

# **Kansas Department of Transportation**

## **Addendum 1**

### **Request for Proposals**

**(Progressive Design-Build Contract)**

### **De Soto Local Roadway Improvements Project**

**KDOT Project: KA-6796-03**



November 21, 2022

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# PROGRESSIVE DESIGN-BUILD CONTRACT

## RECITALS

This Progressive Design-Build Contract (this "Contract") is entered into as of [\_\_\_\_], 2022, between the Secretary of Transportation of the State of Kansas, on behalf of the Kansas Department of Transportation, and [\_\_\_\_] (the "Progressive Design-Builder").

1. The De Soto Local Roadway Improvements Project in Johnson County, Kansas (the "Project") will be delivered via the progressive design-build model.
2. Following receipt and evaluation of the statements of qualification and proposals, the Department selected the Progressive Design-Builder for the Contract.

NOW, THEREFORE, in consideration of the sums to be paid to the Progressive Design-Builder by the Department and the covenants and agreements set forth within the Contract Documents, the Parties hereby agree as follows.

## 1 GENERAL

### 1.1 Project Overview

The Project is more fully described in Exhibit B (*Pre-construction Phase Technical Requirements*).

The Parties intend to use the progressive design-build delivery model, as more fully described in Section 2 (*Progressive Design Build Process*).

### 1.2 Term

Without limiting Section 34.7 (*Survival*) and post-termination obligations under Section 26 (*Termination for Convenience*), this Contract shall take effect on the Effective Date and will remain in effect until the earlier of:

1. Expiration of the Warranty Period.
2. Earlier termination in accordance with the terms of the Contract Documents.

### 1.3 Certain Definitions

Exhibit A (*Acronyms, Definitions, and Submittals*) contains the meaning of various terms used in the Contract Documents.

### 1.4 Phases and Order of Precedence

This Contract includes requirements for two Project phases; the Pre-construction Phase and Construction Phase. The Pre-construction Phase and the Construction Phase may overlap if more than one Work Package Amendment for Construction Work is executed as described in Section 2.2.2 (*Work Package Amendments*).

Pre-construction Work shall be performed in accordance with the requirements of this Contract including Exhibit B (*Pre-Construction Phase Technical Requirements*). During performance of Pre-construction Work, any provisions of the Contract Documents that pertain solely to Construction Work shall not apply to Pre-construction Work.

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The Parties anticipate that Exhibit B may need to be modified as the Progressive Design-Builder advances the Pre-construction Work. The Department may, on its own initiative or at the request of the Progressive Design-Builder, determine that modification of Exhibit B is needed and notify the Progressive Design-Builder in writing of the modification. Upon notification by the Department, and mutual agreement of the Parties, the modification shall be appended to the Contract without further action.

In the event of any conflict among the Contract Documents applicable to Pre-construction Work, the order of precedence shall be as follows:

1. the Contract, as executed by the Parties or amended pursuant to Section 34.1.1 (*General Contract Amendments*);
2. any Pre-construction Phase Amendment;
3. Exhibit B as modified.

All Construction Work shall be performed in accordance with the requirements of this Contract, excluding Exhibit B, and including any additional requirements in the Construction Phase Amendment or a Work Package Amendment.

In the event of any conflict among the Contract Documents applicable to Construction Work, the order of precedence shall be as follows:

1. Change Orders;
2. the Contract, as executed by the Parties;
3. the Construction Phase Amendment;
4. any Work Package Amendment.

## **2 PROGRESSIVE DESIGN BUILD PROCESS**

### **2.1 Pre-construction Phase**

The Pre-construction Phase shall begin upon execution of this Contract. The initial scope of the Pre-construction Work and Pre-construction Compensation Cap is set forth in Exhibit E (*Pre-construction Phase Scope and Compensation Cap*). The Department may elect, in its sole discretion, to issue one or more Pre-construction Phase Amendments to manage progression of the Pre-construction Phase. Each Pre-construction Phase Amendment shall be subject to a Pre-construction Compensation Cap. The Parties shall engage in good faith negotiations to finalize any Pre-construction Phase Amendment on a timely basis. Each Pre-construction Phase Amendment shall include:

1. a description of the scope of Pre-construction Work;
2. an anticipated schedule for performance of the Pre-construction Work; and
3. the Pre-construction Compensation Cap, hourly rates, and distribution of hours.

The Pre-construction Phase shall continue until either:

1. the Pre-construction Compensation Caps for all Pre-construction Phase Amendments is reached;
2. Construction Work is authorized pursuant to Section 2.2 (*Construction Phase*); or

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3. the Department exercises its right to terminate under Section 26 (*Termination for Convenience*).

## **2.2 Construction Phase**

### **2.2.1 Construction Phase Amendment**

The Construction Phase shall begin upon execution of the Construction Phase Amendment. Development of the Construction Phase Amendment shall be part of the Pre-construction Work. The Parties shall engage in good faith negotiations to finalize the Construction Phase Amendment on a timely basis.

The Construction Phase Amendment shall include the requirements specified in Section 16 (Construction Phase Amendment) of Exhibit B (*Pre-construction Phase Technical Requirements*) and generally apply to all Work Packages. The executed Construction Phase Amendment shall not be modified except through a Change Order.

### **2.2.2 Work Package Amendments**

Construction Work shall be authorized by the execution of one or more Work Package Amendments. In addition to other conditions described in the Contract Documents, execution of the Construction Phase Amendment shall be a condition precedent to the execution of a Work Package Amendment.

It is the Department's intent that the Progressive Design-Builder construct the Project through as few Work Packages as possible. If the Progressive Design-Builder intends to perform Construction Work through more than one Work Package, the Progressive Design-Builder shall comply with the requirements of Section 7 (Work Packaging Plan) of Exhibit B (*Pre-construction Phase Technical Requirements*) related to the submittal of a Preliminary Work Packaging Plan and Final Work Packaging Plan. Approval of the Final Work Packaging Plan shall be a condition precedent to execution of the Construction Phase Amendment.

Development of Work Package Amendments shall be part of the Pre-construction Work. Requirements related to the process for developing a Work Package Amendment and its required contents are described in Section 17 (Work Package Amendment) of Exhibit B.

If the Parties are unable to come to agreement on a Work Package Amendment, then the Department may, in its sole discretion, do any combination of the following:

1. For all executed Work Package Amendments, direct the Progressive Design-Builder to complete the Construction Work identified in the Work Package Amendment, but contract with another Person to construct the balance of the Project;
2. Direct the Progressive Design-Builder only to complete production of the Design Documents for all or any portion of the Project through an existing or new Pre-construction Phase Amendment; or
3. Terminate this Contract pursuant to Section 26 (*Termination for Convenience*).

#### **2.2.2.1 Work Package GMPs**

Each Work Package Amendment shall have a Work Package GMP. The Project's Total Construction GMP shall be the sum of all Work Package GMPs. Each Work Package GMP shall be computed as the sum of the following and any other components agreed to by the Parties:

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1. The Progressive Design-Builder's reasonable, good faith estimate of the cost of the Construction Work for the Work Package;
  2. The Progressive Design-Builder's fee;
  3. The cumulative total of Provisional Sums specific to the Work Package documented in the Risk Register which shall include other details relating to relief for each Provisional Risk (e.g., quantities, unit prices). See Section 2.5 (Risk Register) for more information on risks.

Work Package GMPs shall be developed on an Open Book Basis, and the Department shall have the right to access and copy all records, accounts, and other data used by the Progressive Design-Builder in connection with the preparation of any Work Package GMP.

Upon reaching the Work Package GMP for any given Work Package, the Progressive Design-Builder shall not have recourse to the Work Package GMP of other Work Packages without documenting the Department's Approval via Change Order.

#### **2.2.2.2 Schedule of Values and Baseline Schedule**

Each Work Package Amendment shall include a Schedule of Values and a resource/cost-loaded Baseline Work Package Schedule. Requirements for the Baseline Work Package Schedule and Schedule of Values will be developed as part of the Pre-construction Work.

### **2.3 No Liability for Partial Design**

If the Department elects to terminate the Progressive Design-Builder prior to completion of Final Design Documents, the Progressive Design-Builder shall be released from all liability (under contract, tort, or any other legal theory) that may arise in relation to any Department use of the design produced by the Progressive Design Builder.

### **2.4 Risk Register**

The Parties shall develop a Risk Register with respect to the entire Project in accordance with the guidelines and principles described in Exhibit B (Pre-construction Phase Technical Requirements).

The Department, or one of its designees, shall be responsible for maintaining and updating the Risk Register. The Risk Register shall identify potential risk issues related to Construction Work (each, a "Risk Register Event"). All Risk Register Events shall be categorized as either a Department Risk or a Provisional Risk.

The Risk Register shall include dates on which the Department gives its Approval of a particular Risk Register Event (including its associated relief), and the Risk Register Event shall be deemed as being in effect as of that date. All Work Package Amendments shall include the most-current Risk Register as of the effective date of the Work Package Amendment updated with all Risk Register Events reasonably expected to be applicable to the Work Package.

The Risk Register shall also define mitigation strategies to be used with respect to Risk Register Events and identify any probable cost and/or time impacts to the Project.

#### **2.4.1 Department Risks**

All Risk Register Events that are a Department Risk shall describe the types and extent of relief that the Progressive Design-Builder shall be entitled to seek upon occurrence of the Risk Register

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Event. Risk Register Events that are Department Risks may also include requirements for cost sharing, determination of time impacts, payment requirements, and other terms.

If a Risk Register Event occurs while performing Construction Work, and the Risk Register Event is a Department Risk, then the Progressive Design-Builder shall be entitled to seek a Change Order in accordance with Section 22 (Change Orders).

#### **2.4.2 Provisional Risks**

All Risk Register Events that are Provisional Risks shall specify:

1. the amount of any Provisional Sum;
2. whether the Provisional Sum is a Shared Provisional Sum;
3. the types and extent of relief (cost and/or schedule) that the Progressive Design-Builder is provided upon occurrence of the Risk Register Event;
4. whether the Risk Register Event provides for relief in accordance with the Contract if the Provisional Sum, Shared Provisional Sum, or other identified relief is exhausted; and
5. any required mitigation efforts to be taken by the Progressive Design-Builder.

If a Risk Register Event occurs while performing Construction Work, and the Risk Register Event is a Provisional Risk that is not eligible for relief, then the Progressive Design-Builder shall not be entitled to seek any additional costs or schedule relief for occurrence of the Risk Register Event beyond that identified in the Risk Register.

If a Risk Register Event occurs while performing Construction Work, and the Risk Register Event is a Provisional Risk eligible for relief, and the Provisional Sum or other relief provided in the Risk Register is exhausted, then the Progressive Design-Builder shall be entitled to seek relief in accordance with Section 22 (Change Orders).

If a Risk Register Event expressly identifies a Shared Provisional Sum, then upon achievement of Final Acceptance, or such other date determined by the Department in its sole discretion, any unused Shared Provisional Sums in any Work Package shall be allocated to the Department or to the Progressive Design-Builder as described an agreed upon in the Risk Register, and the Progressive Design-Builder's share shall be included as a separate line item on the Application for Final Payment.

### **3 DEPARTMENT OVERSIGHT**

#### **3.1 Oversight, Audit, Inspection, and Testing by the Department and Others**

The Work shall be subject to oversight, spot checks, audits, reviews, tests, inspections, acceptances, Approvals, and approvals by any Person or a Department designee. When any Third Party is to accept or pay for a portion of the cost of the Work, it and its respective representatives have the right to oversee, audit, inspect, and test the Work. The Progressive Design-Builder hereby consents to such oversight, inspection, and testing by the Department and such other Persons. Upon request from the Department, the Progressive Design-Builder shall furnish information to such Persons as are designated in such request and shall permit such Persons access to the Site and all parts of the Work.



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The Progressive Design-Builder shall not be relieved of any of its obligations under the Contract Documents by virtue of the oversight, spot checks, audits, reviews, tests, inspections, acceptances, Approvals, or approvals by any Persons, or by any failure of any Person to take such action. The oversight, spot checks, audits, reviews, tests, inspections, acceptances, Approvals, and approvals by any Person do not constitute Final Acceptance of the material or Work, or waiver of any legal or equitable right with respect thereto.

### **3.2 Approval**

When the Progressive Design-Builder is required to submit an item to the Department "for Approval", the Progressive Design-Builder shall obtain the Department's written approval of such item and may not proceed to incorporate that item into the Work or the Project without the Department's written Approval. If the Department does not respond to such a submittal within any required timeframe set forth in the Contract Documents, the Progressive Design-Builder shall send to the Department a written notice reminding the Department that it is awaiting Approval as a condition precedent to submission of a Request for Change Order for a Relief Event.

