Department of Environmental Protection
MDOT	Maine Department of Transportation
MIL	Military Specifications
MRSA	Maine Revised Statutes Annotated
MUTCD	Manual on Uniform Traffic Control Devices
NBS	National Bureau of Standards
NEC	National Electrical Code
NEMA	National Electrical Manufacturers Association
NEPCOAT	Northeast Protective Coating Committee
NESC	National Electric Safety Code
NETTCP	New England Transportation Technician Certification Program
NHS	National Highway System
NTCW	Notice to Commence Work
OSHA	Occupational Safety and Health Administration
PIN	Project Identification Numbers
QA	Quality Assurance
QC	Quality Control
QCP	Quality Control Plan
QLA	Quality Level Analysis
RFI	Request for Information
RFC	Release for Construction
RFP	Request for Proposals for the Project
RFQ	Request for Qualifications for the Project
SAE	Society of Automotive Engineers
SEWPCP	Soil Erosion and Water Pollution Control Plan

SHA	State Highway Agency (as used by FHWA, meaning the Department)
SOQ	Statement of Qualifications submitted in response to the RFQ
SPCCP	Spill Prevention Control and Countermeasure Plan
SSPC	Steel Structures Painting Council
TAPPI	Technical Association of Pulp and Paper Industry
TCP	Traffic Control Plan
USC	United States Code
USDA	United States Department of Agriculture
UL	Underwriter's Laboratory
VECP	Value Engineering Change Proposal

101.2 Definitions. Words, terms, and phrases are defined below. Capitalized words in these Design-Build General Conditions are defined under this Section. Words, terms, or phrases that are not defined in this Section 101.2 or otherwise in the Contract shall have the meaning commonly accepted in the engineering and construction industry.

Acceptable Work. Work that Conforms or Substantially Conforms to the Contract and is satisfactory to the Department.

Acceptance. Consideration of operations, inspections, samples, tests, certifications, proper QCP implementation, and end product properties to determine whether the product will be accepted for payment, including any adjustment to compensation as provided in the Contract.

Acceptance Test. Test utilized by the Department to evaluate the quality of a Material or product.

Actual Cost. Direct, Project-specific, costs actually incurred by the Design-Builder in the performance of Work. Actual Costs consist of labor, Material, Equipment, and administrative overhead. For related provisions, see Subsections 109.5.2 - Basis of Payment and 109.5.3 - Non-compensable Items.

Addendum. See definition for Amendment.

Aggregate. Inert Material such as sand, gravel, broken stone, crushed stone, or a combination of any of these Materials.

Agreement. The document executed by the Department and the Design-Builder entitled “Design-Build Contract Agreement,” the form of which is included in the RFP, as well as all documents listed in said Design-Build Contract Agreement.

Amendment. Revision to the RFP.

Apparent Successful Proposer. The Proposer that submits the Proposal that the Department considers the best overall value to the State in accordance with the procedures set forth in the RFP. The apparent successful Proposer will not be awarded the Contract if

- A. its Price Proposal is determined to be non-responsive in accordance with Subsection 103.3.1 - Price Proposal Responsiveness,

- B. the Proposer fails to comply with all applicable pre-award and pre-execution requirements of the RFP and/or Contract, or
- C. the Department chooses not to Award a Contract.

Application for Progress Payment. A Design-Builder's request for a progress payment using forms and media approved by the Department.

Alternate Technical Concepts. Concepts that deviate from the requirements set forth in the RFP and that have been included in the Proposal with the Department's prior approval.

Award. The decision of the Department to accept a responsive Proposal from a responsible Proposer that provides the best value to the Department for the Work identified in the RFP, subject to the Design-Builder's satisfaction of the specified Award Conditions.

Award Conditions. Pre-award or pre-execution requirements that the Design-Builder must meet before Contract Execution including bonding and insurance. For a related provision, see Section 103 – Evaluation of Proposals, and Award and Execution of Contract.

Award Decision. All decisions and/or determinations by the Department that impact to whom the Contract will be awarded including determination of Technical Proposal responsiveness, scoring of Technical Proposals, determination of Price Proposal responsiveness, determination of the Apparent Successful Proposer, all other responsiveness issues, and all protest decisions.

Basic Configuration. The salient characteristics of the Project as defined and/or illustrated in the RFP, including any permitted deviations thereto contained in the Design-Builder's Proposal. Basic Configuration elements may include the following:

- A. Horizontal and vertical alignments for the highway
- B. Number of intersections/overpasses/underpasses
- C. Number of highway lanes
- D. Minimum vertical clearances
- E. Number, location, and types of interchanges
- F. Number and type of signalized intersections
- G. Approximate Project limits
- H. Right-of-Way limits
- I. Lane and Shoulder Widths

Any changes in the Basic Configuration may be implemented only with the Department's prior written approval. For related provisions, see Section 102.4 – Alternative Technical Concepts and Subsection 109.1.4 – Basic Configuration Changes.

Best-Value Procurement Process. A process using a Request for Proposals for procuring contractual services in which price and other technical or qualification-based factors are used in determining the successful Proposer. See definitions for Proposer, Request for Proposals, and Design-Build Contract.

Bidder. See definition for Proposer.

Blue Book. The edition of publications entitled “Rental Rate Blue Book for Construction Equipment” or “Rental Rate Blue Book for Older Construction Equipment” as applicable, published by Primedia Information Inc. that was current when the Work being priced was performed.

Bridge. A structure having a clear span of twenty (20) feet or more measured horizontally at the elevation of the Bridge seats along the centerline of the Road or in case of multiple spans when the combined clear spans equal or exceed twenty (20) feet.

- A. Length. The length of a Bridge structure is the overall length measured along the construction centerline back to back of backwalls of abutments, if present; otherwise end to end of the Bridge floor; but in no case less than the total clear opening of the structure.
- B. Roadway Width. The clear width measured at right angles to the longitudinal centerline of the Bridge between the bottom of curbs or guard timbers or in case of multiple heights of curbs, between the bottoms of the lower risers.

Bureau Director. The Director of the Department's Bureau of Project Development.

Business Day. Every Calendar Day less Saturdays, Sundays, and Holidays.

Calendar Day. Every day shown on the calendar, beginning at and ending at midnight.

Change Order. See definition for Contract Modification.

Closeout Documentation. Documents required of the Design-Builder by the Department for final acceptance of the Project. These documents are: Letter “All Bills Paid”, Request for Final Payment, “Buy America” Statement, certificate of Materials, Federal Form PR 47 (On applicable NHS Projects), DBE Goal Attainment Verification Form, and as-built drawings stamped by the Design-Builder's Engineer. The Department reserves the right to add to this list of required closeout documentation. (For example, Maintenance Bonds on all 621 items or Design-Builder performance evaluation) For a related provision, see Subsection 107.8.4.

Commissioner. The Commissioner of Transportation established by 23 MRSA §4205.

Compensable Delay. See Subsection 109.3.1 – Definitions - Types of Delays.

Completion. Completion occurs when the Design-Builder has finished all Work pursuant to the Contract, including Delivery of all conforming Closeout Documentation. Completion does not mean Substantial Completion. Unless the context indicates otherwise, Completion also does not mean Completion of Physical Work.

Completion of Physical Work. Completion of Physical Work occurs when the Work has been substantially completed and has undergone a successful final inspection. The Maintenance or Warranty Bonds for Section 621 Landscape items of the Standard Specifications are normally activated at the Completion of Physical Work.

Conduit. A pipe used for receiving and protecting wires or cable.

Conform or Conformity. Conform or Conformity means in accordance with the Plans, Specifications, or other Contract requirements, as initially and reasonably determined by the Design-Builder, and ultimately as determined by the Department. For a related definition, see Substantially Conform.

Construction Limit Line. A line, usually outside of the Right-of-Way, within which the Design-Builder may Work and outside of which Work shall not be performed.

Contract. The entire agreement between the Department and the Design-Builder, as evidenced by the Contract Documents.

Contract Bonds. The forms of security approved by the Department, executed by the Design-Builder and its Surety or Sureties, guaranteeing performance of the Work, and the payment of all obligations pertaining to the Work. For related provisions, see the definitions of Proposal Guaranty, Performance Bond, and Payment Bond. A Proposal Guaranty is not a Contract Bond because it expires upon execution of the Agreement by the Department. A maintenance bond or warranty bond may come into force after the completion of the physical work.

Contract Completion Date. The required completion date of all Work pursuant to the Contract, except the landscape establishment period and warranty work, as established by the Agreement and as set forth in the Proposer's project schedule.

Contract Completion Time. Length of time allowed under the Contract to complete the Work pursuant to the terms of the Contract. See Contract Completion Date.

Contract Documents. The documents forming the Contract, as listed in the Agreement.

Contract Execution. Execution of the Contract by the Commissioner or his/her authorized agent by signing the Agreement, which action (upon written notification to the Design-Builder) forms a contract as provided in Subsection 103.4.3 - Execution of Contract by Department.

Contract Modification. A formal change to the Contract. For a related provision, see Section 109.6 – Contract Modification.

Contract Representative. The person designated in the RFP to be the Department's single point of contact with the Design-Builder from issuance of the RFP through execution of the Contract.

Contract Time. See definition for Contract Completion Time and Section 107 - Time.

Contracting Entity. Unless the context clearly indicates otherwise, "Contracting Entity" means "Design-Builder".

Contractor. See the definition for Design-Builder.

Critical Path. The sequence of activities from the Project start to the Completion having the greatest cumulative elapsed time, thereby determining the minimum time duration of the entire Project.

Culvert. Any structure not defined as a Strut or Bridge that provides a Drainage opening under the Roadway or approaches to the Roadway).

Days. Business Days.

Default. See Section 112.1 - Default.

Defects or Defective Work. Work that is unsatisfactory, faulty, or deficient in that it is not in Conformity with the Contract or with prevailing industry standards applicable to the Work at the time of submission of the Proposal as determined by the Department or its agents. For related provisions, see the definition of Acceptable Work and Subsection 101.3.1 – Meaning of "Approved," Etc.

Deliver. To cause Receipt by a means set forth in the definition of Received or Receipt.

Department. The Department of Transportation of the State of Maine, as established by 23 MRSA §4202 et seq. for the administration of Highway, Bridge, and other public Works; acting through the Commissioner and his/her duly authorized representatives. For related provisions, see definitions of Department Project Manager and Resident.

Department Project Manager. The Department's duly authorized representative for overall coordination of the Project from preliminary design to Final Acceptance.

Design Checker – Senior Experienced Engineer. The designer performing quality control of the design, being either an employee of the Designer or an independent design firm other than the Design-Builder.

Design Documents. Design-Builder produced drawings, specifications, calculations, records, reports or other documents, including shop drawings and special process procedures, which may be used for design, manufacture fabrication, installation, construction, testing, examination, and certification of items.

Design-Build Contract. A contract in which the Design-Builder is responsible for both design and construction requirements under the Contract, which is procured through a Best-Value Procurement process as outlined in 23 MRSA §753-A.

Design-Builder. The legal entity that will be executing the Contract and that will be a single point of responsibility for all obligations under the Contract. The Design-Builder shall be independent with respect to the Department and shall not be an employee, agent, or representative of the Department. Design-Builder is also used synonymously with the term, “Contractor,” in the Federal forms of Appendix A to the Design-Build General Conditions, and wherever necessary in this RFP.

Design-Builder’s Early Completion Date. A completion date earlier than the Contract Completion Date proposed by the Design-Builder in its initial Schedule of Work submitted with its Proposal. For related provisions, see Subsection 109.3.3 – Early Completion Date Delay Claims.

Design Manager. Engineer of Record who is a Maine Licensed Professional Engineer responsible for all aspects of the design including Quality of the end product. The Design Manager’s duties shall include, as a minimum, oversight, assessment and evaluation of the following:

- A. Design reports;
- B. Site investigations and reports;
- C. Analytical approach;
- D. Basis of design documents;
- E. Drawings and specifications for conformity with the Contract Documents, and for compliance with codes, permits, and regulations;
- F. Coordination of the different Release for Construction Packages;
- G. Coordination of design compliance with the findings of constructability reviews;
- H. QCP compliance;
- I. Field design changes; and
- J. As-built plans for conformity with final design and Contract Documents.

Designer. The entity responsible for design and related work for the Project, either through subcontract to the Design-Builder or otherwise.

Detailed Schedule of Prices. A list of contract work items with unit prices provided in the form included as an Appendix to the RFP on which each Proposer lists all quantities and unit prices used to calculate its Price. This schedule is to be submitted as part of the Price Proposal.

Differing Site Conditions. See Section 109.2 - Differing Site Conditions.

Dispute. Disagreements, claims, counterclaims, matters in question, and differences of opinion between the Department and the Design-Builder and those working for or through the Design-Builder regarding matters related to the Work that arise after Contract Execution. These include interpretation of the Contract, compensation and costs, time for performance, and quality.

Dispute Review Board. A panel of three experienced persons that the parties may agree to use to make recommendations regarding the resolution of Disputes. Upon mutual agreement by the Department and Design-Builder, a single individual may act as a DRB. For a related provision, see Section 111.4 - Dispute Review Board.

Drainage. The system of pipes, drainage ways, ditches, and Structures by which surface or subsurface waters are collected and conducted from the Highway area.

Drawings. See definition for Plans.

Dredge Material (Dredge Spoils). Sand, silt, mud, gravel, rock or other sediment or material removed from beneath any surface water. The term “beneath any surface water” has been interpreted by the MDEP to mean that area that falls beneath the plane bounded by the normal high water line of any stream, river, brook, pond, lake, vernal pool etc. Note that the entire area of Dredge Material removal could be dry at the time of excavation.

Engineer. Unless otherwise indicated in this Contract, a Maine Licensed Professional Engineer who is an employee of the Design-Builder, or a Subcontractor, with the responsibility and authority to require that the Work be performed in Conformity with the Contract.

Engineer of Record. See Design Manager.

Environmental Information. Hazardous waste assessments, dredge material test results, boring logs, geophysical studies, and other records and reports of the environmental conditions. For a related provision, see Subsection 104.3.14 – Interpretation and Interpolation.

Equipment. All machinery, supplies for repair and maintenance of such machinery, tools, and other apparatus necessary or appropriate for Completion of the Work in Conformity with the Contract.

Equitable Adjustment. An adjustment to compensation due to a change in the nature or scope of the Work made part of the Contract by formal Contract Modification. For a related provision, see Section 109.5 - Equitable Adjustments to Compensation.

Escrowed Proposal Documents. All writings, working papers, computer printouts, charts, and data compilations that contain or reflect information, data, or calculations used by the Proposer to determine the Price Proposal submitted, including material relating to design as well as construction work, relating to the determination and application of:

A. Equipment rates

- B. Overhead rates
- C. Time schedules
- D. Labor rates
- E. Efficiency or productivity rates
- F. Arithmetic extensions
- G. Quotations from Subcontractors and Material supplier quotations

Any manuals standard to the industry used by the Proposer in determining the Price Proposal are also considered part of the Escrowed Proposal Documentation. These manuals shall be included in the proposal documentation by reference and shall show the name and date of the publication and the publisher.

It is not necessary to include documents provided by the Department for the Proposer's use in the preparation of the Proposal.

Excusable Delay. See Subsection 109.3.1 – Definitions - Types of Delays.

Extra Work. Work that is outside the scope of the Contract and that the Department determines is necessary.

Extra Work Order. See Contract Modification.

Fabrication Engineer. The Department's representative responsible for Quality Assurance of pre-fabricated products that are produced off-site.

Federal Contract Provisions Supplement. Appendix A to the Design-Build General Conditions, which set forth additional provisions that apply to federally funded Contracts.

Final Acceptance. The Department's Acceptance of all Work and responsibility for the Project from the Design-Builder, except for any Design-Builder warranty obligations.

Force Account Work. Prescribed Work paid on the basis of Actual Costs and additives as set forth in Subsection 109.5.5 – Force Account Work.

Force Majeure. See definition for Uncontrollable Events.

Geometrics. The physical location (horizontally and vertically) and shape of the object under consideration.

Geotechnical Information. Boring logs, soil reports, geotechnical design reports, ground penetrating radar evaluations, seismic refraction studies, and other records of subsurface conditions. For a related provision, see Subsection 104.3.14 - Interpretation and Interpolation.

Haul Road. A private way leading to a public way that is used by the Design-Builder to move Equipment and Materials related to the Work.

Hazardous Material. A substance, product, waste, or other material that is capable of posing an unreasonable risk to health, safety, or property as designated as hazardous in the Hazardous Materials Table in 49 CFR 172.101.

Hearing. Unless otherwise specified by the Department in writing, a Hearing is a review of a decision that includes a review of existing documentation on file with the Department and any additional documentation, including written arguments and supporting exhibits that may be submitted by any interested party. Unless the context clearly indicates otherwise, a Hearing need not include an evidentiary Hearing for the oral presentation of evidence if such an evidentiary Hearing is not requested or if the Department reasonably determines that such an evidentiary Hearing is not necessary to review the matter at issue adequately. Unless the context clearly indicates otherwise, a Hearing shall not be construed as an adjudicatory proceeding within the meaning of the Maine Administrative Procedure Act.

Highway. A general term denoting a public way for purposes of vehicular travel, including the entire area within the Right-of-Way.

Hold Point. Mandatory verification points identified in the approved QCP beyond which work cannot proceed until verification is performed and a written release is granted by the Department.

Holidays. New Year's Day, Martin Luther King Day, President's Day, Patriot's Day, Memorial Day, Independence Day, Labor Day, Columbus Day, Veterans Day, Thanksgiving Day, the Friday after Thanksgiving Day, and Christmas Day. For a related provision, see Subsection 107.3.3 - Sundays and Holidays.

Incentive/Disincentive Payment. An adjustment to the Contract price of a predetermined amount for each Calendar Day the Work is completed ahead of or behind the Contract Completion Time, Contract Completion Date or some specified intermediary milestone. A disincentive is not a penalty, but an estimate of user and other costs incurred by the people of the State of Maine.

Incidental. The terms "incidentals" and "incidental to the contract" mean cost items that are incidental to or incorporated in the Work. The cost of incidentals shall be included in the Design-Builder's Lump Sum Price; there will be no separate or individual payment for incidentals.

Incomplete. Not complete, as defined above by Completion.

Independent Assurance Inspection (IAI). Unbiased and independent evaluations of all sampling and testing (or inspection) procedures used in a Quality Assurance Program. IA provides an independent verification of the reliability of the Acceptance data obtained by the Department and the data obtained by the Design-Builder. The results of IA testing or inspection are not to be used as a basis of Acceptance.

Independent Assurance Testing (IAT). A test conducted to check the calibration of the testing equipment and processes being used.

Inexcusable Delay. See Subsection 109.3.1 - Definitions - Types of Delays.

Initial Submittals. Submittals required within a prescribed number of Days (usually no more than 30) from the execution of the Agreement by the Department including erosion control plans, other environmental plans, quality control plans, safety plans, and other submittals required by the Contract.

Inspector. An authorized representative of the Design-Builder assigned to:

- A. make detailed inspections of the Work,
- B. make initial determinations regarding the Conformity of the Work, and
- C. require the Design-Builder to correct Work not in Conformity. For related provisions, see the definition of Conformity and Subsection 106.2.4.4 – QC Inspector Qualifications.

In Stream Work. Any Work activity(ies) conducted in the water.

Invoice. The Design-Builder's request for progress payment, also called an Application for Progress Payment.

Joint Venture. A legal association of two or more firms to carry out a single, for-profit business enterprise, for which the parties combine their property, capital, efforts, skills and knowledge, and is responsible for a distinct, clearly defined portion of the Work of the Contract and whose share in the capital contribution, control, management, risk, and profits of the joint venture are commensurate with its ownership interest.

Landscape Establishment Period. The period of time commencing at initial Acceptance of each planting and extending for two years, unless otherwise provided in the Contract. For a related provision, see Section 621 – Landscaping of the Standard Specifications.

Landscape Establishment Period Obligations. The obligations of the Design-Builder with regard to landscaping during the Landscape Establishment Period. Unless otherwise provided in the Contract, these obligations consist of monthly inspection and reporting from March through November of the condition of all plants installed and replacing plants that are not in a healthy, vigorous growing condition. For a related provision, see Section 621 – Landscaping of the Standard Specifications.

Lane. A strip of Roadway intended to accommodate a single line of vehicles.

Law or Laws. Any statute, law, regulation, ordinance, rule, judgment, 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 Project, the Right-of-Way, or the Work, whether now or hereafter in effect.

Letter of Intent to Award. A written notice to the selected Proposer stating that the Proposal has been conditionally accepted by the Department and is instructing the Apparent Successful Proposer to perform all pre-award requirements and execute the Agreement. For a related provision, see Section 103 – Evaluation of Proposals, and Award and Execution of the Contract.

Liquidated Damages. An amount due and payable to the Department by the Design-Builder, normally accomplished by a reduction of amounts to be paid to the Design-Builder under the Contract, said amount being calculated by multiplying a daily amount set forth in the Contract by the number of Calendar Days the Work remains incomplete after the Contract Completion Date. By submitting a Proposal, the Design-Builder acknowledges that such an amount is not a penalty and that the daily amount set forth in the Contract is a reasonable per diem forecast of damages incurred by the Department due to the Design-Builder's failure to complete on time.

Lump Sum Price. The price contained in the Price Proposal Form, being a single lump sum price for completion of all Work described in the Contract in conformity with the Contract.

Major Participant. Major Participant means:

- A. The Design-Builder and any Related Entities;
- B. The Builder and all Related Entities;
- C. The Designer and all Related Entities;
- D. Any firm providing more than the percentage specified in the Project Requirements of the value of the on-site construction work and all Related Entities; or
- E. Any firm providing more than the percentage specified in the Project Documents of the value of the design work and all Related Entities.

Material. Any substance specified for use in the construction of the Project and its approaches.

Modification. See Contract Modification.

National Highway System (NHS). A system of Interstate Highways and major collectors specifically designated by the Federal Highway Administration. It includes the Interstate System, other urban and rural principal arterials, highways that provide motor vehicle access between the NHS and major intermodal transportation facilities, the defense strategic highway network, and strategic highway network connectors.

Necessary Basic Configuration Change. Any change in the Basic Configuration that is necessary to correct an error, omission, inconsistency or other defect in the Basic Configuration (with the understanding that a change shall be deemed “necessary” only if the error, omission, inconsistency or other defect creates a conflict with other Contract requirements or another problem that cannot be corrected without a material change in the Basic Configuration). For a related provision, see Subsection 109.1.2.4 – Basic Configuration Changes.

Non-conforming Work. All work not conforming with the Contract. All Defective, Unauthorized, or Uninspected Work. For a related provision, see Section 106.2.4.9 – Non-Conforming Work.

Non-Resident Proposer. A Proposer that is:

- A. any person who is not a resident of the State of Maine, or
- B. any firm, corporation, limited liability company, partnership, joint venture, sole proprietorship, or other entity which:
 - 1. is not licensed to do business within the State of Maine, or
 - 2. does not have a principal place of business within the State of Maine.

Notice of Award. A written notice to the Design-Builder stating that the Contract has been executed.

Notice to Commence Work (NTCW). Written notice to the Design-Builder to proceed with the Work including, when applicable, the date of beginning of the Contract Completion Time. Unless specified elsewhere by authorized Departmental officials in writing, the execution of the Contract by the Department will constitute a Notice to Commence Work. For related provisions, see Section 107 – Time.

Notice to Proceed. “Notice to Proceed” means “Notice to Commence Work”.

Offer. A response to a solicitation that, if accepted, would bind the offeror to perform the resultant contract. Submission of a Proposal constitutes an Offer by the Proposer.

Order. A directive from the Department requiring compliance by the Design-Builder.

Owner. The legal or record owner of the building or premises on which the Project is to be constructed, generally the State of Maine acting by and through the Department.

Partnering. See Subsection 104.4.1 - Partnering.

Pavement Structure. The combination of subbase, base course, and surface course placed on a subgrade to support the traffic load and distribute it to the roadbed.

- A. Base Course. One or more layers of specified Material thickness placed on a subbase or a subgrade to support a surface course.

- B. Subbase. Layers of specified Material thickness placed on a subgrade to support a base course.
- C. Surface Course. Layer(s) of a Pavement Structure designed to accommodate the traffic load. The top layer is sometimes called the “Wearing Course.”

Payment Bond. The security furnished by the Design-Builder and its Surety to guarantee payment of all obligations incurred by the Design-Builder related to the Contract. For a related provision, see Subsection 110.2.1 - Bonds.

Performance Bond. The security furnished by the Design-Builder and its Surety to guarantee performance of the Work in Conformity with the Contract. For a related provision, see Subsection 110.2.1 - Bonds.

Permits. Permits granted to the Department for the Project. Permits required may include, but are not limited to:

- A. environmental Permits including:
 - 1. a Natural Resources Protection Act (NRPA) permit from MDEP and
 - 2. an Army Corps of Engineers Permit,
- B. a U.S. Coast Guard permit, and
- C. a Federal Energy Regulatory Commission (FERC) permit.

Physical Work. All Work specified in the Contract that affects the physical environment including all Work within the Project Limits, final cleaning up and finishing, and Completion of Punch List Items as provided in Section 107.8 – Project Closeout, and removal of traffic control devices.

Plans. When the context so indicates, “Plans” mean applicable construction drawings including plan, profile, typical cross sections, Working Drawings, Standard Details, Supplemental Standard Details, and supplemental Drawings or exact reproductions thereof or electronically displayed equivalents that show the location, character, dimensions, and details of the Work. Where the context so indicates, “Plan” may also mean a detailed process, program, or method worked out beforehand for the accomplishment of an objective. Examples include QCP, the SEWPCP, the TCP, Safety Plan and Project specific emergency planning.

Predecessor Entities. Any individual, sole proprietorship, firm, corporation, limited liability company, partnership, joint venture, or other entity that was owned, operated, or controlled to a significant degree by the Proposer or the Proposer’s owners, officers, or key personnel within the five years previous to the bid opening date. For the purposes of this definition, “significant degree” means a degree that would be reasonably relevant to a person that is considering contracting with the Proposer and therefore wishes to determine the competency, experience, and contract administration history of the Proposer and any predecessor entities.

Premises. Land of the Owner on which the building(s) or railroad now stand or to which they are to be moved.

Price. Unless the context clearly indicates otherwise, “Price” means “Lump Sum Price”.

Price Proposal. The component of the Proposal that includes pricing information, specifically the Price Proposal Form and other submissions required by Section 102 – Proposal Submission and Content Requirements.

Price Proposal Form. The form included in the Appendices to be completed (including a Lump Sum Price) and signed by the Proposer.

Process Control Test. Test performed at the source of supply of Material to determine whether the Material meets the Specification prior to Delivery.

Profile Grade. The trace of a vertical plane intersecting the top of the wearing surface, usually along the longitudinal centerline of the roadbed. Profile Grade means either elevation or gradient of such trace according to the context.

Program. The specific working unit within the Department’s Bureau of Project Development within which a particular Department project is developed, designed, and administered. They are named Regional Program, Urban and Arterial Highway Program, Urban and Federal Bridge Program, and Multimodal Program.

Program Manager. Individual responsible for any one of the four Programs.

Progress Meeting. See Subsection 104.4.4 - Progress Meetings.

Project. The bridge, highway, railroad, pier, airport, building, bike trail, pedestrian trail, ferry vessel, or other infrastructure improvement being constructed, rehabilitated, or repaired, including all professional services, labor, equipment, materials, tools, supplies, warranties, and incidentals needed for a complete and functioning product.

Project Limits. Areas within the Right-of-Way or Construction Limit Lines indicated in the Contract. If no Project Limits are indicated in the Contract, the Project Limits shall be the area actually occupied by the bridge, highway, or other infrastructure before construction extending to and including:

- A. the area outside the Shoulders and ditch lines and within any landmarks or historic features such as fences, fence posts, tree rows, stone walls, corner stones, or other monuments indicating the boundary line, or
- B. in the absence of any landmarks or historic features, sidewalks, shoulders, and ditch lines to the top of cuts or toe of fills. For a related Maine statute, see 23 MRSA §653.

Project Manager. Unless otherwise stated, “Project Manager” means the person designated by the Design-Builder as Project Manager (or an analogous title) in its Statement of Qualifications, or a replacement approved by the Department.

Project Records. Records or data of any type on any media including those produced by the Design-Builder or its consultants, Subcontractors, suppliers, or manufacturers that are related to the Project. Project Records include, but are not limited to:

- A. Plans,
- B. Working Drawings,
- C. Specifications,
- D. design notes and computations,
- E. manufacturer’s recommendations,
- F. catalog cuts,
- G. daily time reports,
- H. records of Force Account Work,
- I. schedules and schedule updates or revisions,
- J. quality control Plans and related documentation,
- K. inspectors’ reports,
- L. traffic control Plans and log,
- M. safety program and incident reports,
- N. soil erosion and water pollution control Plans and log,
- O. employment records,
- P. payrolls,
- Q. internal accounting records,
- R. equal opportunity and affirmative action records,
- S. preconstruction conference records,
- T. as-built records,
- U. Progress Meeting records,

- V. Partnering records,
- W. correspondence,
- X. e-mails, and
- Y. any other documents related to the Work.

Project Requirements. Specifications, provisions, and all other information related to a specific project included as Part 2 of the RFP.

Proposal. The offer by a Proposer to perform the Work submitted in response to the RFP. In order to be responsive, the Proposal must meet all requirements in the RFP and must offer to perform the Work in accordance with the Contract, the Proposer's SOQ, and the Proposer's Technical Proposal, for the price submitted in the Proposer's Price Proposal. The Proposal consists of two major components and related certifications, bonds, and documentation, to be submitted separately, but simultaneously; the Technical Proposal and the Price Proposal.

Proposal Due Date. The calendar date specified in the Project Requirements on which each Proposer must submit its Proposal to the Department.

Proposal Guaranty. A bond or other acceptable security specified in the Project Requirements or elsewhere in the RFP that is forfeited if the Apparent Successful Proposer refuses to enter into a Contract with the Department. For a related provision, see Section 102.3.2.3 – Proposal Guaranty.

Proposer. An individual, firm, corporation, limited liability company, partnership, joint venture, sole proprietorship or other entity that was shortlisted by the Department and that intends to submit a Proposal for the Work. After execution of the Contract, the Proposer is known as the "Design-Builder". Proposer is also used synonymously with the term, "Bidder," in the Federal forms of Appendix A to the Design-Build General Conditions, and wherever necessary in this RFP.

Punch List. See Subsections 107.8.2 - Notice/Inspection/Punch List and 107.8.3 - Notices/Final Inspections/Physical Work Completion.

Qualification (Personnel). The characteristics or abilities gained through training or experience or both, as measured against established written and performance tests, that qualify an individual to perform a required function.

Quality. Those features that the Department determines are most important to the project. Quality criteria shall include, but may not be limited to, quality of design, constructability, long-term maintenance costs, aesthetics, local impacts, traveler and other user costs, service life, time to construct, and other factors that the Department considers to be in the best interest of the State.

Quality Assurance (QA). A program of planned policies, procedures, detailed responsibilities and systematic actions including inspection, testing and audits of the QC

program necessary to provide adequate confidence that the QC, results, and the Project meet the Contract requirements.

Quality Control (QC). The acts of examining, witnessing, inspecting, checking, and testing of in-process or completed work (including design) and installation activities, to determine Conformity with specified requirements and Acceptance of construction. Unless otherwise noted, these acts are to be preformed by the Design-Builder.

Quality Control Plan (QCP). The program and documentation of that program, approved by the Department, which specifies the actions, inspection, sampling, and testing necessary to keep production and placement operations within Specifications, including provisions to quickly determine when an operation becomes out of control and those actions that the Design-Builder will take to restore compliance.

Received or Receipt. When considering documents, unless the context indicates otherwise, receipt by regular US mail, overnight courier, service in hand, or by fax or electronic transmission with confirmation of receipt originating from the recipient (which may be a telephone confirmation). If Delivered by regular US mail, notices that are properly addressed will be deemed Received three (3) Days after mailing, unless the recipient admits earlier Receipt, in which case Receipt will be the date admitted.

Reference Documents. Supplementary information provided with the RFP, or by reference therein, intended to assist Proposers with the development of Proposals.

Reference Stake. A stake set beyond the proposed grading areas for use as control for the new construction.

Related Entities. Any entity:

- A. which directly or indirectly through one or more intermediaries controls, or is controlled by, or is under common control with, the Proposer or any Major Participant; and
- B. for which ten percent (10%) or more of the equity interest in such Person is held directly or indirectly, beneficially or of record by the Proposer, any Major Participant or any Affiliate of the Proposer 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 an entity, whether through voting securities, by contract, family relationship or otherwise.

Released for Construction Documents. Those documents certified to have met all requirements for design quality management and construction and have been stamped and sealed “Released for Construction” by the Engineer.

Request for Proposal (RFP). The document issued by the Department in a Best-Value Procurement Process asking for Proposals, such as when soliciting for an anticipated Design-

Build Contract, and all other documents issued by the Department and identified as part of the RFP. See definitions for Proposal and Best-Value Procurement Process.

Request for Qualifications (RFQ). Document issued by the Department as a solicitation for the qualifications of interested Design-Build teams. Based solely upon the responses it receives to the RFQ, the Department will short-list a select number of Design-Build teams to submit a Proposal for the referenced Project. Only Design-Build teams selected by the Department during the short-listing process are eligible to submit a Proposal.

Resident. The Department's on-site representative.

Resident Work Order. See Contract Modification.

Responsible Bidder. A bidder whose reputation, past performance, and business and financial capabilities are such that the bidder would be judged by an appropriate authority as capable of satisfying an organization's need for a specific contract. In the phrase "lowest responsible bidder", responsible means that such bidder has the requisite skill, judgment, and integrity necessary to perform the contract involved and has the financial resources and ability to carry the task to completion.

RFP Plans. The plans provided by the Department as listed in RFP Appendices.

Right-of-Way. A general term denoting land, property, or interest therein, usually in the form of a strip, acquired for or devoted to the Project or other purposes.

Road. A general term denoting a public way for purposes of vehicular travel, including the entire area within the Right-of-Way.

Roadbed. The graded portion of a Highway within top and side slopes, prepared as a foundation for the Pavement Structure and Shoulders.

Roadside. A general term denoting the area adjoining the outer edge of the Roadway. Extensive areas between the Roadways of a divided Highway may also be considered Roadside.

Roadside Development. Those items necessary to complete the Highway that provide for the preservation of landscape Materials and features; the rehabilitation and protection against erosion of all areas disturbed by construction through seeding, sodding, mulching, and the placing of other ground covers; and such suitable planting and other improvements that increase the effectiveness and/or enhance the appearance of the Highway.

Roadway. The portion of a Highway, including Shoulders, for vehicular use. A divided Highway has two or more Roadways.

Schedule of Work. A written work schedule submitted and maintained by the Design-Builder by which the Design-Builder plans and prosecutes the Work. The Schedule of Work contains dates of commencement and completion of various items of Work within the Contract Time and all authorized extensions. For a related provision, see Subsection 107.4.2 - Schedule of Work Required.

Scoring Administrator. The person appointed by the Department to facilitate and conduct the scoring of Technical Proposals.

Shortlisting Procedure. The current procedure and requirements contained in the RFQ “Notice to Contractors/Consultants” and administered through the Department’s Contracts Section.

Shoulder. The portion of the Road or Roadway that is contiguous with the Traveled Way and that is provided for accommodation of stopped vehicles, emergency use, and lateral support of base and surface courses.

Sidewalk. A way constructed primarily for the use of pedestrians.

Site. A general term denoting land or area, usually within the Right-of-Way, on which Work is conducted with the approval of the Department.

Skew or Skew Angle. The acute angle formed by the intersection of the line normal to the centerline of the Roadway or the working line of the Superstructure with a line parallel to the face of the Substructure or in the case of structural plate units and Culverts, with the centerline of the structural plate units and Culverts.

Special Provision. Revisions to the Standard and/or Supplemental Specifications applicable to an individual Contract.

Specifications. A written or electronic textual compilation of provisions and requirements for the performance of the Work, including incorporations by reference.

Stakeholder. A person or group with an interest in the successful completion and subsequent use of a project.

Standard Details. Detailed Drawings published and approved by the Department for general application and repetitive use.

Standard Specifications. The Standard Specifications for Construction published and adopted by the Department pursuant to 23 MRSA formerly §753, now §4243 for general application and repetitive use on Projects.

State. The State of Maine acting through its authorized agencies and representatives.

Statement of Qualifications (SOQ). Document submitted by an interested Design-Build team in response to a Request For Qualifications (RFQ) issued by the Department. The Department will short-list, based solely upon the information contained in each submitted SOQ, a select number of Design-Build teams to submit a Proposal.

Statistical-based Acceptance. Acceptance of the Design-Builder’s QC test results through statistical comparison with Verification test results.

Stipend. A fee that the Department will pay unsuccessful Proposers that submit responsive Proposals and that are otherwise in compliance with the requirements of the RFP.

Street. A general term denoting a public way for purposes of vehicular travel, including the entire area within the Right-of-Way.

Structures. Bridges, Culverts, catch basins, drop inlets, retaining walls, cribbing, manholes, endwalls, buildings, sewers, services pipes, underdrains, foundation drains, and other manufactured features.

Strut. Any structure not defined as a Culvert or Bridge that provides a Drainage opening under the Roadway or approaches to the Roadway, that is over five (5) feet but less than twenty (20) feet in nominal diameter.

Subcontractor. An individual, firm, corporation, limited liability company, partnership, joint venture, sole proprietorship, or any other entity to whom the Design-Builder subcontracts a portion of the Work, and any other entity with whom any Subcontractor has further subcontracted any part of the Work, at all tiers. A subcontracting arrangement shall be considered to exist when a person or firm assumes obligation for performing part of the Work using its own Equipment and workers, procuring its own Materials and supplies, and furnishing its own supervision with only general overall supervision being exercised by the prime contracting entity of the Design-Builder or higher tier Subcontractors. Unless the context indicates otherwise, Subcontractors include suppliers, vendors, fabricators, and any other entities with which the Design-Builder (or a Subcontractor) contracts to perform any portion of the Work.

Subgrade. The top surface of a Roadbed upon which the Pavement Structure, Shoulders, and curbs are constructed.

Subgrade Treatment. Modification of Roadbed Material by stabilization.

Substantial Completion. The point at which the Project is complete such that it can be safely and effectively used by the public without further delays, disruption, or other impediments. For conventional bridge and highway work, the point at which all bridge deck, parapet, pavement structure, shoulder, permanent signing and markings, traffic barrier, and safety appurtenance work is complete.

Substantially Conform or Substantial Conformity. Substantially Conform or Substantial Conformity means that the Work at issue, though not in strict accordance with the Plans, Specifications, or other Contract requirements, Conforms sufficiently to the applicable standard such that it may be acceptable to the Department (possibly with a credit to the Department) and not require removal, as determined by the Department. For a related definition, see Conformity.

Substructure. All of that part of the Structure below the bearings of simple and continuous spans, Skewbacks of arches, and tops of footings of rigid frames, together with the backwalls, parapets, and wingwalls of abutments.

Superintendent. The Design-Builder's authorized on-site representative who is in charge of and responsible for the Work.

Superstructure. All that part of the Structure above the bearings of simple and continuous spans, Skewbacks of arches and top of footings of rigid frames, excluding backwalls, wingwalls, and wing protection railing.

Supplemental Liquidated Damages. Liquidated Damages for additional costs resulting from the Design-Builder's failure to complete a specific Work item, phase, or milestone within the time specified in the Contract for that item. Supplemental Liquidated Damages are in addition to and separate and distinct from Liquidated Damages.

Supplemental Specification. Approved additions or modifications to the Standard Specifications - Revision of December 2002 (Repair Spec).

Supplemental Standard Details. Approved additions or modifications to the Standard Details.

Surety. Each entity meeting the requirements set forth in Section 110.2 – Bonding that issues a Contract Bond or Proposal Bond.

Technical Proposal. The part of a Proposal detailing, among other things, schedule, management, organization, design, and construction of the project.

Technical Proposal Submission Form (Form A). A required submission in which the Proposer certifies that it has received and reviewed all posted materials, and that its Technical Proposal meets the requirements set forth in the RFP.

Temporary Construction Easement. A temporary right to use or control property, outside of the established Right-of-Way.

Traveled Way. The portion of the Roadway that is intended for the movement of vehicles, exclusive of Shoulders and auxiliary Lanes.

Unacceptable Work. All Work that does not Substantially Conform to the Contract as determined by the Department.

Uncontrollable Events. Events or acts that were unforeseeable at the time of Proposal submission and that were beyond the Design-Builder's control in that the risk of the event or act could not have been prevented or managed by the Design-Builder with proper planning, coordination, Subcontractor management, insurance, bonding, maintenance, erosion control, traffic control, security precautions, workers or Equipment. Uncontrollable Events are of two types:

- A. severe weather events that meet the requirements of the first sentence of this definition and/or

- B. non-weather events that meet the requirements of the first sentence of this definition which might include acts by foreign enemy, quarantine restrictions, strikes not involving the Design-Builder, action or inaction by governmental authorities, acts of terrorism, and freight embargoes.

Uncontrollable Events specifically do not include: fires (unless caused by a weather event described in this definition above), acts by other third parties including vandals and members of the traveling public, non-performance of Subcontractors (except in cases of unforeseeable, permanent, and complete cessation of all operations by the Subcontractor for reasons unrelated to the Design-Builder), and difficult, but foreseeable weather for the location and time of the Work including but not limited to cold, snow, and ice in the winter, flooding caused by snow melt and rain in the spring, and thunderstorms in the summer. For a related provision, see Subsection 104.2.2 – Damage to Project Caused by Uncontrollable Events.

Uninspected Work. Work that was performed without inspection by the Department. For a related provision, see Subsection 106.2.4.13 - Uninspected Work.

Unit Price. The price for one unit of work used by the Design-Builder in the calculation of its Lump Sum Price.

Utility Companies. All persons or entities set forth in 35-A MRSA §2501(2).

Utility Facilities. All Structures, facilities, Equipment, and all appurtenances thereto used by Utility Companies including, but not limited to, poles, wires, support poles, guys, anchors, water pipelines, sewer pipelines, gas pipelines, all other pipelines, fire alarms, service connections, meter boxes, valve boxes, light standards, cableways, Conduits, signals, and manholes.

Value Engineering Change Proposal. See Section 109.4 - Value Engineering.

Wetlands. Areas inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs, and similar areas.

Winter Suspensions. See Subsection 107.5.1 - Winter Suspensions.

Witness Point. A point in production, identified in the approved QCP, where the Department will be afforded the opportunity to inspect the work. Work may proceed beyond a witness point with or without action by the Department provided proper notification has been given.