Any time that the Department denies an Approval, it shall provide comments explaining the denial to the Progressive Design-Builder. The Progressive Design-Builder shall address the comments in revisions or shall explain why it believes it cannot or should not address the comments. Once all comments have been fully resolved to the reasonable satisfaction of the Department, any revised submittal shall then be resubmitted to the Department for Approval.

The Department may, at its discretion, conditionally Approve a submittal, allowing the Progressive Design-Builder to proceed with the Work related to the submittal, provided that the Progressive Design-Builder addresses minor clarifications or edits identified in such Approval.

### **3.3 Review and Comment**

When the Progressive Design-Builder is required to submit an item to the Department "for Review and Comment," the Department shall have an opportunity to review and comment on such submittal. If the Department does not provide any comments within any required timeframe set forth in the Contract Documents, then the Progressive Design-Builder may assume that the Department does not have any comments and the Progressive Design-Builder may proceed. The review and comment process does not represent a schedule hold point. This notwithstanding, the Department may thereafter provide comments to the Progressive Design-Builder, and the Progressive Design-Builder shall be obligated to proceed in accordance with clause 3 below.

When responding to a submittal for review and comment, the Department shall have the option of issuing:

1. a statement of "no comment," in which case the Progressive Design-Builder may proceed to the subsequent submittal;
2. a statement of "no further comment," in which case the Progressive Design-Builder may proceed to issue Released for Construction (RFC) Documents; or
3. a comment submittal form, in which case the Progressive Design-Builder may proceed with the Work without resubmitting the submittal, provided the Progressive Design-Builder addresses the Department's comments in subsequent submittals and fully addresses all comments to the satisfaction of the Department prior to issuing RFC Documents.

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## **4 RESERVED**

## **5 SUBCONTRACTING REQUIREMENTS**

### **5.1 Compliance with Subcontracting Requirements**

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

### **5.2 Limitation on Subcontracted Work**

The Progressive Design-Builder, through the Lead Contractor, shall self-perform at least 30% of the Construction Work, as determined under the agreed Subcontracting Plan.

### **5.3 Limitation on Organizational Changes**

The Progressive Design-Builder shall not add, delete, or change the role of any of the Lead Contractor or the Lead Designer without the prior written Approval of the Department.

### **5.4 Subcontracts for Pre-construction Work**

Engagement and selection of Subcontractors performing Pre-construction Work shall be coordinated with and Approved by the Department. Prior to the award of any such Subcontract, the Department may require the Progressive Design-Builder to solicit qualifications and proposals from multiple firms for professional services or other work required.

Subject to the Department's Approval, the Progressive Design-Builder shall negotiate price and terms for each Pre-construction Work Subcontract that conform to standard industry practice for work of similar scope and complexity.

### **5.5 Affiliate Subcontracts**

The Progressive Design-Builder shall have the right to have Work performed by Affiliates only under the following terms and conditions:

1. the Progressive Design-Builder shall execute a written Subcontract with the Affiliate;
2. the Subcontract shall be consistent with the Contract Documents and Standards of the Industry, and be in form and substance similar to Subcontracts being used by the Progressive Design-Builder for similar Work with unaffiliated Subcontractors;
3. the Subcontract shall set forth the scope of Work and all pricing, terms, and conditions;
4. the pricing, scheduling, and other terms and conditions of the Subcontract shall be no less favorable to the Progressive Design-Builder than those that the Progressive Design-Builder could reasonably obtain in an arms' length, competitive transaction with an unaffiliated Subcontractor. The Progressive Design-Builder shall bear the burden of proving that the same are no less favorable to the Progressive Design-Builder;
5. no Affiliate shall be engaged to perform any Work that any Contract Document indicates shall be performed by an independent or unaffiliated party; and

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6. no Affiliate shall be engaged to perform any Work that would be inconsistent with the requirements of the Contract Documents or Standards of the Industry.

Before entering into a written Subcontract, supplement, or amendment with an Affiliate, the Progressive Design-Builder shall submit a true and complete copy of the proposed Subcontract to the Department for Approval with a cover memorandum orienting the Department to all pricing terms. The Department will have 20 Business Days after receipt to deliver its comments to the Progressive Design-Builder.

The Progressive Design-Builder shall make no payments to Affiliates for Work in advance of performance thereof, except for reasonable mobilization payments or other payments consistent with arm's length, competitive transactions of similar scope. Advance payments in violation of this provision shall be excluded from the calculation of termination compensation under Section 26 (*Termination for Convenience*).

## **5.6 Subcontracting Plan for Construction Work**

The Progressive Design-Builder shall prepare the Subcontracting Plan for Construction Work, pursuant to Exhibit B (*Pre-construction Phase Technical Requirements*) in compliance with the requirements of this Section 5. The Progressive Design-Builder shall comply with the Approved Subcontracting Plan.

## **5.7 Required Subcontract Terms**

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

1. Each Subcontract of any tier shall include terms substantially similar to the terms in this Contract to the extent that such terms are relevant to such Subcontract. "Terms substantially similar" in all instances shall include:
  - a. grants of Intellectual Property Rights;
  - b. access constraints and requirements pertaining to the Site;
  - c. maintenance of books and records;
  - d. joinder to, obligation to offer evidence in, Dispute Resolution Procedures, if necessary, in the Department's sole judgment, to resolve a Dispute; and
  - e. compliance with all EEO Provisions and Exhibit H (*State Labor Requirements*).
2. Each Subcontract of any tier shall include a provision that states that the Subcontractor is not a third-party beneficiary to the Contract.
3. Each Construction Phase Subcontract of any tier shall:
  - a. prohibit retainage in excess of 10% of the amount of payment under the Subcontract, if no separate performance and/or payment security is provided by the lower-tier Subcontractor;
  - b. prohibit retainage entirely under the Subcontract, if separate performance and/or payment security is provided by the lower-tier Subcontractor;

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- c. provide that amounts withheld as retainage, if allowed, from Subcontractors shall be returned within 15 Days after the Work required under the Subcontract is satisfactorily completed; and
  - d. provide that delay or postponement of payment under the Subcontract may only be effected after the Progressive Design-Builder or higher-tier Subcontractor, as applicable, has established good cause and that the delay or postponement is in accordance with the Progressive Design-Builder's or higher-tier Subcontractor's, as applicable, rights under the Subcontract.
4. Each Subcontract of any tier shall include payment (including "prompt payment") and other terms in compliance with this Contract and applicable Laws, including specifically no "pay if paid" clauses, or words of similar effect.
  5. Each Subcontract of any tier shall include language acknowledging the timing of payments from the Department to the Progressive Design-Builder hereunder and the process set forth herein for the submission and review of invoices or Requests for Construction Payment, as applicable.
  6. Each Subcontract of any tier shall expressly include a covenant to require the Subcontractor to participate, at the Progressive Design-Builder's request, in meetings between the Progressive Design-Builder and the Department concerning matters pertaining to such Subcontractor, its work, or the coordination of its work with other Subcontractors and contractors to the Department.
  7. Each Subcontract of any tier shall expressly require the Subcontractor to stop Work on the date and to the extent specified in a Notice of Termination in accordance with Section 26 (*Termination for Convenience*).
  8. Each Subcontract of any tier shall expressly permit assignment to the Department of all Progressive Design-Builder rights under the Subcontract in the event of termination pursuant to Section 26 (*Termination for Convenience*).
  9. Each Subcontract shall provide that the Department is a third-party beneficiary of the Subcontract and shall have the right to enforce all terms of the Subcontract for its own benefit.
  10. Each Subcontract shall provide that all guarantees, indemnities, professional responsibility, and warranties, express and implied, shall inure to the benefit of the Department as well as the Progressive Design-Builder.
  11. Each Subcontract shall provide for the use of appropriate alternative dispute resolution mechanisms to resolve payment disputes.
  12. Each Subcontract of any tier shall expressly provide that any purported amendment with respect to any of the foregoing matters without the prior written consent of the Department will be null and void.

## **5.8 General Responsibility for Work by Others**

The retention of Subcontractors by the Progressive Design-Builder will not relieve the Progressive Design-Builder of its responsibilities under the Contract Documents or for the quality of the Work, materials, or services provided by Subcontractors.

The Progressive Design-Builder shall supervise and be fully responsible for the acts and omissions of any Progressive Design-Builder-Related Entity in connection with the Work, the Site, or the Project, as though the Progressive Design-Builder directly employed all such individuals.

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## **6 EMPLOYEE PERFORMANCE REQUIREMENTS; KEY PERSONNEL**

### **6.1 Employee Performance Requirements**

All employees shall have the skill, experience, and any licenses or certifications required to perform the Work assigned to them. If the Department determines in its reasonable discretion that any Person employed by the Progressive Design-Builder or any Subcontractor is not performing the Work properly and skillfully, or is intemperate or disorderly, then, at the written request of the Department, the Progressive Design-Builder or such Subcontractor shall remove such Person and such Person shall not be re-employed on the Project without the prior written Approval of the Department. If the Progressive Design-Builder or the Subcontractor fails to remove such Person or fails to furnish skilled and experienced personnel for the proper performance of the Work, then the Department may, in its sole discretion, suspend the affected portion of the Work by delivery of written notice of such suspension to the Progressive Design-Builder in accordance with Section 24.2 (*Suspension for Cause*). Such suspension shall in no way relieve the Progressive Design-Builder of any obligation contained in the Contract Documents or entitle the Progressive Design-Builder to a Change Order.

### **6.2 Design and Engineering Personnel**

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

### **6.3 Key Personnel**

Exhibit C (*Progressive Design-Build Team*) identifies certain Key Personnel positions for the Project, each of which are deemed Approved by the Department hereunder.

The Department shall have the right to review the qualifications of, and Approve each individual person not identified in Exhibit C who the Progressive Design-Builder proposes to assign to a Key Personnel position. No proposed Key Personnel may commence any Work until Approved by the Department.

The Progressive Design-Builder shall not change any Key Personnel without the prior written Approval of the Department, given in its sole discretion.

## **7 PERFORMANCE REQUIREMENTS AND GENERAL OBLIGATIONS OF THE PROGRESSIVE DESIGN-BUILDER**

### **7.1 Performance Requirements**

#### **7.1.1 Performance of Work**

All Work necessary to achieve Final Acceptance and to meet the Final Acceptance Deadline shall be the Progressive Design-Builder's sole responsibility, except as otherwise specifically provided in the Contract Documents. Subject to the terms of Section 22 (*Change Orders*), the costs of all such materials, services, and efforts are included in the Contract Price.

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### **7.1.2 Performance Standards**

The Progressive Design-Builder shall furnish the design of the Project in accordance with professional engineering principles and generally accepted Standards of the Industry applicable to design and the scope of the Work and that are required of Engineers in Kansas, that are identified in the Contract Documents, and that are necessary to meet the terms, conditions, and requirements of the Contract Documents even though such principles and standards are not specifically identified. The Progressive Design-Builder shall construct the Project as designed, in a good and workmanlike manner, fit for purpose, and in accordance with the terms, conditions, and requirements of the Contract Documents.

### **7.1.3 Performance as Directed**

During the course of the Work and notwithstanding the existence of any Dispute, the Progressive Design-Builder shall perform as directed by the Department in a diligent manner and without delay, shall abide by the Department's decision or order, and shall comply with all applicable provisions of the Contract Documents. If a Dispute arises regarding such performance or direction, the Dispute shall be resolved in accordance with Section 23 (*Partnering and Disputes*). If the Progressive Design-Builder receives direction from the Department in a form other than a Department-Directed Change and the Progressive Design-Builder believes that such direction constitutes a change to the Work, the Progressive Design-Builder shall request a Department-Directed Change confirming such direction.

## **7.2 General Obligations of the Progressive Design-Builder**

The Progressive Design-Builder, in addition to performing all other requirements of the Contract Documents, shall

1. Provide all design and other services, as well as all goods, materials, and labor and undertake all efforts necessary or appropriate (excluding only those services, materials and efforts which the Contract Documents specify will be undertaken by other Persons) to construct the Project and maintain it during construction in accordance with the requirements of the Contract Documents and within the Completion Deadlines. The word "provide" includes and requires the Progressive Design-Builder to design, furnish, install, construct, and perform all Work necessary for a final, complete, in-place, and fully functional Project which meets all the requirements of the Contract Documents.
2. At all times provide a Project Manager, who will:
  - a. have full responsibility for the prosecution of the Work;
  - b. act as agent and be a single point of contact in all matters on behalf of the Progressive Design-Builder;
  - c. be present (or Approved designee will be present) at the Site at all times that Work is performed; and
  - d. have authority to make binding decisions for the Progressive Design-Builder on all matters relating to the Project.
3. Obtain all Governmental Approvals required by the Contract Documents.
4. Comply with all conditions imposed by and undertake all actions required by and all actions necessary to maintain in full force and effect, all Governmental Approvals, including implementation of all environmental mitigation measures required by the Contract

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Documents, except to the extent that such responsibility is expressly assigned in the Contract Documents to another Person.