Work. The furnishing of all administrative, personnel, design, engineering, labor, materials, supplies, installation, construction, supervision, management, testing, verification, documentation, and other incidentals necessary for the Completion of the Project in conformity with the Contract.

Work Order. See Contract Modification.

Working Day. A Calendar Day, exclusive of Saturdays, Sundays, holidays and the period from November 15th to May 15th inclusive, on which weather and other conditions not under the control of the Design-Builder will permit construction operation to proceed for seventy percent (70%) of the hours of the usual Working Day with normal working force.

Saturday shall be considered one half of a Working Day if the Design-Builder works two (2) or more hours during the forenoon. If the Design-Builder works after 12 o'clock noon, it shall be considered as one (1) Working Day. If after approval, work is performed on a Sunday or Holiday, the day shall be considered a Working Day. Work necessary either for the safety of the traveling public or maintenance, performed on Sundays or Holidays, which is neither caused by nor resulting from any fault of the Design-Builder, will not be considered a Working Day.

Working Drawings. Plans, sketches, or drawings provided by the Design-Builder, or its Subcontractors, vendors, or fabricators for the purpose of supplementing the Plans and being necessary to demonstrate that the Work will comply with the Contract and meet the intent of the Contract. Working Drawings shall be of sufficient detail to meet the purpose set forth in the preceding sentence. Examples include shop drawings, erection plans, falsework plans, cofferdam plans, and bending diagrams for reinforcing steel.

101.3 General Rules of Interpretation.

101.3.1 Meaning of “Approved,” Etc. Unless the Contract clearly indicates otherwise, whenever anything is to be done or is not to be done unless “approved”, “accepted”, “authorized”, “ordered”, “required”, “determined”, “directed”, “specified”, “designated”, “established”, “suitable”, “satisfactory”, “sufficient”, “unacceptable”, or a similar word or phrase, the word or phrase shall be interpreted as if it were followed by the words “by the Department” or “to the Department” as applicable.

Note that such terms, when used in the context of obtaining the Department’s approval of a specific approach, proposal, plan, schedule, analysis, or design submitted by the Design-Builder, means that the Department is in agreement with the specific approach, proposal, plan, schedule, analysis or design and that the submittal itself and its contents appear to conform to the respective requirements of the Contract Documents for that submittal.

101.3.2 Referenced Publications. The Design-Builder is responsible for obtaining all manuals, specifications, reference guides, or other publications referenced or indicated by the Contract and performing the Work in Conformity with the same. Unless a specific date or version is specified, the Design-Builder shall use the most recent version of such publication that existed at the time the Proposal was submitted.

101.3.3 Cross References. Cross-references are sometimes provided in the Contract. (Example: “For a related provision, see Section ___”). These cross references are provided for convenience only and are not a comprehensive listing of related Sections. The lack of a cross reference or an incorrect reference shall not be interpreted as indicating that there are no related provisions and does not relieve the parties of the obligation to read the Contract as a whole.

101.3.4 Headings and Tables of Contents. All headings, titles, and tables of contents are for convenience only. They do not control interpretation and do not relieve the parties of the

obligation to read the Proposal Documents or Contract as a whole. For example, requirements shown under the heading “Design Requirements” that impact construction shall have all the force and effect as if shown under the heading “Construction Requirements” and vice versa.

101.3.5 Calculated Dimensions Control. In the case of discrepancy between calculated dimensions and scaled dimensions, calculated dimensions shall control.

101.3.6 Priority of Conflicting Contract Documents. If the Design-Builder discovers any ambiguity, error, omission, conflict, or discrepancy (“ambiguity, etc.”) related to the Contract Documents that may significantly affect the cost, quality, Conformity, or timeliness of the Work, the Design-Builder must comply with Subsection 104.3.3 - Duty to Notify Department If Ambiguities Discovered. In the case of ambiguity, etc., the following components of the Contract Documents shall control in the following descending order of priority:

- A. Contract Modifications;
- B. Agreement;
- C. Proposal, to the extent that it meets or exceeds the requirements of the other Contract Documents;
- D. Special Provisions;
- E. Project Requirements, as defined in the RFP;
- F. Design-Build General Conditions;
- G. Supplemental Specification (Repair Spec) dated August 18, 2008; and
- H. Standard Specifications.

101.3.7 Overall Intent of Contract Documents. The intent of the Contract Documents is to provide for the design, construction, and completion of the Work described in the Contract in Conformity with the Contract. The Design-Builder shall furnish all design services, supervision, coordination, administration, testing, inspection services, labor, materials, equipment, tools, transportation services, supplies and all incidentals required to complete the Work in accordance with the Contract.

101.3.8 Interrelationships Between SOQ, RFP, Proposal, and Contract. The SOQ is the document submitted by potential Proposers for the purpose of allowing the Department to determine that the Design-Builder, including the Designer and all other Major Participants, are sufficiently qualified and experienced to satisfactorily complete the Work. By executing the Contract, the Design-Builder covenants that all representations in the SOQ are true and accurate to the best of its knowledge and belief and that it will perform the Work in conformity with the SOQ. The SOQ is a Contract Document.

The RFP is the document consisting of the Agreement, Design-Build General Conditions, Project Requirements, and related Appendices that is distributed to short-listed Proposers for the

purposes of transmitting project information to the Proposers, setting forth procedures to be used during the Proposal preparation period, specifying Proposal submittal requirements, establishing the Proposal evaluation process, and specifying procedures and pre-award submittal requirements for award and execution of the Contract.

The Proposal is the submittal by the Design-Builder (then designated a “Proposer”) in response to the RFP. The Proposal represents the Offer by the Design-Builder to perform the Work in accordance with the Contract, its SOQ, and the component of its Proposal known as the Technical Proposal; and for the price submitted in the component of its Proposal known as the Price Proposal. The Proposal is a Contract Document to the extent that it meets or exceeds the requirements of the other Contract Documents. In other words, if the Proposal includes statements that can reasonably be interpreted as offers to provide higher quality items than otherwise required by the Contract or to perform services in addition to those otherwise required, or otherwise contain terms which are more advantageous to the Department than the requirements of the other Contract Documents, the Design-Builder’s obligations hereunder shall include compliance with all such statements, offers and terms. This offer is accepted by the Department upon award of the Contract.

The Contract is the written agreement setting forth the respective rights and obligations of the Department and the Design-Builder from execution of the Contract until the performance of all warranty obligations set forth in the Contract.

101.3.9 Covenants of Good Faith and Fair Dealing. See Section 104 – General Rights and Responsibilities.

101.3.10 Figures Written in Words Control. In the event of a conflict between figures, including prices written out in words and figures given in numerical form, the written words shall control.

101.3.11 Severability. The invalidity or unenforceability of any particular provision or part thereof of these Design-Build General Conditions shall not affect the remainder of said provision or any other provisions, and these Design-Build General Conditions shall be construed in all respects as if such invalid or unenforceable provision or part thereof had been omitted.

101.3.12 Successors and Assigns. The Department and the Design-Builder respectively bind themselves, their partners, successors, assigns and legal representatives to the other party to this Agreement and to partners, successors, assigns of such other party with respect to covenants of this Contract.

101.3.13 Survival. The Design-Builder representations and warranties, the dispute resolution provisions, and all other provisions which by their inherent character should survive termination of the Contract and Final Acceptance, shall survive the termination of the Contract and Final Acceptance.

SECTION 102 - PROPOSAL SUBMISSION AND CONTENT REQUIREMENTS

Scope of Section. This Section includes requirements related to eligibility to submit a Proposal, and Proposal pre-submittal and submittal requirements.

The procurement process for the Project is authorized by Title 23, MRSA §753-A. The Department will Award the Contract (if at all) to the responsive and responsible Proposer offering a Proposal meeting the requirements of the RFP, and which is determined by the Department to provide the best value to the Department in accordance with the two-step Best-Value Procurement Process described herein. The Department will accept Proposals only from Proposers who have been advised by the Department in writing that they have been short-listed to submit Proposals.

102.1 Eligibility to Submit a Proposal.

102.1.1 Basic Requirements. To be eligible to submit a Proposal, prospective Proposers must:

- A. have been short-listed by the Department after submitting an SOQ in the first step of the two-step Best-Value Procurement Process,
- B. not have been debarred or suspended from contracting with the State of Maine, and
- C. not be in default with respect to any outstanding contract with the Department, unless the Department grants written permission to submit a Proposal despite such default.

102.1.2 Suspension From Proposing. The Department may suspend the right of a Proposer to submit Proposals on construction projects being developed by the Department's Bureau of Project Development for up to two years pursuant to Department's "Rules Regarding Suspension From Bidding".

102.1.3 Debarment. The Department may debar a Proposer from Proposing, subcontracting, or being employed in any capacity regarding any Project administered by the Department pursuant to "Rules Regarding Debarment of Contractors," Maine Department of Transportation Register 17-229, Chapter 102 (October 2, 1985).

102.1.4 Conflict of Interest. A person or entity entering into this Contract may not have any financial or other interest, other than the performance of the Contract, in the Project or in its outcome.

- A. This prohibition includes, without limitation,
 - 1. any agreement with, or other interest involving, third parties who have an interest in the outcome of the Project that is the subject of the Contract;

2. any agreement providing incentives or guarantees of future work on the Project or related matters; and
 3. any interest in real property acquired for the Project unless such real property interest is openly disclosed to the Department before the person or entity entered into the Contract.
- B. This section prohibits all conflicts of interest both at the time the contracting party enters into a Contract and during the life of the Contract.
- C. This section prohibits situations involving an actual conflict of interest and those creating an appearance of a conflict of interest. The Department may waive this prohibition or impose curative modifications on the scope of any Contract between the person or entity and MaineDOT to eliminate the conflict or the appearance of a conflict.
- D. A Design-Builder involved in the preparation of information that shall be used or considered in evaluations under the National Environmental Policy Act shall, by virtue of signing the Contract, attest that Design-Builder
1. has no financial or other interest in, or commitment for, any future contract related to the design or construction of the Project or any of its alternatives,
 2. has no financial or other interest in said Project or its alternatives, or any part thereof, and
 3. has no other interest which, under applicable law, would prohibit the selection of said Design-Builder to prepare an Environmental Assessment, Environmental Impact Statement, or other environmental documents for the project.
- E. All determinations made under this section shall be left at the sole discretion of the Department.

102.2 Pre-Submittal Requirements for an RFP.

102.2.1 Designation of Proposer Representative. Each Proposer shall provide the Department with the name and address of a representative or key contact person to receive documents, notices, and Amendments hereunder. Each Proposer shall notify Department of any changes to the representative or address for any notices or Amendments to be sent to the Proposer by the Department. Failure to so identify a representative in writing may result in the Proposer failing to receive Amendments or other important communications from Department, for which the Department will not be responsible.

102.2.2 Examinations of Documents, Site and Other Information.

102.2.2.1 Responsibilities of Proposers. Before submitting a Proposal, the Proposer is responsible for the following:

- A. Proposers shall obtain and examine all documents included in the RFP. The RFP will be issued to Proposers in electronic format
- B. Proposers shall examine all information provided or referenced in the RFP.
- C. Proposers shall examine the Site(s) of Work and make other examinations and investigations that are needed to make the Proposer fully aware of the conditions that would be encountered in performing the Work. As a result of such review, inspection, examination and other activities, the Design-Builder is familiar with and accepts the physical requirements of the Work, including:
 - 1. The nature and location of the Work;
 - 2. The general and local conditions which can affect the Work or its cost, including:
 - (a) conditions bearing upon acquisition, transportation, disposal, handling, and storage of materials;
 - (b) the availability of labor, materials, water, electric power, and roads;
 - (c) uncertainties of weather, river stages, tides, or similar physical conditions at the site;
 - (d) the conformation and condition of the ground;
 - (e) the character of equipment and facilities needed preliminary to and during Work performance; and,
 - (f) the site biological hazards and associated physical hazards.
 - 3. The character, quality, and quantity of surface and subsurface materials or obstacles to be encountered insofar as this information is reasonably ascertainable from an inspection of the Work site (including material sites) and review and interpretation of reference information included in the RFP; and
 - 4. The adequacy of time allowed for the completion of the physical Work.
- D. Proposers shall communicate with the Department as provided in Subsection 102.2.3 – Communication Before Proposal Opening. For a related provision, see Subsection 102.3.2.3 - Effects of Signing and Submission of Proposals.

- E. Proposers shall also be solely responsible for investigating any and all conditions that may in any way affect the amount or nature of its Proposal or the performance of the Work if Proposer enters into the Contract with the Department. The Technical Proposal Submission Form (Form A) includes an acknowledgment that the Proposer has received and reviewed all materials posted thereon. Failure of the Proposer to so examine and inform itself shall be at the Proposer's sole risk, and no relief for error or omission will be provided by the Department.

102.2.3 Communication Before Proposal Opening.

102.2.3.1 Questions From Proposers. Proposers shall direct questions, including requests for explanations or interpretation, in writing to the Contract Representative designated in the Project Requirements. Any such request regarding the RFP or the Project must be submitted in writing to the Contract Representative no later than the deadline for questions set forth in the Project Requirements, provided that requests in connection with an Amendment must arrive no later than five (5) Days after issuance of the Amendment. Each Proposer must make itself available to the Department to discuss any matters it submits to the Department under this Section. For a related provision, see Subsection 102.2.3.3 - RFP Amendments.

102.2.3.2 Proposer's Duty To Notify Department If Ambiguities Discovered. During the preparation of the Proposal, Proposers shall not take advantage of any ambiguity, error, omission, conflict, or discrepancy ("ambiguity, etc.") contained in the RFP, Reference Documents, site conditions, or any other information that may significantly affect the cost, quality, Conformity, or timeliness of the Work. If a Proposer discovers any such ambiguity, etc., it must notify the Contract Representative immediately in writing.

Requests for clarification or interpretation must specifically reference the section and page number of the RFP at issue, unless such request is of general application. Requests shall be faxed to (207) 624-3431, using the Request for Information transmittal sheet included in Appendix B to this RFP. Requests shall be clearly marked with the Project Name and Identification Number in the Subject field of the fax, with Attention to the Contract Representative referenced in the Project Documents. Phone requests will not be accepted. Responses to written questions received will be provided to all Proposers. A final set of questions and answers will be compiled and distributed to all Proposers prior to the Proposal Due Date. If the Department determines, in its sole discretion, that such interpretation or clarification requires a change in the RFP Documents, the Department will prepare and issue an Amendment.

Inquiries shall not go to any Department staff other than the Contract Representative, or to any Department consultant. The Department has no duty to respond to any such inquiries, and the Department will not be responsible for any responses from any other source than the Contract Representative. Furthermore, the Department will not be bound by, and Proposer shall not rely on, any oral communication or representation regarding the RFP Documents, or any written communication except to the extent that it is an Amendment to this RFP and is not superseded by a later Amendment to this RFP.

102.2.3.3 RFP Amendments. The Department reserves the right to revise the RFP Documents. Such revisions, if any, shall be announced by Amendments. Amendments to the RFP will be e-mailed to each Proposer and posted on the Project website. If any Amendment includes changes significantly impacting this RFP, as determined in the Department's reasonable discretion, the Department may set a new Proposal Due Date. The announcement of such new date, if any, shall be included in the Amendment. In any event, the Proposal Due Date shall not occur within five (5) Days after the issuance of the last Amendment. Proposer must expressly acknowledge in its Technical Proposal Submission Form (Form A) receipt of all Amendments. Failure to acknowledge receipt of all Amendments shall cause the Proposal to be deemed non-responsive to this RFP and be rejected without further evaluation. The Department reserves the right to hold group or one-on-one meetings with each Proposer to discuss any Amendments or response to requests for clarifications.

102.2.3.4 Changes in Proposer's Organization. If a Proposer wishes to change its organization and business structure from that described in the SOQ submitted by Proposer in response to the Department's RFQ, the Proposer shall obtain written approval of the change from the Department prior to submitting its Proposal. This includes any changes in the form of organization of Proposer and Major Participants (including additions, deletions, and reorganization). Any such request shall be addressed to the Contract Representative at the address set forth in the Project Requirements, accompanied by the information specified for such entities or individuals in the RFQ. The Department is under no obligation to approve such requests and may approve or disapprove a portion of the request or the entire request at its sole discretion.

102.2.3.5 Ex Parte Communications. During the Request for Proposals process and continuing until award of the Contract or cancellation of this RFP, no Proposer shall have any ex parte communications regarding the RFP Documents with the Department's staff, including any identified member of the RFP evaluation committee or consultant hired to assist with the development of the RFP Documents, except for communications expressly permitted by the RFP Documents. The Department will have the right to disqualify any Proposer engaging in such prohibited communications, and may withdraw its short-listing of the Proposer.

102.3 Proposal Submittal Requirements.

102.3.1 Submittal of Proposals.

102.3.1.1 Location and Time. Proposals must be received at the location and time specified in the Project Requirements.

102.3.1.2 Separate Packages. The Proposal shall be submitted in separate sealed packages as specified in the Project Requirements. Proposals received after the time due will be rejected without consideration or evaluation.

102.3.2 Proposal Format and Content.

102.3.2.1 Format. The Technical Proposal shall contain concise written material and drawings that enable a clear understanding and evaluation of both the capabilities of the Proposer and the characteristics and benefits of the Proposal. Legibility, clarity, and

completeness of the technical approach are essential. Proposers shall organize the Technical Proposal so that the Department can easily separate and evaluate each criterion in the order shown in the Project Requirements.

102.3.2.2 Content. To assist the Proposers in preparing Proposals, the required contents of, as well as forms required for, the Proposal are listed in the Project Requirements.

102.3.2.3 Proposal Guaranty. Proposals must be accompanied by a Proposal Guaranty that complies with all the requirements of this the RFP, unless noted otherwise in this the RFP.

The Proposal Guaranty must be:

- A. in the amount specified in the Project Requirements portion of the RFP;
- B. made payable to the “Treasurer – State of Maine”; and
- C. one of the following types: a Bond Conforming to the next paragraph, a cashier’s check, a certified check, or a United States Postal money order.

Bonds must:

- A. be issued by an insurance company licensed or approved by the State of Maine, Department of Business Regulation, Bureau of Insurance, to do business in the State of Maine;
- B. be properly signed by the Design-Builder (as Principal) and a duly authorized representative of the insurance company referenced above, and
- C. not contain any significant variations from the Department’s Proposal Guaranty Form as determined in the sole discretion of the Department.

102.3.2.4 Effects of Signing and Submission of Proposals. Each Proposal shall be executed on behalf of the Proposer by its authorized representative(s). The signing of the Technical Proposal Submission Form (Form A) and the delivery of a Proposal represents (a) an offer by the Proposer to perform the Work for the Price submitted in the Price Proposal, within the time(s) specified and in accordance with all provisions of the Contract Documents and (b) the Proposer’s agreement to all of the provisions of the RFP and Contract governing requirements and procedures applicable through execution of the Agreement.

By so signing the above referenced Technical Proposal Submission Form and by delivering the Proposal, the Proposer makes the following affirmative representations.

- A. The Proposer has reviewed all documents and undertaken all investigations that could significantly impact the cost, timeliness, quality, or performance of the Work. Specifically, the Proposer has:

1. carefully examined the RFP and Contract Documents and all documents referenced therein,
 2. carefully examined all available reports and data related to subsurface conditions,
 3. become familiar with all applicable Laws,
 4. visited the Site and undertaken field and site investigation, and
 5. correlated the information obtained from the above examinations and investigations.
- B. The Proposer has given the Department written notice of all errors, omissions, or discrepancies in the RFP and/or Contract Documents.
- C. The Proposer has determined that the RFP and Contract are generally sufficient to convey an understanding of all terms and conditions that could significantly impact the cost, timeliness, quality, or performance of the Work.
- D. The Proposer certifies all federally required certifications as set forth in Appendix A to the Design-Build General Conditions.

102.3.2.5 Withdrawal of Proposals Before the Time Specified for Submission of Proposals. A Proposer may withdraw a Proposal after Delivery, provided the request for such withdrawal is made in writing or in person before the time set for Submission of Proposals in the RFP. The Proposer may revise and resubmit a Proposal so withdrawn before the time specified for Submission of Proposals.

102.4 Alternative Technical Concepts (ATCs). As identified in the Project Requirements, the Department will use the ATC process described below to provide Proposers with the opportunity to propose changes to the Project Requirements that are equal or better in quality or effect as determined by the Department in its sole discretion.

All ATCs will be confidential between the Department and the Proposer submitting ATCs and will remain confidential throughout the proposal process until the public opening of the Technical Scores and the Price Proposals. Proposers who violate this confidentiality requirement will be disqualified and not allowed to submit a Proposal. ATCs shall be limited to project requirements other than those listed in the Technical Proposal Responsive Requirements identified in the Project Requirements.

102.4.1 Submittal of ATCs. No ATCs will be accepted prior to issuance of the final RFP. ATCs must be submitted to the Contract Representative by the time specified on the date specified in the Project Requirements. Each ATC submittal shall include five (5) individually bound copies and shall include the following:

- A. Description: A detailed description and schematic drawings of the configuration of the ATC or other appropriate descriptive information (including, if appropriate,

product details [i.e., specifications, construction tolerances, special provisions] and a traffic operational analysis);

- B. Usage: Where and how the ATC would be used on the Project;
- C. Deviations: References to requirements of the RFP documents that are inconsistent with the proposed ATC, an explanation of the nature of the deviations from said requirements, and a request for Approval of such deviations;
- D. Analysis: An analysis justifying use of the ATC and why the deviations from the requirements of the RFP documents should be allowed;
- E. Impacts: Discussion of potential impacts on vehicular and pedestrian traffic, environmental impacts identified on appropriate environmental documents, community impact, safety and life-cycle Project impacts, and infrastructure costs (including impacts on the cost of repair and maintenance);
- F. History: A detailed description of other projects where the ATC has been used, the success of such usage, and names and telephone numbers of project owners that can confirm such statements; and
- G. Risks: A description of added risks to the Department and other Persons associated with implementing the ATC.

102.4.2 Department's Review of ATCs. The Department will review each ATC submitted. If an ATC is summarily approved or not approved, the Department's comments will inform the Proposer that its technical concept appears to be generally acceptable, or the Department will identify areas in which the approach appears to be incompatible with the Project Requirements. If the Department needs more information to determine whether or not the ATC will be approved or not approved, the Department will submit written questions to the Proposer and/or request a one-on-one meeting in order to better understand the details of the ATC. The Department may conditionally approve an ATC based on required revisions to a portion or portions of the ATC.

The Department will make one of the following determinations with respect to each properly submitted ATC:

- A. The ATC is approved.
- B. The ATC is not approved.
- C. The ATC is not approved in its present form, but is approved subject to satisfaction, in the Department's sole judgment, of specified conditions.
- D. The submittal does not qualify as an ATC, but may be included in the Proposal without an ATC (i.e., the concept complies with the RFP requirements).

- E. The submittal does not qualify as an ATC and shall not be included in the Proposal.
- F. Decision on the ATC is pending receipt of additional information and/or one-on-one meeting.

Approval of an ATC will constitute a change in the specific requirements of the Contract Documents associated with the approved ATC. Should the Design-Builder be unable to obtain required approvals for any ATC incorporated into the Contract Documents, or if the concept otherwise proves to be infeasible, the Design-Builder will be required to conform to the original RFP requirements. Each Proposer, by submittal of its Proposal, acknowledges that the opportunity to submit ATCs was offered to all Proposers, and waives any right to object to the Department's determinations regarding acceptability of ATCs.

102.4.3 Incorporation of ATCs into Proposal. A Proposer may incorporate zero, one, or more pre-approved ATCs into its Proposal, including conditionally approved ATCs. If the Department responded to an ATC by identifying conditions to approval, the Proposer may not incorporate such ATC into its Proposal unless all conditions have been met. Copies of the Department's ATC approval letters for each incorporated ATC shall be included in the Proposal as specified in the Project Requirements. Proposals with or without ATCs will be evaluated against the same technical evaluation factors, and the inclusion of an ATC, including an ATC that provides technical enhancements, may or may not receive a higher technical rating.

The Proposal Price must reflect all incorporated ATCs. Except for incorporating approved ATCs, the Proposal shall not otherwise contain exceptions to or deviations from the requirements of the RFP Documents.

SECTION 103 - EVALUATION OF PROPOSALS, AND AWARD AND EXECUTION OF CONTRACT

Scope of Section. This Section includes requirements related to the Escrow of Proposal Documents, the Evaluation of Proposals, the Determination of Proposal responsiveness, and the Award and Execution of the Contract. The Department intends to select the Proposer that offers the best value to the Department, considering price and technical factors. The intent of the Department in this evaluation process is to create a fair and uniform basis for the evaluation of the Proposals in accordance with the State's legislation under Title 23, MRSA §753-A governing this procurement.

103.1 Escrow of Proposal Documents.

103.1.1 Delivery of Price Proposals to Document Depository Facility. A Department representative will deliver all Price Proposal envelopes unopened to a banking institution or other document storage facility, to be placed in escrow.

103.1.2 Duration of Escrow. The Price Proposals will remain in escrow until completion of the scoring process for the Technical Proposals as described in Subsection 103.2.2 – Technical Proposal Evaluation. Proposers shall not be allowed access to the Price Proposals under any circumstances.

103.1.3 Release of Price Proposals from Escrow. Upon completion of the scoring of all Technical Proposals, the escrow agent shall be authorized to release all Price Proposals upon delivery to the escrow agent of a sworn statement from the Scoring Administrator stating that said scoring is complete. Price Proposals will be opened as described in Section 103.3 – Price Proposal Opening.

103.1.4 Cost and Escrow Instruction. The cost of the escrow document storage facility will be borne by the Department. The Department will provide escrow instructions to the document facility consistent with this Section 103.1 – Escrow of Proposal Documents.

103.1.5 Escrowed Proposal Documents (EPDs) for the Apparent Successful Proposer. The Apparent Successful Proposer shall, within ten (10) Days of receiving the Letter of Intent to Award, assemble and deliver documentation (the “EPDs”) containing information regarding the Proposer's assumptions made in determining the scope of work and calculating the Price Proposal and meeting all requirements of Section 103.3 – Price Proposal Opening. The Proposer shall submit its EPDs in hard copy and shall also provide electronic copies. The EPDs shall include detailed information as required by these Design-Build General Requirements, including information from all Subcontractors identified in the Proposal and any other potential subcontractors who provided data upon which the Proposal is based.

103.1.6 The Department's Acknowledgment. The Department acknowledges that the Proposer considers that the EPDs constitute trade secrets or proprietary information. This acknowledgment is based upon Department's understanding that the information contained in the EPDs is not known outside each Proposer's business, is known only to a limited extent and by a limited number of employees of Proposer, is safeguarded while in Proposer's possession, and may be valuable to Proposer's construction strategies, assumptions and intended means, methods

and techniques of design and construction. Except as set forth in the Contract or as required by applicable Law, the Department acknowledges that the EPDs will remain in the possession of the Escrow Agent at all times and will at no time be received by, or become the property of, the Department.

103.2 Evaluation of Technical Proposals. Technical Proposals will be evaluated using a two-step process by the Department's Technical Proposal Responsiveness Committee and the Department's Technical Proposal Scoring Committee. Committee members will be appointed by the Chief Engineer.

The Technical Proposal Responsiveness Committee will consist of technical persons from within the Department and outside of the Department, in accordance with Title 23, MRSA, Section §753-A – Design-Build Contracts. The Technical Proposal Scoring Committee will consist of technical and nontechnical persons. The Department reserves the right to make Committee member substitutions at its discretion.

First, the Technical Proposal Responsiveness Committee will examine Proposals in accordance with Subsection 103.2.1 – Responsiveness Evaluation and make a determination as to whether each Technical Proposal is responsive. Second, responsive Technical Proposals will be scored as specified in Subsection 103.2.2 – Technical Proposal Evaluation.

103.2.1 Responsiveness Evaluation. The Technical Proposal Responsiveness Committee will determine whether or not Technical Proposals are responsive and communicate said determination to the Contract Representative.

Within ten (10) Days of the date of submittal of Proposals, the Contract Representative will send by certified mail, return receipt requested, by overnight mail, by courier, or by fax with confirmed receipt, a written "Notice of Technical Proposal Responsiveness" to all Proposers that submitted Proposals. The Notice shall state, as applicable, that:

- A. as of the date of said Notice, the Technical Proposal is responsive;
- B. the Technical Proposal fails to comply with the Technical Proposal Responsiveness Requirements set forth in the Project Requirements that must be cured within five (5) Days; or
- C. the Technical Proposal contains Non-curable Technical Proposal Defects as provided in 103.2.1.1 and is rejected as non-responsive.

Said Notice may consist of more than one communication in order to allow Proposers more time to cure defects. The Technical Proposal shall be considered finally submitted upon expiration of the responsiveness evaluation.

Proposals considered responsive pursuant to this Section may still be rejected as non-responsive at a later date if the Proposer fails to satisfy such additional responsiveness requirements as are specified elsewhere in this Section.

103.2.1.1 Non-curable Technical Proposal Defects. The Department will reject Proposals as non-responsive if any one of the following occurs:

- A. The Technical Proposal is not properly delivered.
- B. The Department has substantial evidence of collusion by the Proposers.
- C. The Proposer adds any provision reserving the right to accept or reject an Award or a Contract.
- D. The Proposer fails to provide a completed and signed Form A.
- E. The Proposer fails to cure the Technical Proposal Responsiveness Requirements as set forth in the Project Requirements.

103.2.1.2 Curable Technical Proposal Defects. Proposers must cure, to the satisfaction of the Department, all Curable Technical Proposal Defects identified in the Notice of Technical Proposal Responsiveness within five (5) Days of the date of receipt of such Notice. Failure to so cure all such Curable Technical Proposal Defects will result in forfeiture of Proposer's Proposal Guaranty and forfeiture of any claim to the Stipend. Curable Technical Proposal Defects include, but are not limited to, the following:

- A. The Proposer fails to provide all the requested forms, excluding Form A;
- B. The Proposer fails to meet all of the Technical Proposal Responsiveness Requirements as outlined in the Project Requirements; and/or
- C. The Proposer fails to indicate the Proposer's choice where the RFP clearly require a choice.

103.2.2 Technical Proposal Evaluation. Each responsive Technical Proposal will be interpreted and evaluated based on the level of commitment provided by the Proposer. Tentative commitments will be given no consideration. For example, phrases such as "we may" or "we are considering" will be given no consideration in the evaluation process since they do not indicate a firm commitment.

103.2.2.1 Scoring Administrator. The Department's Chief Engineer will appoint a Scoring Administrator (and an optional Assistant Scoring Administrator) to chair and facilitate the Technical Proposal Scoring Committee described in Subsection 103.2.2.2 – Technical Proposal Scoring Committee. The Scoring Administrator will not score any technical criteria items ("Item"). The Scoring Administrator shall conduct the scoring procedure as specified in Subsection 103.2.2.3 – Scoresheets. At the end of the scoring procedure, the Scoring Administrator will supply the Final Score for each Technical Proposal at the public opening of Price Proposals and Scores.

103.2.2.2 Technical Proposal Scoring Committee. Each Item will be scored by four (4) to eight (8) Committee members who are knowledgeable in that particular area. The Department reserves the right to change scoring assignments to better match the Items with

Committee expertise. The Items to be scored and allocation of total points by Item is contained in the Project Requirements.

103.2.2.3 Scoresheets. The Scoresheets identify the technical criteria items, factors that will be considered in the scoring of each Item attached as Exhibit A, raw score definitions, and maximum points allocated to that Item. This information serves two purposes:

- A. it provides Proposers with guidance regarding what is important to the Department and other stakeholders, and
- B. it will provide guidance to scorers during the Scoring Procedure. The factors listed are not necessarily in priority order and no inference of relative importance is intended.

The Raw Score Definitions for Items are as follows:

- A. Minimum Percent (___%) - Percentage as stated in the Project Requirements. The Technical Proposal provides minimally acceptable information regarding the Item, and the Technical Proposal is acceptable relative to the Item. This score indicates a minimally acceptable level of effort and features for a project of this scope and magnitude.
- B. One Hundred Percent (100%) - The Technical Proposal provides all pertinent information regarding the Item in a manner that is easily understood, and the Technical Proposal is exceptional relative to the Item. This score indicates that all practical means to address the intent of the Item have been included in the Technical Proposal.

103.2.2.4 Scoring Procedure. The entire scoring procedure, including Committee meetings, scoring materials, and member identities, will be strictly confidential until after the public opening of Price Proposals and scores. The Scoring Administrator and Committee members will be required to certify in writing that they have no conflicts of interest and that they will strictly adhere to the procedure herein described.

The Committee will meet first to receive an overview of the process, ground rules, and Technical Proposal materials pertaining to their scoring assignments. All subsequent meetings will be specific to a Scoring Item and will only be attended by the Scoring Administrator (or the Assistant Scoring Administrator) and members assigned to score that Item. These meetings will serve as a forum to discuss the strengths and weaknesses of each Technical Proposal relative to the Item, but no discussion of scoring values will be allowed.

After thorough discussion, each Scorer will privately complete their draft Scoresheet for that Item and turn it in to the Scoring Administrator. The Scoring Administrator will compile a summary of initial scores and supporting comments, and provide a copy of the summary to each Scorer if the standard deviation of the initial scores is greater than three (3). The summary will not identify which Scorer provided which scores and comments. The Scorers will regroup, either at the same meeting or at a later meeting, to discuss the Item and initial scores/comments in an attempt to achieve a greater degree of consensus. The Scorers will

privately complete their final Scoresheet and turn it in to the Scoring Administrator. A Scorer may or may not change their score from the first round. The Scoring Administrator may conduct additional iterations of this process if more discussion appears desirable. If the standard deviation of the initial scores is three (3) or less, the initial scores will become the final scores, and the Scorers will not regroup or receive a copy of the summary of scores.

This process will be utilized for each Item, after which the Administrator will calculate the average score for each Item. The summation of average scores for each Item will be the Technical Proposal's final score.

103.2.2.5 Notice of Score. The Final Scores will be known only to the Scoring Administrator and/or the Assistant Scoring Administrator until the public opening of Price Proposals. A Scoring Summary will be available at the public opening, and the Department will provide a copy by mail or fax to Proposers upon request.

103.2.2.6 Review of Scores. After Price Proposal Opening, any of the Proposers may review the Scoring Administrator's materials, including draft and final Scoresheets and summaries of initial scores and comments.

103.2.2.7 Requests for Clarification, Oral Presentations, and Discussions. The Department may issue one or more requests for clarification to the individual Proposers. The Department may also schedule oral presentations and/or discussion meetings with all Proposers on a one-on-one basis for the purpose of enhancing the Department's understanding of the Proposals and obtaining clarifications of the terms contained in the Proposals. The Department may at any time request additional information or clarification from the Proposer or may request the Proposer to verify or certify certain aspects of its Proposal. The scope, length, and topics to be addressed shall be prescribed by, and subject to the discretion of, the Department. At the conclusion of this process, Proposers shall be required to submit written confirmation of any new information and clarifications provided during an oral presentation. If required, oral presentations shall be scheduled at a later date. Upon receipt of requested clarifications and additional information as described above, if any, the Proposals will be re-evaluated to factor in the clarifications and additional information.

103.3 Price Proposal Opening. Unless changed by Amendments, the Price Proposals will be opened and the Lump Sum Prices will be read publicly by the Department at the location, time, and date specified in the Project Requirements. Proposers, their authorized agents, and other interested parties are invited to attend.

The public reading of the price and computation of overall Best-Value ratings at the opening does not constitute a final determination by the Department of whether the Price Proposal is responsive. The Department may refuse to read Price Proposals that are obviously non-responsive.

103.3.1 Price Proposal Responsiveness.

103.3.1.1 Non-Curable Price Proposal Defects. The Department will reject Price Proposals as non-responsive for any of the following reasons:

- A. The Proposer failed to properly deliver the Price Proposal;
- B. The Proposer failed to provide a completed and signed Form D;
- C. The Proposer failed to submit a Proposal Guaranty conforming to the Proposal Requirements;
- D. The Price Proposal contains any provision reserving the right to accept or reject an Award or a Contract or otherwise contains any unauthorized, conditional, or alternate bidding language; or
- E. The Proposer fails to comply with any other provision in the Project Requirements that the RFP expressly indicates will cause Price Proposal rejection.

103.3.1.2 Curable Price Proposal Defects. The Proposer must cure, to the satisfaction of the Department, all Curable Price Proposal Defects within twenty-four (24) hours of the commencement of the Price Proposal Opening. Failure to cure all Curable Price Proposal Defects within said twenty-four (24) hour time period will result in forfeiture of Proposer's Proposal Guaranty and any claim to the Stipend. Curable Price Proposal Defects include, but are not limited to, the following:

- A. Failure to provide properly completed DBE Price Proposal Form(s) or failure of the information in such form(s) to correspond precisely with the information in the "Technical Proposal DBE Compliance Review Form(s)" submitted with the Proposer's Technical Proposal; and
- B. Failure to submit prices or signatures in ink or other non-erasable substance.

103.3.2 Computation of Best-Value Rating. At the Price Proposal Opening, the Department will publicly announce the score of each Proposer's Technical Proposal. The Department will publicly divide each Proposer's Price by the corresponding technical score of each Proposer. The result shall be the overall Best-Value rating for each Proposal.

The formula for calculating the overall Best-Value rating is:

$$BV = \frac{P}{TS}$$

Where:

BV = Overall Best-Value

P = Lump Sum Contract Price

TS = Technical Score

103.3.3 Determination of Apparent Successful Proposer. The Proposal with the lowest overall Best-Value rating will be the Apparent Successful Proposal and its Proposer the Apparent

Successful Proposer, contingent on the Department's determination that the Price Proposal meets the conditions for Award.

103.3.3.1 Return of Proposal Guaranty. Proposal Guaranties will be returned within five (5) Days following Price Proposal Opening, except that the Proposal Guaranties from the two lowest overall Best-Value ratings from responsible Proposers will be retained until Contract Execution or rejection of all Proposals.

103.4 Award of Contract. Within twenty (20) Days of the opening of the Price Proposals, the Department will mail or fax (with confirmation of receipt) a Letter of Intent to Award the Contract to the Apparent Successful Proposer and letters indicating such intent to all other Proposers. Two (2) originals of the Agreement shall be included with said Letter. Said Letter shall also indicate that the Department will award the Contract to Apparent Successful Proposer if said Proposer fulfills the conditions stated in the letter.

As a condition to award, the successful Proposer shall deliver the following required documents to the Department concurrently with the executed copies of the Contract:

- A. Evidence of authorization to execute the Contract, in the form of a certified resolution of the governing body of the Proposer expressly stating such body's authorization to execute the Contract and, if the Proposer is a partnership, joint venture, unincorporated association or limited liability company, of the governing bodies of the entity's partners or members;
- B. The insurance policies, endorsements and/or certificates required under Section 110 – Indemnification, Bonding, and Insurance;
- C. A Performance Bond in the form attached as Form F issued by the Surety listed in the Proposal, or an equivalent surety meeting the requirements stated in Section 110.2 – Bonding of the Design-Build General Conditions;
- D. A Payment Bond in the form attached as Form G issued by the Surety listed in the Proposal, or an equivalent surety meeting the requirements stated in Section 110.2 – Bonding;
- E. Evidence of Availability of a Warranty Bond;
- F. A written opinion from counsel for the Design-Builder, which counsel shall be approved by the Department (which may be in-house or outside counsel, provided that the enforceability opinion shall be provided by an attorney licensed in the State of Maine), in substantially the form attached as Form H; and
- G. A written appointment of a resident agent for service of process, if required by Subsection 103.4.4 – Non-Resident Proposer Requirements.

103.4.1 Apparent Successful Proposer's Obligations. Within ten (10) Days of receipt of the Letter of Intent to Award, the Apparent Successful Proposer must comply with all the provisions of this Section and all additional conditions stated in the letter.

103.4.1.1 Fulfillment of Award Conditions. The Apparent Successful Proposer must fulfill all conditions set forth in the Letter of Intent to Award. Unless otherwise stated in said Letter, all items shall be delivered to the Contract Representative.

103.4.1.2 Execution of the Contract. The Apparent Successful Proposer must properly sign both originals of the Agreement and properly deliver them to the Contract Representative.

103.4.1.3 Extension of Time to Fulfill Conditions and Execute Contract. The Apparent Successful Proposer may request in writing and the Department may provide for an extension of time for fulfillment of Award Conditions and execution of the Contract by the Apparent Successful Proposer for good cause shown, provided said extension is in the best interests of the Department.

103.4.1.4 Failure to Fulfill Conditions or Execute Contract. Unless extended pursuant to Subsection 103.4.1.3 – Extension of Time to Fulfill Conditions and Execute Contract, failure of the Apparent Successful Proposer to fulfill all conditions set forth in the Letter of Intent to Award or to execute the Contract will result in cancellation of the conditional award to the Apparent Successful Proposer and the forfeiture of the Proposal Guaranty and any claim to a Stipend or other compensation.

The Department shall then take any action that is in the best interest of the State as determined by the Department including awarding the Contract to the Proposer with the next lowest overall Best-Value rating or rejecting all Proposals and readvertising the Work. Any Proposer failing to fulfill the Award Conditions or execute the Contract shall be prohibited from submitting a new proposal for the same work in the event that the Work is readvertised.

103.4.2 Final Determination of Proposal Responsiveness/Award of Contract. Within ten (10) Days of receipt of all the items identified in the Letter of Intent to Award and the executed original Agreements, the Department will make a final determination of whether the Proposal of the Apparent Successful Proposer is responsive and, if responsive, award the Contract to the Apparent Successful Proposer. Award may be made after said ten (10) Day period provided in this Section if the Apparent Successful Proposer agrees to accept such Award. The Apparent Successful Proposer will be notified of Award in writing. Until Award of the Contract, the Department reserves the right to reject any or all Proposals, to waive technicalities, or to advertise for new proposals, if the best interests of the Department will be promoted.

103.4.3 Execution of Contract by the Department. The Department will execute the Agreement within ten (10) Days of the Award of the Contract, but in no event prior to such execution by the Apparent Successful Proposer. In the event the Department fails to execute the Agreement within the required ten (10) Days, the Apparent Successful Proposer shall have the right to withdraw its Proposal without loss of the Proposal Guaranty.

After execution by the Commissioner, the two duplicate originals of the Contract shall be distributed as follows: one to be kept by the Department, and the second to be returned to the Proposer. The Contract shall be effective upon execution of the Agreement by the Department.

Promptly following award, the Department will deliver one set of execution copies of the Contract to the selected Proposer.