5. Coordinate with Third Parties regarding the Work and assist the Department in its coordination efforts.
6. Provide such assistance as is reasonably requested by the Department in dealing with any Person and/or in prosecuting and defending claims or lawsuits in any and all matters against the Department by third parties relating to the Project, which may include providing information and reports regarding the Project, executing declarations and attending meetings and hearings, but which shall in no event be deemed to require the Progressive Design-Builder to provide legal services. If the amount of time required to provide assistance becomes unreasonable, the Department may request such assistance at its cost. This obligation is not intended to address and shall not limit the Progressive Design-Builder's indemnification obligation under Section 28 (*Indemnification*).
7. Comply with all requirements of all applicable Laws.
8. Cooperate with the Department and other Governmental Persons in the review and oversight of the Project and other matters relating to the Work.
9. Make payments to Third Parties required by the Contract Documents, if any.
10. Supervise and be responsible to the Department for acts and omissions of all Progressive Design-Builder-Related Entities, as though the Progressive Design-Builder directly employed all such Persons.
11. Take prompt action and measures to effectively mitigate potential loss or damage, including mitigation of delay to the Project and damages due to delay in all circumstances, to the extent reasonably possible, including by re-sequencing, reallocating, or Redeploying, as appropriate.
12. Pay all applicable federal, State, and local sales, consumer, use, and similar taxes, property taxes, and any other taxes, fees, charges, or levies imposed by a Governmental Person, whether direct or indirect, relating to, or incurred in connection with the performance of the Work.

### **7.3 Representations, Warranties, and Covenants**

The Progressive Design-Builder further represents, warrants, and covenants for the benefit of the Department as follows in this Section 7.3.

#### **7.3.1 Maintenance of Professional Qualifications**

Throughout the Term, the Progressive Design-Builder shall obtain and maintain, and shall be responsible for Progressive Design-Builder-Related Entities to obtain and maintain, all required licenses, certifications, permits, professional ability, approvals, consents and other authorizations to perform the Work, and shall perform the Work in accordance with the requirements of the Contract Documents.

#### **7.3.2 Evaluation of Constraints**

The Progressive Design-Builder has evaluated the constraints affecting delivery of the Project, including constraints imposed by the Progressive Design-Builder, right of way, Utility and other third-party facilities, and the conditions of the environmental approvals, and agrees to deliver the Project within such constraints.

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### 7.3.3 Feasibility of Performance

The Progressive Design-Builder has evaluated the feasibility of performing the Work within the time specified herein and for the Contract Price and agrees to deliver the Project within the Completion Deadlines.

### 7.3.4 Governmental Approvals

The Progressive Design-Builder has no reason to believe that any Governmental Approval required to be obtained by the Progressive Design-Builder will not be granted in due course and thereafter remain in effect so as to enable the Work to proceed in accordance with the Contract Documents. If any Governmental Approvals required to be obtained by the Progressive Design-Builder must formally be issued in the name of the Department, the Progressive Design-Builder shall undertake all efforts to obtain such Governmental Approvals, including execution and delivery of appropriate applications and other documentation in a form Approved by the Department. The Department shall reasonably cooperate with the Progressive Design-Builder in obtaining any such Government Approvals at the Progressive Design-Builder's sole cost. If the Department obtains any Governmental Approval for the benefit of the Progressive Design-Builder at the Progressive Design-Builder's request, all costs shall be borne by the Progressive Design-Builder. If the Progressive Design-Builder is required to assist the Department in obtaining any Governmental Approvals pursuant to Section 11.1.1 (*New Approvals to be Obtained by the Department*) that the Department may be obligated to obtain due to a Department-Directed Change, including providing information requested by the Department and participating in meetings regarding such Governmental Approvals, the Progressive Design-Builder may seek additional time and money in accordance with Section 22 (*Change Orders*).

### 7.3.5 Progression of Work

The Progressive Design-Builder shall at all times schedule and direct its Work to provide an orderly progression of the Work to achieve the Completion Deadlines in accordance with the Project Schedule, including furnishing such employees, materials, facilities, and equipment and working such hours (including extra shifts, overtime operations, Saturdays, Sundays, and Legal Holidays) as may be necessary to achieve the Completion Deadlines, all at the Progressive Design-Builder's own expense, except as otherwise specifically provided in Section 22 (*Change Orders*).

### 7.3.6 Design and Engineering Personnel

All design and engineering Work furnished by the Progressive Design-Builder shall be performed by or under the supervision of Persons licensed to practice the relevant technical profession of architecture, landscape architecture, engineering, geology, or surveying in the State, and performed by personnel who are careful, skilled, experienced, and competent in their respective trades or professions, and professionally qualified to perform the Work.

### 7.3.7 Organization

The Progressive Design-Builder [and each joint venture member] [is]/[are] [\_\_\_\_\_], duly organized and validly existing under the laws of [\_\_\_\_\_] [**NTD: amend for JV members, as need be**] with all requisite power to own its properties and assets and carry on its business as now conducted or proposed to be conducted. The Progressive Design-Builder is duly qualified to do business and is in good standing in the State and will remain in good standing throughout the Term and for as long thereafter as any obligations remain outstanding under the Contract Documents.



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### **7.3.8 Authorization**

The execution, delivery, and performance of the Contract have been duly authorized by all necessary actions of the Progressive Design-Builder, and, if applicable, the Progressive Design-Builder's members, and will not result in a breach or a Default under their organizational documents or any indenture, loan, credit agreement, or other material agreement or instrument to which they are a party or by which their properties and assets may be bound or affected.

### **7.3.9 Legal, Valid, and Binding Obligation**

The Contract constitutes the legal, valid, and binding obligation of the Progressive Design-Builder and, if applicable, of each member of the Progressive Design-Builder, enforceable in accordance with its terms.

## **7.4 False or Fraudulent Statements and Claims**

The Progressive Design-Builder recognizes that the requirements of the Federal False Claim Act, 31 U.S.C. 3729 et seq., and Program Fraud Civil Remedies Act of 1986, as amended, 31 U.S.C. § 3801 et seq. and the USDOT regulations, "Program Fraud Civil Remedies," 49 CFR Part 31, apply to its actions hereunder. The Progressive Design-Builder recognizes that the Kansas False Claims Act, K.S.A. 75-7501 et seq. applies to its actions hereunder. Accordingly, by signing the Contract, the Progressive Design-Builder certifies or affirms the truthfulness and accuracy of any statement it has made, it makes, or it may make pertaining to the Contract. In addition to other penalties that may be applicable, the Progressive Design-Builder also acknowledges that if it makes a false, fictitious, or fraudulent claim, statement, submission, or certification, the federal government reserves the right to impose the penalties of these federal Acts on the Progressive Design-Builder to the extent the federal government deems appropriate, and the state of Kansas reserves the right to impose penalties under the state Act. In addition to civil remedies, the Progressive Design-Builder recognizes criminal penalties for fraud and false statements in highway programs may be imposed under 18 U.S.C. 1020.

## **8 DESIGN**

### **8.1 Responsibility for all Design**

The Progressive Design-Builder shall furnish the design of the Project in accordance with professional engineering principles and generally accepted standards of the industry applicable to design and the scope of the Work, that are required of Engineers in Kansas, that are identified in the Contract Documents, and that are necessary to meet the terms, conditions, and requirements of the Contract Documents even though such principles and standards are not specifically identified.

### **8.2 Reference Information Documents**

The Progressive Design-Builder understands and agrees that:

1. the Department shall not be responsible or liable in any respect for any use by a Progressive Design-Builder-Related Entity of any information included in the Reference Information Documents (RIDs) provided by the Department in connection with the procurement for the Contract, or any information provided by the Department after execution of the Contract;
2. if and to the extent that any Progressive Design-Builder-Related Entity uses any RID in any way, such use is made on the basis that the Progressive Design-Builder is responsible

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for accuracy of the RID; and the Progressive Design-Builder is capable of and obligated to confirm that its use of RID is appropriate and acknowledges that any use is entirely at the Progressive Design-Builder's own risk and at its own discretion;

3. Notwithstanding clauses 1 and 2 above, during the Pre-construction Phase the Department and the Progressive Design Builder may determine that reliance on certain information included in the RIDs is appropriate. This reliance shall be documented in a Pre-construction Phase Amendment, Construction Phase Amendment, or Work Package Amendment and specifically identified information documented within the applicable amendment shall not be considered RID.

### **8.3 Professional Licensing Laws**

The Progressive Design-Builder is fully responsible for furnishing the design of the Project, although the fully licensed design firms or individuals designated herein will perform the design services required by the Contract Documents. Any references in the Contract Documents to the Progressive Design-Builder's responsibilities or obligations to "perform" the design portions of the Work shall be deemed to mean that the Progressive Design-Builder shall "furnish" the design for the Project. The terms and provisions of this Section 8.3 shall control and supersede every other provision of the Contract Documents.

### **8.4 Prerequisites for Start of Design of the Project**

The Progressive Design-Builder shall not start design of the Project until all the following events have been fully satisfied and remain so:

1. all insurance policies and bonds, as applicable, that are required to be delivered to the Department hereunder have been submitted to the Department in compliance with the requirements of the Contract Documents and remain in full force and effect;
2. Stage 1 of the Quality Plan has been Approved;
3. the Progressive Design-Builder has made available all Key Personnel and other personnel required to be available;
4. the Progressive Design-Builder is not in breach of this Contract; and
5. all representations, warranties, and covenants of the Progressive Design-Builder remain true and correct in all material respects.

## **9 ACCESS & RIGHT OF WAY**

### **9.1 Access to Right of Way Identified on Right of Way Drawings**

#### **9.1.1 Nature of Progressive Design-Builder's Rights**

Subject to Section 9.1.2 (*Obligation to Provide Access to Right of Way*) and Section 9.1.4 (*Failure to Have Necessary Rights of Access*), the Department grants to the Progressive Design-Builder a non-exclusive right of access, ingress and egress to all real property comprising the Site (revocable only in accordance with this Contract), and the Progressive Design-Builder accepts such right and acknowledges its obligation, to develop, design, and construct the Project, in each instance in accordance with the terms of the Contract Documents.

The foregoing grant is effective as of the Effective Date until the effective date of expiry or early termination of this Contract, it being acknowledged and agreed by the Parties that certain real

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property rights may be acquired after the Effective Date in connection with the performance of Pre-construction Work, in which case the foregoing grant shall be construed to extend to those real property rights, in each case under the terms, and subject to the conditions, in the granting or conveyance documents and delegable by the Department to the Progressive Design-Builder, as and when thereafter acquired.

The foregoing grant shall also extend, subject to the constraints, timing, terms, and conditions in Section 9.1.2, to the Progressive Design-Builder-Related Entities on a non-exclusive basis for the sole purpose of performing its obligations and exercising its rights under this Contract.

The Progressive Design-Builder acknowledges that the Department and its designees, acting within its delegated or legal authority, may enter the Site and any other location where the Work is being carried out at any time and for any reason.

The Parties acknowledge and agree that this Contract will in no way be deemed to constitute:

1. a lease to the Progressive Design-Builder; or
2. a grant (regardless of the characterization of such grant), in each case, of any right, title, interest or estate in the Project or Site, or of any assets incorporated into, or appurtenant to, the Project, other than as set forth in this Section 9.1.1.

The Parties acknowledge and agree that the Progressive Design-Builder will not be treated as or deemed to be the legal or equitable owner of the Site for any purpose under this Contract.

The Progressive Design-Builder's rights under this Contract are derived solely from its status as an independent contractor to the Department, and not as a tenant, lessee, easement holder, optionee, lienor, mortgagee, purchaser or owner of any other interest in real property.

It is the Parties intent that, to the extent permissible under applicable Laws, the Progressive Design-Builder shall not be treated as the legal or equitable owner of the Site and shall not be liable for property taxes assessed against the Site.