103.4.4 Non-Resident Proposer Requirements. If the Apparent Successful Proposer is a Non-Resident Proposer, the Apparent Successful Proposer shall file with the Department at the time of the execution of the Contract Documents a written appointment of a resident attorney of the State of Maine having a place of business within the State. The appointment shall:

- A. set forth the resident attorney's place of residence, place of business, telephone number, and fax number;
- B. name said attorney to be the true and lawful attorney of the Non-Resident Proposer;
- C. include a provision that the Proposer agrees that any lawful process which is served on said attorney shall be of the same legal force and validity as if served on the Proposer; and
- D. the appointment shall continue in force as long as any potential liability in any way related to the Work remains outstanding, including during warranty period(s) or until the Department receives written notice of a change of appointment conforming to this paragraph. The appointment shall be filed in the office of the Secretary of State of Maine.

Service of such process shall be made by leaving a copy of the process in the hands or in the office of the resident attorney. The Proposer hereby expressly agrees that such service shall be effective upon the Proposer, as if service were made in accordance with Rule 4 of the Maine Rule of Civil Procedure, and further expressly waives any and all defenses regarding service of process under Rule 12 of said Civil Rules or otherwise.

103.5 Provisions Regarding Unsuccessful Proposers.

103.5.1 Unsuccessful Proposer Status. Unless notified in writing by the Department to the contrary, Proposers shall be Unsuccessful Proposers as of the earliest of the following dates:

- A. the date of receiving a Notice of Technical Proposal Responsiveness stating that said Technical Proposal contained Non-Curable Technical Proposal Defects;
- B. upon failure to cure Curable Technical Proposal Defects by the expiration of the cure period provided for; or
- C. if not determined to be the Apparent Successful Proposer at the Price Proposal Opening, forty-eight (48) hours after the commencement of the said Opening. Proposers shall be conclusively presumed to have notice of its status as "unsuccessful" at the times specified in the preceding sentence.

103.5.2 Payment of Stipend. Any Proposer submitting a responsive Proposal that is not deemed overall Best-Value will be entitled to receive a stipend from the Department within

twenty (20) Days of the execution of the Contract or the rejection of Proposals, as applicable. If the Department, at its discretion, decides not to award to the Apparent Successful Proposer, then the Apparent Successful Proposer is also entitled to receive the stipend, except as stated under Subsection 103.4.1.4.

In consideration for the Department's agreement to make payment pursuant to the Stipend Agreement, each Proposer receiving a stipend agrees that the Department will be entitled to use all work product (including patents, concepts, ideas, technology, techniques, methods, processes, drawings, reports, plans and specifications) contained in its Proposal, without any further compensation or consideration to the Proposer.

In accepting the stipend, each Proposer acknowledges that the Department will have the right to inform the successful Proposer, after award, regarding the technical contents of all Proposals for which stipends were accepted, and that the Contract or the Project may incorporate the above-described work product or concepts based thereon, even though the due date for the payment will occur after the award date for the Contract. Furthermore, upon the unsuccessful Proposer's acceptance of payment hereunder, this right shall extend to allow Department to use such work product in connection with projects other than the Project, as may be appropriate. However, the Department acknowledges that the use of any of the work product by the Department or the Design-Builder is at the sole risk and discretion of the Department and the Design-Builder, and shall in no way be deemed to confer liability on the unsuccessful Proposer.

Unsuccessful Proposers may elect to refuse payment of the stipend, and retain any rights to their Proposal and proprietary information contained therein that can be defended under Maine Law.

103.5.3 Return of EPDs. If the Department at its discretion, decides not to award to the Apparent Successful Proposer, or the Apparent Successful Proposer is deemed non-responsive, then the EPDs submitted will be returned unopened.

103.5.4 Protest Procedure.

103.5.4.1 Notice of Protest. To protest a determination that a Proposer is unsuccessful (and thus to protest the award of the Contract), Proposers must file a written Notice of Protest with the Commissioner within five (5) Days of the time the protesting Proposer is considered to be unsuccessful as defined in Subsection 103.5.1 – Unsuccessful Proposer Status.

At a minimum, the Notice of Protest must contain:

- A. The specific legal and/or factual errors that the Proposer alleges were made by the Department in determining that the Proposer was unsuccessful;
- B. The specific relief sought;
- C. A request to submit additional written evidence and arguments, (if desired); and
- D. A designation of counsel or any other party that will be representing the parties in the protest (if any).

The Department will transmit a copy of said Notice of Protest to the Apparent Successful Proposer within twenty-four (24) hours of receipt.

103.5.4.2 Written Evidence and Arguments. Within ten (10) Days of the filing of a Notice of Protest conforming to Subsection 103.5.4.1 – Notice of Protest, the protesting Proposer, the Contract Representative, and the Apparent Successful Proposer must file with the Commissioner (or such other person as the Commissioner may designate in writing):

- A. all additional written evidence and arguments that the parties desire the Commissioner to consider in evaluating the protest, and
- B. a request for a hearing, if desired. No hearing will be held unless such written evidence and arguments are submitted by the party requesting a hearing. Within said time period, copies of all such material submitted must be delivered to said other parties.

103.5.4.3 Hearing. If held, the hearing will take place within ten (10) Days of the filing of written evidence and arguments by the protesting Proposer, the Contract Representative, or the Apparent Successful Proposer, whichever occurs later, at a time and place determined by the Commissioner. The parties agree to accept twenty-four (24) hour telephone notice of such hearing. The protesting Proposer, the Apparent Successful Proposer, and the Contract Representative or their designees shall each be afforded an opportunity to be heard by the Commissioner or his designee.

103.5.4.4 Decision. Within ten (10) Days of (a) the close of the hearing (if held), or (b) the last filing of written evidence and arguments (if no hearing is held), the Commissioner or his designee(s) will:

- A. In writing, affirm the determination that the protesting Proposer is unsuccessful;
- B. In writing, revise, amend, or reverse said determination; or
- C. Take no action, which shall be considered an affirmation of said determination.

If protesting Proposers desire additional consideration, protesting Proposers may deliver a written request for a DRB proceeding as authorized under Title 23, MRSA §753-A.

103.5.5 Debriefing. Within thirty (30) Days after execution and delivery of the Contract, the Department will be available for an oral debriefing session upon written request made to the Contract Representative by an authorized representative of an unsuccessful Proposer. No comparisons to Proposals submitted by other Proposers will be made during the debriefing session.

103.6 The Department's Rights. The Department may investigate the Proposal of any Proposer under consideration, may require confirmation of information furnished by a Proposer, may require additional information from a Proposer concerning its Proposal, and may require additional evidence of qualifications to perform the work described in this RFP. The Department reserves the right, in its sole discretion, to:

- A. Investigate the qualifications of any Proposer.
- B. Require confirmation of information furnished by a Proposer.
- C. Require additional evidence of qualifications to perform the Work.
- D. Reject any or all of the Proposals without further obligation or reimbursement to Proposers (except as expressly set forth in Subsection 103.5.2 – Payment of Stipend).
- E. Issue Amendments to this RFP, the RFP Documents, and the RFP process. Amendments to this RFP shall be circulated to all short-listed teams in advance of the Proposal Due Date and, subject to Subsection 102.2.3.3 – RFP Amendments, the Department may extend the Proposal Due Date if such modifications are deemed by the Department to be material and substantive.
- F. Cancel or withdraw the RFP, or any part hereof.
- G. Issue a new request for final proposals for the Project.
- H. Appoint evaluation committees to review Proposals, make recommendations to the Department’s Board and seek the assistance of outside technical experts and consultants in Proposal evaluation.
- I. Revise and modify, at any time before the Proposal Due Date, the factors it will consider in evaluating Proposals and to otherwise revise or expand its evaluation methodology as set forth herein. If such revisions or modifications are made, the Department will circulate an Amendment to all short-listed Proposers setting forth the changes to the evaluation criteria or methodology. The Department may extend the Proposal Due Date if such changes are deemed by the Department to be material and substantive.
- J. Hold meetings, conduct discussions, and exchange correspondence with the Proposers to seek an improved understanding and evaluation of the Proposals.
- K. Seek or obtain data from any source that has the potential to improve the understanding and evaluation of the Proposals.
- L. Disclose information contained in the Proposals to the public as described herein unless Proposer can defend it as proprietary information under Maine Law.
- M. Approve or disapprove changes to a Proposer’s organization, key personnel, or named Subcontractors.
- N. Waive or require correction of minor deficiencies, informalities, and irregularities in the Proposals; or seek and receive clarifications to a Proposal.

- O. Disqualify any team that changes its Proposal after submission without Department approval.
- P. Not issue a NTCW after execution of the Contract.
- Q. Exercise any other right reserved or afforded to the Department under this RFP.

This RFP does not commit the Department to enter into a contract or proceed with the procurement described herein. Except as expressly set forth in Subsection 103.5.2 – Payment of Stipend, no unsuccessful Proposer shall be entitled to reimbursement for any of its costs in connection with this RFP. All of such costs shall be borne solely by the Proposer.

In no event will the Department be bound by, or liable for, any obligations with respect to the Work until such time (if at all) as the Contract has been awarded and, then, only to the extent set forth in the Contract.

SECTION 104 - GENERAL RIGHTS AND RESPONSIBILITIES

Scope of Section. This Section sets forth certain rights and responsibilities of the Department and the Design-Builder after the execution of the Contract that are generally applicable to all Design-Build Contracts. This Section is not all inclusive and additional rights and responsibilities are set forth elsewhere in this RFP or the Contract.

104.1 General.

104.1.1 Basic Roles of the Parties. The Design-Builder has the authority and responsibility to perform all Work in Conformity with the Contract. The Department has the authority and responsibility to assure that the Design-Builder does so.

104.1.2 Joint Covenants of Good Faith and Fairness. This Contract imposes an obligation of good faith and fair dealing on both parties in the execution, performance, interpretation, and enforcement of the Contract. With a positive commitment to honesty and integrity, the Design-Builder and the Department agree to function within all applicable laws, statutes, regulations, and Contract provisions; avoid hindering each other's performance; fulfill all obligations diligently; and cooperate in achievement of the intent of the Contract.

104.2 Department's General Authority and Responsibilities.

104.2.1 Furnishing of Right-of-Way. See the Project Requirements for information regarding Right-of-Way.

104.2.2 Furnishing of Permits. Except as provided otherwise in the Contract, the Department will furnish Permits required to perform the Work within the Project Limits. See the Project Requirements for additional information regarding Permits.

104.2.3 Authority of Department Project Manager and Resident. After Contract Execution, the Department Project Manager and/or the Resident have the authority to take all actions needed to assure that the Design-Builder is performing the Work in Conformity with the Contract. Except as provided elsewhere in the Contract, the Department Project Manager or the Resident will decide all questions regarding Work performed, suspension of Work, and the interpretation of the Contract. The Department Project Manager and/or the Resident have the authority to reject Unacceptable or Unauthorized Work and refuse to approve Progress and Final Payments until the Unacceptable or Unauthorized Work is corrected.

104.2.4 Authority of Residents. Residents and other Departmental employees or representatives working for the Department have the authority to make determinations regarding the Conformity of the Work. Unless authorized by the Department Project Manager, Residents are not authorized to alter or waive the provisions of the Contract or to issue instructions contrary to the Contract. They shall not act as a supervisor for the Design-Builder.

104.2.5 Right to Review Design Documents and Inspect Work. The Department may review the Design-Builder's Design Documents, including shop drawings, product data, samples,

and other submittals, but only for conformance with the Contract Documents. The Department's review does not constitute acceptance of the design. The Department will not have control over and will not be responsible for the acts or omissions of the Design-Builder, the Design-Builder's licensed design professionals, Subcontractors, or any other persons performing any portion of the Work for the Design-Builder.

The Department has the authority to inspect all Materials and every detail of the construction of the Work. Such authority includes rejecting Work that does not conform to the Contract Documents. For a related provision, see Subsection 104.3.5 – Duties Regarding Inspection of Work by the Department or Others.

104.2.6 Right to Suspend Work. The Department has the right to suspend any or all Work at any time for any reason. For related provisions, see Subsections 105.4.3 – Maintenance During Suspension of Work and 107.5 – Suspension of Work.

104.2.7 Damage to Project Caused By Uncontrollable Events. All repairs that are required to the Project or temporary Structures because of property damage that is directly caused by an Uncontrollable Event may entitle the Design-Builder to an Equitable Adjustment if the Design-Builder complies with the notification, documentation and procedural requirements set forth in the Contract. Delays resulting from an Uncontrollable Event will be analyzed in accordance with Section 109.3 – Adjustments for Delay. For related provisions, see Sections 101.2 – Definition of Uncontrollable Event, 104.3.10 – Responsibility for Damage to Work, 109.1.1 – Extra Work, 109.3 – Adjustments for Delay, 109.5 – Equitable Adjustments to Compensation, and 109.6 – Contract Modification.

104.2.8 No Personal Liability. The Department's employees and other representatives act solely as representatives of the Department when conducting and exercising authority granted to them under the Contract. Such persons have no liability either personally or as Department employees.

104.3 Design-Builder's General Authority and Responsibilities.

104.3.1 General Duty to Cooperate. The Design-Builder shall cooperate with Departmental personnel, Utility Companies, railroad personnel, marine traffic personnel, regulating agencies with jurisdiction, other firms, municipalities, and the public in every reasonable way possible. For a related provision, see Section 104.4 - Communication and Coordination.

104.3.2 Furnishing of Other Property Rights, Licenses and Permits. The Design-Builder shall acquire, at its sole expense, all property rights outside the Project Limits needed for construction staging, yarding, construction, waste disposal, or other Project-related purpose. The Design-Builder shall also acquire, at its sole expense, all licenses and Permits necessary to perform the Work that are not furnished by the Department. If Right-of-Way is needed for construction, the property rights will be acquired by the Department.

For related provisions, see Subsections 104.2.1 – Furnishing of Right-of-Way, 104.2.2 – Furnishing of Permits, 104.3.11 – Responsibility for Property of Others, and 105.8.2 – Permit Requirements, and additional information regarding Permits in the Project Requirements.

104.3.3 Duty to Notify Department If Ambiguities Discovered. After the Award of a Contract to the Proposer, the Design-Builder is solely responsible for the design work in accordance with the Contract. As such, the Design-Builder has no right to claims for any ambiguity, error, omission, conflict, or discrepancy (“ambiguity, etc.”) contained in the Contract documents. For a related provision, see Subsection 102.2.3.2 – Proposer’s Duty To Notify Department If Ambiguities Discovered.

104.3.4 Workers and Equipment. The Design-Builder shall at all times provide all design professionals, Superintendents, foremen, laborers, inspectors, Subcontractors, subconsultants, Equipment, Materials, and Incidentals needed to perform the Work in Conformance with the Design-Builder’s Schedule of Work and within the Contract Time.

During the course of the Project, if the Design-Builder proposes to replace any of the Key Personnel identified in its Proposal, a written request shall be submitted to the Department that explains the circumstances necessitating the replacement, and that provides the name, experience, and qualifications of the proposed substitute. Upon the Department’s approval, the substitute shall be assigned to the Project. If the Department rejects the substitute, the Design-Builder shall submit the name and qualifications of a second substitute within five (5) Days. Such process shall be repeated until a proposed replacement meets the Department’s approval.

During all hours of on-site construction activity, the Design-Builder shall provide an on-site, competent, English-speaking Project Manager experienced in the type of Work being performed. The Project Manager shall be capable of reading and understanding the Plans and Specifications, providing and receiving communications, and scheduling and coordinating the Work. The Project Manager shall have full authority to manage the Work in accordance with the Contract. Such project management must be provided regardless of the amount of Work being done by Subcontractors.

All persons employed by or through the Design-Builder shall have sufficient skill and experience, and hold the necessary licenses and certifications, to perform the Work properly. The Department may require that the Design-Builder discharge any such person who the Department determines jeopardizes safety of any person or the Project without cost or liability to the Department. If the Department determines that such person’s performance jeopardizes the intent of the Contract otherwise, the Department may, but is not required, to notify the Design-Builder of such a determination. Such notice, or lack thereof, does not affect the Design-Builder’s duties regarding Workers. Upon Receipt of such notice, the Design-Builder shall take any action it determines necessary to fulfill its obligations under the Contract. For related provisions, see Subsections 104.5.4 – Discharge of Subcontractors, 105.1 – Intent of the Contract, and 105.2.3 – Joint Duty Regarding Safety.

104.3.5 Duties Regarding Inspection of Work by the Department or Others.

- A. Safe Access. The Design-Builder shall provide the Department with safe access to all portions of the Work in Conformity with all applicable OSHA requirements. The Design-Builder shall furnish the Department with all information and assistance required to make a detailed inspection. For a related provision, see Subsection 104.2.5 – Right to Inspect Work by the Department or Others.

- B. Inspection By Others. If any other governmental entity, Utility Company, or railroad is authorized to inspect Work, the Design-Builder must provide their representatives with safe access that Conforms to this Section.

104.3.6 Project Records. Upon request by the Department, the Design-Builder or any other person working for the Design-Builder possessing Project Records must provide the Department with copies of Project Records at all reasonable times without cost or liability to the Department. Unless the context clearly indicates otherwise, Project Records are the property of the Department. The Design-Builder must retain Project Records for at least three years after Final Acceptance or for any applicable warranty period, whichever is longer. For related provisions, see Sections 101.2 – Definition of Project Records and 111.1.6 – Design-Builder’s Obligation to Keep Records.

104.3.7 Laws To Be Observed. The Design-Builder shall keep itself informed of and comply with all applicable federal and State laws, rules, regulations, orders, and decrees (“Law”) affecting the Work including all environmental, wage, labor, equal opportunity, safety, patent, copyright, or trademark laws. If provided by Contract, the Design-Builder must also comply with local Law. The Design-Builder indemnifies the Department and holds the Department harmless against any and all claims or liabilities arising from or based upon the violation or alleged violation of any such Law caused directly or indirectly by or through the Design-Builder.

104.3.8 Wage Rates and Labor Laws.

- A. Federal Wage Rates and Labor Laws. Federal wage rates apply, unless expressly stated otherwise by Project Requirements. The classification of construction type and related wage rates by the U.S. Department of Labor will be provided in Appendix A to this RFP. If not provided, the Design-Builder must contact the Department after Award to determine the applicable wage rates in accordance with Subsection 102.2.3.2 – Proposer’s Duty to Notify Department if Ambiguities Discovered. The Design-Builder must pay according to said rates and must otherwise comply with all applicable federal and State labor laws, rules, and regulations.
- B. State Wage Rates and Labor Laws. Maine State wage rates apply only if provided expressly in the Project Requirements. If so provided, the classification of construction type and related wage rates established by the Maine Department of Labor will be set forth in the Appendices. The Design-Builder shall pay according to said rates and shall otherwise comply with all applicable federal and State labor laws, rules, and regulations.

Although federal law provides that the following provision is invalid with respect to federally funded or partially federally funded Contracts (see 23 CFR 635.117), a Maine statute, 26 MRSA §1303, requires that this Contract contain the following provision.

“In the employment of laborers in the construction of public Works, including State Highways, by the State or by persons Contracting therewith for such construction, preference shall first be given to citizens of the State who are

qualified to perform the Work to which the employment relates, and, if they cannot be obtained in sufficient numbers, then to citizens of the United States.”

104.3.9 Patents and Copyrights. The Design-Builder must provide proof of legal agreement with the patentee or Department, if necessary, for use of any of the following: design(s), process(es), device(s), trademark(s), Material(s), and copyright(s). The Design-Builder indemnifies and holds harmless the Department and any affected third party or political subdivision from all claims of infringement that arise from use of any patented or copyrighted item listed above.

104.3.10 Responsibility for Damage to Work. Except as provided in Subsection 104.2.7 – Damage to Project Caused By Uncontrollable Events, the Design-Builder shall bear all risk of loss relating to the Work until Final Acceptance, regardless of cause, including completed Work, temporary Structures, and all other items or Materials not yet incorporated into the Work. For a related provision, see Subsection 110.3.6 – Builders Risk.

The Design-Builder shall, at its sole expense, rebuild, repair, restore, or replace such damaged Work or otherwise make good any losses that arise from such damage (“rebuilding, etc.”). If the Design-Builder fails to promptly commence and continue such rebuilding, etc., the Department may, upon forty-eight (48) hours advance written notice, commence rebuilding, etc. of the damaged property without liability to the Department with its own forces or with Contracted forces and all costs will be deducted from amounts otherwise due the Design-Builder. For the Design-Builder’s responsibilities for the Work after Final Acceptance, see Section 106.3 – Warranty Provisions.

104.3.11 Responsibility for Property of Others. The Design-Builder shall not enter private property outside the Project Limits without first obtaining permission from the Owners.

The Design-Builder shall be responsible for all damage to public or private property of any kind resulting from any act, omission, neglect, or misconduct of the Design-Builder until Final Acceptance. The preceding sentence includes damage to vehicles passing through the Work area.

The Design-Builder shall, at its sole expense, rebuild, repair, restore, or replace such damaged property or otherwise make good any losses that arise from such damage (“rebuilding, etc.”). If the Design-Builder fails to commence and continue such rebuilding, etc. in a timely manner, the Department may, upon forty-eight (48) hours advance written notice, commence rebuilding, etc. of the damaged property without liability to the Department with its own forces or with contracted forces, and all costs will be deducted from amounts otherwise due the Design-Builder.

104.3.12 Forest Protection and Laws. The Design-Builder shall obey all laws and regulations that govern Work within or adjacent to State or National Forests, keep the Project site orderly and clean, obtain all required Permits, prevent and assist with the suppression of forest fires, and cooperate with authorized forestry officials.

Pursuant to State law, the sale of harvested forest products must be reported to the Maine Forest Service at the end of each year. The Design-Builder is hereby designated as the Department's agent for reporting of any such harvesting.

104.3.13 Materials and Items Found On the Project. With the Department's approval, the Design-Builder may use suitable excavated Material in the Work. Except for Material used for riprap, stone ditch protection, and loam, the Design-Builder shall replace such excavated Material with other approved Material and properly compact it. The Design-Builder shall obtain written permission from the Department before performing any excavation outside the Project Limits.

Unless expressly provided otherwise, the Design-Builder shall remove and assume ownership of all incidental Structures and Materials to be removed such as guardrail, Drainage pipe, Culverts, curbing, Bridges, and other manufactured Materials. Utility Facilities, traffic control devices, and lights, together with all supporting Structures, are excluded from the provisions of this Subsection 104.3.13. The cost of removal of such Structures and Materials is Incidental to the Contract.

104.3.14 Interpretation and Interpolation. The Design-Builder is responsible for all interpretations and interpolations made from information provided in the RFP Documents and Contract, including data and test results related to location, survey, hydrology, hydraulics, soils, ledge quality, existing Structures, Environmental Information, and Geotechnical Information. For related provisions, see Subsections 102.2.2 – Examination of Documents, Site, and Other Information; 102.2.3.2 – Proposer's Duty To Notify Department If Ambiguities Discovered; 104.3.3 – Duty to Notify Department If Ambiguities Discovered; and 105.6 – Design and Construction Surveying.

104.4 Communication and Coordination. The Design-Builder will prepare minutes of all meetings and distribute them to all attendees. Any requests to revise the minutes must be made to the Design-Builder within five (5) Days of Receipt. These minutes will constitute the final record of the meeting.

104.4.1 Partnering.

- A. Definition, Purpose, and Applicability. Partnering is a process of voluntary structured communication between the Department, the Design-Builder, its principal Subcontractors and suppliers, and other Project stakeholders for the purpose of improving efficiency and minimizing Disputes. Partnering, including the establishment of a partnership charter, does not in any way waive, alter, or otherwise affect any provision of the Contract. For a related provision, see Subsection 111.1.3 – Relationship to Partnering.

Participation in Partnering is voluntary; either party may elect to not participate in Partnering for any reason. The associated costs of Partnering will be agreed to mutually and shared equally.

- B. Initial Partnering Workshop. If the Design-Builder and the Department elect to participate in Partnering, representatives of both parties will arrange a facilitated

initial Partnering Workshop, which shall be held before the start of on-site construction. The Department Project Manager and/or the Resident and the Project Manager will determine Workshop attendees, the facilitator, agenda, duration, and location. Key Project level supervisory personnel, corporate/State level management personnel, and key Project personnel of the Design-Builder's principal Subcontractors and suppliers shall attend. Project design Engineers, FHWA, local government representatives, environmental regulators, emergency service personnel, Utility Companies, impacted business and/or landowners, and other stakeholders may also be invited to attend. The product of the initial Partnering Workshop will be a partnership charter. This charter will include mutually agreed upon Project goals and communication escalation procedures.

- C. Follow-Up Workshops. The Design-Builder and the Department may agree to hold follow-up Partnering Workshops periodically throughout the duration of the Contract.

104.4.2 Pre-activity Meetings. The Design-Builder shall prepare an agenda and arrange pre-activity meetings prior to the commencement of all major work activities including design. Attendees must be shown on the agenda and agreed to by the Department. The Design-Builder shall notify all attendees forty-eight (48) hours in advance of the meeting.

104.4.3 Preconstruction Conference. After the Contract has been executed and before the start of on-site construction by the Design-Builder, the Design-Builder will schedule a preconstruction conference that must be attended by the Department and the Project Manager. Others may be invited to attend, including Subcontractors, FHWA, local government representatives, environmental regulators, public relations firms, emergency service personnel, Utility Companies, municipal officials, impacted business representatives and/or landowners, or other Project stakeholders. Meeting agenda shall be established by the Design-Builder and agreed to by the Department prior to the meeting.

104.4.4 Progress Meetings. Except as provided otherwise in this Subsection 104.4.4 – Progress Meetings shall be held at regular intervals, but at least monthly, throughout the duration of the Contract. The Design-Builder shall establish and the Department will agree upon the agenda for each Progress Meeting. All personnel of the Department and the Design-Builder who have significant information relevant to agenda items shall attend. Others may be invited to attend including Subcontractors, FHWA, municipal officials, environmental regulators, emergency service personnel, Utility Companies, impacted landowners, impacted business representatives, public relations firms, or other Project stakeholders.

In lieu of a Progress Meeting, the Department Project Manager and the Project Manager shall exchange written communication by letter, fax, or e-mail before or on the scheduled Progress Meeting date that indicates there is no need for the meeting because the Work is on schedule, compensation is current, communication is ongoing, and there are no significant outstanding or anticipated issues, disputes, or claims. The Project Manager's written communication shall also contain a description of:

- A. progress of the Project since the last Progress Meeting or communication in lieu thereof, and
- B. expected activities before the next scheduled Progress Meeting.

104.4.5 Early Negotiation.

- A. Notice Required. When the Design-Builder becomes aware of facts or circumstances (“Issue”) that may cause the Design-Builder to seek additional compensation, time, or any other change in Contract requirements, then the Design-Builder shall notify the Department within forty-eight (48) hours and before commencing any part of the Work relating to the Issue. The notice must describe the basic nature and extent of the Issue.

Such notice may be verbal only if confirmed in writing in one of the two following ways:

1. If a Progress Meeting is held within ten (10) Days of the date that the Issue became known, such Notice may be confirmed with an entry in the Progress Meeting minutes. Such entry must describe the basic nature and extent of the Issue.
2. Otherwise, the Design-Builder shall confirm a verbal notice by Delivering to the Resident, within ten (10) Days of the date the Issue arose, a written Notice that describes the basic nature and extent of the Issue.

The written notice or confirmation will be known as a “Notice of Issue for Consideration”. The Design-Builder will not be entitled to any additional compensation, time, or any other change to Contract requirements without a timely Notice of Issue for Consideration.

- B. Negotiation. When the Department receives the Notice of an Issue for Consideration Conforming to Subsection 104.4.5.A – Early Negotiation, Notice Required, the Department and the Design-Builder will negotiate in good faith to attempt to resolve the Issue. Any resolution will be noted in the Progress Meeting minutes or confirmed otherwise in writing by the Department. Any changes to the Contract that affect compensation, time, quality, or other Contract requirements shall be by written Contract Modification as provided by Section 109.6 – Contract Modifications.

For related provisions, see Sections 109.3 – Adjustments for Delay and 109.5 – Equitable Adjustments to Compensation.

- C. Additional Consideration. If negotiation fails to resolve the Issue within forty-five (45) Days of the date the Department receives the Notice of Issue for Consideration, and if the Design-Builder desires additional consideration by the Department, then the Design-Builder must comply with Subsection 111.2.2 –

Detailed Notice of Dispute and all other requirements of Section 111 – Resolution of Disputes.

104.4.6 Utility Coordination.

- A. Pre-construction Utility Conference. A pre-construction utility meeting will be held to coordinate the Work of the Design-Builder and the Work of affected Utility Companies. Usually this meeting will be held on the same day as and immediately before the pre-construction conference provided by Subsection 104.4.3 – Pre-construction Conference but, in any event, will be held before the start of on-site construction by the Design-Builder that affects Utility Facilities. The Department, the Design-Builder’s Superintendent, Subcontractors as required, and a representative of each affected Utility Company will attend. The Design-Builder shall prepare minutes of the pre-construction utility meeting and distribute them to all attendees. Any requests to revise the minutes must be made to the Design-Builder within five (5) Days of distribution. These minutes will constitute the final record of the meeting. For a related provision, see Subsection 104.4.3 – Pre-construction Conference(s).
- B. Utilities Within Right-of-Way. Except as otherwise provided in the Project Requirements, all Utility Facilities of all Utility Companies within the Right-of-Way will be relocated and adjusted as provided in the Contract by and at the expense of the affected Utility Company, provided, however, that the Design-Builder is responsible for scheduling its Work in accordance with the time allowed for utility relocation as provided in the Contract. Utility relocation Work shall not proceed without authorization from the Department.
- C. Design-Builder’s Responsibilities.
 - 1. The Design-Builder must exercise every reasonable precaution to prevent damage to Utility Facilities or interruption to utility services known to or discovered by the Design-Builder, whether or not shown on the Plans. Such precautions must include notice to Utility Companies before undertaking Work that could damage Utility Facilities. The Design-Builder must provide each Utility Company with notice at least three (3) Days before the date a Utility Company will have to support any pole.
 - 2. The Design-Builder must take all reasonable precautions to determine the presence of underground Utility Facilities before commencing any excavation Work and must provide all affected Utility Companies with at least seventy-two (72) hour prior notice of the proposed excavation. The Design-Builder must comply with 23 MRSA §3360-A, entitled “Protection of Underground Facilities,” Maine’s “Dig Safe” statute.
 - 3. The Design-Builder must maintain initial markings (spray paint, stakes, etc.) made by the authorized representative of a Utility Company to

indicate the location of underground Utility Facilities and otherwise comply with 23 MRSA §3360-A(4).

4. The Design-Builder must cooperate with Utility Companies in their relocation or operations so that these operations proceed in a logical sequence, minimize duplication of Work, and avoid unnecessary interruptions to utility service.
5. If utility services are interrupted as a result of the Design-Builder's Work, the Design-Builder must promptly notify the appropriate utility company and must cooperate fully in the restoration of service. If service is interrupted, repair Work will be continuous until the service is restored. No Work can be undertaken around fire hydrants until the local fire authority has approved provisions for continued services. Costs for restoration of interrupted utilities caused by the Design-Builder operations shall be borne by the Design-Builder.
6. If blasting occurs on the Project, the Design-Builder must provide each utility company having Utility Facilities that could be damaged by the blast with at least twenty-four (24) hour prior notice that includes the anticipated time of the initial blast.
7. If the Design-Builder observes a Utility Company working within the Project Limits in a manner that (a) obviously violates the MUTCD, the Design-Builder's Traffic Control Plan, or an applicable OSHA requirement or commonly accepted safety practices, and (b) represents a clear and immediate risk of significant bodily injury to any person within the Project Limits, then the Design-Builder must notify the Resident and the Utility Company immediately.
8. The Design-Builder shall give written notice to all public service corporations or officials having charge of publicly or privately owned utilities of its intention to commence operations affecting such utilities at least one week in advance of the commencement of such operations and at that time the Design-Builder shall file a copy of the notice with the Department.
9. Design-Builder shall be responsible for verifying that the utility, as designed and constructed, is compatible with and interfaces properly with the Project. The Design-Builder shall also be responsible for confirming that all appropriate Governmental Approvals have been obtained by each Utility Company that may be performing any utility work and for verifying that such work complies with the requirements of the applicable Governmental Approvals. The Design-Builder shall immediately notify the Department if the Design-Builder has reasonable cause to believe that the Utility Company does not have, or is in violation of any Governmental Approval. If required, the Design-Builder shall provide written

certification that utility relocation has been coordinated with all existing utilities.

10. The Design-Builder shall make diligent efforts to obtain the cooperation of each Utility Company as necessary for the Project. The Design-Builder shall immediately notify the Department if the Design-Builder becomes aware that a Utility Company is not cooperating in providing needed Design-Build Work or approvals. After such notice, the Design-Builder shall continue to diligently seek to obtain the Utility Company's cooperation, and shall assist the Department as reasonably requested by the Department with regard to the problem. The Department agrees to use its reasonable efforts (including taking action to exercise any rights the Department may have with such Utility Company) to assist the Design-Builder in obtaining the cooperation of the Utility Companies, but such assistance shall not be deemed to relieve the Design-Builder of its sole and primary responsibility for the satisfactory compliance of its obligations set forth in the Contract Documents.
11. The Design-Builder shall comply with all applicable Environmental Laws and requirements in performance of the utility work, including those set forth in Project Requirements. The Design-Builder shall be responsible for performance of all environmental mitigation requirements of the Environmental Approvals. The Price Proposal shall include compensation for the Design-Builder's performance of all such mitigation measures.
12. The Design-Builder shall not enter into any agreement with any Utility Company that purports to bind the Department in any way, nor shall any such agreement be deemed to modify the terms of the Contract.
13. The Design-Builder agrees to indemnify, defend, and hold harmless the Department from and against any and all claims or causes of action to the extent arising from any act or omission of the Design-Builder, the Subcontractors or their respective agents, representatives, or employees for failure to comply with this Subsection 104.4.6.

- D. Unforeseeable Utility Relocations. If the Department orders utility adjustments, such adjustments must be in accordance with Subsection 109.2.1 – Differing Site Conditions.

104.4.7 Cooperation With Other Contractors. The Department reserves the right to Contract for, perform, or allow other Work to be performed within or near the Project Limits. The Design-Builder must take all reasonable steps to avoid interfering or hindering such other Work. The Design-Builder must cooperate with Contractors or others performing such other Work as directed by the Department.

If the basic nature and scope of such other Work is provided or referenced in the RFP Documents or is otherwise known or foreseeable to the Design-Builder, then the Design-Builder

assumes all risks and liability associated with such other Work and shall indemnify and hold harmless the Department from all claims related to such other Work that arise from the Design-Builder's acts or omissions.

104.4.8 Coordination with Railroads. The Design-Builder shall;

- A. perform Work within a railroad Right-of-Way without interfering with trains or railroad company traffic and
- B. coordinate all Work crews and the Design-Builder's Schedule of Work to accommodate the railroad company Work.

The Design-Builder shall, at its expense, negotiate and enter into any other agreements with the railroad. See the Project Requirements for more information regarding coordination with the railroad.

104.4.9 Coordination with Marine Traffic. The Design-Builder shall not interfere with free and safe navigation of navigable waters except as provided by permit issued by the US Coast Guard and other applicable regulatory agencies. All Work must comply with all US Coast Guard permit conditions and all applicable Federal regulations affecting navigation.

When the basic nature and scope of marine traffic requirements is provided or referenced in the Project Requirements or is otherwise known or foreseeable to the Design-Builder, then the Design-Builder assumes all risks and liability associated with said requirements and the Design-Builder shall indemnify and hold harmless the Department from all claims related to the maintenance or obstruction of marine traffic that arise from the Design-Builder's acts or omissions.

104.4.10 Coordination of Bridge and/or Highway Closure/Bridge Width Restriction Notification. When a bridge or highway closure or width restriction is allowed by the Contract, prior to a closure or to a bridge width restriction to a single lane less than twelve (12) feet, the Design-Builder shall notify effected public officials, agencies, other entities and the public of the date on which the closure/width restriction will begin and the anticipated duration of the closure/restriction, as indicated below.

A Public Notice shall be published in a local newspaper ten (10) Days prior to and then again the day before, the beginning of the closure/restriction.

The closure/restriction announcement shall be placed on a local radio station during the week preceding commencement of the closure/restriction. The announcement shall run a minimum of three times daily. The closure will also be announced on portable/changeable message signs, placed in approved locations, beginning at least ten (10) Days prior to the closure.

The Design-Builder shall notify the following public officials, agencies, and organizations ten (10) Days prior to, and then again the day before, of the date of the beginning of the closure/restriction and the anticipated length of the closure/restriction. When the bridge or highway is reopened/unrestricted to traffic, the following list will again be notified. The Design-Builder shall provide the Department with documentation that the listed public officials, agencies

and organizations received the notification at least ten (10) Days prior to the closure/restriction or with proof that the notification was mailed fifteen (15) Days prior to the closure/restriction.

- A. Town Officials (Manager or First Selectman)
- B. County Commissioners (If Unorganized Townships)
- C. County Sheriff's Department
- D. Fire Department
- E. Police Department
- F. State Police
- G. Rescue Service
- H. School Department
- I. Post Office
- J. Chamber of Commerce
- K. Any Large Employers
- L. Any Regional Woods-Related Trucking Companies
- M. Mobile or Modular Home Movers, Manufacturers, and Dealers
- N. Department of Motor Vehicle- Commercial Vehicle Center (207-626-8630)
- O. MDOT Maintenance Division Office

All newspaper notices, radio announcements and any notifications will be subject to the approval of the Department and all costs will be considered incidental to the Contract.

104.5 Subcontracting.

104.5.1 Limits on Subcontracting. The Design-Builder shall perform at least thirty percent (30%) of the value of the Work with its own Work force, excluding any percentage performed by Disadvantaged Business Enterprises in satisfaction of specific Contract goals (if any).

The Design-Builder shall not carry the Workers of another recognized Contractor or firm on its payroll or a Subcontractor's payroll. The Design-Builder shall not use any Subcontractors that are debarred from submitting a Proposal by the Federal Government or any agency of the State of Maine.

104.5.2 Design-Builder's Duties Regarding Subcontractors. The Design-Builder is responsible for assuring that its Subcontractors (including design consultants) have sufficient skill and experience, and professional qualifications and licenses, to perform the Work properly and for coordinating and managing its Subcontractors to achieve the intent of the Contract. Except as provided otherwise in this Contract, the Design-Builder waives all claims arising from failure to coordinate and manage its Subcontractors and indemnifies and hold harmless the Department from any such claims. Subcontracting does not alter the Design-Builder's obligations under the Contract. For a related provision, see Section 105.1 – Intent of the Contract.

104.5.3 Documentation Regarding Subcontracting. Within fifteen (15) Days of Contract Execution and before any Work is performed by a Subcontractor, the Design-Builder shall provide the Department with the following:

- A. A list of all Subcontractors, not identified in the Proposal or SOQ, that the Design-Builder anticipates will be providing Work within the Project Limits and a general description of the items of Work that will be performed by each Subcontractor; and
- B. A written certification by the Design-Builder that:
 - 1. no Subcontractors are debarred from bidding by the Federal Government or any agency of the State of Maine, and
 - 2. all subcontracts with Subcontractors contain or incorporate by reference all applicable portions of the Contract including the federal provisions contained in Appendix A to the Design-Build General Conditions, if applicable.

The Design-Builder shall continuously update the list referenced in (A) above and provide it to the Department throughout the duration of the Project.

If requested by the Department, the Design-Builder shall provide the Department with copies of any subcontract or other document that establishes the relationship of the Design-Builder and any Subcontractors. The Design-Builder may omit, remove, or obscure any Unit Prices shown in the copy of the subcontract submitted to the Department.

104.5.4 Discharge of Subcontractors. The Department, upon written notice to the Design-Builder, may require that the Design-Builder discharge any Subcontractor that the Department determines jeopardizes safety of any person or the Project without cost or liability to the Department. If the Department determines that a Subcontractor's performance jeopardizes the intent of the Contract otherwise, the Department may, but is not required, to notify the Design-Builder of such a determination. Such notice, or lack thereof, does not affect the Design-Builder's duties regarding Subcontractors. Upon Receipt of such notice, the Design-Builder shall take any action it determines is necessary to fulfill its obligations under the Contract. For related provisions, see Subsections 104.3.4 – Workers and Equipment, 104.5.2 – Design-Builder's Duties Regarding Subcontractors, 105.1 – Intent of the Contract, and 105.2 – Health and Safety.

104.5.5 Prompt Payment of Subcontractors.

- A. Pay When Paid. The Design-Builder shall pay Subcontractors for all Work satisfactorily performed and invoiced by the Subcontractor no later than twenty (20) Days from the date the Design-Builder receives payment from the Department for such Subcontractor's Work.
- B. Retainage. The Design-Builder shall return to the Subcontractor all retainage withheld from the Subcontractor within twenty (20) Days after the date the Subcontractor's Work is satisfactorily completed. If there is a Delay in such return of retainage, the Subcontractor may pursue all rights it may have under the claims procedure referenced in Subsection 104.5.6 – Subcontractor Claims for Payment.

104.5.6 Subcontractor Claims for Payment. The Design-Builder agrees to notify all Subcontractors of the claim filing procedure contained in 23 MRSA §52-A(2). As provided in this statute, the Department may use retainage to discharge Subcontractor claims.

104.5.7 Flow Down. All subcontracts of the Design-Builder, and all lower tier subcontracts, shall contain or reference all applicable provisions of the Contract, including, but not limited to, all safety, wage, Prompt payment, labor, environmental, equal opportunity, and insurance provisions. The Design-Builder indemnifies and holds harmless the Department against any and all claims or liabilities arising from the failure to include such flow down provisions.

104.5.8 No Third Party Beneficiaries. The Design-Builder and the Department agree that this Contract is not intended to create any third-party beneficiaries or to authorize anyone not a party to the Contract to maintain an action under Contract provisions.

104.5.9 Landscape Subcontractors. The Design-Builder shall retain only Landscape Subcontractors that are certified by the Department's Highway Program.

104.5.10 Warranty and Maintenance Bonds. Warranty and Maintenance Bonds may be required of a Subcontractor for specified items that the Department deems appropriate. Refer to the Project Requirements to determine whether warranty or maintenance bonds are required. The Design-Builder shall provide a copy of said bond to the Department before the performance of any affected on-site Work. Should a Subcontractor be required to provide a Warranty or Maintenance Bond, the Design-Builder hereby authorizes the Department to directly contact the Subcontractor(s) in question and/or its Surety in the event of a failure of the bonded item to perform as specified.

SECTION 105 - GENERAL SCOPE OF WORK

Scope of Section. This Section contains Work requirements that are generally within the scope of all Projects. These include provisions related to design, health and safety, traffic control, maintenance of Work, hauling of Materials and Equipment, construction surveying, plans, Working Drawings, the environment, historic and archeological considerations, equal opportunity and civil rights, and other federal requirements. This Section is not all-inclusive. The scope of these items is often described more specifically and fully elsewhere in the Contract and in other specific items that appear elsewhere.