### **9.1.2 Obligation to Provide Access to Right of Way**

The Department and the Progressive Design-Builder shall jointly produce ROW plans ("ROW Plans") during the Pre-construction Phase identifying the ROW needed to construct the Project, on a Work Package basis. The Department will acquire the ROW identified on the ROW Plans at its own cost on a schedule to be agreed to by the Parties and included, as to a particular Work Package, in the corresponding Construction Phase Amendment.

The Progressive Design-Builder shall not access any ROW parcel prior to receipt of notice from the Department that Progressive Design-Builder has been granted access to such parcel.

### **9.1.3 Access to Right of Way Not Identified in ROW Plans**

The Progressive Design-Builder shall be responsible at its cost for acquiring any temporary easements, other than those easements identified for use on the Project in the ROW Plans, it determines are advisable to complete the Project. Prior to acquiring any such easements, the Progressive Design-Builder must provide the Department with notice of its intent to acquire the easements along with a description of the easements. The Progressive Design-Builder must comply with all Laws when acquiring and using temporary easements.

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#### **9.1.4 Failure to Have Necessary Rights of Access**

If the Progressive Design-Builder enters any property in connection with the Project without having all necessary rights of access, the Department may, in its sole discretion, obtain consent from the landowner for the Progressive Design-Builder's access. The Progressive Design-Builder shall be responsible for all costs incurred by the Department as a result and for any schedule impacts to the Work Package.

### **10 UTILITY WORK**

#### **10.1 Generally**

The Progressive Design-Builder acknowledges and agrees that it is responsible for all Utility Work necessary to accommodate the design and construction of the Project as described in any Work Package Amendment.

All Utility Work, including Betterments, shall be completed by the Progressive Design-Builder in accordance with the Contract, requirements imposed by applicable Law, and any applicable agreements with affected Utility Owners (each a "Utility Agreement"), in each case, as may be entered into with the Utility Owner by the Progressive Design-Builder or by the Department, pursuant to the Approved Utility and Third-Party Coordination Plan.

If any Work Package affords the Department the right to pay Utility Owners directly for amounts to which they are entitled under Utility Agreements, then the Progressive Design-Builder shall identify the direct allowable payment within each Request for Construction Payment.

#### **10.2 Utility-specific Progressive Design Builder Obligations**

The Progressive Design-Builder shall take all reasonable steps to avoid Relocations and to minimize costs to Utility Owners and the Department.

The Progressive Design-Builder shall avoid multiple designs and multiple relocations of the same Utility, whether the design and/or Relocation is performed by a Utility Owner or by the Progressive Design-Builder.

#### **10.3 Utility-Related Risk Register Events**

##### **10.3.1 Utility-Relocations**

Each Relocation with respect to each Utility (and each respective Utility Owner) shall be identified as a Provisional Risk, subject to relief, but not subject to sharing. This notwithstanding, as a threshold matter to eligibility for relief under the Risk Register, the Progressive Design-Builder shall bear the burden of proving that the Relocation cannot reasonably be avoided.

##### **10.3.2 Utility-Owner Acts or Omissions**

The adverse effects of any acts or omissions of each Utility Owner in contravention of its obligations under a Utility Agreement and as relates to each Utility's Relocation, including Utility Owner Delays, shall likewise be identified as a Provisional Risk, subject to relief, but not subject to sharing.

##### **10.3.3 Unidentified Utilities**

Without limiting the Progressive Design-Builder's general mitigation duty under Section 2.4 (Risk Register), Relocations required for a Work Package of any Unidentified Utility shall likewise be

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identified as a Provisional Risk, subject to relief, but not subject to sharing. If only a portion of an Unidentified Utility to be Relocated is encountered, then any relief afforded the Progressive Design-Builder shall be allowed only for that portion of the additional Utility Work.

#### **10.3.4 Constraints on all Utility-Related Risk Register Events**

Any remedy identified with respect to Utility-related Risk Register Events in the Risk Register shall, in all cases, only include additional direct costs, with markup agreed by the Parties, actually incurred by the Progressive Design-Builder and noted in the Risk Register as pertains to each such Utility's respective Risk Register Event.

The Progressive Design-Builder shall not be entitled to any additional compensation hereunder for any costs of coordinating with Utility Owners or for assisting the Department in coordinating with Utility Owners.

Unless the subsequent design and/or Relocation is caused by a Department-Directed Change or a change by the Utility Owner, the Progressive Design-Builder shall be responsible for all costs incurred by the Progressive Design-Builder, Utility Owner, or both for a subsequent design and/or subsequent Relocation.

If the Progressive Design-Builder elects to make payments to Utility Owners or to undertake any other efforts that are not required by the terms of the Contract Documents, the Progressive Design-Builder shall not be entitled to a Change Order in connection therewith.

#### **10.4 Betterments**

The Progressive Design-Builder shall not perform any Betterments in connection with the Work unless Approved by the Department pursuant to the KDOT Utility Accommodation Policy and documented in a Work Package Amendment.

If the Progressive Design-Builder does not perform a Betterment as part of a Work Package Amendment, or the scope of the Progressive Design-Builder's Work regarding such Betterment is materially reduced, then the Department shall be entitled to a Change Order documenting the deletion or reduction of the Work to reflect the value of any reduction in the costs of the Work that is directly attributable to such deletion or reduction.

#### **10.5 Disputes Involving Utilities, Utility Owners**

If a Dispute arises relating to any Utility Agreement or the Utility Work thereunder, and the Utility Owner is a necessary or appropriate party to such Dispute, then such Dispute shall be resolved in the manner set forth in the applicable Utility Agreement, or if not set forth in the applicable Utility Agreement, then the Dispute shall be resolved in accordance with the Dispute Resolution Procedures.

### **11 ENVIRONMENTAL COMPLIANCE**

#### **11.1 Governmental Approvals; Compliance**

The Progressive Design-Builder shall obtain all Governmental Approvals that are agreed to be the responsibility of the Progressive Design-Builder during the Pre-construction Work, including those that must formally be issued in the name of the Department. Any submittals by the Progressive Design-Builder to the Department during the Pre-construction Phase that are related

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to Governmental Approvals relating to environmental compliance shall be subject to review by the Department in its sole discretion.

The Progressive Design-Builder shall assist the Department in obtaining any Governmental Approvals that the Department may be obligated to obtain.

Unless otherwise expressly assigned in the Contract Documents to another person, the Progressive Design-Builder shall comply with all requirements necessary to maintain in full force and effect all Government Approvals.

The Progressive Design-Builder acknowledges and agrees that it will be responsible for all fines and penalties that may be assessed in connection with any failure by any Progressive Design-Builder-Related Entity to comply with such requirements.

### **11.1.1 New Approvals to be Obtained by the Department**

The Department will be responsible for obtaining any New Approvals necessitated by a Relief Event.

### **11.1.2 New Approvals to be Obtained by Progressive Design-Builder**

If a New Approval becomes necessary for any reason other than a Relief Event, the Progressive Design-Builder shall be fully responsible for the cost of:

1. obtaining the New Approval;
2. for all resulting requirements; and
3. for any litigation arising in connection therewith and any related schedule impact.

All required information for a New Approval shall be prepared and submitted to the Department to obtain the New Approval.

The Progressive Design-Builder shall not contact any agencies or Persons regarding the New Approval without the prior consent and participation of the Department.

## **11.2 Hazardous Materials Report; Applicable Laws**

The Progressive Design-Builder shall comply with all applicable Laws pertaining to environmental compliance. The Progressive Design-Builder shall comply with all requirements of the Hazardous Materials Report. The Progressive Design-Builder acknowledges and agrees that it will be responsible for all fines and penalties that may be assessed in connection with any failure by any Progressive Design-Builder-Related Entity to comply with such requirements.

## **11.3 Mitigation Requirements**

The Progressive Design-Builder shall perform all environmental mitigation measures for the Project, including all mitigation measures required by any Governmental Approvals and any mitigation measures identified as a Progressive Design-Builder responsibility pursuant to Section 11.1.2 (*New Approvals to be Obtained by Progressive Design-Builder*).

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## **11.4 Generator, Arranger Status - Hazardous Materials**

Hazardous Materials encountered on the Site in the performance of the Work shall be disposed of, if at all, utilizing an EPA Identification Number or other appropriate legal device obtained by and carried in the name of the Department or another Person designated by the Department.

The Department has exclusive decision-making authority regarding selection of the destination facility for Hazardous Material disposal.

As between the Progressive Design-Builder and the Department, generator and arranger status with respect to Hazardous Materials shall be as set forth below:

1. The Department shall be considered the generator and arranger and assume generator and arranger responsibilities for Hazardous Materials other than those Hazardous Materials for which the Progressive Design-Builder is responsible under Section 28.1.1 (General Indemnities) clause 7.
2. The Progressive Design-Builder shall be considered the generator and assume generator responsibility for those Hazardous Materials for which the Progressive Design-Builder is responsible under Section 28.1.1 clause 7.

The foregoing allocation of generator and arranger status shall not be construed to preclude or limit any rights, remedies, or defenses that the Department or the Progressive Design-Builder may have against any Governmental Person or other third person or party.

## **12 CONSTRUCTION**

### **12.1 Prerequisites for Start of Construction of Any Portion of the Project**

The Progressive Design-Builder shall not start or recommence suspended construction of any portion of the Project until all the following events have been fully satisfied and remain so:

1. the Department and the Progressive Design-Builder have executed the Construction Phase Amendment;
2. the Department and the Progressive Design-Builder have executed a Work Package Amendment;
3. all Governmental Approvals necessary for Construction Work for the Work Package have been obtained and all conditions of such Governmental Approvals that are a prerequisite to commencement of such Construction Work have been performed;
4. all insurance policies and bonds, as applicable, that are required to be delivered to the Department hereunder have been submitted to the Department in compliance with the requirements of the Contract Documents and remain in full force and effect;
5. all necessary rights of access for such portion of the Project have been obtained;
6. the Progressive Design-Builder has made available all Key Personnel and other personnel required to be available;
7. Progressive Design-Builder has issued Released for Construction Documents for such portion of the Project and:
  - a. the Review and Comment process for such documents has been completed; or

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- b. pursuant to Section 3.2 (Approval), the Department has conditionally allowed the Progressive Design-Builder to continue with the Work related to the documents;
  8. the Department has Approved the Approved Plans required as a condition precedent to Construction Work;
  9. the Progressive Design-Builder is not in breach of this Contract; and
  10. all representations, warranties, and covenants of the Progressive Design-Builder remain true and correct in all material respects.

## **12.2 Control and Coordination of Work**

The Progressive Design-Builder shall be solely responsible for and have control over the construction means, methods, techniques, sequences, procedures, and shall be solely responsible for coordinating all portions of the Work under the Contract Documents.

## **12.3 Site Safety and Security; Adjacent Properties**

The Progressive Design-Builder shall provide appropriate safeguards and security for the Site during the performance of the Construction Work and shall take all reasonable precautions and provide protection to prevent damage, injury, or loss to all individual Persons on the Site, or who would reasonably be expected to be affected by the Work (including workers, Department employees/consultants, visitors, etc.), the Work itself and materials and equipment to be incorporated into the Work, as well as all other property at the Site, whether owned by the Progressive Design-Builder, the Department, or any other Person. The Progressive Design-Builder's obligation to provide for safety on and security for the Site shall, at any given time, only extend to those parts of the Site to which the Progressive Design-Builder has been provided access pursuant to Section 9.1.1 (Nature of Progressive Design-Builder's Rights).

The Progressive Design-Builder shall at all times comply with the Approved Safety Plan.

The Progressive Design-Builder shall take all reasonable precautions and provide protection to prevent damage, injury, or loss to property adjacent to the Site or likely to be affected by the Work. The Progressive Design-Builder shall restore damaged, injured, or lost property caused by an act or omission of any Progressive Design-Builder-Related Entity to a condition at least similar or equal to that existing before the damage, injury, or loss occurred.

### **12.3.1 Obligation to Uncover Finished Work**

If a portion of the Work has been covered contrary to the request of the Department or contrary to the requirements of the Contract Documents, it shall be uncovered at the written request of the Department for its observation and replaced at the Progressive Design-Builder's sole cost and expense, and the Progressive Design-Builder shall not be entitled to any Change Order in connection therewith.