This Contract is federally funded, unless expressly provided otherwise in the Contract Documents. As a federally funded Contract, it includes all federal requirements set forth in Appendix A to the Design-Build General Conditions.

105.1 Intent of the Contract. The intent of the Contract is to provide for the design, construction, and completion of a functionally complete Project in Conformity with the Contract. The Design-Builder shall furnish all Work to achieve this intent including all Work that may be reasonably inferred to be required from the Contract or from prevailing industry or trade custom, whether or not specifically called for.

105.2 Health and Safety.

105.2.1 Design-Builder's Safety Program. Prior to award, a copy of the Design-Builder's Safety Plan must be on file with the Contracts Section of the Department as a condition of Award. If such program is revised during the Contract Time, the Design-Builder shall provide the updated program to the Department. The Design-Builder shall comply with its safety program and this Section 105.2 – Health and Safety. The Design-Builder shall be responsible for all claims or damages arising from failure to so comply and indemnifies and holds harmless the Department from all claims and damages arising from such non-compliance.

105.2.2 Project Specific Emergency Planning. Unless the Contract provides for closure of an existing facility, the Design-Builder shall ensure that essential police, fire, rescue, and ambulance services have reasonable and timely access to and through the Project Limits. The Design-Builder shall contact all emergency service providers in the area, discuss potential impacts on emergency operations (including water supply for fire suppression), and minimize any negative impacts. Fire hydrants within or adjacent to the Project Limits shall be kept accessible to fire apparatus at all times, unless the fire Department agrees otherwise in writing. For a related provision, see Subsection 104.3.12 – Forest Protection and Laws.

If the nature of the Work involves deep trenching, confined spaces, toxic chemicals, or any other unusual hazards that could require specialized rescue, the Design-Builder shall inform and cooperate with the appropriate fire Department, rescue service, or EMS.

The Design-Builder shall provide the Department with and post and maintain in conspicuous places within the Project Limits, a list containing:

- A. emergency response numbers with the names and telephone numbers (including cellular phone and pager numbers, if applicable) of local ambulance, police, fire, rescue, and hospitals;
- B. emergency response numbers for hazardous Materials spills as required by Subsection 656.3.4(f) – Spill Prevention of the Standard Specifications;
- C. the Design-Builder’s personnel with phone numbers who may be reached in case of emergency; and
- D. the Department’s personnel with phone numbers who may be reached in case of emergency.

105.2.3 Joint Duty Regarding Safety. If the Design-Builder or the Department actually observes any person(s) performing Work in a manner that:

- A. the observing party actually knows is not in compliance with the MUTCD, the Design-Builder’s TCP, an applicable OSHA requirement, or commonly accepted safety practices; and
- B. creates a clear and immediate risk of significant bodily injury to any person, then the observing party shall immediately notify such person(s) working in an unsafe manner and the other party to the Contract.

The Design-Builder and the Department agree to cooperate in eliminating all such unsafe conditions. For related provisions, see Subsections 104.3.4 – Workers and Equipment, 104.4.6 – Utility Coordination, 105.3 – Traffic Control and Management, and 105.4 – Maintenance of Work.

105.2.4 Compliance with Health and Safety Laws. The Design-Builder shall comply with all applicable federal, State, and local laws governing safety, health, and sanitation including all applicable laws and regulations of OSHA including 29 CFR 1910.120 when handling certain hazardous materials.

105.2.5 Safety and Convenience of the Public. The Design-Builder shall provide all safeguards, safety devices, and protective Equipment and take all other action that is necessary to continuously and effectively protect the safety and health of all persons from hazards related to the Work. Such safeguards include providing a sufficient number of security guards.

At all times the Design-Builder shall perform the Work to minimize obstructions to pedestrian, vehicular, railroad, and marine traffic. All temporary pedestrian access ways must comply with the ADA. Footways, gutters, sewers, inlets, and portions of the Highway adjacent to the Work must not be obstructed unless allowed by the Contract.

If the Design-Builder receives notice from the Department that the Design-Builder has failed to comply with the provisions of this Section 105.2 – Health and Safety, the Design-Builder shall remedy such non-compliance immediately. If the Design-Builder fails to do so, the

Department may remedy such non-compliance by any means and deduct the cost of the remedy from amounts otherwise due the Design-Builder.

For related provisions, see Subsections 105.2.3 – Joint Duty Regarding Safety, 105.3 – Traffic Control and Management, and 105.4 – Maintenance of Work.

105.2.6 Use of Explosives.

- A. Standards. When using explosives, the Design-Builder shall use the utmost care to protect life and property. Explosives must be transported, stored, and used in compliance with this Contract, in compliance with all applicable Federal, State, and local laws, rules and regulations, and in accordance with all applicable provisions of the latest version of the Blasters' Handbook published by the International Society of Explosives Engineers (ISEE) of Cleveland, Ohio. In any case, the Design-Builder shall comply with the recommendations contained in Chapter 13 – "Blasting Safety" of said Blasters' Handbook, unless a qualified person conducting the blasting operations for the Design-Builder certifies to the Department in writing that certain provisions of said Chapter 13 are not necessary to protect life and property.
- B. Blasting Zone – Signage and Flaggers. The Design-Builder shall define a blasting zone. When using electric detonators, the blasting zone must allow safe distances from radio transmitters based upon their power output frequency. The blasting zone must include all areas within which people could be injured or property could be damaged by the blast. The Design-Builder shall mark Highways conspicuously at the perimeter of the blasting zone with signs in accordance with MUTCD. If applicable, the Design-Builder shall place signage along railroads and appropriate notice shall be provided to marine traffic. The Design-Builder shall provide a sufficient number of flaggers stationed outside the blasting zone to stop all approaching traffic during blasting operations. The Design-Builder shall comply with the Clean Water Act Section 404 Permit and the Endangered Species Act (ESA) Incidental Take Statement conditions regarding any use of explosives on/for this project.
- C. Other Requirements. The Design-Builder shall provide the following to the Department:
 - 1. a pre-blast survey;
 - 2. a blasting plan and procedure including shot-size composition, frequency, and special problems;
 - 3. seismography readings prior to and during the blast;
 - 4. blasting logs; and
 - 5. general liability insurance coverage covering use of explosives in accordance with Subsection 110.3.2 - Commercial General Liability.

The blasting plan and procedure shall also be submitted to the U. S. Fish and Wildlife Service (USFWS) for review and approval prior to any blasting

activities. This plan must demonstrate that the blasting will not produce overpressure in surrounding waters that exceeds one hundred (100) kPa. This plan shall be submitted at least thirty (30) Days before the anticipated blasting activities to allow for adequate review and approval by USFWS.

Immediately after the blast, the Design-Builder shall remove any debris that is obstructing Highway, pedestrian, railroad, or marine traffic flow. For related provisions, see Subsections 104.4.6.C.6 – Blasting Notice, 104.3.11 – Responsibility for Property of Others, and 110.1 – Indemnification.

105.3 Traffic Control and Management. The Design-Builder shall provide continuous and effective traffic control in compliance with Section 652 – Implementation of Traffic Control Plan of the Standard Specifications.

Paving Notice. The Design-Builder shall plan paving operations so that the Department will have sufficient advance notification to provide the necessary inspection and testing. Sufficient notification will be considered forty-eight (48) hours.

In the event that paving is suspended, the forty-eight (48) hour notification shall be required again before restarting the paving operations unless otherwise agreed by the Resident.

Consistent notification of paving intent without actually paving will result in the following actions:

- A. First offense – verbal warning
- B. Second offense – written warning
- C. Third and subsequent – liquidated damages will be charged for one (1) Calendar Day

105.4 Maintenance of Work.

105.4.1 Maintenance During Construction. The Design-Builder shall maintain the Project and all related Work in a safe and satisfactory condition until Final Acceptance. Such maintenance requires continuous and effective Work conducted daily.

Where existing pavement carries traffic and is removed, the pavement shall be replaced daily with a temporary pavement consisting of a minimum of three inches of acceptable hot or cold bituminous mixture. Cold bituminous mixture shall contain aggregates, asphalt cutbacks, liquefiers, and wetting agents.

Before placing any permanent pavement over backfilled trenches, the edge of the adjoining existing pavement shall be cut even and vertical, and coated with tack coat to form a tight joint between the new and the existing pavements.

If the Design-Builder fails to meet the conditions of this Subsection, the Department will notify the Design-Builder of such failure. The Design-Builder shall remedy such failure within

four (4) hours after receiving such notice. If the Design-Builder fails to do so, the Department may remedy the situation with its own or contracted forces without liability to the Department and all costs will be deducted from amounts otherwise due to the Design-Builder. When the Contract involves placing Material on, or use of previously constructed subgrade, base course, pavement, or structure, the Design-Builder shall maintain such previously constructed Work in a safe and satisfactory condition until Final Acceptance.

105.4.2 Use of Granular Materials. The Department may authorize granular Materials that are capable of supporting traffic and necessary to maintain the specified traffic Lane widths upon the following conditions.

- A. The Design-Builder must prepare the area where the granular Materials are to be used by eliminating objectionable Material and providing adequate temporary Drainage before the granular Material is placed.

105.4.3 Maintenance During Winter Construction. Except as provided in the following paragraph, when the Design-Builder performs Work during winter weather conditions, the Design-Builder shall plow snow from the portions of the Project that carry vehicular or pedestrian traffic, including all Bridges and Sidewalks of Bridges, so as to allow the free and safe flow of such traffic. The State or local governmental agency that would otherwise be responsible for winter maintenance will sand and salt such portions of a Project.

On such portions of a Project that:

- A. have been untouched or left by the Design-Builder in a suitable condition to carry traffic as determined by the Department, and
- B. are unaffected by the construction operations, the State or local governmental agency responsible for winter maintenance will plow, sand, and salt.

105.4.4 Maintenance During Suspension of Work. Prior to suspension, the Design-Builder must make the Project suitable for the free and safe flow of traffic as determined by the Department including covering or removal of signs. To provide space for snow removal, all areas to be used by traffic must be clear for the entire usable Roadway including Shoulders, or curb-to-curb including Sidewalks.

During an approved suspension, the Department will maintain the temporary Roads and Project sections by plowing snow, controlling ice, and patching or retreating the surface. During suspension, the Design-Builder must:

- A. take precautions necessary to prevent damage to the Work and to allow the Department to provide such maintenance (such precautions include providing Drainage and erecting any necessary Structures, signs, or other facilities);
- B. maintain all temporary Structures and traffic control devices; and

- C. continuously maintain, in an acceptable growing condition, all living plant Material, including newly established seedings and soddings furnished under the Contract, and take precautions to protect vegetative growth from damage.

After suspension, the Design-Builder must clean up all evidence of the snow and ice control, including removing excess sand and debris from the Roadway and replacing all base or subbase Material that was lost as a result of maintenance activity.

If a Work suspension is not approved, the Design-Builder will remain responsible for maintaining the Project, including plowing snow, controlling ice, and patching or retreating the surface.

For related provisions, see Subsections 104.2.6 – Right to Suspend Work and 107.5 – Suspension of Work.

105.4.5 Special Detours. When the Project includes Special Detours, the Lump Sum Price shall cover all costs for constructing, repairing, maintaining, and removing the detour or detours, including all temporary Bridges and accessory features and obliteration of the detour Road. The Department will furnish right-of-way for temporary detours or Bridges or both unless indicated otherwise in the RFP.

105.5 Hauling of Materials and Equipment.

105.5.1 General Requirements. Except as provided otherwise and limited in this Contract, the Design-Builder may use any public Road or Bridge for the hauling of Materials and Equipment in legally registered vehicles that are carrying legal loads and operating otherwise in accordance with all applicable State or federal laws. If the Design-Builder violates such laws or the terms of the Contract relating to hauling, the Design-Builder shall, at its expense, repair damage to any Road or Bridge that the Department determines was caused by the Design-Builder to the satisfaction of the governmental entity that maintains the Road or Bridge.

The Design-Builder must abate any dust nuisances caused by such hauling. For a related provision, see Sections 637 – Dust Control and 656 – Temporary Soil Erosion and Water Pollution Control of the Standard Specifications and Supplemental Specification (Repair Spec) dated August 18, 2008.

105.5.2 Bond for Use of Municipal Roads. If the Design-Builder wants to use Roads maintained by a municipality for hauling, the municipality may require the Design-Builder to purchase a bond for each kilometer of traveled length. The face value for such bond shall not exceed \$16,000 per mile. The cost of said bond shall be Incidental to the Contract.

105.5.3 Posted Roads or Bridges. The Design-Builder must comply with all restrictions set forth pursuant to 29-A MRSA §2395, including springtime posting of load restrictions. An overlimit movement permit pursuant to 29-A MRSA §2382 will not relieve the Design-Builder of its obligation to repair damage to such posted Roads or Bridges. For a related provision, see Subsection 104.3.2 – Furnishing of Other Property Rights, Licenses, and Permits.

105.5.4 Narrow Roads. The Design-Builder shall not haul on Roads having a bituminous surface width of less than twenty (20) feet unless there is no practical alternative.

105.5.5 Overlimit Loads.

- A. Within Project Limits. Within the Project Limits, the Design-Builder shall not haul over the base courses, surface course, or accepted subgrades with loads that exceed legal limits, except for Equipment used in grading operations including the preparation of the subgrade.
- B. Outside Project Limits. Outside the Project Limits, the Design-Builder must comply with 29-A MRSA §2382 – Overlimit Movement Permits before moving vehicles or hauling loads in excess of legal limits. The Design-Builder is responsible for all damage caused by the movement of loads in excess of legal limits whether under permit or not.

105.6 Design and Construction Surveying.

105.6.1 Department Provided Services.

105.6.1 Design. The Project Requirements set forth the Department's goals, objectives, and constraints related to the Design-Builder's design of the Work.

The Department may review the Design Documents developed by the Design-Builder, but only for conformance with the Contract. Such action will be taken in a timely manner so as to avoid unreasonable delay in the Design-Builder's progress. The Department's review of the Design Documents does not constitute acceptance of the design nor relieve the Design-Builder of the responsibility for the satisfactory completion of the Work in Conformity with the Contract.

105.6.1.2 Construction Surveying. The Department will provide the Design-Builder with the description and coordinates of vertical and horizontal control points; set by the Department, within the Project Limits, for full construction Projects and other Projects where survey control is necessary. For Projects of 1,500 feet in length, or less: The Department will provide three points. For Projects between 1,500 and 5,000 feet in length: The Department will provide one set of two points at each end of the Project. For Projects in excess of 5,000 feet in length, the Department will provide one set of two points at each end of the Project, plus one additional set of two points for each mile of Project length. For non-full construction projects and other Projects where survey control is not necessary, the Department will not set any control points and, therefore, will not provide description and coordinates of any control points. Upon request of the Design-Builder, the Department will provide the Department's survey data management software and Survey Manual to the Design-Builder or its survey Subcontractor, for the exclusive use on the Department's Projects.

105.6.2 Design-Builder Provided Services.

105.6.2.1 Design. The Design-Builder is solely responsible for completing the design of the Project in Conformity with the Contract, including performing all site investigative work it determines to be necessary to properly design, schedule, and construct the Work.

Before commencing any design or construction Work in an area, the Design-Builder shall review the Basic Configuration for constructability and shall notify the Department in writing of any errors, omissions, inconsistencies or other defects in such design affecting constructability. If, after the start of any design or construction Work, the Design-Builder becomes aware of any such error, omission, inconsistency or other defect in the Basic Configuration, the Design-Builder shall immediately notify the Department of the same.

The Design-Builder shall determine the actual locations, shape and other geometrics of the Project within the constraints set forth in the Project Requirements. Before commencing any Work on a particular aspect of the Project, the Design-Builder shall verify all governing dimensions at the Site, and shall examine all adjoining work that may have an impact on such Work. The Design-Builder shall ensure that the Design Documents and Released for Construction Documents accurately depict all governing and adjoining dimensions and conditions.

105.6.2.2 Construction Surveying. Utilizing the survey information and points provided by the Department, described in Subsection 105.6.1 – Department Provided Services, the Design-Builder is responsible for all other survey Work and construction layout necessary or appropriate to complete the Work. This may include, but not be limited to, reestablishing all points provided by the Department, establishing additional control points, staking out of the Work on the site, running axis lines, providing layout and maintenance of all other lines, grades, or points, and survey quality control to assure accuracy and conformance with the Contract. The Design-Builder is also responsible for providing construction centerline, or close reference points, for all Utility Facilities relocations and adjustments as necessary to complete the Work. When new Work is to connect with existing Structures, the Design-Builder shall verify all dimensions before proceeding with the Work. The Design-Builder shall employ or retain competent Engineering and/or surveying personnel to fulfill these responsibilities. Surveying for design shall be in accordance with this Section and the Project Requirements.

The Design-Builder must notify the Department of any errors or inconsistencies regarding the data and layout provided by the Department as provided by Subsection 104.3.3 – Duty to Notify Department If Ambiguities Discovered.

Survey Quality Control. The Design-Builder is responsible for all construction survey quality control. Construction survey quality control is generally defined as first performing initial field survey layout of the Work and, second, performing an independent check of the initial layout using independent survey data to assure the accuracy of the initial layout; additional iterations of checks may be required if significant discrepancies are discovered in this process. Construction survey layout quality control also requires written documentation of the layout process such that the process can be followed and repeated, if necessary, by an independent survey crew.

105.6.3 Survey Quality Assurance. It is the Department's prerogative to perform construction survey quality assurance. Construction survey quality assurance may, or may not, be performed by the Department. Construction survey quality assurance is generally defined as

an independent check of the construction survey quality control. The construction survey quality assurance process may involve physically checking the Design-Builder's construction survey layout using independent survey data, or may simply involve reviewing the construction survey quality control written documentation. If the Department elects to physically check the Design-Builder's survey layout, the Design-Builder's designated surveyor may be required to be present. The Department will provide a minimum notice of forty-eight (48) hours to the Design-Builder, whenever possible, if the Design-Builder's designated surveyor's presence is required. Any errors discovered through the quality assurance process shall be corrected by the Design-Builder, at no additional cost to the Department.

105.6.4 Boundary Markers. The Design-Builder shall preserve and protect from damage all monuments or other points that mark the boundaries of the Right-of-Way or abutting parcels that are outside the area that must be disturbed to perform the Work. The Design-Builder indemnifies and holds harmless the Department from all claims to reestablish the former location of all such monuments or points including claims arising from 14 MRSA §7554-A. For a related provision, see Subsection 104.3.11 – Responsibility for Property of Others.

105.7 Working Drawings. The Design-Builder shall provide and be responsible for review and approval of Working Drawings. The Design-Builder shall not allow final assembly or fabrication of any structural units until the review is complete.

The Design-Builder shall prepare in writing a review procedure for Working Drawings that shall include the review of drawings and engineering computations for conformance with Design Documents, Specifications, and Contract Documents. The Department will review and concur with the written procedure prior to the Design-Builder reviewing any working drawing. The Department's concurrence of the review procedure shall not relieve the Design-Builder of the responsibility for overall correctness of Working Drawings including engineering and mathematical computations, shop fits, and field connections.

The Department may at any time request documentation from the Design-Builder that the Design-Builder is following the review procedure as submitted to and concurred with by the Department.

When Design-Builder reviews are complete, the Design-Builder shall furnish the Department with one set of reproducible copies of the final Working Drawings prior to assembly fabrication or construction of the element(s) in the working drawings.

The Department reserves the right to review working drawings at any time. Such review shall not relieve the Design-Builder of the responsibility for the Design-Builder review or for the overall correctness of working drawings including engineering and mathematical computations, shop fits, and field connections.

105.8 Environmental Requirements.

105.8.1 Temporary Soil Erosion and Water Pollution Control. The Design-Builder shall provide continuous and effective soil erosion and water pollution control in compliance with Section 656 – Temporary Soil Erosion and Water Pollution Control of the Standard Specifications and Supplemental Specification (Repair Spec) dated August 18, 2008.

105.8.2 Permit Requirements.

- A. Permits Granted To Department. Permits are to be included in or incorporated by reference into the RFP. If Permits are not so included and the Design-Builder is aware the Work will impact a regulated resource such as waterbodies or wetland, the Design-Builder shall notify the Department before Submitting a Proposal. For a related provision, see Subsection 102.2.3.2 – Proposer’s Duty to Notify Department If Ambiguities Discovered.

The Design-Builder is responsible for complying with all Permit conditions, especially the Clean Water Act Section 404 Permit and the Endangered Species Act (ESA) Incidental Take Statement. If the Design-Builder desires to modify or seek interpretation of any permit granted to the Department, it must coordinate any such requests through the Department. Any modifications to permits issued to the Department that may impact the Project’s schedule or costs are at the sole risk of the Design-Builder.

- B. All Other Permits. Except as expressly provided otherwise in the Contract, the Design-Builder, at its expense, shall procure all other environmental or land use Permits, licenses, or other permissions that are necessary or appropriate to perform the Work. At the time of application, the Design-Builder shall provide the Department with notice of all applications for such Permits, licenses, or other permissions, and upon request, a copy of all such applications. For a related provision, see Subsection 104.3.2 – Furnishing of Other Property Rights, Licenses, and Permits.

105.8.3 Wetland and Waterbody Impacts.

- A. General Prohibition. Except as specifically allowed by the Contract, there shall be no permanent or temporary impacts to waterbodies or wetlands identified on the Plans or otherwise known to the Design-Builder. For a related provision, see Subsection 656.3.4 – Water Pollution Control Requirements of the Standard Specifications.
- B. Wetlands Outside Project Limits. If the Design-Builder desires to conduct an activity that can disturb the soil in an area that is outside the Project Limits, but is contiguous or in close proximity to such Limits, the area first must be examined and analyzed by a qualified wetlands specialist in order to determine whether wetlands exist, and if so, to delineate them. The Design-Builder must notify the Department of all such examinations and analyses and the results thereof. Wetlands so delineated must not be impacted unless properly permitted.

Any fill Material generated from this Project shall not be placed, stored, or disposed of in a wetland at an off-site location unless the Design-Builder provides the Department with written evidence that all Permits necessary for such use have been obtained. Such evidence must be signed by the Owner of such site and otherwise acceptable to the Department.

- C. Temporary Structures. Temporary Structures that are in place longer than seven (7) months, temporary Structures that are not pile or similarly supported, or fill that involves temporary or permanent impacts to wetlands are prohibited without proper permitting or modification to existing Permits. Temporary Structures in a waterbody must comply with any Contract provisions regarding Instream Work.

105.8.4 Hazardous Materials. If the Design-Builder encounters any condition that indicates the presence of uncontrolled petroleum or Hazardous Materials, the Design-Builder shall immediately stop Work, notify the Department, treat any such conditions with extreme caution, and secure the area of potential hazard to minimize health risks to workers and the public, and to prevent additional releases of contaminants into the environment. Such conditions include the presence of barrels, tanks, unexpected odors, discoloration of soil or water, an oily sheen on soil or water, excessively hot earth, smoke, or any other condition indicating uncontrolled petroleum or Hazardous Materials. The Design-Builder shall continue Work in other areas of the Project unless otherwise directed by the Department. The Design-Builder shall comply with all federal, State, and local laws concerning the handling, storage, treatment, and disposal of uncontrolled petroleum or Hazardous Material. If the condition meets the definition of a Differing Site Condition under Subsection 109.2.1, the Design-Builder may be eligible for an Equitable Adjustment.

105.8.5 Dredge Spoils (Dredge Materials). Unless otherwise provided in the Contract, dredge spoils shall not be used as fill within the Project Limits. Any use or disposal of dredge spoils must be in accordance with all applicable federal and State laws.

105.8.6 Pit Requirements.

- A. General. Pits that are sources of Material for the Project, including loam fields, shall meet the requirements of this Subsection 105.8.6. The Design-Builder must procure an Agreement from the Owners of such pits stating that the Owners will comply with these requirements. If requested by the Department, the Design-Builder will provide the Department with a copy of such agreement.
- B. Excavation Requirements. Surface Material stripped from the pit shall be stored to allow for restoration of the pit. The Design-Builder shall not excavate from pit faces that are vertical or have an overhang. The Design-Builder must stop excavating within a two (2) horizontal to one (1) vertical slope ten (10) feet inside of a property line of a deposit, even though the Material within the pit may have a steeper angle of repose. The exception may be when an additional agreement is reached with an adjacent property Owner to allow the extension of a pit onto the adjacent property Owner's land. The Design-Builder must ensure that hazards such as steep pit faces and ponds are protected by flattening slopes or by erecting suitable fencing.
- C. Rehabilitation. If the pit is licensed by MDEP or LURC, the Design-Builder shall follow the rehabilitation provisions of said license and provide copies of license upon request. In the absence of such license requirements, pits, including loam fields, shall be rehabilitated as provided below and in Section 657 –

Rehabilitation of Pits of the Standard Specifications and Supplemental Specification (Repair Spec) dated August 18, 2008.

1. Newly opened pits and loam fields from which any Material has been removed for the Project shall be completely rehabilitated, as defined below.
2. Areas of extensions of existing pits from which common borrow, granular borrow, gravel borrow, rock borrow, or loam have been removed for the Project shall be completely rehabilitated.
3. Areas of extensions of existing pits that have become depleted, as defined below, by the removal of other gravel, sand, Aggregate items, or loam for the Project shall be completely rehabilitated.
4. Areas of extensions of pits which have not become depleted by the removal of other gravel, sand, Aggregate items, or loam shall be rehabilitated to the extent of grading the slopes to 1 horizontal to 1 vertical or flatter.

For the purposes of this Subsection 105.8.6, the following definitions apply:

“Completely Rehabilitated” means grading all areas disturbed as a result of the Department Project and treating of the ground surface in accordance with Section 657 – Rehabilitation of Pits of the Standard Specifications and Supplemental Specification (Repair Spec) dated August 18, 2008.

“Depleted” means when the only remaining Material is within ten (10) feet of a property line on a 1 horizontal to a 1 vertical slope or when the character of the Material so radically changes that it can no longer be used as originally anticipated.

105.8.7 Environmental Non-compliance – Remedies and Costs. The Design-Builder shall be in non-compliance if it, or Subcontractors at any tier, fails to comply with the terms of the Contract or, pursuant to Subsection 104.3.7 – Laws To Be Observed, any applicable environmental or land use law or regulation including Project specific permit conditions.

If the Design-Builder is in non-compliance as determined by the Department or regulatory agencies, the Department may, at its discretion:

- A. Withhold all Progress Payments, or any portion thereof, during the period the Design-Builder is in non-compliance;
- B. Remedy such non-compliance using State forces or another contractor and deduct all costs incurred by the Department from Progress Payments (such costs include direct costs, Project Engineering costs, and Design-Builder costs from amounts otherwise due the Design-Builder); and/or

- C. Suspend the Work for cause and without cost or liability to the Department. Said suspension shall continue until the Design-Builder has addressed all non-compliance issues as directed by the Department.

The Design-Builder shall be responsible for any fines and penalties assessed by environmental or land use regulatory agencies due to such non-compliance. Such penalties may be withheld from amounts otherwise due the Design-Builder. For related provisions, see Sections 108.6 – Right to Withhold Payments and 108.10.3 – Amounts Due to the Department.

105.9 Historic and Archeological Considerations. Unless expressly provided otherwise by the Contract, FHWA has determined that the Project will have no effect upon any site of historic or archaeological significance and the Maine State Historic Preservation Office (MSHPO) has concurred with that determination, as identified by the National Historic Preservation Act of 1966 and the Archaeological and Historic Preservation Act of 1974.

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

The first indication of archaeological deposits may be the burial grounds or campsites of Native Americans that reveal the bones of the dead and the people's implements. The first indications of paleontologic deposits may be the exposure of marine fossils or shells found mainly in clay deposits. Indications of deposits of more recent historic interest may be the exposure of dumps in landfill areas, abandoned campfire sites, and building foundations.

Any Delay of the Design-Builder's operations resulting from the above will be analyzed in accordance with Section 109.3 – Adjustments for Delay, except that in no event will such Delay be a Compensable Delay.

The Design-Builder is notified of a Maine statute, 27 MRSA §371, which states that artifacts, specimens, and material, are public property by virtue of having been found on, in, or beneath State controlled lands, and places Ownership of the same in the State of Maine.

105.10 Equal Opportunity and Civil Rights.

105.10.1 Requirements Applicable to Federally Funded Contracts. Unless expressly provided otherwise in the RFP Documents, the provisions contained in Section 2 – Federal Equal Opportunity & Civil Rights Requirements of Appendix A to the Design-Build General Conditions are incorporated into the RFP Documents and Contract.

These provisions include requirements regarding Non-discrimination & Civil Rights – Title VI, Non-discrimination and Affirmative Action – Executive Order 11246, Goals for Employment of Women and Minorities, On-the-Job Training (OJT) Requirements, and Disadvantaged Business Enterprise (DBE) Requirements.

105.10.2 Requirements Applicable to All Contracts. Unless expressly provided otherwise in the RFP Documents, the provisions contained herein apply to this Contract.

- A. Maine Code of Fair Practices and Affirmative Action. The Design-Builder must comply with the provisions of Maine's Code of Fair Practices and Affirmative Action, 5 MRSA §781, et seq., and all regulations promulgated thereunder. This Code, at 5 MRSA §784(2), reads as follows:

“During the performance of this Contract, the Design-Builder agrees as follows:

1. The Contractor will not discriminate against any employee or applicant for employment because of race, color, religious creed, sex, sexual orientation, national origin, ancestry, age, physical handicap, or mental handicap. Such action shall include, but not be limited to, the following: Employment, upgrading, demotions, transfers, recruitment or recruitment advertising; layoffs or terminations; rates of pay or other forms of compensation; and selection for training, including apprenticeship.
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 consideration for employment without regard to race, color, religious creed, sex, sexual orientation, national origin, ancestry, age, physical handicap, or mental handicap.
3. The Contractor will send to each labor union or representative of the Workers with which he has a collective or bargaining Agreement, or other Contract or understanding, whereby he is furnished with labor for the performances of [sic] his Contract, a notice, to be provided by the Contracting Department or agency, advising the said labor union or Workers' representative of the Contractor's commitment under this Section and shall post copies of the notice in conspicuous places available to employees and to applicants for employment.
4. The Contractor will cause the foregoing provisions to be inserted in all Contracts for any Work covered by this Agreement so that such provisions will be binding upon each Subcontractor.”

- B. Maine Human Rights Act. The Design-Builder must comply with the provisions of Maine's Human Rights Act, 5 MRSA §4551, et seq., and all regulations promulgated thereunder. This Act provides, among other things, that it is unlawful discrimination for any employer to fail or refuse to hire or otherwise discriminate against any applicant for employment because of race or color, sex, sexual orientation, physical or mental disability, religion, age, ancestry or national origin, except when based on a bona fide occupational qualification.

- C. EEO Notice to Labor Sources. Pursuant to Maine's Code of Fair Practices and Affirmative Action and federal law, all Design-Builders and Subcontractors engaged in Work on this Project must notify each union and/or the Maine

Department of Labor's Career Centers and Job Service Centers from which the Design-Builder intends to obtain labor, and pledge to provide equal employment opportunities without regard to race, color, religion, sex, sexual orientation, national origin, or disability. This notice must consist of the letter shown below. The letter must be written on the Design-Builder's or Subcontractors letterhead stationery and sent to the applicable union or agency. A list of the Maine Department of Labor's Career Centers and Job Service Centers follows the letterform.

To: _____
(Union, employment agency or employee's representative)

(Address)

Subject: Equal Employment Opportunities on
State Project No.: _____
Federal Aid Project No. _____
Location: _____
Description of Work: _____

For Work related to the construction of the above listed Project to be performed under State Contract No.: _____, I have pledged to provide equal employment opportunities without regard to race, color, religion, sex, national origin, or disability. This pledge applies to all employees and applicants for employment in connection with:

- Hiring, Placement, Upgrading, Transfer or Demotion
- Recruitment, Advertising or Solicitation for Employment
- Treatment During Employment
- Rates of Pay or Other Forms of Compensation
- Selection for Training, Including Apprenticeship
- Layoff or Termination

Inquiries and complaints shall be addressed to:

President's Committee on Equal Employment Opportunity
Washington, D.C. 20425

Signed: _____

(Title)

For: _____
(Design-Builder)

(Address)

(Dated)

MAINE DEPARTMENT OF LABOR CAREER CENTERS:

<u>Augusta</u> 21 Enterprise Drive, Suite 2 109 State House Station Augusta, ME 04333- 0109 624-5120 or 1-800-760-1573 Fax: 287-6236 TTY: 1-800-633-0770	<u>Machias</u> 15 Prescott Drive, Suite 1 Machias, ME 04654 255-1900 or 1-800-292-8929 Fax: 255-4778 TTY: 800-381-9932	<u>Skowhegan</u> 98 North Avenue, Suite 20 Skowhegan, ME 04976-1923 474-4950 or 1-800-760-1572 Fax: 474-4914 TTY: 888-697-2912
<u>Bangor</u> 45 Oak Street, Suite 3 Bangor, ME 04401-7902 561-4050 or 1-888-828-0568 Fax: 561-4066 TTY: 800-498-6711	<u>Madawaska</u> 88 Fox Street, Suite 103 Madawaska, ME 04756-1352 728-6345 or 1-800-432-7881 Fax: 728-4491 TTY-888-697-2877	<u>South Paris</u> (Western Maine Community Action Job Training) 232 Main St South Paris, Maine 04281 743-7763 Fax: 743-8439
<u>Bath</u> 34 Wing Farm Parkway Bath, ME 04530-1515 442-0300 or 1-888-836-3355 Fax: 442-0065 TTY: 888-697-2871	<u>Portland</u> 185 Lancaster Street Portland, ME 04101-2453 771-5627 or 1-877-594-5627 Fax: 822-0221 TTY : 888-817-7113	<u>Springvale</u> 9 Bodwell Court Springvale, ME 04083 324-5460 or 1-800-343-0151 Fax: 324-7069 TTY: 888 697- 2913
<u>Calais</u> One College Drive Calais, ME 04619 454-7551 or 1-800-543-0303 Fax: 454-0349 TTY: 888-697-2883	<u>Presque Isle</u> 66 Spruce Street, Suite 1 Presque Isle, ME 04769-3222 760-6300 or 1-800-635-0357 Fax: 760-6350 TTY: 888-697-2877	<u>Wilton Career Center</u> 865 US Route 2 E Wilton, Maine 04294-6649 645-5800 or 1 800 982-4311 Fax: 645-2093 TTY 888 697- 2895
<u>East Millinocket</u> 1 Dirigo Drive, Suite 2 East Millinocket, ME 04430 746-9608 or 1-800-777-8173 Fax: 746-9439 TTY: 800-498-6711	<u>Rockland</u> 91 Camden Street, Suite 201 Rockland, ME 04841-3424 596-2600 or 1-877-421-7916 Fax: 594-1428 TTY: 888-212-6229	
<u>Lewiston</u> 5 Mollison Way Lewiston, ME 04240-5805 753-9000 or 1-800-741-2991 Fax: 783-5301 TTY: 877-796-9833	<u>Rumford</u> 60 Lowell Street Rumford, ME 04276-2096 364-3738 or 1-877-421-7915 Fax: 369-9315 TTY: 888-313-9400	

- D. Prevention of Sexual Harassment. It is the policy of the Department that all parties have a right to Work in an environment free from harassment, including sexual harassment. Maine State Law and the Department prohibit any and all forms of sexual harassment in the Workplace, on the job site or that which may have an effect on the Work environment.

THEREFORE:

The Design-Builder hereby agrees to the following requirements in order to provide and promote a non-discriminatory Workplace free of sexual harassment.

1. No Design-Builder, supervisor, or employee shall allow repeated, objectionable, or unwanted verbal or physical advances, sexually explicit derogatory Statements, or sexually discriminatory remarks which cause discomfort, humiliation, or are in any way offensive to the recipient, or which interfere with the quality of any employee's Work environment in any way. Furthermore, no one on any job shall threaten or insinuate either explicitly or implicitly that any employee's submission to or rejection of sexual advances will have any effect on that person's employment, job assignment, training, evaluation, promotion, wages, or any other term or condition of employment or future job opportunity. Design-Builders, under Maine State Law, are responsible for ensuring and maintaining a Work environment, which is free from sexual harassment.
2. Any Design-Builder whose employee sexually harasses another employee shall be subject to disciplinary action. Design-Builders who fail to adequately and expeditiously investigate sexual harassment claims will be subject to enforcement proceedings and such sanctions as are authorized by law. Design-Builders are required to provide detailed written reports to the Department when so requested which shall describe the investigation and corrective actions taken by Design-Builders in all instances of sexual harassment allegations.

Design-Builders shall also be responsible for ensuring that no retaliation, reprisal, or intimidation be directed against any complainant or other employee who provides information to any person or agency investigating an allegation or complaint of sexual harassment.

- E. DBE Reporting Requirements. The Design-Builder must submit quarterly reports of actual dollars paid to Disadvantaged Business Enterprises (DBE's) on this Contract to the Department Office of Human Resources by the end of the first week of January, April, July, and October for the period covering the preceding three months considered Federal Fiscal Year quarters. The reports will be submitted directly to the Office of Human Resources on the form provided in the latest version of the DBE Program Manual. The Department may withhold Progress Payments if the Design-Builder fails to submit the report.

- F. Certification of Continuing EEO Efforts. The Design-Builder must certify, to the best of its knowledge and belief, that the Design-Builder has made and will continue to make a good faith effort to comply with all applicable State requirements on equal employment opportunity, non-discrimination, and affirmative action.

105.11 Other Federal Requirements. Unless otherwise provided in the RFP Documents, the Federal requirements contained in Appendix A to the Design-Build General Conditions are hereby incorporated into the Contract.

These provisions include Buy America requirements regarding steel procurement and Standard FHWA Contract Provisions (FHWA-1273) governing Non-discrimination, Non-segregated Facilities; Payment of Predetermined Minimum Wage, Statements and Payrolls; Record of Materials, Supplies, and Labor; Subletting or Assigning the Contract; Safety and Accident Prevention; False Statements Concerning Highway Projects; Implementation of Clean Air Act and Federal Water Pollution Control Act; Certification Regarding Debarment, Suspension, Ineligibility, and Voluntary Exclusion; and Certification Regarding Use of Contract Funds for Lobbying. For a related provision, see Subsection 104.3.8 – Wage Rates and Labor Laws.

SECTION 106 - QUALITY

Scope of Section. This section contains general provisions related to the Quality of work including roles, standards, Materials, Quality Control, Acceptance, Non-conforming Work, and warranties.

106.1 Quality Control during Design. To ensure that the Design-Builder's design fulfills the requirements of the Contract Documents, and the materials, equipment, and all elements of the Design-Builder's Work perform satisfactorily for the purpose intended, the Design-Builder shall provide a Design Quality Management Plan (DQMP) for project design. The plan shall be prepared and submitted for review and concurrence by the Department. The Design-Builder shall at all times abide by the requirements of this plan. The DQMP shall be submitted within twenty (20) Days of NTCW.

The DQMP objective is intended to place the responsibility for the quality of the design on the Design-Builder, facilitate construction by the Design-Builder, and allow the Department to fulfill its responsibilities of exercising due diligence in overseeing the design process and products.

106.1.1 Plan. The Design-Builder shall submit a DQMP that ensures that all Design Documents are prepared in accordance with generally accepted design and engineering practice and meet all requirements of the Contract Documents. The plan shall:

- A. Describe the quality control and assurance procedures the Design-Builder's design plans, specifications, reports, calculations, and other documentation used for construction will follow for the Project and be organized by design discipline (structural, civil, utilities, etc.). These procedures shall specify appropriate quality requirements and control deviations from such requirements.
- B. Describe the QC/QA procedures for preparing and checking all plans, specifications, calculations, reports, and all other documents that designers will prepare for use by the Design-Builder. Independent checking and back checking of these documents shall be in accordance with industry accepted practices. Computer program verification shall also be included. This shall pertain to all designs including Release for Construction packages issued prior to final design plans.
- C. Describe the procedures for coordinating and ensuring that all work performed by subconsultants and other design disciplines has proper QC/QA as required in the DQMP to ensure that conflicts, omissions, or misalignments do not occur between design discipline drawings or specifications.
- D. Describe the procedures that ensure that the Design-Builder personnel are familiar with the provisions of the Contract Documents concerning their respective responsibilities. Provide for training and certification as appropriate of personnel performing activities affecting or assessing the quality of design and to ensure that the design is performed in accordance with the DQMP and Contract requirements.

- E. Describe the independent quality control and quality assurance organization, including the number of employees with specific quality control and quality assurance responsibilities. A chart showing lines of responsibility shall be included. Persons and organizations performing QC/QA functions shall have sufficient authority to identify quality problems and to initiate, recommend, provide and verify implementation of solutions. Persons performing QC/QA functions shall be at an organizational level that ensures that the proper performance of their duties is not influenced by the potential impacts to project schedule.
- F. Identify the names, qualifications, duties, and authority of each person assigned as either a QC or QA reviewer. Each person assigned to a QC or QA role shall be exclusively designated as such and will perform no work related to the design that they are reviewing.
- G. Identify the process for all quality audits and also the Release for Construction of Design plans and specifications and clearly state the person responsible for each of these activities. Auditors must be completely independent from the design process.

106.1.2 Quality Assurance Manager for Design. The Quality Assurance (QA) Manager identified in the Proposal is considered one of the Project's key personnel. The QA Manager shall be responsible for the overall management of the design QC/QA process. The QA Manager shall be a Maine Licensed Professional Engineer and shall report to the Design Manager.

The Design-Builder shall not replace the QA Manager without prior written approval of the Department. A written request to replace the QA Manager shall name a new QA Manager that will be available for the project full time within twenty (20) Days of Department approval.

106.1.2.1 Engineer. The Design Manager shall designate (by name) an Engineer. The Engineer shall be a Maine Licensed Professional Engineer who is responsible for directly supervising the Design and who will stamp, sign and date all design plans, reports and specifications for a given item or segment of the Work

106.1.2.2 Senior Experienced Engineers. The Design-Builder shall provide senior experienced engineers to check all design work. These engineers (Design Checkers) shall be Maine Licensed Professional Engineers in the design discipline and type of work being checked and shall have an equal or higher level of qualification and experience than the engineers performing the design. Design Checkers shall not be directly involved with the design item, segment, or phase being checked. If Design Checkers are not available within the design firm conducting the design work, the Design-Builder shall arrange with an independent firm, other than the design firm or subsidiaries of the design firm, to conduct QC checks. The independent firm shall follow the DQMP for conformance with QC procedures for this Work.

106.2 Quality Control during Construction. This section contains general provisions related to the Quality of Work including roles, standards, Materials, Quality Control, Acceptance, Non-conforming Work, and warranties.