If a portion of the Work has been covered that the Department has not specifically requested to observe prior to its being covered or which the Approved Quality Plan does not require to be observed prior to its being covered, the Department may request to see such Work and it shall be uncovered by the Progressive Design-Builder. If such Work is in accordance with the Contract Documents and the uncovering and restoring of such Work causes an increase in the cost or time of performing the Work, the Progressive Design-Builder shall be entitled to seek a Change Order for a Relief Event in accordance with Section 21 (Relief & Compensation) and Section 22 (Change Orders). If the Work exposed or examined is not in conformance with the requirements of the



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Contract Documents, then the cost of uncovering, removing, and restoring the Work or making good the parts removed and recovery of any delay to the performance of the Work occasioned thereby shall be at the Progressive Design-Builder's expense.

## **13 TIMELY PERFORMANCE**

### **13.1 Construction Work, Collateral Estoppel**

As a material consideration for entering into each Work Package Amendment, the Progressive Design-Builder hereby commits, and the Department is relying upon the Progressive Design-Builder's commitment, to perform the Construction Work described in the Work Package, ultimately and cumulatively so as to construct the entire Project, meeting each of the Completion Deadlines in each Baseline Work Package Schedule as set forth in the Contract Documents.

### **13.2 Adherence to Baseline Work Package Schedule**

Without limiting the generality of the foregoing Section 13.1 (*Construction Work; Collateral Estoppel*), the Progressive Design-Builder shall:

1. perform the Construction Work described in each Work Package in accordance with its Baseline Work Package Schedule; and
2. perform the Construction Work described in each Work Package so as to achieve each milestone by its Completion Deadline reflected in the Baseline Work Package Schedule.

### **13.3 Time is of the Essence**

Time is of the essence with respect to:

1. the time periods and limitations pertaining to notices and submittals;
2. the time periods, limitations, and milestones in each Baseline Work Package Schedule; and
3. all other time periods and limitations otherwise identified under the Contract Documents, and in each case, except where this Contract expressly provides for extension of time due to a Relief Event or where delays are subject to payment of Delay Charges or other compensation to the Department, the Progressive Design-Builder hereby waives any right at law or in equity to tender or complete delivery, response, or performance, as applicable, beyond the applicable time period, or to require the Department to accept such delivery, response, or performance.

### **13.4 Final Acceptance Deadline**

The Progressive Design-Builder shall achieve Final Acceptance by the Final Acceptance Deadline.

#### **13.4.1 No Time Extensions**

Except as otherwise specifically provided in Section 21 (*Relief & Compensation*) and Section 22 (*Change Orders*), the Department shall have no obligation to extend any Completion Deadline and the Progressive Design-Builder shall not be relieved of its obligation to perform the Construction Work in accordance with each Baseline Work Package Schedule, and to achieve the Completion Deadlines for any reason.

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### **13.4.2 Float**

All Float contained in each Baseline Work Package Schedule shall be considered a jointly owned and shared resource by the Progressive Design-Builder and the Department, available to the Project, and shall not be considered as time for the exclusive use or benefit of either the Department or the Progressive Design-Builder (subject to the restriction set forth in the definition of "Department-Caused Delay").

All Float shall be shown as such in each Baseline Work Package Schedule on each affected schedule path. The Progressive Design-Builder shall monitor and account for Float in accordance with the Critical Path Method.

### **13.4.3 Schedule Updates**

The Progressive Design-Builder shall prepare and deliver each Schedule Update as and when required under the Construction Phase Amendment or Work Package Amendment. For avoidance of doubt, Schedule Updates do not serve to revise or amend, nor shall be deemed to revise or amend, a Baseline Work Package Schedule.

### **13.4.4 Estoppel for Acceptance of Schedule Submittals**

The Progressive Design-Builder's obligations under this Section 13.4, and, with respect to any claim for additional time or costs in performance of the Construction Work, any acceptance by the Department of a Baseline Work Package Schedule, any Revised Baseline Work Package Schedule thereafter, or Schedule Update shall not, and shall not be construed to bind the Department to any improper logic, improper activity durations, or errors in the expression of the Critical Path or otherwise be used as a defense by or on behalf of the Progressive Design-Builder in any dispute hereunder.

Without limiting the Progressive Design-Builder's other obligations under the Contract Documents, the Progressive Design-Builder shall correct any improper logic, improper activity durations, or errors in the Baseline Work Package Schedule, any Revised Baseline Work Package Schedule, or succeeding Schedule Update, as applicable.

### **13.4.5 Use of Schedule in Relief Event Process**

For avoidance of doubt, Baseline Work Package Schedules only (not any Schedule Update) are relevant to measuring the duration of any delay hereunder; provided, however, that Schedule Updates may be relevant to determining whether the Progressive Design-Builder mitigated any such delay and may be relevant in determining whether a portion of the Work identified on a Baseline Work Package Schedule was completed.

## **14 QUALITY MANAGEMENT**

The Progressive Design-Builder shall perform the quality management necessary for the Progressive Design-Builder to comply with the Approved Quality Plan and otherwise meet all requirements of the Contract Documents.

## **15 LIQUIDATED DAMAGES; DAILY ROAD USER COSTS**

### **15.1 Failure to Meet Contract Requirements**

The Progressive Design-Builder understands and agrees that if the Progressive Design-Builder fails to complete the Construction Work in accordance with the Contract Documents, the Department will suffer substantial losses and damages. The cost to the Department of the

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administration of the Contract will be increased as the time occupied in the Work is lengthened. Losses will also accrue to the public due to delays in access to the Project. The Progressive Design-Builder agrees that it shall be liable for all such losses and damages, liquidated as Delay Charges.

## **15.2 Liquidated Damages**

The Progressive Design-Builder and the Department will have stipulated the amount payable by the Progressive Design-Builder in the event of its failure to achieve the Completion Deadlines (in each case, "Liquidated Damages") under each Work Package Amendment.

Without limiting the Department's rights under Section 27.1 (Offset; Withholding; Waiver), if the Progressive Design-Builder fails to achieve Completion Deadlines, the Progressive Design-Builder shall pay to the Department Liquidated Damages in the amounts agreed to in the Work Package Amendment.

The Progressive Design-Builder acknowledges and agrees that such Liquidated Damages are intended to compensate the Department solely for the Progressive Design-Builder's failure to meet Completion Deadlines. Payment of Liquidated Damages shall not excuse the Progressive Design-Builder from liability from any other breach of the Contract Documents.

## **15.3 Daily Road User Costs**

In addition to Liquidated Damages, the Progressive Design-Builder shall also be responsible for any stipulated lane use charges, lane site use charges, and contract site use charges (collectively, "Daily Road User Costs") as agreed to and set forth in each Work Package Amendment, if any, it being the Parties' intent that the methods and criteria for assessment, as well as valuation of Daily Road User Costs will be prepared as part of the Pre-construction Work.

The Progressive Design-Builder acknowledges and agrees that Daily Road User Costs are intended to compensate the Department solely for the Progressive Design-Builder's failure to meet these Contract Document requirements and shall not excuse the Progressive Design-Builder from liability from any other breach of Contract Document requirements.

## **15.4 Maximum Liquidated Damages and Daily Road User Costs**

Cumulative Liquidated Damages and Daily Road Use Costs under this Section 15 shall not exceed the amount identified in each Work Package GMP if any, as may be adjusted by Change Order.

## **15.5 Multiple Assessments of Liquidated Damages and Daily Road User Costs**

Liquidated Damages and Daily Road User Costs may be assessed simultaneously under more than one subsection of this Section 15 as well as simultaneously under more than one Work Package.

## **15.6 Reasonableness of Delay Charge Amounts**

The Progressive Design-Builder acknowledges and agrees that Delay Charges shall have been set based on an evaluation and estimation by the Department of damages that it will incur. The Progressive Design-Builder understands and agrees that any Liquidated Damages or Daily Road User Costs payable are not a penalty and that such sums are reasonable under the circumstances

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existing as of the date of execution and delivery of this Contract. The Progressive Design-Builder further acknowledges and agrees that Liquidated Damages and Daily Road User Costs may be owing even though no Progressive Design-Builder Default has occurred. The Progressive Design-Builder and the Department agree that the Parties have agreed or shall agree to such charges in order to fix the Progressive Design-Builder's costs and to avoid later disputes over which items are properly chargeable to the Progressive Design-Builder.

## **16 NONCONFORMING WORK**

### **16.1 Replacement of Nonconforming Work**

The Progressive Design-Builder shall correct any Nonconforming Work in the manner and within the time frames required by the Contract Documents. The Department may reject or require the Progressive Design-Builder to remedy any Nonconforming Work and/or identify additional Work that must be done to bring the Project into compliance with Contract Document requirements at any time prior to Final Acceptance, whether or not previous oversight, spot checks, audits, reviews, tests, inspections, acceptances, approvals, or Approvals were conducted by any Person.

### **16.2 Nonconforming Work Pay Adjustment**

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

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

## **17 DIFFERING SITE CONDITIONS; ITEMS OF ARCHAEOLOGICAL OR BIOLOGICAL SIGNIFICANCE; HAZARDOUS MATERIALS**

What follows in this Section 17 is the process the Parties agree to observe upon, and associated responsibilities regarding discovery of Differing Site Conditions, Items of Archaeological or Biological Significance, and discovery or release of Hazardous Materials. For avoidance of doubt, if the Progressive Design-Builder encounters a Differing Site Condition, an Item of Archaeological or Biological Significance, or Hazardous Materials for which it is not responsible in accordance with this Section 17, then the Progressive Design-Builder shall refer to Section 21 (*Relief & Compensation*).

### **17.1 Notification to the Department; Department Response**

If the Progressive Design-Builder becomes aware of any Item of Archaeological or Biological Significance or the presence of Hazardous Materials that are not disclosed in the Hazardous Materials Report, or any release of Hazardous Materials, then, as a condition precedent to any Progressive Design-Builder right to any relief under this Contract, if any, the Progressive Design-Builder shall immediately notify the Department thereof by telephone or in person, to be followed by written notification within 24 hours.

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The Progressive Design-Builder shall immediately stop Work and secure the area. Operations within the area shall be temporarily suspended and shall not be resumed at that location until authorized by the Department.

If the Progressive Design-Builder becomes aware of any Differing Site Conditions, the Progressive Design-Builder shall promptly secure the area and suspend all Work affecting the Differing Site Conditions and shall provide notice to the Department pursuant to Section 21.2.1 (Relief Event Notice).

As to any Differing Site Conditions, Items of Archaeological or Biological Significance, or Hazardous Materials, the Department will view the location within 10 Business Days after receipt of notification or notice, as applicable, and will advise the Progressive Design-Builder at that time whether to resume Work or whether further investigation is required. For notifications regarding Hazardous Materials, the Department will first confirm (itself or through designees) whether an alleged condition is in fact a Hazardous Material.

### **17.2 Further Investigation**

Within five Business Days after its initial written notice to the Department, the Progressive Design-Builder shall advise the Department what course of action the Progressive Design-Builder proposes to take. The Department then will either Approve or require modification of the Progressive Design-Builder's proposed actions. The Parties shall so proceed until the Department Approves the Progressive Design-Builder's proposed actions, and upon Approval, the Progressive Design-Builder shall implement the proposed actions.

### **17.3 Recommence Work**

In the case of a Differing Site Condition or Item of Archaeological or Biological Significance, the Department may require the Progressive Design-Builder to recommence Work in the area at any time, even though an investigation may be ongoing (so long as such Work is not in violation of any Laws or Governmental Approvals). The Progressive Design-Builder shall promptly recommence Work in the area upon receipt of the Department's notification to recommence Work.

In the case of a Hazardous Materials, the Progressive Design-Builder shall resume Work at the affected area of the Project only after the Department has issued a clearance, the Hazardous Materials have been removed or rendered harmless, and all necessary Governmental Approvals have been obtained, as reasonably determined by the Department.

### **17.4 Obligation to Minimize Impacts**

The Progressive Design-Builder shall ensure that all activities undertaken pursuant to this Section 17 are done in a manner that will minimize, to the maximum extent practicable, the effect on surrounding property and on the public.

### **17.5 Responsibility for Hazardous Materials**

Without limiting Section 11.4 (Generator, Arranger Status – Hazardous Materials), the Progressive Design-Builder shall be responsible for and shall Remediate or render harmless all Hazardous Materials disclosed in the Hazardous Materials Report.

If confirmed as a Hazardous Material under Section 17.1 (Notification to the Department; Department Response), the Department shall take the necessary measures required to ensure

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that Hazardous Materials are Remediated or rendered harmless or shall direct the Progressive Design-Builder to do so.

Except to the extent provided otherwise in this Section 17.5, the Progressive Design-Builder is not responsible for any Hazardous Materials encountered at the Site that are not disclosed in the Hazardous Materials Report. Notwithstanding the preceding sentence, the Department is not responsible for any spill or release, threatened spill or release, or exacerbation of Hazardous Materials attributable to any Progressive Design-Builder-Related Entity. If the Department reasonably determines that any Progressive Design-Builder-Related Entity has spilled or released, threatened to spill or release, or exacerbated Hazardous Materials on the Site, then any response, removal, cleanup, or other remedial action required by applicable Laws shall be performed by the Progressive Design-Builder at its sole cost and expense. Except as to the Progressive Design-Builder's initial response to an emergency, any such remedial actions shall require the prior Approval of the Department.

## **18 PROJECT ACCEPTANCE**

### **18.1 Substantial Completion of a Work Package**

As a pre-requisite to achievement of Substantial Completion with respect to a Work Package, the Progressive Design-Builder shall provide a written certificate to the Department that the following have occurred, with such supporting documents as the Progressive Design-Builder determines as appropriate or otherwise as may be required by the Department:

1. the Department and the Progressive Design-Builder have agreed upon a Punch List of items, as to such Work Package, to be completed for Final Acceptance;
2. the Progressive Design-Builder has completed all Work within the Work Package (excepting only for Punch List items), and the Progressive Design-Builder represents that the Work Package has been performed in accordance with the requirements of the Contract Documents;
3. if completion of a Work Package affords use of that portion of the Project by the Department, then, in writing, the Progressive Design Builder certifies that such portion of the Project:
  - a. may be operated safely without injury to any Person or damage to the Project or any other property on or off the Site;
  - b. is ready to be opened for its intended use and is safe for all users, all points of entry and exit are in their final configuration and no further Work will require any lane or shoulder closure or temporary traffic controls;
4. all commitments related to the Work Package as required pursuant to the environmental documents have been completed in accordance therewith and the Contract Documents;
5. the Progressive Design-Builder has satisfied all requirements under all other applicable Governmental Approvals required for Substantial Completion of the Work Package;
6. the Progressive Design-Builder has furnished to the Department certifications from the Progressive Design-Builder's Design Quality Assurance Manager, in form and substance satisfactory to the Department, certifying that the Design Documents meet the requirements of the Contract Documents;
7. all Relocations attending the Work Package have been completed in accordance with all Utility Agreements, and utility clearances in respect of Utility Work have all been received;

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8. all submittals required by the Contract Documents to be submitted to the Department as a condition to Substantial Completion (including all supporting information) have been submitted to and accepted by the Department;
  9. the Progressive Design-Builder has obtained all applicable Third-Party and Utility Owner approvals relating to the Work Package, and all Third Parties and Utility Owners have completed all work that involves obligations by the Progressive Design-Builder;
  10. the Progressive Design-Builder has achieved or completed all other conditions identified in the Contract Documents as a condition to Substantial Completion, if any;
  11. the Progressive Design-Builder has paid in full all amounts due and owing to the Department pursuant to the Contract Documents that are not in Dispute;
  12. there exist no uncured breaches that with the giving of notice or passage of time, or both, could become a Progressive Design-Builder Default (except any Progressive Design-Builder Default for which Final Acceptance will affect its cure); and
  13. the Progressive Design-Builder has certified to the Department in writing that no overdue amounts owing to any Subcontractor remain unpaid (except for amounts relating to good faith disputes).

### **18.2 Notice of Substantial Completion of a Work Package**

Within 10 Business Days following receipt of the Progressive Design-Builder's notice under Section 18.1 (*Substantial Completion of a Work Package*), the Department will either:

1. issue a Notice of Substantial Completion; or
2. notify the Progressive Design-Builder of any prerequisites to Substantial Completion that have yet to be corrected or satisfied.

If the Department notifies the Progressive Design-Builder under clause 2, then the Progressive Design-Builder shall resubmit its Substantial Completion notice upon correction or satisfaction of outstanding prerequisites, and the Parties shall continue this process until the Department issues a Notice of Substantial Completion, the Parties proceed under Dispute Resolution Procedures, or the Contract is otherwise terminated.

### **18.3 Certificate of Final Acceptance of the Project**

As a pre-requisite to achievement of Final Acceptance of the Project, the Progressive Design-Builder shall provide a written certificate to the Department that the following have occurred, with such supporting documents as the Progressive Design-Builder determines as appropriate or otherwise as may be required by the Department (the "Certificate of Final Acceptance"):

1. all Work has been performed in accordance with the requirements of the Contract Documents, and specifically all requirements for Substantial Completion for all Work Packages have been and remain satisfied;
2. the Project may be operated safely without injury to any Person or damage to the Project or any other property on or off the Site;
3. the Project is ready to be opened for its intended use and is safe for all users, all points of entry and exit are in their final configuration, and no further Work will require any lane or shoulder closure or temporary traffic controls;

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4. all Punch List items for all Work Packages have been completed in accordance with their respective Work Package Amendments and the Contract Documents;
  5. all Progressive Design-Builder and Subcontractor personnel, supplies, equipment, waste materials, rubbish, and temporary facilities not incorporated into the Work have been removed from the Site, the Progressive Design-Builder has restored and repaired all damage or injury arising from such removal to the satisfaction of the Department, and the Site is in good working order and condition;
  6. the Department has received a complete set of Record Drawings in form and substance required by the Contract, all Governmental Persons with jurisdiction requiring any form of certification of design, engineering, or construction with respect to the Project have been provided such certifications, and all warranties, manuals, and other deliverables required as a condition to Final Acceptance have been provided to the Department;
  7. all submittals and other State Law Requirements have been satisfied;
  8. all Progressive Design-Builder obligations under the Contract Documents (other than obligations which by their nature are required to be performed after Final Acceptance as determined by the Department) have been satisfied in full or waived in writing by the Department;
  9. there are no overdue amounts owing to any Subcontractor or Supplier that remain unpaid, and the Progressive Design-Builder has resolved all, and there are no outstanding claims; actual, pending, or threatened claims against the Contract Bond; Liens on any materials, supplies, or equipment; or stop notices relating to the Project, including claims by Utility Owners;
  10. the Progressive Design-Builder has no reason to believe that any other Person has a valid claim against the Progressive Design-Builder, the Department, or the Project which has not been communicated in writing by the Progressive Design-Builder to the Department as of the date of the certificate;
  11. the Progressive Design-Builder has paid in full all amounts due and owing to the Department pursuant to the Contract Documents;
  12. there is no existing default by the Progressive Design-Builder under any Utility Agreement, and no event has occurred which, with the passing of time or giving of notice or both, would lead to a claim relating to the Work or event of default under any Utility Agreement;
  13. there exist no uncured breaches that with the giving of notice or passage of time, or both, could become Progressive Design-Builder Defaults; and
  14. all guarantees, warranties, and the Contract Bond are in full force and effect.

#### **18.4 Notice of Final Acceptance**

Within 10 Business Days following receipt of the Certificate of Final Acceptance, the Department will either issue a Notice of Final Acceptance or notify the Progressive Design-Builder of any prerequisites to Final Acceptance that have yet to be corrected or satisfied. If the Department notifies the Progressive Design-Builder of outstanding prerequisites, then the Progressive Design-Builder shall resubmit its Certificate of Final Acceptance upon correction or satisfaction of outstanding prerequisites, and the Parties shall continue this process until the Department issues a Notice of Final Acceptance, the Parties proceed under Dispute Resolution Procedures, or the Contract is otherwise terminated.



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## **18.5 Opening of Sections of Project to Traffic; No Waiver**

Opening of portions of the Project to the public prior to Final Acceptance does not constitute acceptance of the Work or a waiver of any provisions of the Contract Documents.

## **19 TITLE; RISK OF LOSS**

### **19.1 Department-Furnished Materials**

The Contract Documents may provide that certain materials for the Project are to be provided by the Department. All Department-furnished materials will be made available during normal business hours at Department-designated sites. The Progressive Design-Builder shall be responsible for arranging pick up, inspection, determinations of acceptability, loading, and transportation of all such materials from Department-designated sites and shall bear the risk of loss during such activities.

The Progressive Design-Builder shall be responsible for any defects or deficiencies discovered after any Department-furnished materials are removed from Department-designated sites.

### **19.2 All Other Goods, Consumables, Materials, Supplies, Equipment, and Tools**

Title to all other goods, consumables, materials, supplies, equipment, and tools which shall have been delivered to the Site shall pass to the Department, free and clear of all Liens, upon the sooner of incorporation into the Project or payment by the Department to the Progressive Design-Builder of invoiced amounts for such good, etc.

Notwithstanding passage of title, the Progressive Design-Builder shall retain sole care, custody, control, and risk of loss of such goods, consumables, materials, supplies, equipment, and tools and shall exercise due care with respect thereto as part of the Work until expiration of the Term.

#### **19.2.1 Maintenance, Rebuilding, Repair, Restoration of Damaged Work**

Until the Final Acceptance Date or such other date identified in the Construction Phase Amendment or a Work Package Amendment, the Progressive Design-Builder shall maintain, rebuild, repair, and restore all damaged Work at the Site, whether owned by the Progressive Design-Builder, the Department, or any other Person. If such damage was caused by any Person other than any Progressive Design-Builder-Related Entity, then after exhausting Builder's Risk Insurance coverage required to be carried by the Progressive Design-Builder (including the Progressive Design-Builder's obligation to pay any deductibles or self-insured retentions), the Department shall pay to the Progressive Design-Builder the costs of rebuilding, repairing, and restoring the damage in excess of the policy limits of the Builder's Risk Insurance coverage by appropriate Change Order.

If the Progressive Design-Builder fails to satisfy its obligations to maintain, rebuild, repair, or restore any damaged Work then after five Days' notice, the Department may take all steps it deems necessary to satisfy such obligations. The Progressive Design-Builder shall reimburse the Department for any costs related to such activities.

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### **19.2.2 Maintenance During Construction**

The Department will be responsible for the operation and maintenance of the Right of Way until execution of the Construction Phase Amendment, whereupon the Progressive Design-Builder shall assume full responsibility for maintenance of that portion of the Site subject to a Work Package Amendment. If there are multiple Work Packages, then the Department will relinquish such other portions of the Site subject to the Work Packages to the Progressive Design-Builder to assume such maintenance responsibility.

Upon Final Acceptance, the Department will assume responsibility for the operation and maintenance of the entire Project, provided that nothing contained herein shall otherwise limit any Warranty obligations of the Progressive Design-Builder.

## **20 PAYMENT**

### **20.1 Pre-construction Phase Compensation**

The Progressive Design-Builder's compensation for Pre-construction Work performed during the Pre-construction Phase shall be an amount ("Pre-construction Phase Compensation") equal to the hourly rates set forth in Exhibit D (Hourly Rates) for the personnel performing the Pre-construction Work multiplied by number of hours worked by such personnel on the Pre-construction Work, plus actual and documented direct costs incurred in performing Pre-construction Work. However, in no event shall the Pre-construction Phase Compensation exceed the initial or amended Pre-construction Compensation Cap for any Pre-Construction Phase Amendment. The rates in Exhibit D shall be the rates identified in Form PF of the Proposal subject to adjustment by the Department through Pre-construction Phase Amendments.

#### **20.1.1 Payment of Pre-construction Phase Compensation**

No later than the tenth day of each calendar month during the Pre-construction Phase, the Progressive Design-Builder shall invoice the Department for payment of Pre-construction Phase Compensation earned in the prior month.

Each monthly invoice shall be supported by such information substantiating the Progressive Design-Builder's right to payment as the Department shall reasonably require, in a form Approved by the Department. The invoice shall include:

1. costs of labor;
2. progress of the Pre-construction Work; and
3. duly executed conditional waivers of rights to make claim against the Contract Bond from the Progressive Design-Builder and all Subcontractors, establishing timely payment or satisfaction of the payment requested by the Progressive Design-Builder in the previous invoice.

The Department shall make payment in the amount due to the Progressive Design-Builder not later than 14 days after the Department's approval of the invoice.

If an invoice is received after the date for such invoice set forth in this Section 20.1.3, then payment shall be made by the Department as part of the subsequent payment.

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## **20.2 Total Construction GMP**

### **20.2.1 Generally**

The Progressive Design-Builder shall only be entitled to compensation for Construction Work to the extent such Construction Work has been authorized pursuant to an executed Work Package GMP. Each Work Package shall have a Work Package GMP and the Total Construction GMP shall be the sum of the Work Package GMPs for all executed Work Packages.