106.2.1 Roles Regarding Quality.

106.2.1.1 Cooperation. The Design-Builder and the Department will work cooperatively within their respective Quality Assurance (QA) responsibilities to produce and document a high quality project, meeting or exceeding the quality requirements of the Contract.

106.2.1.2 Role of the Design-Builder. The Design-Builder shall appoint an individual (QCP Manager) who is responsible for all aspects of the quality of construction, including labor, equipment, materials, incidentals, processes, construction methods, and QC. The Design-Builder shall develop, submit for approval, implement, and adjust if necessary a QCP for the work specified.

106.2.1.3 Role of the Department. The Department is responsible for approving the QCP, and assuring that the Design-Builder is following the QCP. The Department will perform random acceptance sampling, testing, and inspection for any element of the Work to ensure compliance with the QCP and Contract requirements. The Department may also sample and test at any time if the material appears defective or when the Department determines that a change in the process or product has occurred. The Department may perform Independent Assurance sampling and/or testing at any time.

106.2.2 Quality Standards.

106.2.2.1 Conformity with Contract. The Design-Builder shall comply with all Contract requirements in performance of the Work. Any required plans such as QCP, the TCP, and the SEWPCP, as approved by the Department, are binding upon the Design-Builder as Contract requirements.

106.2.2.2 Standards. All work, to the extent applicable, shall conform to the appropriate, related, current editions of the following publications, including, but not limited to:

Maine Department of Transportation:

- A. Design-Build General Conditions
- B. Standard Details and Supplemental Standard Details
- C. Standard Specifications with Interim Specifications
- D. Outline of the Department's latest Project Development Process
- E. CADD Standards
- F. Bridge Design Guide
- G. Bridge Plan Development Guide
- H. Highway Design Guide

- I. Survey Manual
- J. MaineDOT Right-of-way Policies and Procedures
- K. MaineDOT Utilities Policies and Procedures
- L. MaineDOT Construction Manual
- M. MaineDOT Metric Conversion Plan
- N. MaineDOT Best Management Practices for Erosion and Sediment Control
- O. MaineDOT Format for Bridge Geotechnical Reports
- P. MaineDOT Format for Highway Geotechnical Reports

AASHTO:

- A. A Policy on Geometric Design of Highways and Streets
- B. LRFD Bridge Design Standards with Interim Specifications
- C. Standard Specifications for Highway Bridges with Interim Specifications
- D. Standard Specifications for Structural Supports for Highway Signs, Luminaires and Traffic Signals
- E. Other Applicable AASHTO Standards and Guide Specifications

Highway Research Board:

- A. Highway Capacity Manual, SR 209

U.S. Department of Transportation:

- A. Pertinent Federal-Aid Policy Guides
- B. Rules and Regulations, Federal Highway Administration
- C. Manual on Uniform Traffic Control Devices for Streets and Highways
- D. Roadside Design Guide
- E. FHWA Right-of-Way Project Development Guide

Deviations from any of those referenced design standards must be made, in writing, by the Department.

106.2.2.3 Conformity with Other Standards. Unless otherwise provided in the Contract, all Work shall conform to the following standards, as applicable.

- A. The Department
- B. AASHTO
- C. ASTM
- D. AREMA
- E. Standard conditions and special conditions contained in any permit
- F. Recommended Procedures for the Safety Performance Evaluation of Highway Features (NCHRP 350)
- G. Manufacturer's Specifications and Recommendations

106.2.2.4 Industry Standards. If there is no applicable standard set forth in this Contract for a particular item of work, then the Design-Builder shall perform that item of work in accordance with industry standards prevailing at the time of bid.

106.2.2.5 Endorsed and Sealed. All plans, specifications, estimates, and data prepared by the Design-Builder shall be signed and sealed with a State of Maine seal by the Design-Builder's Licensed Professional Engineer, Landscape Architect, Geologist, Site Evaluator, Surveyor, Soil Scientist, Appraiser, or other professional, as applicable under Maine State Law.

106.2.3 Material Quality.

106.2.3.1 General. Materials and manufactured products incorporated into the work shall be new unless otherwise specified, free from defect, and in Conformity with the Contract.

When material is fabricated or treated with another material or where any combination of materials is assembled to form a finished product, any or all of which are covered by specifications, the Department may reject the finished product if any of the components do not comply with the specifications.

106.2.3.2 Quality Requirements. Materials shall meet the requirements of the Contract at the time they are incorporated into the Work. The Design-Builder shall test proposed sources of materials, and materials shall not be used in the Work until passing results are obtained.

The Design-Builder shall perform QC inspection, sampling, testing, and documentation in accordance with the Contract requirements and the QCP. For work without specific QC requirements, the Design-Builder shall perform inspection, sampling, and testing, as the Design-Builder deems necessary to ensure adequate process control and end product quality.

The Design-Builder shall provide all facilities, testing equipment, and material samples as the Department may require to collect and forward Acceptance samples, and conduct related field tests.

The Design-Builder shall supply materials and perform work using methods and equipment in a manner which will not degrade the quality of the materials. Materials with prior approval that become unfit for use or fall outside the specification limits will result in the affected product being declared Non-conforming Work. For a related provision, see Section 106.2.4.9 – Non-conforming Work.

The cost of the Design-Builder's QC activities and for furnishing facilities, testing equipment, and samples for the Department's Acceptance activities is included in the lump sum price.

106.2.3.3 Sources.

- A. General. The Design-Builder shall furnish all materials and products required to complete the Work, except as otherwise provided in the Contract. Unless otherwise specified in the Contract, the Design-Builder shall use only those products contained on the Department's List of Pre-Approved Materials (available on the Department internet site – <http://www.maine.gov/mdot/index.php>), if a list is established for that type of product or material.
- B. Department Furnished Materials. The Contract may specify that the Department will furnish certain materials. If the Design-Builder reasonably believes that the Department-furnished material is deficient in any way, the Design-Builder shall immediately notify the Department before accepting delivery. After acceptance of delivery, the Design-Builder is responsible for all risk or loss of Department-furnished material. The cost of inspecting, handling, and storing Department-furnished materials after delivery is incidental to the Contract. The Department may deduct from amounts otherwise due the Design-Builder all costs necessary to make good any shortage, damage, or deficiencies discovered after the Design-Builder accepts delivery including any demurrage or car hire charges.

106.2.3.4 Storage. The Design-Builder shall store materials to preserve their quality and fitness for the work. If materials fail to meet the requirements of the Contract, the materials will be rejected. The Department may inspect stored materials at any time. The Design-Builder shall locate stored materials to facilitate their prompt inspection. The Department may approve portions of land within the Right-of-Way for storage purposes and for the placing of the Design-Builder's equipment, but the Design-Builder shall provide any additional land required without cost to the Department. The Design-Builder shall not use private property for storage purposes without written permission of the owner, with copies of the written permission furnished to the Department upon request. The Design-Builder shall restore all storage sites, whether within the Right-of-Way or on private property, to original condition at the completion of the Project, without cost to the Department. The provisions of this Section

shall not apply to the stripping and storing of topsoil or to other materials salvaged from the Work.

106.2.3.5 Handling. The Design-Builder shall handle all materials in a manner that preserves their quality and fitness for the Work. The Design-Builder shall transport aggregates in tight vehicles to avoid loss or segregation of materials after loading and measuring.

106.2.3.6 Unacceptable Materials. The Department may reject materials not conforming to the Specifications at any time, and the Design-Builder shall remove them immediately from the Project site unless otherwise instructed by the Department. The Design-Builder shall not store or use rejected materials on any Department project.

106.2.3.7 Sampling and Testing. Department personnel may take samples for Acceptance Testing. Work in which material is used without the Department's approval will be at the Design-Builder's sole risk and the work will be considered Non-conforming Work. Unless otherwise designated, the Department's testing costs will be at the expense of the Department. Materials being used are subject to inspection, testing, or rejection at any time. The Department will furnish copies of test reports to the Design-Builder upon request.

The Design-Builder is responsible for the quality of construction and materials incorporated into the Work. The Design-Builder shall perform all necessary QC inspection, sampling, and testing in accordance with the approved QCP. The Design-Builder shall not rely on the results of the Department's Acceptance Testing for process QC.

The Design-Builder may observe the Department's sampling and testing activities. If the Design-Builder observes a deviation from the specified sampling or testing procedures, then the Design-Builder shall describe the deviation to the Department immediately and document the deviation in writing within twenty-four (24) hours.

106.2.4 Quality Control.

106.2.4.1 General. The Design-Builder shall develop, submit, and implement a Quality Control Plan (QCP), approved by the Department, for those items of work specified that will result in work that meets or exceeds the quality requirements of this Contract. Quality Control for all work is the Design-Builder's responsibility.

- A. Submittal. Within ten (10) Days of Contract Execution or at least thirty (30) Days before any related work is to be performed, the Design-Builder shall submit three copies of its QCP to the Department.
- B. Approval. Within five (5) Days of Receipt, the Department will determine if the QCP is in accordance with the requirements of this Subsection 106.2.4 and:
 - 1. notify the Design-Builder that its QCP is approved or
 - 2. return it for any needed revisions.

If returned for revision, the Design-Builder shall resubmit three copies of its revised QCP as provided above within five (5) Days and the Department will have five (5) Days from receipt of the revised plan to notify the Design-Builder whether its QCP is approved or again requires revision. Additional iterations will occur in a like manner until the Department approves the Design-Builder's QCP. Failure to submit an approvable QCP shall not be cause for any adjustment to compensation or time.

Upon final approval of the QCP, the Design-Builder shall provide five (5) bound copies to the Department. All Design-Builder QC personnel shall also be issued their own copy of the approved QCP.

The Design-Builder's QCP shall consist of plans, procedures, responsibilities, authority, and an organizational structure that demonstrates that an effective level of QC will exist and that the end result products will comply with all Contract requirements. The Design-Builder shall provide all necessary QC inspection, sampling, and testing to implement the QCP. The QCP shall include an organizational structure and reporting requirements that demonstrate that QC personnel have sufficient independence to allow them to be primarily concerned with quality, as opposed to schedule and budget.

The individual managing the QCP shall be a full-time employee of the Designer engaged by the Design-Builder and shall report to the Design Manager. The individual shall have full authority and responsibility for assuring effective implementation and maintenance of a quality system and for instituting any and all actions necessary for the successful implementation of the QCP. The individual is responsible for assuring the existence of information systems that measure the effectiveness of the quality program. The individual shall have access to executive management to report on the performance of the quality system.

The Design-Builder's management with executive responsibility shall review the quality system at defined intervals sufficient to ensure its continuing suitability and effectiveness in satisfying the quality policy and objectives.

The frequency of the reviews shall be dependent on the maturity of the quality system being implemented and the results of the last management review. Minutes shall be taken of the quality review meetings and these minutes shall be provided to the Department.

The Department will not sample or test for process control or assist in controlling the Design-Builder's production operations. The Design-Builder shall provide QC personnel and testing equipment capable of providing a quality product that meets or exceeds the Contract requirements.

106.2.4.2 Quality Control Plan Requirements. The QCP shall include, at a minimum, the following:

- A. All Work items covered by the QCP
- B. Sampling location and techniques

- C. Tests and test methods
- D. Testing frequencies
- E. Inspection frequencies
- F. Documentation procedures, including:
 - 1. Inspection and test records
 - 2. Temperature measurements
 - 3. Accuracy, calibration, or recalibration checks performed on production or testing equipment
- G. Resolution of defective work
- H. Resolution of Non-conforming Work
- I. Qualifications of inspection staff
- J. Design-Builder's QC organizational chart and description of responsibilities

The QCP shall identify the Design-Builder's QC personnel, including the Design QA Manager ultimately responsible for the quality of the work. The QCP shall include the number of employees with specific quality control and quality assurance responsibilities, including, but not limited to, individuals responsible for conformance with Project standards, documentation, and material testing, including: fill materials, Hot Mix Asphalt (HMA), concrete, and any other material to be used in the construction of the Project. The organizational chart shall include lines of responsibility.

106.2.4.3 Testing. Qualified technicians in laboratories approved by the Department shall perform all QC testing covered by the QCP. Technician qualifications shall be as described in this Section for the corresponding item of work.

Upon notification by the Department, the Design-Builder's testing personnel shall perform sampling and testing operations and be evaluated by the Department's Independent Assurance personnel to verify the accuracy of Design-Builder test results. Any discrepancies noted shall be investigated by the Design-Builder and appropriate corrective action taken.

Laboratory facilities shall be clean and all equipment shall be maintained in proper working condition. The Department will be permitted unrestricted access to inspect the Design-Builder's laboratory facility. The Department will advise the Design-Builder in writing of any noted deficiencies concerning the laboratory facility, equipment, supplies, or testing personnel and procedures. Deficiencies shall be grounds for the Department to order an immediate stop to incorporating materials into the Work until deficiencies are corrected. Work already in place affected by QC deficiencies is Non-conforming Work.

The Design-Builder shall maintain original documentation of all inspections, tests (including all associated data such as measurements, weights, dial readings, etc., used in the completion of the test), and calculations used to generate reports. The records shall indicate the nature, number, and type of deficiencies found, the quantities approved and rejected, and the nature of corrective actions taken. The Design-Builder shall maintain standard testing equipment and qualified personnel as required by the Contract.

The QCP shall include the testing and record keeping requirements for each item as contained in the Contract. The number preceding each item refers to the item and specification number in the Standard Specifications. When testing requirements are not specified, the Design-Builder shall perform all testing and record keeping as recommended by the manufacturer, vendor, or supplier.

If an item is required to be in the QCP but the Standard Specifications do not specify testing requirements, the Design-Builder shall propose testing requirements in the QCP.

The Design-Builder shall maintain Control Charts in a manner and location acceptable to the Department. At a minimum, the Control Charts shall identify the project number, each test parameter, the upper and lower control limits applicable to each test parameter, and the running average of the last three Design-Builder test results. The Design-Builder shall use the Control Charts as part of a process control system for identifying production and equipment problems and for identifying potential quality reductions before they occur. Acceptable Control Charts are part of the approved QCP.

After final records review, the Design-Builder shall certify with a written report by the QCP Manager to the Department that the Project has been constructed and inspected, and all materials have been tested in accordance with the Contract. The written report shall be stamped and sealed by a Maine Licensed Professional Engineer.

106.2.4.4 QC Inspector Qualifications. The Design-Builder's QC Inspectors shall hold all certifications from MCTCB or NETTCP that apply to the items included in the QCP. The Department will require the Design-Builder to remove Inspectors from the Project that are not certified as required or that are otherwise unqualified or unable to fulfill their duties in a good and workmanlike manner.

106.2.4.5 Inspection Requirements. The QCP shall cover all construction operations on the site and at off-site production facilities, keyed to the proposed construction materials, sequence, and schedule. The QCP shall also identify QC personnel (including qualifications), procedures, controls, tests, records, and forms to be used.

The Design-Builder shall provide a copy of each completed QC report to the Department by 1:00 PM on the day following each construction activity, unless other arrangements are made with the Resident. Failure to provide this report will constitute non-compliance with the QCP and the Contract.

If an item is required to be in the QCP but QC Inspection requirements are not specified in the Contract, the Design-Builder shall propose inspection and record keeping requirements for such items in the QCP.

106.2.4.6 QCP Non-Compliance. The Design-Builder shall comply with the approved QCP and shall take all other steps necessary to assure a high quality project.

Failure by the Design-Builder to comply with the approved QCP will result in the following actions:

- A. 1st Incident: Written warning. If the Design-Builder does not take corrective action upon receipt of written warning, the Department will escalate immediately to the 2nd Incident.
- B. 2nd Incident: Mandatory work suspension until compliance and loss of one percent (1%) of the value of the work item covered by the QCP, as described in this Section.
- C. 3rd Incident: Mandatory work suspension until compliance and loss of an additional two percent (2%) of the value of the work item covered by the QCP, as described in this Section.
- D. 4th and subsequent Incidents: Mandatory work suspension until compliance and loss of an additional three percent (3%) of the value of the work item (each occurrence) covered by the QCP, as described in this Section.

Disincentives for failure to comply with the approved QCP are additive, and the Department will deduct any disincentives due from amounts otherwise due the Design-Builder. These disincentives are intended to encourage the Design-Builder to comply with its approved QCP, and are not related to the quality of the material provided.

106.2.4.7 Quality Assurance. The Department may conduct Quality Assurance by:

- A. Review of QC Reports.
- B. Random inspection of work.
- C. Randomly accompanying the Inspector during QC Inspections/Testing.
- D. Sampling and Testing

Any such oversight, spot checks, audits, reviews, tests, and inspections conducted by the Department will not constitute acceptance of the Material or Work inspected or waiver of any warranty or legal or equitable right with respect thereto.

Items that are to be buried or covered, are of high cost, or affect the long-term durability of the Work must receive extra attention in the QC effort.

Unacceptable work, found by the Department's Representative, will be brought to the attention of the Resident, who will determine what corrective action the Design-Builder will take. The Design-Builder shall schedule the corrective work with the Resident, and both the QC and Department's Representative will witness the corrective work. Failure of the Design-Builder

to correct unacceptable work in a timely manner, as determined by the Department, may result in the withholding of progress payment(s) or suspension of the work, or both. The Design-Builder will not be eligible for either additional monetary compensation or a time extension should this happen. If necessary for protection of the work or for public convenience, the Department may accomplish corrective work by other means and deduct the cost from any monies due the Design-Builder.

The Department may review and obtain copies of all QC test reports (including original test data), inspections reports, and control charts at all reasonable times without cost to the Department.

If the Department decides to inspect the materials or operations at the plant, then the following conditions shall be met:

- A. The Department will have the cooperation and assistance of the Design-Builder and the producer with whom the Design-Builder has arranged for materials.
- B. The Department will have full access at all times to the parts of the plant that concern the manufacture and production of the materials being furnished.
- C. If required, the Design-Builder shall arrange for an approved testing laboratory building for the sole use of the Department. The building shall be located near the plant and conform to the requirements of Section 639 – Engineering Facilities of the Standard Specifications and Supplemental Specification (Repair Spec) dated August 18, 2008.
- D. The Design-Builder shall provide any needed equipment for safe access to plant stockpiles, equipment, and operations.

106.2.4.8 Acceptance. The Department is responsible for determining the acceptability of the Work. Acceptance of the material is based on the visual inspection of the construction, monitoring of the Design-Builder's QCP, and Acceptance Test results. Acceptance sampling and testing is the responsibility of the Department (unless alternate procedures are specified) except for furnishing facilities, testing equipment, transportation, and material samples as required. The Department's Acceptance does not alter or waive the Design-Builders' responsibility for QC, as set forth in the Contract.

106.2.4.9 Non-Conforming Work.

A non-conformance shall be defined as any condition in equipment, materials, or processes which does not comply with required drawings, specifications, codes, standards, documentation, records, procedures, or Contract requirements which cause the acceptability of equipment, materials, or processes to be unacceptable or indeterminate.

Non-conforming product shall be reviewed in accordance with documented procedures, and if required:

- A. Reworked to meet the specified requirements;

- B. Reworked in accordance with a Department approved rework procedure;
- C. Regarded for alternative applications; or
- D. Rejected or scrapped.

Repaired and/or reworked product shall be re-inspected in accordance with the QCP and/or other documented procedures.

106.2.4.10 Substantially Conforming Work. If the Department determines that non-conforming work substantially conforms to the Contract, the Department may accept the non-conforming work, provided that the Department may require a credit to the Department to be deducted from amounts otherwise due the Design-Builder. If the Department and Design-Builder cannot agree to the amount of the credit, the work shall be unacceptable work.

106.2.4.11 Unacceptable Work. The Design-Builder shall remove, replace, or otherwise correct all unacceptable work as directed by the Department at the expense of the Design-Builder, without cost or liability to the Department.

106.2.4.12 Unauthorized Work. Prior to Final Acceptance and upon written order by the Department, the Design-Builder shall remove or uncover unauthorized work. After examination, the Design-Builder shall rebuild the uncovered work to a condition conforming to the Contract at the expense of the Design-Builder and without cost or liability to the Department. Any delay arising from unauthorized work shall be an inexcusable delay.

106.2.4.13 Uninspected Work. Prior to Final Acceptance and upon written order by the Department, the Design-Builder shall uncover uninspected work. After examination, the Design-Builder shall rebuild the uncovered work to a condition conforming to the Contract.

106.3 Warranty Provisions.

106.3.1 Warranty By Design-Builder. For items that do not otherwise have specific warranty requirements identified in the Project Requirements, the Design-Builder unconditionally warrants and guarantees that the Project will be free from warranty defects for one year from the date of Final Acceptance. Final Acceptance includes receipt of all conforming Closeout Documentation. For a related provision, see Subsection 107.8.5 – Final Acceptance.

If the Department discovers any warranty defects during the warranty period, the Design-Builder agrees to promptly perform all remedial work at no additional cost or liability to the Department.

For a related provision regarding obligations regarding plantings, see Subsection 104.5.9 – Landscape Subcontractors.

106.3.2 Warranty Definitions. Notwithstanding any other provision of the Contract, the following words or phrases have the following definitions for the purposes of the Design-Builder's warranty obligation under this Contract.

- A. Warranty Defects. Conditions that result from material, manufacture, or workmanship and that are not in conformity with the Contract or with industry standards applicable to the work prevailing at the time of submission of the Proposal. Warranty defects do not include:
1. normal wear and tear;
 2. conditions caused by occurrences clearly beyond the Design-Builder's control and not attributable to material, manufacture, or workmanship; and
 3. Defects in landscape items that are the subject of Landscape Establishment Period Obligations.

Examples of such excepted occurrences might be fires, floods, abnormally poor weather for the site of work, accidents, improper use, improper maintenance, vandalism, or acts of God.

- B. Emergency. Emergency means necessary for public safety or convenience, as determined by the Department.
- C. Promptly. Unless an emergency, "Promptly" means in the first construction season after the Design-Builder has been notified of the defect(s), but always within one year of such notice. In case of emergency, Promptly means within forty-eight (48) hours.
- D. Remedial Work. "Remedial Work" means all work necessary to make the item in like new condition as reasonably determined by the Department and performed in accordance with the Contract and in a good and skillful manner. Remedial Work includes all design, permitting, project management, supervision, materials, and labor, including erosion control and traffic control.

106.3.3 Remedial Work Procedure and Requirements. Within thirty (30) Days of being notified of warranty defects, the Design-Builder shall submit to the Department for approval a Remedial Work Plan including the scope of work, conceptual work methods, schedule, construction phasing, and other significant aspects of the work (the "Work Plan"). Unless otherwise provided by the Department in writing, any work commenced prior to Department's approval of the Work Plan will be at the Design-Builder's sole risk. Before starting any on-site work, the Design-Builder shall deliver to the Department certificates of insurance complying with Section 110.3 – Insurance. If the estimated cost of remedial work exceeds \$100,000, the Contract shall provide Performance and Payment Bonds complying with Section 110.2 – Bonding.

If any one or more of the following occurs, then the Department may perform or contract for such remedial work and the Design-Builder will be responsible for all claims, costs, damages, losses, and expenses arising out of such work including fees and charges of engineers, consultants, attorneys, dispute resolution professionals, and court costs.

- A. The Design-Builder fails to submit a Remedial Work Plan.

- B. The Design-Builder does not comply otherwise with written instructions from the Department.
- C. A State of emergency exists in which delay would cause serious risk of loss or damage.

Upon a final inspection satisfactory to the Department, the Department will issue a written acceptance of the remedial work. The Design-Builder warrants and guarantees all remedial work to be free from warranty defects for one year after such acceptance.

106.3.4 Other Warranty Provisions. The Design-Builder hereby assigns to the Department the right to enforce all manufacturer's warranties or guarantees on all materials, equipment or products purchased for the Work that exceed the nature or duration of the warranty obligations assumed by the Design-Builder under this Contract.

The Performance Bond and/or Warranty Bond required by Subsection 110.2.1 – Bonds shall cover all warranty obligations of the Design-Builder provided by this Contract. Final Acceptance by the Department does not relieve the Design-Builder of any warranty obligations provided by this Contract.

The Design-Builder agrees that the warranty obligations provided by this Contract shall be reported as an outstanding obligation in the event of bankruptcy, dissolution, or the sale, merger, or cessation of operations of the Design-Builder.

SECTION 107 - TIME

Scope of Section. This Section contains general time-related provisions of the Contract including the Contract Time, allowable Work times, schedule requirements, Liquidated Damages, and Project Closeout.

107.1 Contract Time and Contract Completion Date. All Work must be Complete by the Contract Completion Date and within the Contract Time specified in the Project Requirements. Unless expressly provided otherwise by the Department in writing, the Contract Time shall be all time between the Contract Execution and the Completion date specified in the Contract, and any authorized extensions.

107.2 Commencement of Contract Time and Work. Unless provided elsewhere in this Contract or in writing from the Department, the Contract Time will commence on the date of Contract Execution. For related provisions, see Sections 101.2 – Definition of Notice to Commence Work and 103.4.3 – Execution of Contract by the Department.

Unless specified otherwise, Work may commence upon Contract Execution. Any Work performed before Contract Execution is Unauthorized Work and is at the sole risk of the Design-Builder.

107.3 Allowable Work Times.

107.3.1 General. Work can be performed at any time except Sundays and Holidays, unless expressly specified otherwise in the Project Requirements of this Contract, including any applicable Permit conditions. If a Holiday occurs on a Sunday, the following Monday shall be considered a Holiday. Sunday or Holiday work must be approved by the Department, except that the Design-Builder may work on Martin Luther King Day, President's Day, Patriot's Day, the Friday after Thanksgiving, and Columbus Day without the Department's approval.

107.3.2 Night Work. If the Design-Builder performs Work during periods of darkness, the Design-Builder shall comply with Contract requirements governing night work. If the Design-Builder elects to perform Work during periods of darkness on its own initiative and without direction from the Department, then the Design-Builder shall also comply with all municipal ordinances affecting such Work including noise ordinances. When pricing and scheduling the Work, the Design-Builder shall not assume that such non-directed night work will be allowed. Accordingly, the Design-Builder shall not be entitled to any adjustment to either compensation or time due to its inability to secure any required municipal approvals.

107.3.3 Sundays and Holidays. The Design-Builder shall not carry on construction operations on Sundays or Holidays unless:

- A. expressly specified otherwise in this Contract,
- B. authorized by the Department, or

- C. necessary to avoid or eliminate a clear and immediate risk of significant bodily injury to any person.

107.3.4 Seasonal Work Restrictions. The Design-Builder shall meet all seasonal restrictions on time of Work contained in the Contract including all Permits.

107.4 Scheduling of Work.

107.4.1 General Duty of Design-Builder. The Design-Builder is solely responsible for the planning and execution of Work in order to complete the Work within the Contract Time.

107.4.2 Initial Schedule. Within five (5) Days of Contract Execution, the Design-Builder shall provide the Department with its Initial Schedule for the first sixty (60) Days of work plus a summary level bar chart schedule for the balance of the project with milestones and completion dates no later than the Contract Completion Date. For contracts in excess of \$40 million, the Initial Schedule will cover at least the first ninety (90) Days of the project. At a minimum, the Initial Schedule must show the major initial Work activities that will affect completion dates including but not limited to planning, design, submittals, procurement, utility adjustments, mobilization, construction staging and phasing, and Department reviews. Any restrictions that affect the Schedule of Work such as paving restrictions or In-Stream Work windows must be charted with the related activities to demonstrate that the Schedule of Work complies with the Contract.

The Department will review the Initial Schedule and provide comments to the Design-Builder within five (5) Days of receipt of the schedule. The Design-Builder will make the requested changes to the schedule and issue the finalized version to the Department.

107.4.3 Schedule of Work Required. Within sixty (60) Days after Contract Execution and before beginning any on-site construction activities, the Design-Builder shall submit a Critical Path Method (CPM) Schedule of Work depicting the detailed work plan for the entire Contract Time. The Design-Builder shall plan the Work, including the activity of Subcontractors, vendors, and suppliers, such that all Work will be performed in Substantial Conformity with its Schedule of Work. The Schedule must include sufficient time for the Department to perform its functions as indicated in this Contract.

At a minimum, the Schedule of Work shall show the major Work activities, milestones, durations, and a timeline. Milestones to be included in the schedule include:

- A. Commencement of Work, including design activities, particularly release for construction packages;
- B. beginning and ending of planned Work suspensions;
- C. completion of major Work phases;
- D. Substantial Completion;
- E. Completion of Physical work; and

F. Completion.

The Schedule of Work must incorporate required utility Work to coordinate with utility owners having facilities within the project limits.

Any restrictions that affect the Schedule of Work such as paving restrictions or In-Stream Work windows must be charted with the related activities to demonstrate that the Schedule of Work complies with the Contract.

The Design-Builder shall include a written narrative detailing any assumptions made in preparing the schedule including constraints, equipment requirements, production rates to support activity durations, activities requiring overtime, additional shifts, permits, coordination requirements, long lead delivery items, or other significant requirements which would affect the ability to meet the interim and final milestone dates. Failure to include any Work activity will not relieve the Design-Builder from completing all Work within the Contract Time, notwithstanding the acceptance of the schedule by the Department.

The Department will review the Schedule of Work and provide comments to the Design-Builder within ten (10) Days of receipt of the schedule. The Design-Builder will make the requested changes to the schedule within five (5) Days and issue the finalized version to the Department.

If the Design-Builder Plans to Complete the Work before the specified Completion date, the Schedule of Work shall so indicate.

107.4.4 Projected Payment Schedule. Within five (5) Days after approval of the Payout Schedule defined in Subsection 108.1.3 – Payout Schedule, the Design-Builder shall also provide the Department with a Projected Payment Schedule that estimates the value of the Work as scheduled, including requests for payment of Delivered Materials. The Projected Payment Schedule must be in accordance with the Design-Builder's Schedule of Work and price. The Design-Builder shall revise the Projected Payment Schedule to reflect the actual progress of the Work.

107.4.5 Schedule Updates and Revisions. On a monthly basis or at such intervals as agreed upon, the Design-Builder will submit a schedule update to the Department reflecting the actual progress of the Work including any changes in the Work, Contract Time, or both. The progress of the Work shall be compared against the Schedule of Work at each Progress Meeting. If the Department determines that the Design-Builder's actual progress is not in Substantial Conformity with the Schedule of Work, then the Design-Builder shall either increase Project resources to get back on schedule or submit a revised Schedule of Work and Projected Payment Schedule to the Department. Any schedule revisions must be approved by the Department.

107.4.6 Failure to Submit Schedules. The Department may withhold approval of progress payments until the contractor submits and the Department accepts the initial schedule, the Schedule of Work, and schedule updates.

107.5 Suspension of Work.

107.5.1 Winter Suspensions.

- A. Start of Winter Suspension. If the Design-Builder determines that winter weather conditions make it impossible to perform all or specified portions of the Work, the Design-Builder shall notify the Department and set the start date and the proposed end date of the Winter Suspension with respect to such portions.
- B. Monitoring and Communications. During the Winter Suspension, the Design-Builder is responsible for monitoring weather conditions. If the Design-Builder decides to resume work, the Design-Builder shall notify the Resident ten (10) Days before the end date of the Winter Suspension specified in this Subsection.
- C. Impact on Liquidated Damages . Winter Suspensions will not affect the assessment of Liquidated Damages. For a related provision, see Section 107.7 – Liquidated Damages.

107.5.2 Suspensions Due To Uncontrollable Events. Upon request of the Design-Builder or upon its own initiative, the Department may suspend the Work due to Uncontrollable Events. Any Delay related to such a suspension will be analyzed in accordance with Section 109. For a related provision, see Section 101.2 – Definition of Uncontrollable Event.

107.5.3 Suspensions for Cause. The Department may suspend the Work if the Design-Builder violates any provision of the Contract that may affect the quality, cost, timeliness or Conformity of the Work. Any Delay related to such a suspension will be an Inexcusable Delay. For a related provision, see Section 109.3 – Adjustments for Delay.

107.5.4 Suspensions for Convenience. The Department may suspend the Work for any other reason it determines is in the best interest of the Department. Any Delay related to such a suspension will be analyzed in accordance with Section 109.3 – Adjustments for Delay.

107.5.5 Pre-Suspension Work. If Work is to be suspended for an extended period of time, the Design-Builder shall store all Materials in a manner that does not obstruct the free and safe flow of vehicular, pedestrian, railroad, or marine traffic and that protects the Materials from damage. The Department may direct the Design-Builder to install guardrail or other traffic control devices necessary to protect the traveling public. The Design-Builder shall take all precautions to prevent damage or deterioration of the Work already performed, provide suitable Drainage of the Roadway by opening ditches and Shoulder drains, erecting temporary Structures, and providing temporary erosion control where necessary. The cost of such pre-suspension Work will be analyzed in accordance with Section 109.

For related provisions, see Subsections 104.2.6 – Right to Suspend Work, 105.4.3 – Maintenance During Suspension of Work, and Sections 107.7 – Liquidated Damages, and 109.3 – Adjustments for Delay.

107.6 Completion Incentives and Disincentives. When provided in the Project Requirements, financial incentives for early Completion and disincentives for late Completion will be added to

or deducted from amounts otherwise due the Design-Builder. Incentives/Disincentives are separate and distinct from Liquidated Damages and Supplemental Liquidated Damages.

107.7 Liquidated Damages.

107.7.1 General. Except as otherwise provided in this Contract, the Design-Builder shall owe the Department the per diem amount specified in Subsection 107.7.2 – Schedule of Liquidated Damages for each Calendar Day that any portion of the Work remains incomplete after the Contract Time has expired. Liquidated Damages will be deducted from amounts otherwise due to the Design-Builder. For related provisions, see Sections 107.1 – Contract Time and Contract Completion Date, 107.5.1.C – Winter Suspensions – Impact on Liquidated Damages, and 109.3 – Adjustments for Delay.

Permission for the Design-Builder or the Surety to continue and finish Work after the Contract Time has expired shall not waive the Department’s rights to assess Liquidated Damages.

107.7.2 Schedule of Liquidated Damages. The specific per diem rates for Liquidated Damages are set forth in the table below. By executing the Contract, the Design-Builder acknowledges that such an amount is not a penalty and that the daily amount set forth in the Contract is a reasonable per diem forecast of damages incurred by the Department due to the Design-Builder’s failure to Complete the Work within the Contract Time.

Original Contract Amount		Per Diem Amount of Liquidated Damages Calendar Day
From More Than	To and Including	
\$0	\$100,000	\$100
\$100,000	\$300,000	\$200
\$300,000	\$500,000	\$400
\$500,000	\$1,000,000	\$575
\$1,000,000	\$2,000,000	\$750
\$2,000,000	\$4,000,000	\$900
\$4,000,000	\$6,000,000	\$1,875
\$6,000,000	\$10,000,000	\$3,000
\$10,000,000	\$14,000,000	\$5,000
\$14,000,000	and more	\$8,000

107.7.3 Supplemental Liquidated Damages. Supplemental Liquidated Damages, if any, will be specified by the Project Requirements and are separate and distinct from Liquidated Damages. Supplemental Liquidated Damages will be deducted from amounts otherwise due the Design-Builder.

107.8 Project Closeout.

107.8.1 Final Cleanup and Finishing. To prepare for Final Acceptance, the Design-Builder shall clean the Project and all ground, lawns, streams, Structures, and other areas adjacent to the Project of all rubbish, excess Material, temporary Structures, and Equipment. The ground shall be backfilled with Material that is generally the same as the surrounding Material, graded to drain properly, and finished such that the surface matches the surrounding surface (examples – loam and seed, compacted gravel, pavement). The Design-Builder must leave all areas impacted by the Work in a condition that is reasonably acceptable to the Department.

107.8.2 Notice/Inspection/Punch List. The Design-Builder will notify the Department in writing that it considers the Project complete. As soon as practicable thereafter, the Department will inspect the Work. If incomplete or unsatisfactory Work is noted, the Department will prepare a written list of all items that must be completed or corrected before the Physical Work is Complete (“Punch List”). The Design-Builder shall immediately take such measures as are necessary to complete all Punch List items.

107.8.3 Notices/Final Inspections/Physical Work Completion. The Design-Builder shall notify the Department in writing that all Punch List items have been completed and/or corrected and that the Design-Builder considers the Project Complete. As soon as practicable thereafter, the Department will make another inspection of the Work. The Department and the Design-Builder will attend this inspection jointly. If incomplete or unsatisfactory Work is noted, the Department will prepare a revised Punch List (which may include items not on previous Punch List(s)) and the Design-Builder shall immediately take such measures as are necessary to complete the revised Punch List items. Additional iterations will occur in a like manner until the Department finds that the Physical Work is Complete and in Conformity with the Contract. If the Design-Builder has not already done so, the Design-Builder will promptly remove all temporary traffic control devices.

107.8.4 Closeout Documentation. The Department will notify the Design-Builder in writing that the Physical Work is Complete and in Conformity with the Contract and that the Project will be finally accepted when the Closeout Documentation is received from the Design-Builder. The Design-Builder shall deliver all Closeout Documentation, exclusive of the All Bills Paid and Request for Final Payment Letters, to the Department within thirty (30) Days of receiving the above notification. Liquidated Damages will cease upon Physical Completion of Work. For a related provision, see Section 101.2 – Definition of Closeout Documentation.

107.8.5 Final Acceptance. Upon receipt of the Closeout Documentation, exclusive of the All Bills Paid and Request for Final Payment Letters, the Department will notify the Design-Builder in writing that the Project is Complete and finally accepted (“Final Acceptance”), subject to the Design-Builder’s warranty obligations set forth in the Contract. Within seventy-five (75) Days of the receipt of the documents required by Subsection 107.8.4 – Closeout Documents, the Department will advise the Design-Builder in writing of the Final Quantities if applicable, and any damages to be assessed for the Project. The Design-Builder shall resolve any Project issues that remain and provide the All Bills Paid and Request for Final Payment Letters to the Department within thirty (30) Days. The Department will make Final Payment, including the

release of all remaining retainage, and release any escrowed Proposal documents within twenty (20) Days of receipt of the above letters, which complete the Closeout Documentation. For a related provision, see Section 108.9 – Final Payment.

If the Design-Builder fails to resolve issues and deliver Closeout Documentation within the thirty (30) Days provided in this Section, the Department may provide a final notice informing the Design-Builder in writing that unless the Design-Builder delivers all Closeout Documentation within thirty (30) Days of the date of Receipt of final notice, the Design-Builder shall be in Default under the Contract. The Design-Builder, and all Major Participants, shall become ineligible to propose on any Department Contracts. The Department may then pursue all remedies provided by the Contract or by law, including withholding Final Payment. For a related provision, see Section 102.1 – Eligibility to Submit a proposal.

107.8.6 No Waiver of Legal Rights. Final Acceptance does not preclude the Department from correcting any measure, estimate, or certificate made. The Department may recover from the Design-Builder or its Surety, or both, overpayments made due to failure to fulfill Contract obligations.

A waiver on the part of the Department of any breach of any part of the Contract is not a waiver of any other or subsequent breach.

The Design-Builder retains liability for latent Defects, fraud (or such gross mistakes as may amount to fraud), and warranty obligations.

SECTION 108 - PAYMENT

Scope of Section. This Section contains general provisions related to payment including measurement of quantities, progress payment, retainage, the right to withhold payment, and other payment-related terms.

108.1 Payment.

108.1.1 Lump Sum Price. Unless expressly provided elsewhere in this Contract, payment for all Work within the Scope of Work shall be included in the Lump Sum Price shown on the Price Proposal Form. Compensation for all work not specifically designated in this Contract as a unit price, incentive/disincentive, QC/QA, cost-plus, or allowance item shall be included in the said Lump Sum Price.

108.1.2 Scope of Payment. Payments to the Design-builder shall be full compensation for furnishing all materials and for performing all work under the contract in a complete and acceptable manner and for all risk, loss, damage, or expense of whatever character arising out of the nature of the Work or the prosecution thereof.

108.1.3 Payout Schedule.

108.1.3.1 Submittal. Within fifteen (15) Days of the NTCW, the Design-Builder shall submit to the Department a Payout Schedule based on a cost breakdown of the major activities or tasks shown in their Schedule of Work. This schedule shall be a realistic and documentable presentation of the costs to complete the major activities or tasks that comprise the Lump Sum Price for the Work. Applications for Payments should reference, and reflect actual progress on, the activities and tasks on the Payout Schedule. The Department will use the Payout Schedule to assist in evaluating requests for payment.

Within five (5) Days after approval of the Payout Schedule, the Design-Builder shall submit to the Department a Projected Monthly Schedule of Payments for the Project. The Projected Monthly Schedule of Payments will provide the Department with an estimate of monthly cash flow requirements by forecasting the Design-Builder's monthly Applications for Progress Payments for the duration of the Project. A sample form of the Monthly Projected Schedule of Payments is provided as Exhibit B to Appendix B of this RFP.

The Design-Builder shall maintain the Payout Schedule and Projected Monthly Schedule of Payments to reflect changes in their Schedule of Work.

108.1.3.2 Review and Approval. Within five (5) Days of the submittal of the Payout Schedule, the Department shall approve the Payout Schedule or return it to the Design-Builder with deficiencies noted. The Department will not approve a Payout Schedule that is unbalanced. The Design-Builder shall then resubmit the Payout Schedule until an acceptable Payout Schedule is approved. No progress payment, including costs for design services and any initial request of mobilization costs, will be made until a Payout Schedule is approved. The Design-Builder is responsible for incorporating time for submission and approval of the Payout Schedule in its Schedule of Work.

108.1.3.3 Justification of Payout Schedule or Projected Monthly Schedule of Payments. The Department may require the Design-Builder to provide explanations and supporting documentation if the Payout Schedule or Projected Monthly Schedule of Payments indicate unbalancing or do not reasonably reflect the actual cost of performing the work or the value of work received by the Department.

108.2 Measurement of Quantities for Payment.

108.2.1 Use of Plan Quantities. Payment for all items labeled in the Bid Documents as “Plan Quantity” will be based upon the estimated quantity. The Design-Builder shall accept such payment as full and complete compensation for that item without physical measurement. Upon mutual written Agreement by the Department and the Design-Builder, the estimated quantity of any item of Work may be used as the final quantity for that item without physical measurement.

108.2.2 General Measurement Provisions. The Department will use the U.S. Customary system for all measurements, unless stated otherwise. Measurement of Items shall include all resources necessary to complete the Work under the Contract. The Department will measure items for payment in accordance with the “Method of Measurement” provisions of the applicable Specification. For all items of Work, other than those paid for by lump sum, the Department will determine the quantities accepted as the basis for Final Payment after the Physical Work is completed.

108.2.3 Provisions Relating to Certain Measurements. Unless expressly provided otherwise, the Department and the Design-Builder shall use the following general measurement provisions.