### **20.2.2 Progress, Invoicing, and Payment**

#### **20.2.2.1 Request for Construction Payment**

The Progressive Design-Builder shall submit a Request for Construction Payment in a form Approved by the Department, including all of the information required by the Department under the Construction Phase Amendment, Work Package Amendment, and this Section 20.2, containing the amount claimed to be payable for Construction Work 100% completed (by reference to the Schedule of Values and the “cost-loaded” Baseline Work Package Schedule) plus amounts due under executed Change Orders.

If Construction Work advances under multiple Work Packages, then the Progressive Design-Builder shall itemize all amounts payable by reference to the respective Work Package but submit only one monthly Request for Construction Payment.

The Department and Progressive Design-Builder shall meet to review the Request for Construction Payment to resolve any outstanding issues regarding activities for which payment is sought. The Progressive Design-Builder shall submit a revised Request for Construction Payment to address any outstanding issues identified by the Department.

The Department will pay the amount ultimately agreed under each Request for Construction Payment as and when required under each Work Package Amendment.

#### **20.2.2.2 Progressive Design-Builder Certification of Construction Payment**

Each Request for Construction Payment shall be certified by the Project Manager, and with respect to a Request for Construction Payment relating to design Work, the Design Manager. Such certification shall provide that all amounts being requested are true and correct, the required level of testing and inspection is complete, all certifications of compliance are submitted, the Work is completed in accordance with the Contract Documents, and there is no outstanding Nonconforming Work for which payment is being requested. No Request for Construction Payment will be processed without such certification.

#### **20.2.2.3 Documents Required to be Provided with the Request for Construction Payment**

All documents reasonably requested by the Department shall be submitted with each Request for Construction Payment application, including the following. No Request for Construction Payment will be processed without all such documents:

1. conditional waivers of right to make claims against the Contract Bond from each Subcontractor;
2. a Progress Report;

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3. documentation supporting the direct allowable payments by the Department to Utility Owners pursuant to Section 10.1 (*Generally*), and
  4. a Schedule Update.

### **20.2.3 Withholding**

No payment will be made for activities that are incomplete. Payment will not be made for Nonconforming Work unless the Department agrees that a pay adjustment may be made for Nonconforming Work in accordance with Section 16.2 (*Nonconforming Work Pay Adjustment*).

### **20.2.4 Partial Payment for Material Delivered to the Site**

Upon application by the Progressive Design-Builder and Approval by the Department, payments for the Actual Cost of certain materials may be made to the Progressive Design-Builder prior to incorporation of such material in the permanent Work. The Progressive Design-Builder shall include with any such request such documents as the Department may require (e.g., bills of sale, evidence of suitability, etc.).

All costs associated with handling, transportation, and storage of material, are borne by the Progressive Design-Builder.

## **20.3 Prompt Payment to Subcontractors**

All first-tier Subcontracts shall provide for the payment of Subcontractors and Suppliers of all undisputed amounts (less retentions, offsets, and deductions under the Subcontract or allowed by Law) for satisfactory performance of subcontracted work no later than 10 Days after receiving payment from the Department for such work or sooner if required by applicable Law.

Within 15 Days after receiving payment from the Department and for each Subcontract, the Progressive Design-Builder shall submit to the Project Director a "Certificate of Subcontractor Work and Payment," KDOT Form No. 1010, certifying that payment was made to such Subcontractors in accordance with this Section 20.3.

The Department shall have no obligation to pay or to see to the payment of money to a Subcontractor, except as may otherwise be required by Law.

The Department may seek other remedies, under this Contract, under KDOT Specification Section 109 and associated Special Provisions, and as allowed under applicable Law, for the Progressive Design-Builder's or its Subcontractors' failure to comply with these "prompt payment" obligations.

## **20.4 Final Payment**

### **20.4.1 Application for Final Payment**

Following the Department's issuance of a Notice of Final Acceptance pursuant to Section 18.4 (*Notice of Final Acceptance*), the Progressive Design-Builder shall prepare and submit an Application for Final Payment to the Department showing the proposed total amount due the Progressive Design-Builder.

In addition to meeting all other requirements for invoices hereunder, the Application for Final Payment shall include the written consent by the Surety to such payment and such other documentation as the Department may reasonably require. Prior applications and payments shall be subject to correction in the proposed Application for Final Payment.

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It is the Parties' intent that the amount of the Final Payment consists almost entirely in the value of the Work on the Punch Lists across all Work Packages, modest administrative charges to finalize and deliver the Record Drawings and other Project close-out documentation, at-cost demobilization expenses, and final accounting of Shared Provisional Sums under Section 2.4.2 (Provisional Risks).

The Department will review the Progressive Design-Builder's proposed Application for Final Payment, responding with changes, corrections, or requests for additional information or documentation. The Progressive Design-Builder shall resubmit its proposed Application for Final Payment upon responsive changes, corrections, or documentation, and the Parties shall continue this process until the Department Approves the Application for Final Payment.

The Progressive Design-Builder's receipt of Final Payment shall constitute a waiver and release of Claims by the Progressive Design-Builder, for itself and for all Progressive Design-Builder-Related Entities, against the State, and in particular the Department, and any of its employees, officers, directors, commissioners and officeholders, agents, representatives, consultants, attorneys, successors, and permitted assigns, except for Claims the Progressive Design-Builder has already submitted to the Department.

## **20.5 Right to Stop Work if Undisputed Payment is Not Made**

The Progressive Design-Builder shall have the right to stop Work if the Department fails to make an undisputed payment due hereunder within 30 Days after receipt of notice of nonpayment. Any such Work stoppage shall be deemed a suspension for purposes of Section 24.1 (Suspension for Convenience).

## **20.6 Appropriations**

The obligation of the Department to pay all amounts due and owing or scheduled to become due and owing from the Department to the Progressive Design-Builder hereunder, is a contractual commitment of the State of Kansas and does not constitute a debt, pledge of the faith, credit, or taxing power, or any other pledge of the State of Kansas or any political subdivision thereof. The Department has no taxing power. The Progressive Design-Builder has no taxing power, nor any other right to have taxes levied or to compel appropriations by the Kansas State Legislature for any payment of any amounts due and owing or scheduled to become due and owing from the Department to the Progressive Design-Builder hereunder.

# **21 RELIEF & COMPENSATION**

## **21.1 Relief Events**

### **21.1.1 Relief Event Defined**

The occurrence of any of the following events during the Construction Phase shall constitute a "Relief Event" for which the Progressive Design-Builder shall be entitled to seek adjustments to the Baseline Work Package Schedule or the applicable Work Package GMPs may be allowed under the Risk Register or otherwise pursuant to this Section 21 and Section 22 (Change Orders):

1. the occurrence of a Risk Register Event that is identified as a Department Risk;
2. the occurrence of a Provisional Risk Register Event that is subject to relief, upon exhaustion of the Provisional Sum;
3. a Change in Law;

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4. a Department-Caused Delay;
  5. unavoidable delays arising from a suspension order pursuant to Section 24.1 (*Suspension for Convenience*);
  6. uncovering, removing, and restoring Work, to the extent additional costs or time are provided for in Section 12.3.1 (*Obligation to Uncover Finished Work*);
  7. discovery at, on, or under the Right of Way (after acquired) of any Differing Site Conditions:
    - a. not known to the Progressive Design-Builder prior to the effective date of the Work Package where the scope of the Work includes the affected portion of the Right of Way; or
    - b. that would not have become known to the Progressive Design-Builder by undertaking a reasonable investigation;
  8. discovery at, on, or under the Right of Way (after acquired) of any Item of Archaeological or Biological Significance:
    - a. not known to the Progressive Design-Builder prior to the effective date of the Work Package Amendment where the scope of the Work includes the affected portion of the Right of Way; or
    - b. that would not have become known to the Progressive Design-Builder by undertaking a reasonable investigation;
  9. Force Majeure Events; and
  10. discovery at, on, or under the Right of Way (after acquired) of any Hazardous Materials not constituting a release of Hazardous Materials by a Progressive Design-Builder-Related Entity:
    - a. not known to the Progressive Design-Builder prior to the effective date of a Work Package Amendment where the scope of the Work includes the affected portion of the Right of Way; or
    - b. that would not have become known to the Progressive Design-Builder by undertaking a reasonable investigation.

#### **21.1.2 Limitations on Relief Events**

None of the foregoing events described in Section 21.1.1 (*Relief Event Defined*) shall be deemed a Relief Event to the extent that performance of the Work would have been suspended, delayed, or interrupted by any other cause, including the negligence, reckless or willful misconduct, act or omission, or breach or violation of applicable Law, Governmental Approval, or contract (including any Contract Document) by the Progressive Design-Builder or any Progressive Design-Builder-Related Entity on any part of the Project.

For those Relief Events for which the Progressive Design-Builder is afforded additional time for performance (or excuse from performance for a period of time), delays are measured as direct delays to the Critical Path on the affected Baseline Work Package Schedule.

For those Relief Events for which the Progressive Design-Builder is afforded an increase in the Work Package GMP for any Work Package the amount of the additional compensation shall equal the increased Actual Costs incurred by and necessary for Progressive Design-Builder's performance in accordance with the Contract Documents, or actual time or quantities under unit prices for the same, if so identified.

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Without limiting the Progressive Design-Builder's general duty of mitigation under Section 2.4 (Risk Register) or those criteria expressed in any of the foregoing events described in Section 21.1.1 themselves, Relief Events shall be limited to the extent that the adverse effects of the Relief Event could have been avoided by the exercise of caution, due diligence, or reasonable efforts by the Progressive Design-Builder or any Progressive Design-Builder-Related Entity acting in accordance with Standards of the Industry in all circumstances to the extent possible, including by Redeploying.

If the Progressive Design-Builder seeks relief for Force Majeure Events or Relief Events that are caused, extended, exacerbated, or otherwise informed by the occurrence of a Force Majeure Event, or if any costs are covered by insurance required to be placed under this Contract (regardless of whether the Progressive Design-Builder has actually obtained such insurance), then the Progressive Design-Builder shall only be entitled to seek adjustments to the Baseline Work Package Schedule and not to any increase in a Work Package GMP for a Work Package; provided, however, that nothing in this Section 21.1.2 shall be construed to preclude the Progressive Design-Builder's recourse to any insurance policy or coverages.

## **21.2 Relief Event Claims**

### **21.2.1 Relief Event Notice**

The Progressive Design-Builder shall provide notice to the Department within 15 Days after the date on which the Progressive Design-Builder first knew or should have known that a Relief Event occurred or is imminent (the "Relief Event Notice"). The Relief Event Notice shall include a reasonably detailed description of the Relief Event, relevant circumstances, an initial estimate of the approximate number of Days of delay to the Critical Path of affected Baseline Work Package Schedules, if any, and the approximate additional costs the Progressive Design-Builder will incur as a result of the Relief Event. The Relief Event Notice shall also describe the efforts of the Progressive Design-Builder that have been (or are going to be) undertaken to overcome, remove the Relief Event, or to mitigate the adverse effects of the Relief Event.

If the Progressive Design-Builder fails to deliver the Relief Event Notice within such 15 Days, then the Progressive Design-Builder shall have irrevocably and forever waived and released the portion of any Claim or right to relief for the adverse effect attributable to the Relief Event occurring before the date of actual delivery of a Relief Event Notice.

### **21.2.2 Request for Change Order**

The Progressive Design-Builder shall submit to the Department a Request for Change Order (RCO) within 30 Days after submitting the Relief Event Notice. The RCO shall include:

1. all requirements of Section 22.2 (Contents of Change Orders); and
2. to the extent not repetitive of clause 1:
  - a. the Relief Event, including a detailed description, whether it is a Risk Register Event (with annotation to the Risk Register, if yes), the date of its occurrence, and its duration;
  - b. the adverse effect of the Relief Event on the Progressive Design-Builder's ability to perform any of its obligations under this Contract,
  - c. analysis of the effects of the Relief Event on the relevant Baseline Work Package Schedule's Critical Path; and

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- d. the specific relief sought (including, where applicable, by reference to the Risk Register).

If the Progressive Design-Builder fails to deliver the RCO within such 30 Days, the Progressive Design-Builder shall have irrevocably and forever waived and released any Claim or right to relief for the adverse effect attributable to the Relief Event occurring before the date of actual delivery of a Relief Event Notice.

### **21.2.3 Good Faith Efforts**

The Department and the Progressive Design-Builder will use good faith efforts to agree on the extent to which the Progressive Design-Builder is entitled to cost, schedule, or performance relief, as may be applicable, as a result of any such Relief Event.

Once the Parties have mutually agreed as to the Progressive Design-Builder's entitlement to cost relief, they shall enter into a Change Order reflecting their agreement as to the adjustment in the applicable Work Package GMP pursuant to Section 22 (Change Orders).