Lump Sum or Each. Lump Sum payment is total reimbursement for all resources necessary to complete the item of Work. Each is payment per complete unit.

Length. Length is defined as linear measurement parallel to the item base or foundation. A station is one hundred (100) feet.

Area. Area refers to the length, as defined above, multiplied by the width, which is defined as the linear measurement perpendicular to the item base or foundation. When calculating area for payment, use horizontal, longitudinal, and plan (neat) transverse measurements for surface area computations. Make no deductions for individual fixtures having an area of one (1) square yard or less. For purposes of the preceding sentence, “fixtures” means small subareas that do not receive material(s) or on which no Work is performed.

Volume. Measure Structures using plan (neat) or approved Contract Modification dimensions. Use the average end area method to compute excavation volumes. Use hauling vehicles approved by the Department, when transporting Materials measured by volume. Measure Materials at the point of Delivery. Ensure the body shape allows contents to be accurately measured. Load and level vehicles to their water level capacity. Obtain the Department’s approval to convert Materials specified for measure by mass to volume. Use specified conversion factors.

Measure water to the nearest cubic yard with calibrated tanks, distributors, certified scale weights or water meters.

Measure bituminous Materials by the gallon. Measure liquid volumes at 60°F or correct to volume at 60°F under ASTM D1250 or ASTM D633.

Use net certified scale weights or certified rail car volumes. Correct for bituminous Material lost, wasted, or otherwise not incorporated in the Work. Correct net certified bituminous Material weights or volumes for loss or foaming when shipped by truck or transport.

Measure timber by the yard. Base measurement on nominal widths and thicknesses and individual maximum lengths.

Mass. A ton is two thousand (2,000) pounds. Use certified scales to determine mass (weight). Accept certified “car weights” for Material shipped by rail, except for Material to be subsequently processed in mixing plants. Obtain certified haul truck tares as specified. Each Haul Truck shall display a legible identification mark.

Measure cement by the pound or ton.

Accept nominal mass or dimensions for standard manufactured items unless otherwise specified.

Accept industry-established manufacturing tolerances, unless otherwise specified.

Measure Aggregate mass in the saturated surface dry condition.

If the Contract requires, or the Design-Builder’s Payout Schedule proposes payment for specific items by weight, then the Design-Builder shall furnish and maintain weigh systems tested and certified by the State or use certified permanently installed commercial scales. The Design-Builder shall provide certifications after each set-up and before use or as requested by the Department. The weigh system shall be scaled after certification and display and certification stamp. Only mechanical or electronic scales shall be used.

The beams, dials, platforms, and other scale Equipment shall be arranged for safe and convenient viewing by the operator and inspector. Scales shall be tested for accuracy before use at a new site. Platform scales shall be level and with rigid bulkheads at each end. The Department will adjust quantities of Materials received on scales found to be outside of specified tolerances, using a correction based on the last documented test within specified tolerances.

All materials, which are measured or proportioned by weight, shall be weighed on approved weighing systems. When a delivery slip is required for payment of Materials measured by weight, weighing, except for automatic ticket printer systems, shall be performed on approved platform truck scales by a Licensed Public Weighmaster furnished by the Design-Builder, in accordance with the following requirements.

- A. Licensed Public Weighmaster. A Licensed Public Weighmaster shall be any person satisfying the requirements of the State Sealer of Weights and Measures

and granted a license as a Public Weighmaster. Each Licensed Public Weighmaster shall provide him/her with an impression seal as required by the State Sealer and shall impress this seal upon delivery slips issued by him/her. When completed by a Licensed Public Weighmaster, delivery slips shall be considered as the Weight Certificates required by the Maine Weights and Measures Law, MRSA Title 10. The Weighmaster shall perform all duties required of him/her by law and the specifications.

- B. Weighing Trucks. Tare weights of trucks hauling stone, bituminous mixes and similar items shall be determined twice daily, once during the forenoon and once during the afternoon. The tare weight thus found shall be used to determine the net load until the next tare weighing of the empty truck. Tare weights of trucks hauling liquid and bituminous cement materials or other items not generally on a repeat basis shall be determined immediately before being loaded and the weight thus found shall be used for that load only. The tare weight of a truck shall be defined as the weight of the empty vehicle including the driver, but with no passengers.
- C. Platform Truck Weighing Systems. An approved platform truck scale, meeting the following requirements shall be provided, installed and maintained, when required, by the Design-Builder or be available to him/her at an approved nearby location:
 - 1. The weighing system shall conform to the specifications, tolerances, and regulations for commercial weighing devices of the National Institute of Standards and Technology and shall be accurate within maximum tolerances of plus or minus two (2) pounds per one thousand (1,000) pounds of load.
 - 2. No auxiliary indicators, in combination with the beams or dial of the weighing system shall be used to increase the maximum allowable load above one hundred and five percent (105%) of the manufacturer's rated capacity, as stated in the National Institute of Standards and Technology Handbook 44 S.1.7.
 - 3. The platform of the weighing system shall be sufficient size to accommodate the entire vehicle or combination of vehicles. If a combination of vehicles must be divided into separate units in order to be weighed, each unit shall be entirely disconnected before weighing and a separate weight certificate, delivery slip, or ticket shall be issued for each separate unit.
 - 4. The value of the minimum graduation on the indicator of the scale shall not be greater than twenty (20) pounds. All weighing shall be read and recorded to the nearest twenty (20) pounds.

5. The weighing system shall be set on concrete or other approved foundation. The recording mechanism of the scale shall be suitably housed or protected from weather.
6. The Design-Builder shall have the weighing system inspected and approved by the State Sealer of Weights and Measures or by a Repairman registered and approved by the State Sealer within a period of twelve (12) months preceding the date of any weighing and again after each change of location.

D. Check Weighing for Platform Truck Weighing System. Check weighing shall be made on the weights and on the weighing in scales during production in the following manner:

1. At least twice during five (5) Days of production, in the presence of a State Inspector, a loaded truck which has been weighed and issued a weigh slip shall be turned and a new weighing made of the truck and load with the truck heading in reverse direction and at the opposite end of the weighing system platform from the first weighing. The new weight will be recorded. If the variation from the first weight is 0.2 percent (0.2%) or less, the fact will be so noted in the project records. However, if the variation exceeds 0.2 percent (0.2%), the scales shall not be used until rechecked and resealed by the State Sealer of Weights and Measures.
2. At least twice during five (5) Days of production, a loaded truck, which has moved off the weighing system, will be intercepted, directed back to the scales, and reweighed under supervision of a State Inspector.
3. At least twice during five (5) Days of production, in the presence of a State Inspector, a truck which has been emptied will be directed to the weighing system before being loaded at a time other than the normal tare weighing and weighed again for a check on the tare weight.
4. Check weighing will be on a plant basis and, although a plant may produce material for more than one project or Contract, check weighing will not be required for each project or Contract.
5. Although at least twice during five (5) Days of production, additional checks will be made occasionally at the discretion of the Engineer. Claims by the Design-Builder for delays or inconvenience due to check weighing will not be considered.

E. Reciprocal Agreements. Weighing of materials on weighing systems located outside the State of Maine will be permitted for materials produced or stored outside the State, when requested by the Design-Builder and approved. Out-of-state weighing, in order to be approved, must be performed by a Licensed Public Weighmaster or a person of equal authority in the State concerned, on scales accepted in the State concerned and meeting the requirements of this Section.

F. Delivery Slips. Serially prenumbered delivery slips of acceptable size and format for stating the following minimum information shall be furnished by the Design-Builder, in as many copies as may be necessary. One copy shall be retained by the Resident or Inspector upon accepting delivery of the material.

1. Vehicle identification
2. Date loaded
3. Project number
4. Identification of material:
 - (a) Source location of supplier
 - (b) Type and grade
 - (c) Tank number from which loaded, if liquid
5. Quality information as necessary for bituminous liquids
 - (a) Specific gravity at 60°F
 - (b) Serial number of the Certificate of Analysis as furnished according to Division 700, General Statement of the Standard Specifications.
 - (c) The Certificate Statement as required in Division 700, General Statement of the Standard Specifications.
 - (d) The Viscosity of the material: if asphalt cement, in poises at 60°C and in centistokes at 275°F; if other bituminous liquid, the specified viscosity according to the type and grade shown in Section 702 of the Standard Specifications and Supplemental Specification (Repair Spec) dated August 18, 2008.
6. Quantity information as necessary: gross, tare and net weights, volume of load if not material requiring weighing, net gallons at 60°F if bituminous liquids
7. Signatures (legible initials acceptable) Of: Weighmaster (if weight measured material), Design-Builder's representative (if volume measured material), and Resident (Cover Slips).

If materials are shipped by rail the car weight may be accepted provided that only the actual weight of material is paid for. However, car weights will not be acceptable for materials to be passed through mixing plants. Trucks used to haul material being paid for by weight shall be weighed empty daily, at such times as directed. Each truck shall bear a legible identification mark.

Rail shipments of bituminous liquid shall be measured directly by volume. Correction shall be made when liquid bituminous material has been lost from the car, wasted, or otherwise not incorporated in the work. Other shipments of bituminous liquids will be measured by the gallon. Volumes will be measured at 60°F or will be corrected to the volume at 60°F using the tables in ASTM D1250.

When bituminous liquids are shipped by truck or transport, net certified weights or volume subject to correction for loss or foaming may be used for computing quantities. Net certified weight shall be determined upon loading for all bituminous liquids when shipped by truck or transport. The net weight of each load shall be converted to net gallons at 60°F by a conversion factor expressed in pounds per gallon.

Time. Measure Equipment by hours in accordance with Section 631 – Equipment Rental of the Standard Specifications and Supplemental Specification (Repair Spec) dated August 18, 2008.

108.3 Progress Payments.

108.3.1 Application for Progress Payment. In order to receive payment, the Design-Builder shall submit to the Department a written Application for Progress Payment including receipts, invoices, or other vouchers, including payments to subcontractors. Applications for Progress Payment shall be made to the Department monthly. Said invoices shall be based on the proportionate quantities of the various classes of work satisfactorily designed, checked, and completed or incorporated in the Work in accordance with the Schedule of Work and the value thereof determined from the Contract Payout Schedule.

108.3.2 Payment. All invoice payments shall be subject to correction in subsequent invoices and payments and upon the final acceptance and payment. No payment shall be made when, in the judgment of the Department, the Work is not proceeding in accordance with the provisions of the Contract or when the total value of the Work done since the last estimate amounts to less than \$5,000 dollars. Portions of the progress payment may be withheld in accordance with provisions of this Contract including the Project Requirements.

The Design-Builder may submit to the Department an Application for Progress Payment monthly during prosecution of the Work, on forms and media approved by the Department. Upon the request of the Department, the Design-Builder shall submit backup documentation including copies of Receipts, Invoices, and an itemization of payments to Subcontractors.

If any Application is inconsistent with the Projected Payment Schedule, backup documentation, or the actual progress of Work, the Application shall include a written explanation for such inconsistencies. The Department will consider all documentation provided in accordance with this Section as it prepares the Progress Payment.

If the Design-Builder does both of the following, then the Department will pay all Conforming and approved Progress Payments, less retainage and any amounts the Department may withhold pursuant to this Contract, within fifteen (15) Days of Receipt of the Conforming Application, except as otherwise provided in the Contract.

- A. Submits Applications for Progress Payments in an electronic form approved by the Department, and
- B. accepts electronic transfer of payments in a manner approved by the Department.

In other cases, the Department will make payment within thirty (30) Days, except as otherwise provided in the Contract. These payment obligations shall not apply in the event of unforeseeable circumstances such as insufficient legislative appropriations, information systems failure, and other Uncontrollable Events. All payments made are subject to correction in subsequent Progress Payments and the Final Payment. For related provisions, see Subsections 107.8.5 – Final Acceptance, 108.9 – Final Payment, and 108.10.2 – No Inflation Adjustments/Interest.

108.3.3 Mobilization Payments. Mobilization includes the mobilization and demobilization of all resources as many times as necessary during the Work. The maximum amount that the Department will pay for Mobilization is ten percent (10%) of the Lump Sum Price.

Upon approval of all pre-construction submittals required for approval by this Contract including those listed in Subsection 104.4.3 – Preconstruction Conference, the Design-Builder may request payment of up to fifty percent (50%) of the Lump Sum price for Mobilization. After the Department determines that the Work is fifty percent (50%) complete, the Design-Builder may request the other fifty percent (50%) of the Lump Sum price for Mobilization

108.4 Retainage. The Department will pay one hundred percent (100%) of each approved Progress Payment until the Work is approximately fifty percent (50%) complete. Thereafter, the Department will deduct five percent (5%) of the amount of each Progress Payment as retainage. In the event that the Department reasonably believes that retainage will be insufficient to cover all Design-Builder obligations under this Contract, the Department may increase the retainage to up to five percent (5%) of the Contract amount.

The Department may hold, temporarily or permanently, retainage as needed to reflect amounts due to the Department under the Contract and to assure timely Completion of the Work in Conformity with the Contract. The Department may also disburse retainage to Subcontractors pursuant to 23 MRSA §52-A(2). For a related provision, see Subsection 104.5.6 – Subcontractors Claims for Payment.

The Design-Builder may withdraw retainage by depositing certain securities with the Treasurer of State as provided by 23 MRSA §52-A(1).

Upon Completion of Physical Work, the Design-Builder may request that the Department reduce retainage. The Department may grant or deny such request as it deems desirable and prudent. Otherwise, retainage will be held until Final Acceptance. For related provisions, see Subsections 107.8.5 – Final Acceptance and 108.9 – Final Payment.

108.5 Payment for Materials Obtained and Stored. Acting upon a request from the Design-Builder and accompanied by bills or Receipted bills, the Department will pay for all or part of the value of acceptable, non-perishable Materials that are to be incorporated in the Work,

including Materials that are to be incorporated into the Work not yet delivered on the Work site, but stored at places acceptable to the Department. Examples of such Materials include steel piles, stone masonry, curbing, timber and lumber, metal Culverts, stone and sand, gravel, and other Materials Delivered on or near the Work site at acceptable storage places. The Department will not make payment on living or perishable Materials until acceptably planted in their final locations.

If payment for Materials is made to the Design-Builder based on bills only, then the Design-Builder must provide receipted bills to the Department for these Materials within ten (10) Days of the date the Design-Builder receives payment for the Materials. Failure of the Design-Builder to provide receipted bills for these Materials within ten (10) Days of the date the Design-Builder receives payment will result in the paid amount being withheld from the subsequent progress payment or payments, until such time the receipted bills are received by the Department.

Materials paid for by the Department are the property of the Department, but the risk of loss shall remain with the Design-Builder. Payment for Materials does not constitute Acceptance of the Material. If Materials for which the Department has paid are later found to be unacceptable, then the Department may withhold amounts reflecting such unacceptable Materials from payments otherwise due the Design-Builder.

In the event of Default, the Department may use or cause to be used all paid-for Materials in any manner that is in the best interest of the Department.

Payment for certain materials shall be made in proportion to the Payout Schedule provided in Subsection 108.1.3 or upon such other basis as the Department may determine is an accurate reflection of the value of the materials.

The amount thus paid by the Department shall reduce amounts due the Design-Builder.

108.5.1 Materials Not Delivered. At the discretion of the Department and acting upon a request from the Design-Builder, an estimate accompanied by the receipted bills, may be made for payment for all or part of the value of acceptable nonperishable material not delivered on the Project, but stored in acceptable storage and not used at the time of such estimate. Payment for such materials shall be in accordance with Subsection 108.10.1 – Full Compensation. Payment will be in the amount indicated by receipted bills filed with the Department.

In the event of Default, the Department may use or cause to be used all paid-for Materials in any manner that is in the best interest of the Department.

108.5.2 Price Adjustment for Hot Mix Asphalt. For all contracts with hot mix asphalt in excess of 500 tons total, a price adjustment for performance graded binder will be made for the following pay items:

- Item 403.206 Hot Mix Asphalt - 25 mm
- Item 403.207 Hot Mix Asphalt - 19 mm
- Item 403.208 Hot Mix Asphalt - 12.5 mm
- Item 403.2081 Hot Mix Asphalt - 12.5 mm (PG 70-28)

Item 403.209 Hot Mix Asphalt - 9.5 mm (sidewalks, drives, & incidentals)
 Item 403.210 Hot Mix Asphalt - 9.5 mm
 Item 403.2102 Hot Mix Asphalt - 9.5 mm
 Item 403.211 Hot Mix Asphalt - Shim
 Item 403.212 Hot Mix Asphalt - 4.75 mm
 Item 403.213 Hot Mix Asphalt - 12.5 mm (base and intermediate course)
 Item 403.2131 Hot Mix Asphalt - 12.5 mm (base and intermediate course PG 70-28)
 Item 403.2132 Hot Mix Asphalt - 12.5 mm (Asphalt Rich Base and intermediate course)
 Item 461.13 Maintenance Surface Treatment

Price adjustments will be based on the variance in costs for the performance graded binder component of hot mix asphalt. They will be determined as follows:

The quantity of hot mix asphalt for each pay item will be multiplied by the performance graded binder percentages given in the table below times the difference in price between the base price and the period price of asphalt cement. Adjustments will be made upward or downward, as prices increase or decrease.

Item 403.206: 4.8%	Item 403.2102: 6.2%
Item 403.207: 5.2%	Item 403.211: 6.2%
Item 403.208: 5.6%	Item 403.212: 6.8%
Item 403.2081: 5.6%	Item 403.213: 5.6%
Item 403.209: 6.2%	Item 403.2131: 5.6%
Item 403.210: 6.2%	Item 403.2132: 5.6%
Item 461.13: 6.4%	

Hot Mix Asphalt: The quantity of hot mix asphalt will be determined from the quantity shown on the progress estimate for each pay period.

Base Price: The base price of performance graded binder to be used is the price per standard ton current with the bid opening date. This price is determined by using the average New England Selling Price, as listed in the Asphalt Weekly Monitor.

Period Price: The period price of performance graded binder will be determined by the Department by using the average New England Selling Price, listed in the Asphalt Weekly Monitor current with the paving date. The maximum Period Price for paving after the adjusted Contract Completion Date will be the Period Price on the adjusted Contract Completion Date.

108.6 Right to Withhold Payments. The Department may withhold payments claimed by the Design-Builder on account of:

- A. Defective Work,
- B. Damages for Non-conforming Work,
- C. Failure to provide the Department the opportunity to inspect the Work,

- D. Damage to a third party,
- E. Claims filed or reasonable evidence indicating probable filing of claims,
- F. Failure of the Design-Builder to make payments to Subcontractors or for Materials or labor,
- G. Substantial evidence that the Project cannot be completed for the unpaid balance,
- H. Substantial evidence that the amount due the Department will exceed the unpaid balance,
- I. Regulatory non-compliance or enforcement,
- J. Failure to submit Closeout Documentation, and
- K. All other causes that the Department reasonably determines negatively affect the State's interest.

108.7 Taxes, Fees, Allowances, and Notices. The Design-Builder shall pay all taxes, charges, fees, and allowances and give all notices necessary and incidental to the due and lawful prosecution of the Work. Except as expressly provided otherwise in this Contract, all such taxes, charges, fees, and allowances are Incidental to the Contract.

Most items are exempt from Maine sales tax. The Design-Builder shall prepare its Price Proposal in accordance with the Maine statutory exemption from sales tax located at 36 MRSA §1760, subsections (2) and (61).

108.8 Damages for Non-Conforming Work. If the Design-Builder performs Non-conforming Work that causes the Department to incur costs including environmental costs or penalties, failure of the Federal Highway Administration to participate in certain costs for reasons due to the Design-Builder's performance, Departmental staff time related to the non-conformity, penalties, or other damages of any nature whatsoever ("Damages"), then the Design-Builder shall be liable to the Department for such Damages. The Department, at its option, and without liability, may deduct such Damages from amounts otherwise due the Design-Builder and/or postpone disbursement of Progress Payments until the non-conformity is corrected.

108.9 Final Payment. Upon Final Acceptance, the Department will prepare a final Invoice. The Department may require the Design-Builder to provide information necessary to substantiate Items, including Statements itemizing Force Account Work. The Department will make final payment in the amount of the Work done, less all previous payments and all amounts to be retained or deducted under the provisions of the Contract. For a related provision, see Subsection 107.8.5 – Final Acceptance.

The Acceptance by the Design-Builder of the final payment, as evidenced by cashing of the final payment check, constitutes a release to the Department from all claims and liability under the Contract. Upon Final Acceptance, the Design-Builder is released from further obligation, except for warranty obligations provided for in this Contract.

108.10 General Payment Provisions.

108.10.1 Full Compensation. Payments to the Design-Builder shall be full compensation for furnishing all labor, Equipment, Materials, services, and Incidentals used to perform all Work under the Contract in a complete and acceptable manner, and for all risk, loss, damage, or expense of any kind arising from the nature or prosecution of the Work.

108.10.2 No Inflation Adjustments/Interest. No payments due the Design-Builder will be adjusted for inflation. No interest shall be due and payable on any payment due the Design-Builder, except that the Department will pay statutory interest on uncontested Final Payments for any period of time that extends beyond sixty (60) Days of the date of Receipt of all Conforming Closeout Documentation. The preceding exception expressly does not include payments regarding pending Issues, a Dispute or claim. For related provisions, see Subsections 107.8.5 – Final Acceptance and 108.9 – Final Payment.

108.10.3 Amounts Due the Department. Unless expressly provided otherwise in this Contract, in cases where the Department may deduct sums from amounts otherwise due the Design-Builder and where the sums to be deducted are more than the funds otherwise due the Design-Builder, the Design-Builder shall remit all amounts due the Department within thirty (30) Days of receiving an Invoice from the Department. After such thirty (30) Days, the Design-Builder shall be in Default of this Contract and shall not be entitled to any additional cure period. Statutory interest shall accrue after sixty (60) Days of Receipt of the Invoice.

SECTION 109 - CHANGES

Scope of Section. This Section contains general provisions related to changes in scope, time, and payment.

109.1 Scope Changes. The Department reserves the right to revise the Contract by either adding or deleting Work. Such revisions neither invalidate the Contract nor release the Surety. The Design-Builder and/or its Surety agree to perform or eliminate all such Work.

109.1.1 Added (Extra) Work. The Department will pay for Scope Changes by written Contract Modification in accordance with Subsections 109.5.1 – General and 109.5.2 – Basis of Payment. Any Delay related to Scope Changes will be analyzed in accordance with Section 109.3 – Adjustments for Delay.

109.1.2 Deleted Work. Upon notification, the Department is entitled to a credit for deleted Work by written Contract Modification in accordance with Subsections 109.5.1 – General and 109.5.2 – Basis of Payment.

109.1.3 Matters Not Constituting a Scope Change. The Design-Builder acknowledges and agrees that no adjustment to the Contract Price or Time is available except in circumstances expressly provided for in the Contract, that such adjustments shall be available only as provided in this Section 109 – Changes, and that the Design-Builder shall bear full responsibility for the costs of all other changes. Matters that are the Design-Builder's exclusive responsibility include the following:

- A. Errors, omissions, inconsistencies or other defects in the Design Documents, subject only to the right to a Change Modification for Necessary Basic Configuration Changes;
- B. Any design changes required by the Department as part of the process of reviewing the Design Documents for consistency with the requirements of the Contract Documents, except to the extent directly attributable to errors, omissions, inconsistencies or other defects in the Basic Configuration as provided herein;
- C. Defects or errors in the Design-Builder's schedule for performance of the Work or changes in the planned sequence of performance of the Work (except to the extent that changes in the planned sequence of performance of the Work arise from causes which otherwise give rise to a right to a Contract Modification).

109.1.4 Basic Configuration Changes. Upon the Design-Builder's fulfillment of all applicable requirements and limitations relating to Contract Modifications as specified in this Section 109 – Changes, if a Basic Configuration Change deemed necessary by the Department increases the cost and/or time to perform the Work, the Design-Builder shall be entitled to an increase in the Contract Price and/or an extension of the Contract Time, excluding any costs and/or time that could have been avoided by the Design-Builder; provided, however, the Design-

Builder shall not be entitled to an increase in the Contract Price or an extension of the Contract Time in connection with any error, omission, inconsistency or other defect resulting from approved ATCs incorporated in the Contract Documents.

If a Necessary Basic Configuration Change decreases the cost and/or time to perform the Work, the Contract Price and/or Contract Time shall be decreased accordingly.

If a VECP results in a change to the Basic Configuration, any cost savings from such VECP shall be shared in accordance with Section 109.4 – Value Engineering.

The Design-Builder shall be responsible for any cost increases and/or delays resulting from changes in requirements and obligations of the Design-Builder relating to the Project due to inaccuracies in the Basic Configuration that do not necessitate a material change in the Basic Configuration. In such event, no change in the Work shall be deemed to have occurred and no Contract Modification shall be issued for any such cost increases and/or delays.

109.2 Differing Site Conditions.

109.2.1 Definition. “Differing Site Conditions” are subsurface or latent physical conditions of a man-made nature that, at the time of submittal of the Proposal are:

- A. Materially different from conditions indicated in the RFP and Reference Documents;
- B. Not discoverable from a reasonable investigation and analysis of the site, including subsurface conditions, prior to submittal of Proposal;
- C. Materially different from conditions generally recognized as inherent in the nature of the Work in the area of the site of Work; and
- D. Actually unknown to the Design-Builder, and its Subcontractors.

Differing Site Conditions could include the following conditions if all the requirements set forth in the preceding paragraph are met: hazardous substances, archeological deposits, sunken man-made objects, or utilities. Differing Site Conditions expressly do not include conditions related to geology or hydrology, including bedrock, soils, groundwater, or other natural conditions.

109.2.2 Risk of Other Conditions. All costs, Work, Delays, or other damages related to or arising from site conditions that are not Differing Site Conditions are the sole risk and responsibility of the Design-Builder.

109.2.3 Notice and Procedural Requirements. If the Design-Builder discovers what it considers Differing Site Conditions that may cause adjustments to compensation, time, or other Contract requirements, the Design-Builder shall provide “Notice of Issue for Consideration” within forty-eight (48) hours of discovery and before doing any Work relating to such conditions as provided in Subsection 104.4.5 – Early Negotiation. The Design-Builder shall then comply with all other requirements of Subsection 104.4.5 – Early Negotiation and Section 111 – Resolution of Dispute. The Design-Builder will not be entitled to any change to compensation,

time, or Work requirements without proper notice as specified herein. Failure to provide such notice or to otherwise comply with this Section 109.2 – Differing Site Conditions will constitute a waiver of all claims related to such conditions.

109.2.4 Investigation/Adjustment. Upon notification by the Design-Builder or upon the Department’s own initiative, the Department will investigate the conditions. If the Department determines that Differing Site Conditions exist and that the Differing Site Conditions have caused an increase in the cost or time required for the performance of the Work, then the Design-Builder is entitled to an Equitable Adjustment for the additional costs of compensable items listed in Subsection 109.5.2 – Basis of Payment that are caused directly by the Differing Site Conditions. If the Department determines that Differing Site Conditions exist and that the Differing Site Conditions have caused a decrease in the cost or time required for the performance of the Work, then the Department is entitled to a credit in the amount of savings to compensable items listed in Subsection 109.5.2 – Basis of Payment, that are caused directly by the Differing Site Conditions. Delays caused by Differing Site Conditions will be considered in accordance with Section 109.3 – Adjustments for Delay.

109.3 Adjustments for Delay.

109.3.1 Definitions – Types of Delays. Delays are defined as follows and may be divided into more than one type depending upon cause.

- A. Excusable Delay. Except as expressly provided otherwise by this Contract, an “Excusable Delay” is a Delay to the Critical Path that is directly and solely caused by an Uncontrollable Event.
- B. Compensable Delay. A “Compensable Delay” is a Delay to the Critical Path that is directly and solely caused by:
 - 1. A weather-related Uncontrollable Event of such an unusually severe nature that a Federal Emergency Disaster is declared. The Design-Builder will only be entitled to an Equitable Adjustment if the Project falls within the geographic boundaries prescribed under the disaster declaration.
 - 2. An Uncontrollable Event caused by a third party (not Subcontractors) working on Project-related Work within the Project Limits if, and only if, the other third party offers the Department reimbursement for such Delay.
 - 3. A Department Suspension of Work due to uncontrollable events or for the convenience of the Department.
 - 4. Acts by the Department that are in violation of applicable laws or the Contract.
- C. Inexcusable Delay. “Inexcusable Delays” are all Delays that are not Excusable Delays or Compensable Delays.

109.3.2 Entitlement to Adjustments.

- A. Types of Adjustments. Provided the Design-Builder meets the requirements of Subsection 109.3.2.B below and complies with the notification, documentation, and procedural requirements set forth in the Contract, the Design-Builder is entitled to certain adjustments to the Contract depending upon the type of Delay.
1. If an Excusable Delay, the Design-Builder is entitled to an extension of time, but no additional compensation.
 2. If a Compensable Delay, the Design-Builder is entitled to an extension of time and an Equitable Adjustment as set forth in Section 109.5 – Equitable Adjustments to Compensation.
 3. If an Inexcusable Delay, the Design-Builder is entitled to neither an extension of time nor additional compensation.
- B. Requirements for Entitlement. To be entitled to any adjustments for an Excusable Delay or a Compensable Delay, the Design-Builder must demonstrate all of the following.
1. The Design-Builder consistently utilized its Schedule of Work to schedule, coordinate, and manage the Work as evidenced by documentation created as the Work progressed including Progress Meeting minutes,
 2. The Delay impacted the Critical Path of the Schedule of Work; and
 3. There are no concurrent Inexcusable Delays.
- C. Concurrent Delays. The Design-Builder is not entitled to a time extension for the period of time when Excusable and Inexcusable Delays are concurrent. The Design-Builder also is not entitled to either a time extension or an Equitable Adjustment for the period of time when Compensable and Inexcusable Delays are concurrent. In the event Compensable and Excusable Delays are concurrent, the Design-Builder is only entitled to time extension, not an Equitable Adjustment, for the period of time such Delays are concurrent.

109.3.3 Early Completion Date Delay Claims. For the purposes of this Subsection 109.3.3, a “Design-Builder’s Early Completion Date” means a Project Completion date shown on the Design-Builder’s initial Schedule of Work submitted in accordance with Subsection 107.4.2 – Schedule of Work Required that is earlier than the Contract’s specified Completion Date. The Department will not be liable for any claims or expenses related to the period of time between the Design-Builder’s Early Completion Date and the Contract’s specified Completion date, unless the Design-Builder demonstrates by clear and convincing evidence that:

- A. all requirements of Subsection 109.3.2.B – Requirements for Entitlement are met, and

- B. that the Design-Builder's Early Completion Date was reasonable at the time of submitting its Proposal in light of the surrounding facts and circumstances, including the Design-Builder's available resources, and the requirements of the Work.

109.3.4 Notice and Procedural Requirements. If the Design-Builder becomes aware of facts or circumstances that may cause a Delay for which the Design-Builder may seek adjustments to compensation, time, or other Contract requirements, the Design-Builder must notify the Resident of such "Issue" within forty-eight (48) hours and before doing any Work relating to such facts or circumstances as provided in Section 104 – General Rights and Responsibilities. Except as otherwise provided in this Section 109.3, the Design-Builder shall then comply with all other requirements of Section 111 – Resolution of Disputes. The Design-Builder will not be entitled to any change to compensation, time, or Work requirements without proper and timely notice. Failure to provide such notice constitutes a waiver of all claims related to such conditions.

109.3.5 Documenting the Delay and Request for Adjustments.

- A. Weekly Reports During Delay. To be entitled to any adjustments for Delay, the Design-Builder must keep records as provided in Subsection 111.1.6 – Design-Builder's Obligation to Keep Records. Further, the Design-Builder must submit weekly written reports containing the following information.
1. Number of Days of impact to the Critical Path.
 2. A summary of all operations that have been Delayed, or will be Delayed on the impact of the Design-Builder's Critical Path.
 3. A narrative describing how the cause of the Delay meets the definition of "Excusable Delay" or "Compensable Delay" contained in Subsection 109.3.1.A or 109.3.1.B.
 4. Itemization of all extra costs being incurred, including:
 - (a) how the extra costs relate to the Delay,
 - (b) the identification of all non-salaried Project employees for whom costs are being compiled, and
 - (c) a summary of time charges for Equipment, identified by the manufacturer's number for which costs are being compiled.
- B. Request and Report After Completion. Within ten (10) Days of Completion of the phase of Work that the Design-Builder claims has been Delayed, the Design-Builder shall submit a written report to the Department that contains the following information:

1. a description of the operations that were Delayed and the documentation and narrative of how the cause for the Delay meets the definition of “Excusable Delay” or “Compensable Delay” contained in Subsections 109.3.1.A or 109.3.1.B, including all reports prepared for the Design-Builder by consultants, if used,
2. an as-built chart showing when Work operations were actually performed,
3. a graphic depiction of how the operations were Delayed and the impact on the Critical Path; and
4. an item-by-item request for additional time and compensation including measurement and explanation.

The Department may require that all costs shown in the report be certified by an accountant, and that the Design-Builder provide all other information described in Subsection 111.2.2 – Detailed Notice of Dispute.

109.3.6 Decision by Program Manager. Within thirty (30) Days of receiving all information described in Subsection 109.3.5.B – Request and Report After Completion, the Department will Deliver a written decision on the request made to the Design-Builder. Failure to provide a decision within said thirty (30) Day period shall be considered a denial of the Design-Builder’s request, unless the parties mutually agree to an extension of time for such decision.

109.3.7 Additional Consideration By Department. If the Design-Builder wants additional consideration, the Design-Builder shall Deliver a “Notice of Unresolved Dispute” to the Department’s appropriate Bureau Director within ten (10) Days of Receipt of the Program Manager’s decision. Such Notice shall comply with Section 111 – Resolution of Disputes. The parties must then comply with all other Dispute resolution provisions of this Contract, beginning with Section 111 – Resolution of Disputes.

109.4 Value Engineering.

109.4.1 Overview – General Requirements. A Value Engineering Change Proposal (VECP) is a proposal made by a Design-Builder after Contract Execution that is intended to produce cost savings without impairing essential characteristics of the Project including function, serviceability, safety, durability, maintainability, and aesthetics, all as determined by the Department.

A VECP shall contain proven features that have been used under similar conditions. A proposal is not a VECP if equivalent options are already provided in the Contract.

For a VECP to be allowed and implemented, it must be approved by the Department. Unless otherwise agreed in writing, the Design-Builder and the Department will equally share the Net Savings generated by the VECP as provided in Subsection 109.4.4.C – Contract Modification – Amount of Payment.

Unless mutually agreed otherwise, the VECP approval process will occur in three steps:

- A. Conceptual VECP submission and review;
- B. Detailed VECP submission and evaluation; and, if approved,
- C. Contract Modification, including the amount of payment due to the Design-Builder and credit due to the Department.

When the nature and scope of a VECP warrants, the parties may agree to truncate the VECP approval process.

109.4.2 Conceptual VECP.

- A. Submittal. To propose a VECP, the Design-Builder must submit a written “Conceptual VECP” to the Resident. The Conceptual VECP is not a formal and complete submittal based upon detailed technical analysis, but instead relays a conceptual idea based upon the Design-Builder’s knowledge and experience. The Conceptual VECP shall include the following information based upon the Design-Builder’s best knowledge and belief.
 - 1. General Description. A narrative that describes the proposed change in concept and includes the basic differences between the existing Contract and the proposed change.
 - 2. Advantages and Disadvantages. A listing and brief description of the comparative advantages and disadvantages of the VECP including effects on function, serviceability, safety, durability, maintainability, aesthetics, and any other factors significantly altered by the VECP.
 - 3. Identification of Prior Similar VECPs. If the VECP was submitted previously on another Departmental Project, the date, PIN, and the action taken by the Department shall be indicated.
 - 4. Known Use or Testing. A description of any previous use or testing of the concept(s) included in the VECP that is known to the Design-Builder, including the tester, the conditions, and the results.
 - 5. Estimate of Net Savings. An estimate of the Net Savings as defined in Subsection 109.4.4.C – Contract Modification – Amount of Payment below.
 - 6. Estimate of Development Costs. A scope of Work and related cost estimate to develop and submit a Detailed VECP and, if desired by the Design-Builder, a request for the Department to share such costs.
 - 7. Savings and Schedule Impacts. An estimate of the time necessary for the Design-Builder to submit a Detailed VECP. Such estimate must specify the date by which the Department must approve the VECP to obtain the maximum cost reduction, and the latest date by which the Department

must approve the VECP for the Design-Builder to avoid significant impacts on the estimated Net Savings or the Design-Builder's Schedule of Work. If the Department determines that the time for response is insufficient for review, the Design-Builder will be so notified Promptly.

- B. Conceptual Review and Response. The Department will use its best efforts to review a Conforming Conceptual VECP and respond to the Design-Builder within ten (10) Days of Receipt. The Department may, in its sole discretion:
1. invite the Design-Builder to submit a Detailed VECP,
 2. reject the Conceptual VECP for reasons that will be described briefly, or
 3. request additional information.

The Department may also, in its sole discretion, agree to partially reimburse the Design-Builder for the costs to develop and submit a Detailed VECP. Except under extraordinary circumstances, such reimbursement will range up to fifty percent (50%) of such development costs to a maximum stated upset amount.

109.4.3 Detailed VECP.

- A. Submittal. If invited by the Department as provided by Subsection 109.4.2.B – Conceptual Review and Response, the Design-Builder may submit a “Detailed VECP” within the time specified by the Department. The Detailed VECP shall contain the following Materials and information that is sufficient in detail to clearly define and explain the proposed change(s).
1. Updated and more complete information regarding items included in the Conceptual VECP including the general description of the VECP, advantages and disadvantages, use or testing elsewhere, a detailed computation of the estimated Net Savings to be generated as defined in Subsection 109.4.4.C – Contract Modification – Amount of Payment, actual VECP development costs to date, and estimated savings and schedule impacts including approval date(s) required. If the Department determines that the time for response is insufficient for review, the Design-Builder will be notified Promptly.
 2. A complete set of Plans and Specifications showing the proposed revisions relative to the original Contract features and requirements. All VECPs that require Engineering design, computations, or analysis shall be prepared under the responsible charge of and sealed by a Maine Licensed Professional Engineer.
- B. Evaluation.
1. Additional Information. The Department may request any additional information that it determines is necessary to properly evaluate the VECP.

Where design changes are proposed, such additional information may include results of field investigations and surveys, design computations, Specifications, and field change sheets. The Design-Builder will Promptly provide any such requested information.

2. Cost Verification. The Department may require the Design-Builder to provide additional information to verify the Design-Builder's cost analyses.

- C. Response. The Department will use its best effort to evaluate a Conforming Detailed VECP and provide the Design-Builder with a written response within ten (10) Days of Receipt of all of the information it has determined was necessary to properly evaluate the VECP. Such response will include a brief description of the Department's reason(s) for its decision. The Department, in its sole discretion, will either approve the Detailed VECP, approve it with conditions, or rejected it. The Department may base its decision on any reason that is in the best interest of the Department including:

1. unacceptable impact on the function, serviceability, safety, durability, maintainability, or aesthetics of the Project;
2. insufficient testing or use of the VECP concepts elsewhere;
3. insufficient justification of cost savings;
4. unacceptable schedule impacts;
5. insufficient review time; or
6. differing Engineering judgment.

The Design-Builder may Promptly request that the Department reconsider certain portions of the decision. If requested, the Department will Promptly reconsider its decision. After reconsideration, the Department's decision is final and not subject to review or appeal.

- D. Termination of VECP Process. If the Department rejects the VECP or the Design-Builder does not desire to proceed with the VECP as approved by the Department, the VECP process will terminate and the Department will reimburse the Design-Builder for all VECP development costs that the Department agreed to pay as provided in Subsection 109.4.2.B – Conceptual Review and Response, if any.

109.4.4 Contract Modification – Amount of Payment. If the Department approves the VECP, or if the Department approves it with conditions and if the Design-Builder wants to proceed, a Contract Modification will be executed by the parties. In addition to the requirements of Section 109.6 – Contract Modification, the VECP will set forth the credit due to the Department for the difference between the cost of performing the Work, as specified originally

in the Contract, and the payment due to the Design-Builder for the revised work, which will include the following amounts:

- A. The cost of performing the Work as revised by the VECP at agreed upon unit or lump sum prices.
- B. The VECP development costs that the Department agreed to reimburse the Design-Builder as provided in Subsection 109.4.2.B – Conceptual Review and Response, if any.
- C. Fifty percent (50%) of the Net Savings (NS) generated by the VECP as determined by the Department, calculated as follows:

$$NS = EGS - DBUDC - DVEC$$

Where:

NS = Net Savings generated by the VECP

EGS = Estimated Gross Savings is an agreed upon difference between the cost of performing the Work as originally specified in the Contract and the cost of performing the Work as revised by the VECP.

DBUDC = Design-Builder's Unreimbursed Development Costs related to the preparation of the Detailed VECP including costs of the Design-Builder's design subconsultants and subcontractors, but excluding all such costs paid by the Department under Subsection 109.4.4.B above.

DVEC = Department's VE Costs related to review, approval, and implementation of the VECP including design costs, field inspection, and the value of any Department provided property.

The Contract Modification shall also set forth any adjustments to Contract Time related to the Work as revised by the VECP, if any.

109.4.5 Subsequent Payment Adjustments. Upon Completion of the portion of the Work revised by the VECP, the Department, on its own initiative or upon request by the Design-Builder, may review the actual net savings realized by the VECP. The Design-Builder will be afforded an opportunity to review and comment on such a review. If the actual net savings were greater than set forth in the Contract Modification, the increased savings will be shared equally by the parties. If the net savings were less than set forth in the Contract Modification, the reduction in savings will be borne equally by the parties by a reduction of amounts otherwise due the Design-Builder.

109.4.6 General Conditions Regarding VECPs.

- A. VECPs will remain the property of the Design-Builder, provided that the Department will have the unrestricted right to use any approved VECP, or any

VECP in which the Department has reimbursed the Design-Builder for any portion of the development costs, on other Department Projects without notice, cost, or liability to the Design-Builder.

- B. Only the Design-Builder may submit VECPs. The Design-Builder shall review, be responsible for, and submit all proposals initiated by the Design-Builder's Subcontractors.
- C. The Design-Builder shall not anticipate Departmental approval of a VECP before submitting its Proposal or otherwise before approval of a Detailed VECP. The Design-Builder is responsible for all Delays caused by the VECP that were not negotiated in the Contract Modification.
- D. If a VECP is rejected, the Design-Builder shall perform the Work in accordance with the Contract.
- E. Except as otherwise provided in this Section, the Design-Builder shall have no claim against the Department for additional compensation or time resulting from the delayed review or rejection of a VECP, including but not limited to, development costs, loss of anticipated profits, and increased Material or labor costs.
- F. Cost sharing applies only to the Contract for which the VECP was submitted.
- G. Because the Department has no obligation to change the terms of the original Contract, all VECP decisions by the Department are final and are not subject to the Dispute resolution provisions provided in this Contract or otherwise available at law.

109.5 Equitable Adjustments to Compensation.

109.5.1 General. Equitable Adjustment means an adjustment to compensation due to a change in the nature or scope of Work as defined in this Section 109 – Changes.

This Section 109.5 – Equitable Adjustments to Compensation applies to all changes to the nature or scope of the Work, excepting payment for Value Engineering Change Proposals, which is governed by Section 109.4 – Value Engineering.

109.5.2 Basis of Payment. Equitable Adjustments will be established by mutual agreement based upon Unit or Lump Sum Prices. These agreed upon Unit or Lump Sum prices will be full compensation and no additions or mark-ups will be allowed. If Agreement cannot be reached, the Design-Builder shall accept payment on a Force Account basis as provided in Subsection 109.5.5 – Force Account Work, as full and complete compensation for all Work relating to the Equitable Adjustment.

109.5.3 Non-Compensable Items. The Design-Builder is not entitled to compensation or reimbursement for any other items including the following:

- A. Profit or home office overhead in excess of fifteen percent (15%),
- B. Lost profits or lost opportunity costs,
- C. Labor inefficiencies,
- D. Consequential damages, including but not limited to loss of bonding capacity, loss of Bidding opportunities, and insolvency,
- E. Indirect costs or expenses of any nature,
- F. Dispute resolution costs of any nature including attorneys fees, claims consultant fees, expert witness fees, claims preparation expenses, and costs related to DRB proceedings, mediation, arbitration, or litigation, and
- G. Interest.

109.5.4 Force Account Work. Compensation for Force Account Work will be computed according to this Section.

- A. Labor. The Design-Builder will receive the actual hourly wages paid to Workers actually engaged in the changed Work and the foreman in direct charge of the changed Work as determined from certified payrolls, plus ninety percent (90%) of the sum thereof for all fringe benefits, payroll taxes, overhead, and profit.
- B. Materials. For Materials incorporated in the permanent Work, the Design-Builder will receive the Actual Cost of Materials including freight and Delivery charges (but excluding any sale or use tax) plus a single fifteen percent (15%) markup. For all Materials not incorporated in the permanent Work, the Design-Builder will receive the difference of actual value of such Material at the time of its use less the fair salvage value of Material when released, plus fifteen percent (15%) of said difference. There shall be no markup on markups.
- C. Equipment. For all authorized usage of power-operated machinery, trucks, or other Equipment, the Design-Builder will receive the rental rates for the actual time to the nearest one quarter (¼) hour that such Equipment is in operation on the Work. Time spent moving Equipment within the Project Limits and any approved idle time may be measured for payment when authorized. Time spent servicing, maintaining, and changing attachments will not be paid for. The rental rates shall include the cost of all fuel oil, lubrication, supplies, necessary attachments, repairs and maintenance of any kind, depreciation, storage, insurance, small tools, and all other Incidentals.

The maximum Hourly Equipment rental rates (R) will be determined using the most current Blue Book rates and the following formula:

$$R = A \times B \times E + C + D$$

Where:

A = Blue Book monthly rate divided by 176
B = Blue Book regional adjustment factor for Maine
C = Blue Book estimated operating costs per hour
D = Operator's hourly payroll rate plus ninety percent (90%)
E = Factor from the Rate Adjustment Table for the year the machine was made

When the Design-Builder's Equipment is ordered to be available for Force Account Work, but is idle for reasons not the fault of the Design-Builder, standby time will be paid at seventy percent (70%) of the hourly Equipment rental rate excluding all operating costs.

For each piece of Equipment, the Design-Builder shall provide the following information: the manufacturer's name, Equipment type, year of manufacture, model number, type of fuel used, horsepower rating, attachments required, together with its size or capacity and any further information necessary to ascertain the proper rate. The Design-Builder shall also provide a photocopy of the appropriate pages from the Blue Book that were used to arrive at the rates and prepare a chart that fully shows all the details of the Equipment costs.

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

If the Department specifies Equipment not listed in the above publication, the Department will establish a suitable rate for such Equipment. If requested by the Department, the Design-Builder will produce cost data to assist the Department in the establishment of such rental rate, including all records that are relevant to the Actual Costs including rental Receipts, acquisition costs, financing documents, lease Agreements, and maintenance and operational costs records.

Equipment leased by the Design-Builder for Force Account Work and actually used on the Project will be paid for at the actual invoice amount plus ten percent (10%) markup for administrative costs.

- D. Superintendence. No part of the salary or expense of anyone connected with the Design-Builder above the grade of foreman or having general supervision of the Work will be included in the labor items as specified above, except when the Design-Builder's entire on-site Workforce is occupied with Force Account Work, in which case, the salaries of the Superintendent may be included in the labor item specified above when the nature of the Work is such that their services are required, as determined by the Department.
- E. Documentation Requirements. All Statements shall be accompanied and supported by Receipted Invoices for all Materials used and transportation charges. If Materials used on the Force Account Work are not specifically purchased for

such Work but are taken from the Design-Builder's stock, then instead of Invoices, the Statements shall contain or be accompanied by an affidavit of the Design-Builder certifying that such Materials were taken from stock, that the quantity claimed was actually used, and that the price and transportation claimed represent the Actual Cost to the Design-Builder, excluding storage costs.

No payment will be made for Work performed on a Force Account basis until the Design-Builder has furnished duplicate itemized Statements of the cost of such Force Account Work detailed to the following:

1. Name, classification, date, daily hours, total hours, rate, and amount for each foreman and laborer.
2. Designation, dates, daily hours, total hours, rental rate, and amount for each unit of Equipment.
3. Quantities of Materials, prices, and amounts.
4. Transportation charges on Materials.

- F. Subcontractor Work. When accomplishing Force Account Work that utilizes Subcontractors, the Design-Builder will be allowed a maximum markup of five percent (5%) for profit and overhead on the Subcontractor's portion of the Force Account Work.

109.6 Contract Modification. All changes to the Contract that affect compensation, time, or quality must be made by written Contract Modification. The Contract Modification will describe the underlying issue that resulted in the Contract Modification and will specify adjustments to compensation, time, or other Work requirements, as applicable. If adjustments to compensation or time are not shown on the face of the Contract Modification, then there are no such adjustments.

All Contract Modifications must be signed by the Design-Builder. By signing a Contract Modification, the Design-Builder agrees to all the terms thereof and waives any and all claims for additional compensation, time, or other Work requirement adjustments relating to the issue that is the subject of the Contract Modification. All Contract Modifications are to be noted in Progress Meeting minutes.

SECTION 110 - INDEMNIFICATION, BONDING AND INSURANCE

Scope of Section. This Section contains general requirements for indemnification, bonding, and insurance by the Design-Builder. For a related provision, see Section 104.4 – Communication and Coordination.

110.1 Indemnification. The Design-Builder indemnifies, defends, and holds harmless the Department and its officers, directors, employees, agents and consultants from and against all claims, actions, torts, costs, losses, and damages for bodily injury (including sickness, disease, or death) and property damage arising out of or relating to this Contract or the performance of Work by the Design-Builder and its Subcontractors, subconsultants, Engineers, suppliers, any individuals or entities directly or indirectly employed by any of them, or anyone for whose acts any of them may be liable, excepting only claims directly and solely caused by the negligence of the Department. Damages covered include, but are not limited to, all Dispute resolution costs including court costs, attorney's fees, and the fees of Engineers and consultants, arbitrators, and other professionals related to Dispute defense and preparation.

This indemnity obligation shall not be limited in any way by any limitation on the amount or type of damages, compensation, or benefits payable by or for the Design-Builder or any Subcontractor, subconsultant, Engineer, supplier, or other individual or entity under Workers' Compensation acts, disability benefit acts, or other employee benefit acts.

110.2 Bonding.

110.2.1 Bonds. The Design-Builder shall provide signed, valid, and enforceable Performance and Payment Bonds complying with the Contract. The Department may also require Warranty and Maintenance Bonds for specific items as specified in the Project Requirements. For a related provision, see Section 103.4 – Award of Contract.

The Design-Builder shall procure bonds from a company organized and operating in the United States, licensed or approved to do business in the State of Maine by the State of Maine Department of Business Regulation, Bureau of Insurance, and listed on the latest Federal Department of the Treasury listing for "Companies Holding Certificates of Authority as Acceptable Sureties on Federal Bonds and as Acceptable Reinsuring Companies".

The bonds shall each be in the full Contract amount, payable to the "Treasurer – State of Maine," and on the Department's forms, on exact copies thereof, or on forms that do not contain any significant variations from the Department's forms as solely determined by the Department.

By issuing a bond, the Surety agrees to be bound by all terms of the Contract, including those related to payment, time of performance, quality, warranties, and the Department's self-help remedy provided in Section 112.1 – Default, to the same extent as if all terms of the Contract are contained in the bond(s).

Regarding claims related to any obligations covered by these bonds, the Surety shall provide, within sixty (60) Days of Receipt of written notice thereof, full payment of the entire claim or written notice of all bases upon which it is denying or contesting payment. Failure of the Surety to provide such notice within the sixty (60) Day period constitutes the Surety's waiver

of any right to deny or contest payment and the Surety's acknowledgment that the claim is valid and undisputed.

If the Surety becomes financially insolvent or stops operating in the United States, the Design-Builder shall file new bonds complying with this Section within ten (10) Days of the date the Design-Builder is notified of such change.

For a related provision, see Subsection 106.3.4 – Other Warranty Provisions.

110.2.2 Bond for Use of Municipal Roads. A bond for use of municipal Roads may be required as provided in Section 105.5 – Hauling of Materials and Equipment.

110.2.3 Bonding for Landscape Subcontractors. The Design-Builder's Landscape Subcontractor shall provide a signed, valid, and enforceable Performance, Warranty, or Maintenance Bond complying with the Contract to the Department at Final Acceptance.

The bond shall be in the full Subcontract amount for work pursuant to Section 621 – Landscape of the Standard Specifications and Supplemental Specification (Repair Spec) dated August 18, 2008, payable to the "Treasurer – State of Maine," and on the Department's forms, on exact copies thereof, or on forms that do not contain any significant variations from the Department's forms as solely determined by the Department.

The Design-Builder shall pay all premiums and take all other actions necessary to keep said bond in effect for the duration of the Landscape Establishment Period described in Section 621.0036 – Establishment Period of the Supplemental Specification (Repair Spec) dated August 18, 2008. If the Surety becomes financially insolvent, ceases to be licensed or approved to do business in the State of Maine, or stops operating in the United States, the Design-Builder shall file new bonds complying with this Section within ten (10) Days of the date the Design-Builder is notified or becomes aware of such change.

All Bonds shall be procured from a company organized and operating in the United States, licensed or approved to do business in the State of Maine by the State of Maine Department of Business Regulation, Bureau of Insurance, and listed on the latest Federal Department of the Treasury listing for "Companies Holding Certificates of Authority as Acceptable Sureties on Federal Bonds and as Acceptable Reinsuring Companies."

By issuing a bond, the Surety agrees to be bound by all terms of the Contract, including those related to payment, time for performance, quality, warranties, and the Department's self-help remedy provided in Section 112.1 – Default to the same extent as if all terms of the Contract are contained in the bond(s).

Regarding claims related to any obligations covered by the bond, the Surety shall provide, within sixty (60) Days of Receipt of written notice thereof, full payment of the entire claim or written notice of all bases upon which it is denying or contesting payment. Failure of the Surety to provide such notice within the sixty (60) Day period constitutes the Surety's waiver of any right to deny or contest payment and the Surety's acknowledgment that the claim is valid and undisputed.

110.3 Insurance. The Design-Builder shall provide signed, valid, and enforceable certificate(s) of insurance complying with this Section. The Design-Builder shall provide copies of policies for each of the insurances required under this Section. All insurance must be procured from insurance companies licensed or approved to do business in the State of Maine by the State of Maine, Department of Business Regulation, Bureau of Insurance. The Design-Builder shall pay all premiums and take all other actions necessary to keep required insurance(s) in effect for the duration of the Contract obligations, excluding warranty obligations.

110.3.1 Workers' Compensation. For all operations performed by the Design-Builder and any Subcontractor, the Design-Builder and each Subcontractor shall carry Workers' Compensation Insurance or shall qualify as a self-insurer with the State of Maine Workers' Compensation Board in accordance with the requirements of the laws of the State of Maine. If maritime exposures exist, coverage shall include United States Long Shore and Harbor Workers coverage.

110.3.2 Commercial General Liability. With respect to all operations performed by the Design-Builder and any Subcontractors, the Design-Builder and any Subcontractors shall carry commercial general liability insurance in an amount not less than \$1,000,000 per occurrence and \$2,000,000 in the Aggregate. The coverage must include products, completed operations, and Contractual liability coverage, and ISO (Insurance Services Office) form #CG25031185 or equivalent. The Contractual liability insurance shall cover the Design-Builder's obligations to indemnify the Department as provided in this Contract including Section 110.1 – Indemnification. The coverage shall also include protection against damage claims due to use of explosives, collapse, and underground coverage if the Work involves such exposures.

110.3.3 Automobile Liability. The Design-Builder and subcontractors and subconsultants shall carry Automobile Liability Insurance covering the operation of all motor vehicles including any that are rented, leased, borrowed, or otherwise used in connection with the Project. The minimum limit of liability under this Section shall be \$1,000,000 per occurrence.

110.3.4 Professional Liability. The Design-Builder and/or subconsultants who engage in design Work, preliminary Engineering Work, and environmental consulting Work for shall maintain a Professional Liability policy for errors and omissions with a minimum limit of liability of \$1,000,000. "Design Work" includes the design of temporary Structures and all other Work that requires design computations. This policy shall cover "Wrongful Acts," meaning negligent acts, errors or omissions by the Design-Builder and/or subconsultants, or any entity for whom the Design-Builder is legally liable, arising out of the performance of, or failure to perform, professional services.

110.3.5 Owner's and Design-Builder's Protective Liability. If required by the Project, the Design-Builder shall carry an Owner's and Contractor's Protective (OCP) Policy covering all operations performed by the Design-Builder and any Subcontractor, in an amount not less than \$1,000,000 per occurrence and \$2,000,000 in the Aggregate, naming the Department as the sole insured party under the policy.

110.3.6 Builders Risk. Unless required by the Project Requirements, the Department does not require the Design-Builder to carry Builders Risk Insurance. However, the Design-Builder is advised of its risks for damage to the Work as provided in Subsection 104.3.10 – Responsibility for Damage to the Work. The Design-Builder is responsible for managing and insuring these risks as it deems appropriate.

110.3.7 Environmental Impairment. If required by the Project Requirements, the Design-Builder shall carry Environmental Impairment insurance to cover the risk of sudden or accidental discharge of pollutants during the prosecution of the Work. The limits of liability for this coverage shall be in the amount of \$1,000,000 per occurrence and \$2,000,000 in the Aggregate. Regardless of whether such insurance is carried by the Design-Builder, the Design-Builder is responsible for managing these risks as it deems appropriate.

110.3.8 Administrative & General Provisions.

- A. Additional Insured. Each policy with the exception of Workers' Compensation and Professional Liability insurance shall name the Department of Transportation as an additional insured.
- B. Defense of Claims. Each insurance policy shall include a provision requiring the carrier to investigate, defend, indemnify, and hold harmless all named insureds against any and all claims for death, bodily injury, or property damage, even if groundless.
- C. Primary Insurance. The insurance coverage provided by the Design-Builder shall be primary insurance with respect to the State, its officers, agents, and employees. Any insurance or self-insurance maintained by the State for its officers, agents, and employees is in excess of the Agent's insurance and shall not contribute with it.
- D. Reporting. Any failure to comply with reporting provisions of the policies shall not affect coverage provided to the State, its officers, agents, and employees.
- E. Separate Application. The insurance provided by the Design-Builder shall apply separately to each insured against whom claim is made or suit is brought, except with respect to the limits of the insurer's liability.

SECTION 111 - RESOLUTION OF DISPUTES

Scope of Section. This Section contains provisions for resolving Disputes early, efficiently, fairly, and as close to the Project level as possible.

111.1 General.

111.1.1 Definitions. “Dispute” is defined in Section 101.2 – Definitions. An “Issue,” as used in Sections 111.1 through 111.3 below, is a matter that may give rise to a Dispute, but has not yet been negotiated as provided in Subsection 104.4.5 – Early Negotiation.

111.1.2 Escalation Process. To resolve Issues or Disputes, the Design-Builder and the Department may mutually agree in writing at any time to any form of Dispute resolution including mediation, facilitated negotiation, neutral case evaluation, arbitration, or litigation.

In the absence of such written agreement, the parties must pursue resolution of Issues or Disputes that arise after Contract Execution as follows:

- A. first through negotiation at the Project level as provided in Subsections 104.4.5 – Early Negotiation and 111.2 – Project Level Negotiation;
- B. next through negotiation by management as provided in Section 111.3 – Negotiation by Management;
- C. next, if the parties consent, through a Dispute Review Board as provided in Section 111.4 – Dispute Review Board; and
- D. next through the Commissioner as set forth in Section 111.5 – Appeal to Commissioner.

If the Dispute remains unresolved after final agency action by the Commissioner, then, and only then, may a party seek judicial review of a Dispute as provided in Section 111.6 – Judicial Review.

111.1.3 Relationship to Partnering. Partnering, including the establishment of a partnership charter, does not in any way waive, alter, or otherwise affect any provision of the Contract including those requiring notice and all other provisions governing the resolution of Issues or Disputes. For a related provision, see Subsection 104.4.1 – Partnering.

111.1.4 Mandatory Notice. The Design-Builder shall comply with all notice provisions of this Contract relating to Issues or Disputes including those contained in Subsections 104.3.3 – Duty to Notify If Ambiguities Discovered; 104.4.5.A – Early Negotiation, Notice Required; 109.2.3 – Differing Site Conditions, Notice and Procedural Requirements; 109.3.4 – Adjustments for Delay, Notice and Procedural Requirements; and Section 111 – Resolution of Disputes. In order to promote the purposes of this Section, all notice provisions are mandatory and are to be strictly construed. Failure to provide Conforming notice constitutes waiver by the Design-

Builder of any and all claims to additional compensation, time, or modification of Contract requirements related to the Issue or Dispute. Such waiver of claims shall not be affected by the Department's willingness to enter into discussions or negotiations regarding Issues or Disputes for which the Design-Builder failed to provide proper notice.

111.1.5 Work to Proceed Despite Issue or Dispute. Regardless of the status or disposition of any Issue or Dispute, the Design-Builder and the Department must perform their Contractual responsibilities Promptly and diligently. Unless expressly directed otherwise by the Department, the Design-Builder shall proceed without Delay to perform the Work or to Conform to the decision or Order of the Department.

111.1.6 Design-Builder's Obligation to Keep Records. Throughout the course of any Issue or Dispute, the Design-Builder shall keep daily records, including supporting documentation, of extra costs and time related to the Issue or Dispute. Such records shall include all non-salaried labor, Material costs, Equipment expenses, and location for all operations that are affected by the Issue or Dispute. The Design-Builder will not be entitled to any change to compensation, time, or Work requirements without such records. The Design-Builder shall permit the Department daily access to and shall provide copies of these and any other records needed for evaluating the Dispute. The Design-Builder shall retain those records for the duration of the Dispute and as provided in Subsection 104.3.6 – Project Records.

111.1.7 Dispute Resolution Time Extensions. All deadlines provided in this Section may be extended only by mutual written consent signed by both parties.

111.1.8 Commissioner Communications Before Appeal. Because the Commissioner may hear an Appeal and render final agency action under Section 111.5 – Appeal to Commissioner, the following persons shall not communicate with the Commissioner regarding the substance of a Dispute, except upon notice and opportunity for all parties to participate:

- A. the Design-Builder or any agent for the Design-Builder and
- B. Department staff, counsel, or consultants who are directly participating in Dispute resolution processes in an advocate capacity.

The preceding sentence does not prohibit the Commissioner from communicating with, or having the aid or advice of all other Department staff, counsel, or consultants.

111.1.9 Contract Modification Required. All changes to the Contract that regard Issues or Disputes and that affect compensation, time, quality, or other Contract requirements must be made by written Contract Modification as provided by Section 109.6 – Contract Modification.

111.2 Project Level Negotiation.

111.2.1 Early Negotiation. The parties must first comply with all requirements of Subsection 104.4.5 – Early Negotiation.

111.2.2 Detailed Notice of Dispute. If Early Negotiation fails to resolve the Issue within forty-five (45) Days of the date of Receipt of the written Notice of Issue for Consideration

Conforming to Subsection 104.4.5.A – Early Negotiation, and if the Design-Builder desires additional consideration by the Department, then the Design-Builder must Deliver a written Detailed Notice of Dispute to the Program Manager within ten (10) Days of the expiration of said forty-five (45) Day period. At a minimum, the Detailed Notice of Dispute shall include all of the following information in sufficient detail to allow reasoned analysis as determined by the Program Manager:

- A. A description of the background of Dispute including the date(s) the Issue or Dispute first arose and the date the Design-Builder provided the Department Project Manager or Resident with the “Notice of Issue for Consideration” Conforming to Subsection 104.4.5.A – Early Negotiation;
- B. All Contract provisions that are relevant to the Dispute;
- C. All facts relevant to the Dispute including all non-Contract Documents and all non-documentary facts including identification of all persons with knowledge of relevant facts and a synopsis of their testimony;
- D. The Design-Builder’s position as to why the Contract and facts demonstrate that the Design-Builder is entitled to additional compensation and/or time;
- E. The estimated dollar cost, if any, of the Disputed Work and how the estimate was determined;
- F. If the Design-Builder is asserting an Excusable or Compensable Delay occurred, an analysis of the progress schedule showing the impact on the Critical Path; and
- G. A specific request for additional compensation or time, or other change to provisions of the Contract.

111.2.3 Decision by Program Manager. Within twenty (20) Days of receiving a Detailed Notice of Dispute Conforming to Subsection 111.2.2 – Detailed Notice of Dispute, the Program Manager will Deliver a written decision to the Design-Builder on the specific request made.

111.3 Negotiation by Management.

111.3.1 Notice of Unresolved Dispute. If the Design-Builder desires additional consideration, the Design-Builder shall Deliver a written “Notice of Unresolved Dispute” to the Department’s appropriate Bureau Director (hereafter “Director” in this Section 111 – Resolution of Disputes within ten (10) Days of receiving the Program Manager’s decision provided for in Subsection 111.2.3 – Decision by Program Manager.

At a minimum, the Notice of Unresolved Dispute must include the following information in sufficient detail to allow reasoned analysis as determined by the Director or the director’s designee(s):

- A. all documentation submitted to the Resident for Project-level negotiation,

- B. all decisions rendered by the Program Manager or equivalent Bureau level manager, and
- C. all additional information the Design-Builder desires the Department to consider.

111.3.2 Additional Documentation. Within ten (10) Days of the receiving a Notice of Unresolved Dispute Conforming to Subsection 111.3.1, the Director or the Director's designee(s) may require the Design-Builder to provide Additional Documentation. If required, the Design-Builder shall completely and accurately supply all requested information in writing within fifteen (15) Days of receiving said request. Failure to provide all Additional Documentation constitutes a waiver of all claims for additional compensation or time.

Additional Documentation may include the following:

- A. The date(s) on which facts arose which gave rise to the Issue or Dispute.
- B. The dates the Department Received the "Notice of Issue for Consideration" Conforming to Subsection 104.4.5.A – Early Negotiations – Notice Required and the "Detailed Notice of Dispute" Conforming to Subsection 111.2.2.
- C. A list of all Contract provisions that is relevant to the Dispute and a Statement of which specific Contract provisions the Design-Builder believes controls the outcome of the Dispute.
- D. A narrative setting forth the Design-Builder's position regarding additional compensation and time, if any, including all supporting facts including dates, locations, and items of Work affected by the Dispute, and how the Contract provisions set forth in subparagraph C support the Design-Builder's position.
- E. A list of and copies of all documents that are relevant to the Dispute organized chronologically. With respect to each document, the list must include its date, the author(s) (including address and telephone numbers), and the recipient(s).
- F. A list of all persons that are involved in or knowledgeable of the Dispute including addresses, and telephone numbers of such persons. If such person has knowledge of oral Statements upon which the Design-Builder is relying, the list must also include the substance of the oral Statements, the date(s) they were made, and all people present at the time the Statement was made.
- G. If an extension of time is sought:
 - 1. The specific Days or dates, for which it is sought, including an explanation of impact on the Critical Path;
 - 2. The specific reasons the Design-Builder believes a time extension should be granted; and
 - 3. The specific provisions of the Contract under which it is sought.

H. If additional compensation is sought, the exact amount sought and a breakdown of that amount into the categories provided by Subsection 109.5.2 –Basis of Payment.

I. An oath consisting of the following language:

“ON OATH, and under the penalty of law for perjury or falsification, the undersigned, (Name of person signing oath and title) hereby certifies that the amounts claimed by the Design-Builder for additional compensation and time (as applicable) set forth in the Notice of Unresolved Dispute and this additional documentation are a true and complete Statement of the Actual Costs incurred and time sought, and are fully documented and supported in accordance with the Contract.”

J. Date of signature, sworn signature, and acknowledgment by notary.

The Director or the Director’s designee may also retrieve and review the Proposal Escrow Documentation, if any, if the Contract required submission of Proposal Escrow.

111.3.3 Decision by Director. Within fifteen (15) Days of receiving a Notice of Unresolved Dispute Conforming to Subsection 111.3.1 – Notice of Unresolved Dispute or, if requested, all Additional Documentation, whichever is later, the Director or the Director’s designee(s) will Deliver a written decision. The decision will affirm, reverse, revise, or amend the decision of the Program Manager and/or request a Dispute Review Board (DRB) proceeding as provided in Section 111.4 – Dispute Review Board below.

111.4 Dispute Review Board. If the Design-Builder wants additional consideration and the Director has not requested a DRB proceeding, the Design-Builder may Deliver a written request for a DRB proceeding to the Director within ten (10) Days of receiving the Director’s decision as provided in Subsection 111.3.3 – Decision by Director.

Within ten (10) Days of receiving a request for a DRB proceeding (“DRB Consent Period”), the non-requesting party shall notify the other as to whether or not it consents to a DRB proceeding. If both parties consent, a DRB proceeding shall take place and shall conform to the DRB Rules agreed upon by the Department and the Associated Constructors of Maine. If either party does not consent within the DRB Consent Period and the Design-Builder wants additional consideration, the Design-Builder must file an Appeal with the Commissioner as provided in Subsection 111.5.1 – Filing of Appeal. For a related provision, see Section 101.2 – Definition of Dispute Review Board.

The purpose of the DRB is to assist consenting parties in resolving Disputes in a manner that complies with the Contract and that is fair, impartial, less expensive, and less formal than litigation. The DRB will do so by issuing non-binding recommendations, unless the parties mutually agree in writing at the time of consenting to a DRB proceeding that such recommendations will be binding.

111.5 Appeal to Commissioner.

111.5.1 Filing of Appeal. If a DRB proceeding did not occur and the Design-Builder wants additional consideration, the Design-Builder must file an “Appeal of the Director’s Decision” to the Commissioner within ten (10) Days of the expiration of the DRB Consent Period. If a DRB proceeding did occur and failed to resolve the Dispute and/or the Design-Builder or the Director want additional consideration, that party must file an “Appeal of Dispute Review Board Recommendation” to the Commissioner within thirty (30) Days of the date the DRB’s recommendation is final. At a minimum, the Appeal must contain:

- A. If a DRB proceeding did not occur, all Materials submitted to the Director and all decisions by the Director;
- B. If a DRB proceeding did occur, all Materials submitted to the DRB and all recommendations from the Dispute Review Board;
- C. The specific findings of the Director and/or the DRB that the appealing party claims are contrary to law and/or fact;
- D. Any other pertinent new documentary evidence;
- E. Any written arguments the appealing party wishes the Commissioner to consider; and
- F. The specific relief sought.

Unless directed otherwise by the Commissioner, review of the Appeal will be limited to the documentation submitted.

111.5.2 Rebuttal Information. The non-appealing party will have ten (10) Days of receiving notice that an Appeal was filed with the Commissioner to submit written rebuttal information.

111.5.3 Time and Alternatives for Commissioner Action. Within twenty (20) Days of receiving an Appeal Conforming to Subsection 111.5.1 – Filing an Appeal or, if applicable, the Receipt of the rebuttal information allowed by Subsection 111.5.2 – Rebuttal Information, the Commissioner will:

- A. In writing, affirm the recommendation(s) of the DRB or the decision of the Director, as applicable;
- B. In writing, revise, amend, or reverse the recommendation(s) of the DRB or the decision of the Director, as applicable; or
- C. In writing, submit the claim to binding or non-binding alternative Dispute resolution.

111.5.4 Final Agency Action. Any affirmation, revision, amendment, or reversal by the Commissioner is final agency action as of the date of Receipt of such action by the Design-Builder. If the Commissioner submits the Dispute to alternative Dispute resolution, the date of final agency action will be established by the mediator, arbitrator, or other Dispute resolution neutral by written notice to the parties. If the Commissioner takes no action within such thirty (30) Day period, the DRB's final recommendation (if one exists) or the decision of the Director (if a DRB recommendation does not exist) shall be final agency action upon the expiration of said thirty (30) Day period.

111.6 Judicial Review. The Design-Builder must comply with all of the notice and Dispute resolution provisions of this Contract in order to pursue judicial review. For related provisions, see Subsections 111.1.2 – Escalation Process and 111.1.4 – Mandatory Notice.

All Proposers and the Design-Builder agree that any judicial review of any claim or cause of action arising from the Proposal and/or the Contract must be commenced in the Superior Court of Maine, Kennebec County. Any petition for review must be in accordance with the Maine Administrative Procedure Act, 5 MRSA §11001, et seq. and Rule 80C of the Maine Rules of Civil Procedure.

SECTION 112 - DEFAULT AND TERMINATION

Scope of Section. This Section contains general provisions related to Default and termination of the Contract.

112.1 Default.

112.1.1 Grounds for Default. The Design-Builder and the Surety are in Default of the Contract if the Design-Builder or the Surety:

- A. Fails to Promptly begin the Work under the Contract after being authorized to proceed,
- B. Fails to perform the Work with sufficient labor, Equipment, or Materials to assure the timely Completion of the Work,
- C. Performs Defective Work, neglects or refuses to uncover, remove or rebuild Unacceptable Work, or neglects or refuses to uncover Unauthorized or Uninspected Work when directed by the Department;
- D. Discontinues the prosecution of the Work without Departmental approval,
- E. Continues to perform Work after the Department directs that Work be stopped,
- F. Fails to resume Work, which has been suspended as required by the Contract,
- G. Becomes insolvent or is declared bankrupt or commits any act of bankruptcy or insolvency that could affect the Work in any way,
- H. Allows any final judgment to stand against the Design-Builder unsatisfied for a period of ten (10) Days,
- I. Makes an assignment for the benefit of creditors without authorization by the Department, or
- J. In any other manner, fails to perform the Work in Substantial Conformity with any material provision of the Contract.

112.1.2 Notice of Default/Cure. Except as otherwise provided in this Contract, if Default occurs, the Department may give written Notice of Default to the Design-Builder and its Surety. Failure to give Notice of Default is in no way a waiver by the Department of any provision of the Contract.

If the Design-Builder or Surety fails to completely cure such Default within a period of ten (10) Days after Notice of Default, then the Department may:

- A. terminate the Contract for cause in accordance with Subsection 112.2.1 – For Cause, or
- B. take prosecution of the Work away from the Design-Builder without violating the Contract.

112.2 Termination. The Department may, by written order to the Design-Builder, terminate the Contract as provided in this Section. Termination of the Contract or portion thereof shall not relieve the Design-Builder of its Contractual responsibilities for the Work completed (including warranty obligations), nor shall it relieve the Surety of its obligation for claims arising from the Work or the Contract.

112.2.1 For Cause. If the Design-Builder fails to completely cure all Defects identified in the Notice(s) of Default provided for in Subsection 112.1.2 – Notice of Default/Cure, within the fourteen (14) calendar Day cure period provided, the Department may immediately terminate the Contract for cause by written Notice of Termination For Cause. The Design-Builder shall immediately deliver to the Department all design documents of whatever nature 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 the Department deems necessary for completion of the Work. The Department shall have the unequivocal right to use said documents to complete the Work and may enter into an agreement with another entity for the Completion of the Work, or use such other methods as in the opinion of the Department are required for the Completion of the intent of the Contract in an acceptable and timely manner.

The Department will pay for all Accepted items of Work as of the date of Termination at agreed upon prices. The Design-Builder shall make all Work records available to the Department upon request regarding payment under this Section. All costs and charges incurred by the Department, together with the cost of completing the Work specified in the Contract, will be deducted from amounts otherwise due the Design-Builder. If such expenses exceed the sum that would have been payable under the Contract, then the Design-Builder and the Surety are liable and shall pay to the Department the amount of such excess within thirty (30) Days of the Delivery of a Statement setting forth such expenses to the Design-Builder and the Surety, as applicable.

If the Design-Builder files for bankruptcy at any time before expiration of the warranty periods provided by this Contract, then the Design-Builder and its Surety agree, if requested by the Department and within thirty (30) Days of such request, to take all actions necessary or convenient to reject or accept this Contract under the executory Contract provisions of the federal bankruptcy code.

112.2.2 For Convenience. The Department may terminate this Contract for convenience or for any reason that is in the best interest of the Department. Terminations caused without fault of or for reasons beyond the control of the Design-Builder are Terminations for Convenience. The Department will notify the Design-Builder of such terminations by sending a Notice of Termination for Convenience.

In case of a Termination for Convenience, the Department will pay for all Accepted Work as of the date of termination at agreed upon prices. The Design-Builder shall make all Work records available to the Department upon request regarding payment under this Section. Acceptable Materials, obtained by the Design-Builder for the Work but which have not been incorporated therein, may at the option of the Department be purchased from the Design-Builder at Actual Cost Delivered to a prescribed location or otherwise disposed of as mutually agreed.

After Receipt of Notice of Termination for Convenience from the Department, the Design-Builder may also submit a claim for additional damages or costs not covered above or elsewhere in this Contract to the Program Manager within sixty (60) Days of the effective Termination date. Such claim may include such cost items as idle Equipment time, Project investigative costs, overhead expenses attributable to the Project terminated, legal and accounting charges involved in claim preparation, Subcontractor costs not otherwise paid for, idle labor cost if Work is stopped in advance of termination date, guaranteed payments for private land usage as part of the original Contract, and any other cost or damage item for which the Design-Builder reasonably believes reimbursement should be made. In no event, however, will loss of anticipated profits be considered as part of any settlement.

The Design-Builder agrees to make the Proposal Escrow Documentation, if any, and its cost records available to the extent necessary to determine the validity and amount of each item claimed.

The Department will respond in writing to such claim within sixty (60) Days of Receipt. If the Design-Builder wants additional consideration, the Design-Builder must Deliver a written "Notice of Unresolved Dispute" to the Director as provided in Subsection 111.3.1 – Notice of Unresolved Dispute and comply with all other applicable Dispute resolution provisions of Section 111 – Resolution of Disputes.

APPENDIX A TO DIVISION 100 DESIGN-BUILD GENERAL CONDITIONS

SECTION 1 - BIDDING PROVISIONS

- A. Federally Required Certifications. By signing and delivering a Bid, the Bidder certifies as provided in all certifications set forth in this Appendix A - Federal Contract Provisions Supplement including:
- Certification Regarding No Kickbacks to Procure Contract as provided on this page 1 below.
 - Certification Regarding Non-collusion as provided on page 2 below.
 - Certification Regarding Non-segregated Facilities as provided by FHWA Form 1273, section III set forth on page 23 below.
 - "Certification Regarding Debarment, Suspension, Ineligibility and Voluntary Exclusion" as provided by FHWA Form 1273, section XI set forth on page 34 below.
 - "Certification Regarding Use of Contract Funds for Lobbying" as provided by FHWA Form 1273, section XII set forth on page 37 below.

Unless otherwise provided below, the term "Bidder", for the purposes of these certifications, includes the Bidder, its principals, and the person(s) signing the Bid. Upon execution of the Contract, the Bidder (then called the Contractor) will again make all the certifications indicated in this paragraph above. Upon execution of the Contract, the Bidder (then called the Contractor) will again make all the certifications indicated in this paragraph above.

CERTIFICATION REGARDING NO KICKBACKS TO PROCURE CONTRACT. Except expressly stated by the Bidder on sheets submitted with the Bid (if any), the Bidder hereby certifies, to the best of its knowledge and belief, that it has not:

- (A) employed or retained for a commission, percentage, brokerage, contingent fee, or other consideration, any firm or person (other than a bona fide employee working solely for me) to solicit or secure this contract;
- (B) agreed, as an express or implied condition for obtaining this contract, to employ or retain the services of any firm or person in connection with carrying out the contract, or;
- (C) paid, or agreed to pay, to any firm, organization, or person (other than a bona fide employee working solely for me) any fee, contribution, donation, or consideration of any kind for, or in connection with, procuring or carrying out the contract;

By signing and submitting a Bid, the Bidder acknowledges that this certification is to be furnished to the Maine Department of Transportation and the Federal Highway Administration, U.S. Department of Transportation in connection with this contract in anticipation of federal aid highway funds and is subject to applicable state and federal laws, both criminal and civil.

CERTIFICATION REGARDING NONCOLLUSION. Under penalty of perjury as provided by federal law (28 U.S.C. §1746), the Bidder hereby certifies, to the best of its knowledge and belief, that:

the Bidder has not, either directly or indirectly, entered into any agreement, participated in any collusion, or otherwise taken any action in restraint of competitive bidding in connection with the Contract.

For a related provisions, see Section 102.7.2 (C) of the Standard Specifications - "Effects of Signing and Delivery of Bids" - "Certifications", Section 3 of this Appendix A entitled "Other Federal Requirements" including section XI - "Certification Regarding Debarment, Suspension, Ineligibility, and Voluntary Exclusion" and section XII. - "Certification Regarding Use of Contract Funds for Lobbying."

B. Bid Rigging Hotline. To report bid rigging activities call: **1-800-424-9071**

The U.S. Department of Transportation (DOT) operates the above toll-free "hotline" Monday through Friday, 8:00 a.m. to 5:00 p.m., eastern time. Anyone with knowledge of possible bid rigging, bidder collusion, or other fraudulent activities should use the "hotline" to report such activities.

The "hotline" is part of the DOT's continuing effort to identify and investigate highway construction contract fraud and abuse and is operated under the direction of the DOT Inspector General. All information will be treated confidentially and caller anonymity will be respected.

SECTION 2 - FEDERAL EEO AND CIVIL RIGHTS REQUIREMENTS

Unless expressly otherwise provided in the Bid Documents, the provisions contained in this Section 2 of this "Federal Contract Provisions Supplement" are hereby incorporated into the Bid Documents and Contract.

A. Nondiscrimination & Civil Rights - Title VI. The Contractor and its subcontractors 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 Department deems appropriate. The Contractor and subcontractors shall comply with Title VI of the Civil Rights Act of 1964, as amended, and with all State of Maine and other Federal Civil Rights laws.

For related provisions, see Subsection B - "Nondiscrimination and Affirmative Action - Executive Order 11246" of this Section 2 and Section 3 - Other Federal Requirements of this "Federal Contract Provisions Supplement" including section II - "Nondiscrimination" of the "Required Contract Provisions, Federal Aid Construction Contracts", FHWA-1273.

B. Nondiscrimination and Affirmative Action - Executive Order 11246. Pursuant to Executive Order 11246, which was issued by President Johnson in 1965 and amended in 1967 and 1978, this Contract provides as follows.

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 efforts 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:

Ensure and maintain a working environment free of harassment, intimidations, 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 forepersons, 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.

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 union have employment opportunities available, and to maintain a record of the organization's responses.

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.

Provide immediate written notification to the Department's Office of Human Resources – Equal Employment Opportunity 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 Design-Builder's efforts to meet its obligations.

Develop on-the-job training opportunities and/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 B above.

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 obligation; 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.

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 on-site supervisory personnel such as Superintendents, General Forepersons, 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.

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 Contractor's and Subcontractors with whom the Contractor does or anticipates doing business.

Direct its recruitment efforts, both orally 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, screenings, procedures, and test to be used in the selection process.

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 workforce.

Validate all tests and other selection requirements.

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.

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.

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.

Document and maintain a record of all solicitations of offers for subcontracts from minority and female construction Contractor's and suppliers, including circulation of solicitations to minority and female Contractor associations and other business associations.

Conduct a review, at least annually, of all supervisors' adherence to and performance under the Contractor's EEO policies and affirmative action obligations.

C. Goals for Employment of Women and Minorities. Per Executive Order 11246, craft tradesperson goals are 6.9 percent (6.9%) women and 0.5 percent (0.5%) minorities employed. However, goals may be adjusted upward at the mutual agreement of the Contractor and the Department. Calculation of these percentages shall not include On-the-Job Training Program trainees, and shall not include clerical or field clerk position employees.

For a more complete presentation of requirements for such Goals, see the federally required document "Goals for Employment of Females and Minorities" set forth in the next 6 pages below.

Start of GOALS FOR EMPLOYMENT OF FEMALES AND MINORITIES
Federally Required Contract Document

§60-4.2 Solicitations

(d) The following notice shall be included in, and shall be part of, all solicitations for offers and bids on all Federal and federally assisted construction contracts or subcontracts in excess of \$10,000 to be performed in geographical areas designated by the Director pursuant to §60-4.6 of this part (see 41 CFR 60-4.2(a)):

Notice of Requirement for Affirmative Action to Ensure Equal Opportunity (Executive Order 11246)

1. The Offeror's or bidder's attention is called to the "Equal Opportunity Clause" and the "Standard Federal Equal Employment Specifications" set forth herein.
2. The goals and timetables 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:

<u>Goals for female participation in each trade</u>	6.9%
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<u>Goals for minority participation for each trade</u>	
Maine	

001 Bangor, ME 0.8%
Non-SMSA Counties (Aroostook, Hancock, Penobscot, Piscataquis, Waldo, Washington)

002 Portland-Lewiston, ME
SMSA Counties: 4243 Lewiston-Auburn, ME 0.5%
(Androscoggin)

6403 Portland, ME 0.6%
(Cumberland, Sagadahoc)

Non-SMSA Counties: 0.5%
(Franklin, Kennebec, Knox, Lincoln, Oxford, Somerset, York)

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 in 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. The Contractor shall provide written notification to the Director of the Office of Federal Contract Compliance Programs within ten (10) Working Days of award of any construction subcontract in excess of \$10,000 at any tier for construction work under the contract resulting from this solicitation. The notification shall list the name, address and telephone number of the subcontractor, employer identification number of the subcontractor, estimated dollar amount of the subcontract; estimated started and completion dates of the subcontract; and the geographical area in which the subcontract is to be performed.

4. As used in this Notice, and in the Contract resulting from this solicitation, the "covered area" is (insert description of the geographical areas where the contract is to be performed giving the state, county and city, if any).

STANDARD FEDERAL EQUAL EMPLOYMENT OPPORTUNITY CONSTRUCTION CONTRACT SPECIFICATIONS (EXECUTIVE ORDER 11246)

1. 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" means the Federal Social Security number" means the Federal Social Security number used o 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 the North America and maintaining identifiable tribal affiliations through membership and participation or community identification).
2. 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.
3. If the contractor, is participating (pursuant to 41 CFR 60-.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 EEO clause, 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 for 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.
4. 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 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 areas 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 specific.

5. 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.
6. In order for the non working 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.
7. 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 expensive as the following:
 - a. Ensure and maintain a working environment free of harassment, intimidation, coercion at all sites, and in all facilities at which the Contractor's employees are assigned to work. The Contractor, when 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 organization's 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 sources 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 and/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 complied 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 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 on-site 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 other training by any recruitment source, the Contractor shall send written notification to organizations such as the above, describing prior to the date for the acceptance of applications for apprenticeship or 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 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 solicitation to minority and female contractor associations and other business associations.
 - p. Conduct a review, at least annually, of all supervisor's adherence to and performance under the Contractor's EEO policies and affirmative action obligations.
8. Contractors are encouraged to participate in voluntary associations which assist in fulfilling one or more of their affirmative action obligations (7 a 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 7 a 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 work force 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.
9. 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, specific minority group of women is underutilized.)

10. The Contractor shall not use the goals and timetables or affirmative action even through the Contractor has achieved its goals for women generally, the Contractor may be in violation of the Executive Order if standards to discriminate against any person because of race, color, religion, sex, or national origin.
11. The Contractor shall not enter into any Subcontract with any person or firm debarred from Government contracts pursuant to Executive Order 11246.
12. The Contractor shall carry out such sanctions and penalties for violation of these specifications and of the Equal Opportunity Clause, including suspension, termination and cancellation of existing subcontracts as may be imposed or ordered pursuant to Executive Order 11246, as amended, and its implementation 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.
13. 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 60-4.6.
14. 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 location sat which the work was performed. Records 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.
15. 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).

End of GOALS FOR EMPLOYMENT OF FEMALES AND MINORITIES
Federally Required Contract Document

D. Disadvantaged Business Enterprise (DBE) Requirements. The Department has established an annual Disadvantaged Business Enterprise aspirational goal to be achieved through race neutral means. This goal will be adjusted periodically and will be provided by Supplemental Provision. Unless otherwise specifically provided in the Contract, there are no specific percentage requirements for use of DBEs for individual construction contracts. The Contractor shall comply with all provisions of this section regarding DBE participation and the Department's latest version of the Disadvantaged Business Enterprise Program Manual, said Manual being incorporated herein by reference. In the case of conflict between this Contract and said Manual, this Contract shall control. The Department reserves the right to adjust DBE goals on a project-by-project basis by addendum.

Policy. It is the Department's policy that DBEs as defined in 23 CFR Part 26 and referenced in the Transportation Equity Act for 21st Century of 1998, as amended from the Surface Transportation Uniform Relocation Assistance Act of 1987, and the Intermeddle Surface Transportation Efficiency Act of 1991. The intent hereto remains to provide the maximum opportunity for DBEs to participate in the performance of contracts financed in whole or in part with federal funds.

The Department and its Contractors shall not discriminate on the basis of race, color, national origin, ancestry, sex, age, or disability in the award and performance of DOT assisted contracts.

Disadvantaged Business Enterprises are those so certified by the Maine Department of Transportation Office of Human Resources prior to bid opening date.

The Department has determined that elements of a good faith effort to meet the contract goal include but are not limited to the following:

1. Whether the Contractor advertised in general circulation, trade association, and minority/women's-focus media concerning the subcontracting opportunities;
2. Whether the Contractor provided written notice to a reasonable number of specific DBEs that their interest in the contract is being solicited;
3. Whether the Contractor followed up on initial solicitations of interest by contacting DBEs to determine with certainty whether the DBEs were interested;
4. Whether the Contractor selected portions of the work to be performed by DBEs in order to increase the likelihood of meeting the DBE goals;
5. Whether the Contractor provided interested DBEs with adequate information about the plans, specification and requirements of the contract;
6. Whether the Contractor negotiated in good faith with interested DBEs, not rejecting the DBE as unqualified without sound reasons based on a thorough investigation of their capabilities;

7. Whether the Contractor made efforts to assist interested DBEs with other appropriate technical/financial assistance required by the Department or Contractor;
8. Whether the Contractor effectively used the services of available minority/women's community organizations, minority/women's business assistance offices; and other organizations that provide assistance in the recruitment and placement of DBEs.

Substitutions of DBEs. The following may be acceptable reasons for Office of Human Resources approval of such a change order:

- The DBE defaults, voluntarily removes itself or is over-extended;
- The Department deletes portions of the work to be performed by the DBE.

It is not intended that the ability to negotiate a more advantageous contract with another certified DBE be considered a valid basis for such a change in DBE utilization once the DBE Bid Submission review has been passed. Any requests to alter the DBE commitment must be in writing and included with the change order.

Failure to carry out terms of this Standard Specification shall be treated as a violation of this contract and will result in contract sanctions which may include withholding of partial payments totaling the creditable dollars amount which would have been paid for said DBE participation, termination of this contract or other measures which may affect the ability of the Contractor to obtain Department contracts.

Copies of the Maine Department of Transportation's DBE Program may be obtained from:

Maine Department of Transportation
Office of Human Resources
#16 State House Station
Augusta, Maine 04333-0016
Tel. (207) 624-3050

Quarterly Reporting Requirement. The Contractor must submit quarterly reports of actual dollars paid to Disadvantaged Business Enterprises (DBE's) on this Project to the MDOT Office of Human Resources by the end of the first week of January, April, July and October for the period covering the preceding three months considered Federal Fiscal Year quarters. The reports will be submitted directly to the Office of Human Resources on the form provided in the latest version of the DBE Program Manual. Failure to submit the report by the deadline may result in a withholding of approval of partial payment estimates by the Department.

SECTION 3 - OTHER FEDERAL REQUIREMENTS

Unless expressly otherwise provided in the Bid Documents, the provisions contained in this Section 3 of this "Federal Contract Provisions Supplement" are hereby incorporated into the Bid Documents and Contract.

A. Buy America

If the cost of products purchased for permanent use in this project which are manufactured of steel, iron or the application of any coating to products of these materials exceeds 0.1 percent (0.1%) of the contract amount, or \$2,500.00, whichever is greater, the products shall have been manufactured and the coating applied in the United States. The coating materials are not subject to this clause, only the application of the coating. In computing that amount, only the cost of the product and coating application cost will be included.

Ore, for the manufacture of steel or iron, may be from outside the United States; however, all other manufacturing processes of steel or iron must be in the United States to qualify as having been manufactured in the United States.

United States includes the fifty (50) United States and any place subject to the jurisdiction thereof.

Products of steel include, but are not limited to, such products as structural steel, piles, guardrail, steel culverts, reinforcing steel, structural plate and steel supports for signs, luminaries and signals.

Products of iron include, but are not limited to, such products as cast iron grates.

Application of coatings include, but are not limited to, such applications as epoxy, galvanized, and paint.

To assure compliance with this section, the Contractor shall submit a certification letter on its letterhead to the Department stating the following:

“This is to certify that products made of steel, iron or the application of any coating to products of these materials whose costs are in excess of \$2,500.00 or 0.1 percent (0.1%) of the original contract amount, whichever is greater, were manufactured and the coating, if one was required, was applied in the United States.”

B. Materials

a. Convict Produced Materials. References: 23 U.S.C. 114(b)(2), 23 CFR 635.417

Applicability: FHWA's prohibition against the use of convict material only applies to Federal-aid highways. Materials produced after July 1, 1991, by convict labor may only be incorporated in a Federal-aid highway construction project if: 1) such materials have been produced by convicts who are on parole, supervised release, or probation from a prison; or 2) such material has been produced in a qualified prison facility, e.g., prison industry, with the amount produced during any 12-month period, for use in Federal-aid projects, not exceeding the amount produced, for such use, during the 12-month period ending July 1, 1987.

Materials obtained from prison facilities (e.g., prison industries) are subject to the same requirements for Federal-aid participation that are imposed upon materials acquired from other

sources. Materials manufactured or produced by convict labor will be given no preferential treatment.

The preferred method of obtaining materials for a project is through normal contracting procedures which require the contractor to furnish all materials to be incorporated in the work. The contractor selects the source, public or private, from which the materials are to be obtained (23 CFR 635.407). Prison industries are prohibited from bidding on projects directly (23 CFR 635.112e), but may act as material supplier to construction contractors.

Prison materials may also be approved as State-furnished material. However, since public agencies may not bid in competition with private firms, direct acquisition of materials from a prison industry for use as State-furnished material is subject to a public interest finding with the Division Administrator's concurrence (23 CFR 635.407d). Selection of materials produced by convict labor as State-furnished materials for mandatory use should be cleared prior to the submittal of the Plans Specifications & Estimates (PS&E).

b. Patented/Proprietary Products. References: 23 U.S.C. 112, 23 CFR 635.411

FHWA will not participate, directly or indirectly, in payment for any premium or royalty on any patented or proprietary material, specification, or process specifically set forth in the plans and specifications for a project, unless:

- the item is purchased or obtained through competitive bidding with equally suitable unpatented items,
- the STA certifies either that the proprietary or patented item is essential for synchronization with the existing highway facilities or that no equally suitable alternative exists, or
- the item is used for research or for a special type of construction on relatively short sections of road for experimental purposes. States should follow FHWA's procedures for "Construction Projects Incorporating Experimental Features" (<http://www.fhwa.dot.gov/programadmin/contracts/expermnt.cfm>) for the submittal of work plans and evaluations.

The primary purpose of the policy is to have competition in selection of materials and allow for development of new materials and products. The policy further permits materials and products that are judged equal may be bid under generic specifications. If only patented or proprietary products are acceptable, they shall be bid as alternatives with all, or at least a reasonable number of, acceptable materials or products listed; and the Division Administrator may approve a single source if it can be found that its utilization is in the public interest.

Trade names are generally the key to identifying patented or proprietary materials. Trade name examples include 3M, Corten, etc. Generally, products identified by their brand or trade name are not to be specified without an "or equal" phrase, and, if trade names are used, all, or at least a reasonable number of acceptable "equal" materials or products should be listed. The licensing of several suppliers to produce a product does not change the fact that it is a single product and should not be specified to the exclusion of other equally suitable products.

c. State Preference. References: 23 U.S.C. 112, 23 CFR 635.409

Materials produced within Maine shall not be favored to the exclusion of comparable materials produced outside of Maine. State preference clauses give particular advantage to the designated source and thus restrict competition. Therefore, State preference provisions shall not be used on any Federal-aid construction projects.

This policy also applies to State preference actions against materials of foreign origin, except as otherwise permitted by Federal law. Thus, States cannot give preference to in-State material sources over foreign material sources. Under the Buy America provisions, the States are permitted to expand the Buy America restrictions provided that the STA is legally authorized under State law to impose more stringent requirements.

d. State Owned/Furnished/Designated Materials. References: 23 U.S.C. 112, 23 CFR 635.407

Current FHWA policy requires that the contractor must furnish all materials to be incorporated in the work, and the contractor shall be permitted to select the sources from which the materials are to be obtained. Exceptions to this requirement may be made when there is a definite finding, by MDOT and concurred in by Federal Highway Administration's (FHWA) Division Administrator, that it is in the public interest to require the contractor to use materials furnished by the MDOT or from sources designated by MDOT. The exception policy can best be understood by separating State-furnished materials into the categories of manufactured materials and local natural materials.

Manufactured Materials. When the use of State-furnished manufactured materials is approved based on a public interest finding, such use must be made mandatory. The optional use of State-furnished manufactured materials is in violation of our policy prohibiting public agencies from competing with private firms. Manufactured materials to be furnished by MDOT must be acquired through competitive bidding, unless there is a public interest finding for another method, and concurred in by FHWA's Division Administrator.

Local Natural Materials. When MDOT owns or controls a local natural materials source such as a borrow pit or a stockpile of salvaged pavement material, etc., the materials may be designated for either optional or mandatory use; however, mandatory use will require a public interest finding (PIF) and FHWA's Division Administrator's concurrence.

In order to permit prospective bidders to properly prepare their bids, the location, cost, and any conditions to be met for obtaining materials that are made available to the contractor shall be stated in the bidding documents.

Mandatory Disposal Sites. Normally, the disposal site for surplus excavated materials is to be of the contractor's choosing; although, an optional site(s) may be shown in the contract provisions. A mandatory site shall be specified when there is a finding by MDOT, with the concurrence of the Division Administrator, that such placement is the most economical or that

the environment would be substantially enhanced without excessive cost. Discussion of the mandatory use of a disposal site in the environmental document may serve as the basis for the public interest finding.

Summarizing FHWA policy for the mandatory use of borrow or disposal sites:

- mandatory use of either requires a public interest finding and FHWA's Division Administrator's concurrence,
- mandatory use of either may be based on environmental consideration where the environment will be substantially enhanced without excessive additional cost, and
- where the use is based on environmental considerations, the discussion in the environmental document may be used as the basis for the public interest finding.

Factors to justify a public interest finding should include such items as cost effectiveness, system integrity, and local shortages of material.

C. Standard FHWA Contract Provisions - FHWA 1273

Unless expressly otherwise provided in the Bid Documents, the following "Required Contract Provisions, Federal Aid Construction Contracts", FHWA-1273, are hereby incorporated into the Bid Documents and Contract.

Start of FHWA 1273 REQUIRED CONTRACT PROVISIONS FEDERAL-AID CONSTRUCTION CONTRACTS(As revised through March 10, 1994)

I. GENERAL

1. 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.
2. Except as otherwise provided for in each section, the contractor shall insert in each subcontract all of the stipulations contained in these Required Contract Provisions, and further require their inclusion in any lower tier subcontract or purchase order that may in turn be made. The Required Contract Provisions shall not be incorporated by reference in any case. The prime contractor shall be responsible for compliance by any subcontractor or lower tier subcontractor with these Required Contract Provisions.
3. A breach of any of the stipulations contained in these Required Contract Provisions shall be sufficient grounds for termination of the contract.
4. A breach of the following clauses of the Required Contract Provisions may also be grounds for debarment as provided in 29 CFR 5.12:

Section I, paragraph 2;

Section IV, paragraphs 1, 2, 3, 4, and 7;
Section V, paragraphs 1 and 2a through 2g.

5. Disputes arising out of the labor standards provisions of Section IV (except paragraph 5) and Section V of these Required Contract Provisions shall not be subject to the general disputes clause of this contract. Such disputes shall be resolved in accordance with the procedures of the U.S. Department of Labor (DOL) as set forth in 29 CFR 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 DOL, or the contractor's employees or their representatives.
6. Selection of Labor: During the performance of this contract, the contractor shall not:
 - a. discriminate against labor from any other State, possession, or territory of the United States (except for employment preference for Appalachian contracts, when applicable, as specified in Attachment A), or
 - b. employ convict labor for any purpose within the limits of the project unless it is labor performed by convicts who are on parole, supervised release, or probation.

II. NONDISCRIMINATION (Applicable to all Federal-aid construction contracts and to all related subcontracts of \$10,000 or more.)

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 (28 CFR 35, 29 CFR 1630 and 41 CFR 60) 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 Equal Opportunity Construction Contract Specifications set forth under 41 CFR 60-4.3 and the provisions of the American Disabilities Act of 1990 (42 U.S.C. 12101 et seq.) set forth under 28 CFR 35 and 29 CFR 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 State highway agency (SHA) and the Federal Government in carrying out EEO obligations and in their review of his/her activities under the contract.
 - b. The contractor will accept as his 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, 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, preapprenticeship, and/or on-the-job training."

2. EEO Officer. The contractor will designate and make known to the SHA contracting officers an EEO Officer who will have the responsibility for and must be capable of effectively administering and promoting an active contractor program of EEO 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 who 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.
 - 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 (30) Calendar 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 minority group employees.
 - 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 minority groups 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 minority group applicants. To meet this requirement, the contractor will identify sources of potential minority group employees, and establish with such identified sources procedures whereby minority group 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, he is expected to observe the provisions of that agreement to the extent that the system permits the contractor's compliance with EEO contract provisions. (The DOL has held that where implementation of such agreements have the effect of discriminating against minorities or women, or obligates the contractor to do the same, such implementation violates Executive Order 11246, as amended.)
 - c. The contractor will encourage his present employees to refer minority group applicants for employment. Information and procedures with regard to referring minority group 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, national origin, age or disability. The following procedures shall be followed:
- a. The contractor will conduct periodic inspections of project sites to insure 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 his 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 his avenues of appeal.
6. Training and Promotion.
- a. The contractor will assist in locating, qualifying, and increasing the skills of minority group and women employees, and applicants for employment.
 - 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. Where feasible, twenty-five percent (25%) of apprentices or trainees in each occupation shall be in their first year of apprenticeship or training. In the event a special provision for training is provided under this contract, this subparagraph will be superseded as indicated in the special provision.

- 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 minority group and women employees 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 his/her best efforts to obtain the cooperation of such unions to increase opportunities for minority groups and women within the unions, and to effect referrals by such unions of minority and female employees. 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 best efforts to develop, in cooperation with the unions, joint training programs aimed toward qualifying more minority group members and women for membership in the unions and increasing the skills of minority group employees and women so that they may qualify for higher paying employment.
 - b. The contractor will use best 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, 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 SHA 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 minority and women referrals within the time limit set forth in the collective bargaining agreement, the contractor will, through independent recruitment efforts, fill the employment vacancies without regard to race, color, religion, sex, national origin, age or disability; making full efforts to obtain qualified and/or qualifiable minority group persons and women. (The DOL has held that it shall be no excuse that the union with which the contractor has a collective bargaining agreement providing for exclusive referral failed to refer minority employees.) 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 SHA.

8. Selection of Subcontractors, Procurement of Materials and Leasing of Equipment. The contractor shall not discriminate on the grounds of race, color, religion, sex, national origin, age or disability in the selection and retention of subcontractors, including procurement of materials and leases of equipment.
 - a. The contractor shall notify all potential subcontractors and suppliers of his/her EEO obligations under this contract.
 - b. Disadvantaged business enterprises (DBE), as defined in 49 CFR 23, shall have equal opportunity to compete for and perform subcontracts which the contractor enters into pursuant to this contract. The contractor will use his best efforts to solicit bids from and to utilize DBE subcontractors or subcontractors with meaningful minority group and female representation among their employees. Contractors shall obtain lists of DBE construction firms from SHA personnel.
 - c. The contractor will use his best efforts to ensure subcontractor compliance with their EEO obligations.
9. 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 completion of the contract work and shall be available at reasonable times and places for inspection by authorized representatives of the SHA and the FHWA.
 - a. The records kept by the contractor shall document the following:
 - (1) The number 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;
 - (3) The progress and efforts being made in locating, hiring, training, qualifying, and upgrading minority and female employees; and
 - (4) The progress and efforts being made in securing the services of DBE subcontractors or subcontractors with meaningful minority and female representation among their employees.
 - b. All such records must be retained for a period of three years following completion of the contract work and shall be available at reasonable times and places for inspection by authorized representatives of the MDOT and the Federal Highway Administration.

The Contractor will submit to the MDOT a report for the month of July, indicating the total hours worked by 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 PR-1391. If on-the-job training is being required by "Training Special Provision," the Contractor will be required to furnish Form FHWA-1409. The report is required for week

ending July 15 and can be obtained from MDOT, is due by week ending August 20th. This report is to be furnished directly to MDOT - Office of Civil Rights.

III. NONSEGREGATED FACILITIES. (Applicable to all Federal-aid construction contracts and to all related subcontracts of \$10,000 or more.)

- a. By submission of this bid, the execution of this contract or subcontract, or the consummation of this material supply agreement or purchase order, as appropriate, the bidder, Federal-aid construction contractor, subcontractor, material supplier, or vendor, as appropriate, certifies that the firm does not maintain or provide for its employees any segregated facilities at any of its establishments, and that the firm does not permit its employees to perform their services at any location, under its control, where segregated facilities are maintained. The firm agrees that a breach of this certification is a violation of the EEO provisions of this contract. The firm further certifies that no employee will be denied access to adequate facilities on the basis of sex or disability.
- b. As used in this certification, the term "segregated facilities" means any waiting rooms, work areas, restrooms and washrooms, restaurants and other eating areas, time clocks, locker rooms, and other storage or dressing areas, parking lots, drinking fountains, recreation or entertainment areas, transportation, and housing facilities provided for employees which are segregated by explicit directive, or are, in fact, segregated on the basis of race, color, religion, national origin, age or disability, because of habit, local custom, or otherwise. The only exception will be for the disabled when the demands for accessibility override (e.g. disabled parking).
- c. The contractor agrees that it has obtained or will obtain identical certification from proposed subcontractors or material suppliers prior to award of subcontracts or consummation of material supply agreements of \$10,000 or more and that it will retain such certifications in its files.

IV. PAYMENT OF PREDETERMINED MINIMUM WAGE (Applicable to all Federal-aid construction contracts exceeding \$2,000 and to all related subcontracts, except for projects located on roadways classified as local roads or rural minor collectors, which are exempt.)

1. General:

- a. All mechanics and laborers employed or working upon the site of the work 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 (29 CFR 3) issued by the Secretary of Labor under the Copeland Act (40 U.S.C. 276c)] the full amounts of wages and bona fide fringe benefits (or cash equivalents thereof) due at time of payment. The payment shall be computed at wage rates not less than those contained in the wage determination of the Secretary of Labor (hereinafter "the wage determination") which is attached hereto and made a part hereof, regardless of any contractual relationship which may be alleged to exist between the contractor or its subcontractors and such laborers and mechanics. The wage determination (including any

additional classifications and wage rates conformed under paragraph 2 of this Section IV and the DOL poster (WH-1321) or Form FHWA-1495) shall 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. For the purpose of this Section, contributions made or costs reasonably anticipated for bona fide fringe benefits under Section 1(b)(2) of the Davis-Bacon Act (40 U.S.C. 276a) on behalf of laborers or mechanics are considered wages paid to such laborers or mechanics, subject to the provisions of Section IV, paragraph 3b, hereof. Also, for the purpose of this Section, 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 shall be paid the appropriate wage rate and fringe benefits on the wage determination for the classification of work actually performed, without regard to skill, except as provided in paragraphs 4 and 5 of this Section IV.

- b. 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.
- c. All rulings and interpretations of the Davis-Bacon Act and related acts contained in 29 CFR 1, 3, and 5 are herein incorporated by reference in this contract.

2. Classification:

- a. The SHA contracting officer shall require that any class of laborers or mechanics employed under the contract, which is not listed in the wage determination, shall be classified in conformance with the wage determination.
- b. The contracting officer shall approve an additional classification, wage rate and fringe benefits only when the following criteria have been met:
 - (1) the work to be performed by the additional classification requested is not performed by a classification in the wage determination;
 - (2) the additional classification is utilized in the area by the construction industry;
 - (3) the proposed wage rate, including any bona fide fringe benefits, bears a reasonable relationship to the wage rates contained in the wage determination; and
 - (4) with respect to helpers, when such a classification prevails in the area in which the work is performed.
- c. If the contractor or subcontractors, as appropriate, the laborers and mechanics (if known) to be employed in the additional classification 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 shall be sent by the contracting officer to the DOL, Administrator of the Wage and Hour Division, Employment Standards Administration, Washington, D.C. 20210. The Wage and Hour Administrator, or an authorized representative, will approve, modify, or disapprove every additional classification action within thirty (30) Calendar Days of receipt and so advise the contracting officer or will notify the contracting officer within the thirty (30) Calendar Day period that additional time is necessary.

- d. In the event the contractor or subcontractors, as appropriate, the laborers or mechanics to be employed in the additional 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 shall refer the questions, including the views of all interested parties and the recommendation of the contracting officer, to the Wage and Hour Administrator for determination. Said Administrator, or an authorized representative, will issue a determination within thirty (30) Calendar Days of receipt and so advise the contracting officer or will notify the contracting officer within the thirty (30) Calendar Day period that additional time is necessary
- e. The wage rate (including fringe benefits where appropriate) determined pursuant to paragraph 2c or 2d of this Section IV shall be paid to all workers performing work in the additional classification from the first day on which work is performed in the classification.

3. Payment of Fringe Benefits:

- a. 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 or subcontractors, as appropriate, shall either pay the benefit as stated in the wage determination or shall pay another bona fide fringe benefit or an hourly case equivalent thereof.
- b. If the contractor or subcontractor, as appropriate, does not make payments to a trustee or other third person, he/she may consider as a 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, 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.

4. Apprentices and Trainees (Programs of the U.S. DOL) and Helpers:

a. Apprentices:

- (1) Apprentices will be permitted to work at less than the predetermined rate for the work they performed when they are employed pursuant to and individually registered in a

bona fide apprenticeship program registered with the DOL, Employment and Training Administration, Bureau of Apprenticeship and Training, or with a State apprenticeship agency recognized by the Bureau, or if a person is employed in his/her first ninety (90) Calendar Days of probationary employment as an apprentice in such an apprenticeship program, who is not individually registered in the program, but who has been certified by the Bureau of Apprenticeship and Training or a State apprenticeship agency (where appropriate) to be eligible for probationary employment as an apprentice.

- (2) The allowable ratio of apprentices to journeyman-level employees on the job site in any craft classification shall not be greater than the ratio permitted to the contractor as to the entire work force under the registered program. Any employee listed on a payroll at an apprentice wage rate, who is not registered or otherwise employed as stated above, shall be paid not less than the applicable wage rate listed in 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 the registered program shall be paid not less than the applicable wage rate on the wage determination for the work actually performed. Where a contractor or subcontractor is performing construction on a project in a locality other than that in which its program is registered, the ratios and wage rates (expressed in percentages of the journeyman-level hourly rate) specified in the contractor's or subcontractor's registered program shall be observed.
- (3) Every apprentice must be paid at not less than the rate specified in the registered program for the apprentice's level of progress, expressed as a percentage of the journeyman-level hourly rate specified in the applicable wage determination. Apprentices shall 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 for the Wage and Hour Division determines that a different practice prevails for the applicable apprentice classification, fringes shall be paid in accordance with that determination.
- (4) In the event the Bureau of Apprenticeship and Training, or a State apprenticeship agency recognized by the Bureau, withdraws approval of an apprenticeship program, the contractor or subcontractor will no longer be permitted to utilize apprentices at less than the applicable predetermined rate for the comparable work performed by regular employees until an acceptable program is approved.

b. Trainees:

- (1) Except as provided in 29 CFR 5.16, trainees will not be permitted to work at less than the predetermined rate for the work performed unless they are employed pursuant to and individually registered in a program which has received prior approval, evidenced by formal certification by the DOL, Employment and Training Administration.

- (2) The ratio of trainees to journeyman-level employees on the job site shall not be greater than permitted under the plan approved by the Employment and Training Administration. Any employee listed on the payroll at a trainee rate who is not registered and participating in a training plan approved by the Employment and Training Administration shall be paid not less than the applicable wage rate on the wage determination for the classification of work actually performed. In addition, any trainee performing work on the job site in excess of the ratio permitted under the registered program shall be paid not less than the applicable wage rate on the wage determination for the work actually performed.
- (3) Every trainee must be paid at not less than the rate specified in the approved program for his/her level of progress, expressed as a percentage of the journeyman-level hourly rate specified in the applicable wage determination. Trainees shall be paid fringe benefits in accordance with the provisions of the trainee program. If the trainee program does not mention fringe benefits, trainees shall be paid the full amount of fringe benefits listed on the wage determination unless the Administrator of the Wage and Hour Division determines that there is an apprenticeship program associated with the corresponding journeyman-level wage rate on the wage determination which provides for less than full fringe benefits for apprentices, in which case such trainees shall receive the same fringe benefits as apprentices.
- (4) In the event the Employment and Training Administration withdraws approval of a training program, the contractor or subcontractor will no longer be permitted to utilize trainees at less than the applicable predetermined rate for the work performed until an acceptable program is approved.
- c. Helpers. Helpers will be permitted to work on a project if the helper classification is specified and defined on the applicable wage determination or is approved pursuant to the conformance procedure set forth in Section IV.2. Any worker listed on a payroll at a helper wage rate, who is not a helper under a approved definition, shall be paid not less than the applicable wage rate on the wage determination for the classification of work actually performed.
- 5. 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. 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 journeymen shall not be greater than permitted by the terms of the particular program.
- 6. Withholding. The SHA shall upon its own action or upon written request of an authorized representative of the DOL withhold, or cause to be withheld, from the contractor or subcontractor under this contract or any other Federal contract with the same prime contractor, or any other Federally-assisted contract subject to Davis-Bacon prevailing wage

requirements which is held by the same prime contractor, as much of the accrued payments or advances as may be considered necessary to pay laborers and mechanics, including apprentices, trainees, and helpers, employed by the contractor or any subcontractor the full amount of wages required by the contract. In the event of failure to pay any laborer or mechanic, including any apprentice, trainee, or helper, employed or working on the site of the work, all or part of the wages required by the contract, the SHA contracting officer may, 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.

7. Overtime Requirements. No contractor or subcontractor contracting for any part of the contract work which may require or involve the employment of laborers, mechanics, watchmen, or guards (including apprentices, trainees, and helpers described in paragraphs 4 and 5 above) shall require or permit any laborer, mechanic, watchman, or guard in any workweek in which he/she is employed on such work, to work in excess of forty (40) hours in such workweek unless such laborer, mechanic, watchman, or guard receives compensation at a rate not less than one-and-one-half times his/her basic rate of pay for all hours worked in excess of forty (40) hours in such workweek.
8. Violation. Liability for Unpaid Wages; Liquidated Damages: In the event of any violation of the clause set forth in paragraph 7 above, the contractor and any subcontractor responsible thereof shall be liable to the affected employee for his/her unpaid wages. 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, mechanic, watchman, or guard employed in violation of the clause set forth in paragraph 7, in the sum of \$10 for each Calendar Day on which such employee was required or permitted to work in excess of the standard work week of forty (40) hours without payment of the overtime wages required by the clause set forth in paragraph 7.
9. Withholding for Unpaid Wages and Liquidated Damages. The SHA shall upon its own action or upon written request of any authorized representative of the DOL withhold, or cause to be withheld, from any monies payable on account of work performed by the contractor or subcontractor under any such contract or 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, which is held by the same prime contractor, such sums as may be determined to be necessary to satisfy any liabilities of such contractor or subcontractor for unpaid wages and liquidated damages as provided in the clause set forth in paragraph 8 above.

V. STATEMENTS AND PAYROLLS (Applicable to all Federal-aid construction contracts exceeding \$2,000 and to all related subcontracts, except for projects located on roadways classified as local roads or rural collectors, which are exempt.)

1. Compliance with Copeland Regulations (29 CFR 3). The contractor shall comply with the Copeland Regulations of the Secretary of Labor which are herein incorporated by reference.

2. Payrolls and Payroll Records:

- a. Payrolls and basic records relating thereto shall be maintained by the contractor and each subcontractor during the course of the work and preserved for a period of 3 years from the date of completion of the contract for all laborers, mechanics, apprentices, trainees, watchmen, helpers, and guards working at the site of the work.
- b. The payroll records shall contain the name, social security number, and address of each such employee; his or her correct classification; hourly rates of wages paid (including rates of contributions or costs anticipated for bona fide fringe benefits or cash equivalent thereof of the types described in Section 1(b)(2)(B) of the Davis Bacon Act); daily and weekly number of hours worked; deductions made; and actual wages paid. In addition, for Appalachian contracts, the payroll records shall contain a notation indicating whether the employee does, or does not, normally reside in the labor area as defined in Attachment A, paragraph 1. Whenever the Secretary of Labor, pursuant to Section IV, paragraph 3b, has found 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 Section 1(b)(2)(B) of the Davis Bacon Act, the contractor and each subcontractor shall maintain records which show that the commitment to provide such benefits is enforceable, that the plan or program is financially responsible, that the plan or program has been communicated in writing to the laborers or mechanics affected, and show the cost anticipated or the actual cost incurred in providing benefits. Contractors or subcontractors employing apprentices or trainees under approved programs shall maintain written evidence of the registration of apprentices and trainees, and ratios and wage rates prescribed in the applicable programs.
- c. Each contractor and subcontractor shall furnish, each week in which any contract work is performed, to the SHA resident engineer a payroll of wages paid each of its employees (including apprentices, trainees, and helpers, described in Section IV, paragraphs 4 and 5, and watchmen and guards engaged on work during the preceding weekly payroll period). The payroll submitted shall set out accurately and completely all of the information required to be maintained under paragraph 2b of this Section V. This information may be submitted in any form desired. Optional Form WH-347 is available for this purpose and may be purchased from the Superintendent of Documents (Federal stock number 029-005-0014-1), U.S. Government Printing Office, Washington, D.C. 20402. The prime contractor is responsible for the submission of copies of payrolls by all subcontractors.
- d. Each payroll submitted shall be accompanied by a "Statement of Compliance," signed by the contractor or subcontractor or his/her agent who pays or supervises the payment of the persons employed under the contract and shall certify the following:
 - (1) that the payroll for the payroll period contains the information required to be maintained under paragraph 2b of this Section V and that such information is correct and complete;

- (2) that such laborer or mechanic (including each helper, apprentice, and trainee) employed 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 the Regulations, 29 CFR 3;
- (3) that each laborer or mechanic has been paid not less than the applicable wage rate and fringe benefits or cash equivalent for the classification of work performed, as specified in the applicable wage determination incorporated into the contract.
- e. The weekly submission of a properly executed certification set forth on the reverse side of Optional Form WH-347 shall satisfy the requirement for submission of the "Statement of Compliance" required by paragraph 2d of this Section V.
- f. The falsification of any of the above certifications may subject the contractor to civil or criminal prosecution under 18 U.S.C. 1001 and 31 U.S.C. 231.
- g. The contractor or subcontractor shall make the records required under paragraph 2b of this Section V available for inspection, copying, or transcription by authorized representatives of the SHA, the FHWA, or the DOL, and shall permit such representatives to interview employees during working hours on the job. If the contractor or subcontractor fails to submit the required records or to make them available, the SHA, the FHWA, the DOL, or all may, after written notice to the contractor, sponsor, applicant, or owner, take such actions 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 may be grounds for debarment action pursuant to 29 CFR 5.12.

VI. RECORD OF MATERIALS, SUPPLIES, AND LABOR

- 1. On all Federal-aid contracts on the National Highway System, except those which provide solely for the installation of protective devices at railroad grade crossings, those which are constructed on a force account or direct labor basis, highway beautification contracts, and contracts for which the total final construction cost for roadway and bridge is less than \$1,000,000 (23 CFR 635) the contractor shall:
 - a. Become familiar with the list of specific materials and supplies contained in Form FHWA-47, "Statement of Materials and Labor Used by Contractor of Highway Construction Involving Federal Funds," prior to the commencement of work under this contract.
 - b. Maintain a record of the total cost of all materials and supplies purchased for and incorporated in the work, and also of the quantities of those specific materials and supplies listed on Form FHWA-47, and in the units shown on Form FHWA-47.

- c. Furnish, upon the completion of the contract, to the SHA resident engineer on Form FHWA-47 together with the data required in paragraph 1b relative to materials and supplies, a final labor summary of all contract work indicating the total hours worked and the total amount earned.
2. At the prime contractor's option, either a single report covering all contract work or separate reports for the contractor and for each subcontract shall be submitted.

VII. SUBLETTING OR ASSIGNING THE CONTRACT

1. The contractor shall perform with its own organization contract work amounting to not less than thirty percent (30%), or a greater percentage if specified elsewhere in the contract, of the total original contract price, excluding any specialty items designated by the State. 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).
 - a. "Its own organization" shall be construed to include only workers employed and paid directly 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, assignee, or agent of the prime contractor.
 - 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 on the contract as a whole and in general are to be limited to minor components of the overall contract.
2. The contract amount upon which the requirements set forth in paragraph 1 of Section VII 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. 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 SHA 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 SHA 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 SHA has assured that each subcontract is evidenced in writing and that it contains all pertinent provisions and requirements of the prime contract.

VIII. SAFETY: ACCIDENT PREVENTION

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 635). The contractor shall provide all safeguards, safety devices and protective equipment and take any other needed actions as it determines, or as the SHA 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.
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 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. 333).
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. 333).

IX. FALSE STATEMENTS CONCERNING HIGHWAY PROJECTS. 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, the following notice shall be posted on each Federal-aid highway project (23 CFR 635) in one or more places where it is readily available to all persons concerned with the project:

NOTICE TO ALL PERSONNEL ENGAGED ON FEDERAL-AID HIGHWAY PROJECTS

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 1, 1916, (39 Stat. 355), as amended and supplemented;

Shall be fined not more than \$10,000 or imprisoned not more than 5 years or both."

X. IMPLEMENTATION OF CLEAN AIR ACT AND FEDERAL WATER POLLUTION CONTROL ACT. (Applicable to all Federal-aid construction contracts and to all related subcontracts of \$100,000 or more.)

By submission of this bid or the execution of this contract, or subcontract, as appropriate, the bidder, Federal-aid construction contractor, or subcontractor, as appropriate, will be deemed to have stipulated as follows:

1. That any facility that is or will be utilized in the performance of this contract, unless such contract is exempt under the Clean Air Act, as amended (42 U.S.C. 1857 et seq., as amended by Pub.L. 91-604), and under the Federal Water Pollution Control Act, as amended (33 U.S.C. 1251 et seq., as amended by Pub.L. 92-500), Executive Order 11738, and regulations in implementation thereof (40 CFR 15) is not listed, on the date of contract award, on the U.S. Environmental Protection Agency (EPA) List of Violating Facilities pursuant to 40 CFR 15.20.
2. That the firm agrees to comply and remain in compliance with all the requirements of Section 114 of the Clean Air Act and Section 308 of the Federal Water Pollution Control Act and all regulations and guidelines listed thereunder.
3. That the firm shall promptly notify the SHA of the receipt of any communication from the Director, Office of Federal Activities, EPA, indicating that a facility that is or will be utilized for the contract is under consideration to be listed on the EPA List of Violating Facilities.
4. That the firm agrees to include or cause to be included the requirements of paragraph 1 through 4 of this Section X in every nonexempt subcontract, and further agrees to take such action as the government may direct as a means of enforcing such requirements.

XI. CERTIFICATION REGARDING DEBARMENT, SUSPENSION, INELIGIBILITY AND VOLUNTARY EXCLUSION

1. Instructions for Certification - Primary Covered Transactions:

(Applicable to all Federal-aid contracts - 49 CFR 29)

- a. By signing and submitting this proposal, the prospective primary 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 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 primary participant to furnish a certification or an explanation shall disqualify such a person from participation in this transaction.
- c. The certification in this clause is a material representation of fact upon which reliance was placed when the department or agency determined to enter into this transaction. If it is later determined that the prospective primary participant knowingly rendered an erroneous certification, in addition to other remedies available to the Federal Government, the department or agency may terminate this transaction for cause of default.
- d. The prospective primary participant shall provide immediate written notice to the department or agency to whom this proposal is submitted if any time the prospective primary participant learns that its certification was erroneous when submitted or has become erroneous by reason of changed circumstances.
- e. The terms "covered transaction," "debarred," "suspended," "ineligible," "lower tier covered transaction," "participant," "person," "primary covered transaction," "principal," "proposal," and "voluntarily excluded," as used in this clause, have the meanings set out in the Definitions and Coverage sections of rules implementing Executive Order 12549. You may contact the department or agency to which this proposal is submitted for assistance in obtaining a copy of those regulations.
- f. The prospective primary 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.
- g. The prospective primary 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 Transaction," provided by the department or agency entering into this covered transaction, without modification, in all lower tier covered transactions and in all solicitations for lower tier covered transactions.
- 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. A participant may decide the method and frequency by which it determines the eligibility of its principals. Each participant may, but is not required to,

check the nonprocurement portion of the "Lists of Parties Excluded From Federal Procurement or Nonprocurement Programs" (Nonprocurement List) which is compiled by the General Services Administration.

- i. 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.
- 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.

Certification Regarding Debarment, Suspension, Ineligibility and Voluntary Exclusion--
Primary Covered Transactions

1. The prospective primary participant certifies to the best of its knowledge and belief, that it and its principals:

- a. Are not presently debarred, suspended, proposed for debarment, declared ineligible, or voluntarily excluded from covered transactions by any Federal department or agency;
- b. Have not within a 3-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;
- c. 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 1b of this certification; and
- d. Have not within a 3-year period preceding this application/proposal had one or more public transactions (Federal, State or local) terminated for cause or default.

2. Where the prospective primary participant is unable to certify to any of the statements in this certification, such prospective participant shall attach an explanation to this proposal.

2. Instructions for Certification - Lower Tier Covered Transactions: (Applicable to all subcontracts, purchase orders and other lower tier transactions of \$25,000 or more - 49 CFR 29)

- a. By signing and submitting this proposal, the prospective lower tier 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 and/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.
- d. The terms "covered transaction," "debarred," "suspended," "ineligible," "primary covered transaction," "participant," "person," "principal," "proposal," and "voluntarily excluded," as used in this clause, have the meanings set out in the Definitions and Coverage sections of rules implementing Executive Order 12549. You may contact the person to which this proposal is submitted for assistance in obtaining a copy of those regulations.
- 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.
- 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.
- 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 may decide the method and frequency by which it determines the eligibility of its principals. Each participant may, but is not required to, check the Nonprocurement List.
- 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 and/or debarment.

Certification Regarding Debarment, Suspension, Ineligibility and Voluntary Exclusion--
Lower Tier Covered Transactions:

1. The prospective lower tier participant certifies, by submission of this proposal, that neither it nor its principals is presently debarred, suspended, proposed for debarment, declared ineligible, or voluntarily excluded from participation in this transaction by any Federal department or agency.
2. Where the prospective lower tier participant is unable to certify to any of the statements in this certification, such prospective participant shall attach an explanation to this proposal.

XII. CERTIFICATION REGARDING USE OF CONTRACT FUNDS FOR LOBBYING

(Applicable to all Federal-aid construction contracts and to all related subcontracts which exceed \$100,000 - 49 CFR 20)

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 his or her bid or proposal that he or she 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.

End of FHWA 1273