## **21.3 Waiver**

The rights and remedies set forth in this Section 21 shall be the Progressive Design-Builder's sole and exclusive rights and remedies upon the occurrence or due to the effects of a Relief Event, and the Progressive Design-Builder hereby waives all other rights and remedies at law and/or in equity that it might otherwise have against the Department on account of a Relief Event.

## **21.4 Assumption of Risk**

Except as otherwise expressly provided in the Contract Documents, the Progressive Design-Builder:

1. acknowledges and accepts all risks, responsibilities, obligations, and liabilities in connection with performance of the Work and delivery of the Project; and
2. is not entitled to make any claim under the Contract Documents, at law, or in equity against the Department, or the State for any losses suffered in connection with the Project, the Work, or the Contract Documents.

## **22 CHANGE ORDERS**

This Section 22 sets forth the requirements for obtaining all Change Orders under this Contract. The Progressive Design-Builder hereby acknowledges and agrees that the Total Construction GMP constitutes full compensation for performance of all of the Construction Work, subject only to those exceptions specified in Section 21 (Relief & Compensation) and this Section 22.

### **22.1 Change Orders Constraints**

A Change Order shall not be effective for any purpose unless executed by the Department. Change Orders may be issued only for the following purposes (or combination thereof):

1. to modify the Work;
2. to revise a Completion Deadline;
3. to revise a Work Package GMP; or
4. as otherwise specifically permitted in this Contract



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## 22.2 Contents of Change Orders

The Progressive Design-Builder shall prepare a form of Change Order for the Department's Approval, conforming in all respects to the requirements and constraints in this Section 22 and, as it pertains to Change Orders due to Relief Events, Section 21 (*Relief & Compensation*).

Each RCO and Change Order shall document the following, at a minimum:

1. Scope of Work: The scope of work shall describe in detail satisfactory to the Department all additional or changed (or both) activities to be authorized by the Change Order.
2. Cost Estimate: The cost estimate shall set out the estimated costs in such a way that a fair evaluation can be made, acceptable to the Department, consistent with the Change Order pricing constraints and requirements set forth in Exhibit I (*Change Order Pricing*).
3. Time Impact Analysis: For Change Orders contemplating Construction Work, if the Progressive Design-Builder claims that such event, situation, or change affects the Critical Path affecting a Completion Deadline, it shall provide a time impact analysis as to each affected Baseline Work Package Schedule, indicating all activities represented or affected by the change, with activity numbers, durations, predecessor and successor activities, resources and cost, and with a narrative report, in a form satisfactory to the Department, which compares the proposed new schedule to the then-current Baseline Work Package Schedule (stated as to Construction Work completed and not in dispute), as appropriate. The time impact analysis shall only propose to modify the activities that have been impacted by the event, situation, or change to justify the extension.
4. Justification. Each RCO shall include a justification detailing all causes of the proposed change, making specific reference to the applicable provisions of this Section 22 which permit a Change Order to be issued, and describing the data and documents which establish the necessity of such proposed change.
5. Other Supporting Documentation: The Progressive Design-Builder shall provide other supporting documentation as required by the Department.

### 22.2.1 Disposition; Incomplete Request for Change Orders

The Department may reject the Progressive Design-Builder's claim at any point in the process. The Department's failure to respond to any RCO within 14 Days of delivery shall be deemed rejected.

The Department shall have no obligation to review the supporting documentation associated with any RCO until a complete RCO is provided.

Excepting only amendments to the Contract, only complete Change Orders executed by the Department shall change the Total Construction GMP, adjust any Work Package GMP, or extend any Completion Deadline.

### 22.2.2 Performance of Changed or Extra Work without a Change Order

If the Progressive Design-Builder undertakes any extra or changed work without receiving a Change Order executed by the Department, the Progressive Design-Builder shall be deemed to have performed such work voluntarily, without right to a Change Order. In addition, the Progressive Design-Builder may be required to remove or otherwise undo any such work at its sole cost.

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### **22.2.3 Procedure for Department Initiated Change Orders**

If the Department desires to evaluate whether to initiate a Change Order, the Department may, at its discretion, issue a Request for Change Proposal.

Within seven Days after the Progressive Design-Builder's receipt of a Request for Change Proposal, the Department and the Progressive Design-Builder shall consult to define the proposed scope of the change, including rough order of magnitude of cost and time impacts, if any, as relates to Construction Work.

Within seven Days after the consultation meeting, the Department shall notify the Progressive Design-Builder whether the Department desires the Progressive Design-Builder to prepare a Change Order. The Department may require the Progressive Design-Builder to account for impacts on the Baseline Work Package Schedule or to keep the Baseline Work Package Schedules but reflect additional Acceleration Costs to meet existing Completion Deadlines.

If requested by the Department, the Progressive Design-Builder shall prepare and submit to the Department for Approval a Change Order within 21 Days after receipt of the Department's notification seeking a Change Order, complying with all applicable requirements of Section 22.4 (Pricing of Change Orders), and incorporating all requests made by the Department. The Progressive Design-Builder shall bear the cost of developing the Change Order form, including any modifications requested by the Department.

If the Department and the Progressive Design-Builder agree that a change in the requirements relating to the Work has occurred but disagree as to whether the change justifies additional compensation or time, or disagree as to the amount of any change to be made to a Work Package GMP or a Completion Deadline, the Department may, in its sole discretion, issue a Department-Directed Change to the Progressive Design-Builder to proceed with the performance of the Work requested.

## **22.3 Certain Limitations for all Change Orders**

### **22.3.1 Limitation on Work Package GMP Increases**

Any increase in a Work Package GMP pursuant to Section 21 (Relief & Compensation) and this Section 22 shall exclude:

1. costs caused by a breach of contract or fault or negligence, or act or failure to act of any Progressive Design-Builder-Related Entity;
2. costs that could reasonably have been avoided by the Progressive Design-Builder, including by Redeploying; and
3. costs for any rejected Work which failed to meet the requirements of the Contract Documents and any necessary remedial Work.

### **22.3.2 Limitation on Time Extensions**

Any extension of a Completion Deadline pursuant to Section 21 (Relief & Compensation) and this Section 22 shall exclude any delay to the extent that it:

1. did not impact the Critical Path affecting a Completion Deadline;
2. was due to the fault or negligence, or act or failure to act of any Progressive Design-Builder-Related Entity; or

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3. could reasonably have been avoided by the Progressive Design-Builder, including by Redeploying.

The Progressive Design-Builder shall demonstrate to the Department's satisfaction that the change in the Work (or other event or situation which is the subject of the Change Order request seeking a change in a Completion Deadline) has caused or will result in an identifiable and measurable disruption of the Work, impacting a Critical Path activity affecting a Completion Deadline.

### **22.3.3 Limitation on Delay Costs**

Before the Progressive Design-Builder may obtain any compensation for delay costs, the Progressive Design-Builder shall have demonstrated to the Department's satisfaction that:

1. the Baseline Work Package Schedule in fact sets forth a reasonable method for completion of the Work;
2. the damages giving rise to the delay costs could not reasonably have been avoided by the Progressive Design-Builder, including by Redeploying; and
3. the Progressive Design-Builder has suffered or will suffer Actual Costs due to such delay, each of which costs shall be justified and documented in a manner satisfactory to the Department.

### **22.3.4 Limitation on Acceleration Costs**

Acceleration Costs shall be compensable hereunder only with express, written direction by the Department to the Progressive Design-Builder to accelerate its efforts and evidenced by Change Orders issued by the Department.

### **22.3.5 No Disruption Damages**

Disruption Damages, whether from a single event, multiple or repetitive events, or continual events are not allowed or recoverable under the Contract.

## **22.4 Pricing of Change Orders**

The Department and the Progressive Design-Builder (on its own behalf and on behalf of its Subcontractors) shall endeavor to negotiate, in good faith, a reasonable cost for each Change Order. If compensation amounts or methodologies for compensation for a particular Relief Event is provided for in the Risk Register, then such compensation shall be determined in such amount or by such methodology. If the Risk Register does not address compensation or compensation methodologies for a particular Relief Event, and the Department and the Progressive Design-Builder cannot agree on the terms of pricing of a Change Order, then compensation, if any, for such Relief Event shall be determined pursuant to the Dispute Resolution Procedures contained in Section 23 (*Partnering & Disputes*).

## **22.5 No Release or Waiver**

### **22.5.1 Extension of Time for Performance**

No extension of time granted hereunder shall release the Progressive Design-Builder's Surety from its obligations. The Department shall not be deemed to have waived any rights under this Contract as the result of any grant of an extension of any Completion Deadline, any acceptance of performance of any part of the Work after a Completion Deadline, or the making of any payments to the Progressive Design-Builder after such date.

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### **22.5.2 No Change Order Based on Course of Conduct or Order by Unauthorized Person**

No course of conduct or dealings between the parties, nor express or implied acceptance of alterations or additions to the Work, and no claim that the Department has been unjustly enriched shall be the basis for any claim, request for additional compensation, or extension of a Completion Deadline. Further, the Progressive Design-Builder shall undertake, at its risk, work included in any request, order, or other authorization issued by a Person in excess of that Person's authority as provided herein or included in any oral request. The Progressive Design-Builder shall be deemed to have performed such work as a volunteer and at its sole cost. In addition, the Department may require the Progressive Design-Builder to remove or otherwise undo any such work, at the Progressive Design-Builder's sole cost.

## **23 PARTNERING & DISPUTES**

### **23.1 Partnering**

The Department intends to encourage the use of an extensive partnering program among the Department, the Progressive Design-Builder, its Subcontractors, and other stakeholders where appropriate. The partnering relationship will be structured to draw on the strengths of each organization to identify and achieve reciprocal goals. The objectives include effective and efficient Project performance and completion on schedule, within budget and in accordance with the Contract Documents.

The Department anticipates a partnering effort involving executive management, Project management, Project staff and others. The Progressive Design-Builder shall pay all costs associated with effectuating the partnership.

### **23.2 Dispute Resolution**

#### **23.2.1 Intent**

It is the intent of the Parties that these Dispute resolution provisions contained in this Section 23.2 shall apply only in the event that the Department-Progressive Design-Builder Dispute resolution efforts through partnering under Section 23.1 (*Partnering*) are not successful. The provisions of this Section 23.2 shall apply to all Disputes arising out of the Work that are not so resolved, except as expressly provided to the contrary in the Contract Documents.

#### **23.2.2 Dispute Resolution Procedure**

When a Dispute arises between the Progressive Design-Builder and the Department, and the Parties have been unable to resolve the issue through the partnering process under Section 23.1 (*Partnering*), the Parties agree to use the following procedure, the completion of which is a condition precedent to either Party pursuing any litigation to resolve the matter in a Dispute:

1. The Progressive Design-Builder shall submit a claim to the Project Director. The Project Director will issue a written decision within 21 Days, accepting or denying the claim, in whole or in part.
2. If dissatisfied with the Project Director's decision, the Progressive Design-Builder may appeal the decision in writing to the Bureau Chief of Construction and Materials within 15 Days after receiving the Project Director's decision. The Bureau Chief of Construction and Materials will issue a written decision within 30 Days after holding an informal settlement hearing with all Parties.

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3. If dissatisfied with the Bureau Chief of Construction and Materials' decision, the Progressive Design-Builder may appeal the decision in writing to the State Transportation Engineer within 15 Days after receiving the Bureau Chief of Construction and Materials' written decision.
    - a. The State Transportation Engineer will hold a formal, final administrative hearing, or will appoint another hearing officer or a hearing panel to hold a formal, final administrative hearing regarding the Disputed matter.
      - 1) The State Transportation Engineer has sole discretion to conduct the final administrative hearing or appoint another hearing officer or a panel for this purpose. Any hearing officer may be a Department employee or a non-department employee. Any panel may consist of Department employees, non-Department employees, or a combination thereof.
      - 2) If the Progressive Design-Builder requests a non-Department hearing officer or panel and the State Transportation Engineer grants this request, both Parties will share equally the expense of the outside hearing officer or panel.
    - b. The State Transportation Engineer will issue a final agency decision whether the State Transportation Engineer conducts the hearing or appoints a hearing officer or panel to conduct the final administrative hearing. If a hearing officer or a panel conducted the final administrative hearing, the State Transportation Engineer will issue the agency's final decision after:
      - 1) reviewing the State Transportation Engineer-appointed hearing officer's or panel's decision; and
      - 2) concurring in the decision or modifying the decision as the State Transportation Engineer deems best.
    - c. The State Transportation Engineer's decision under this Section 23.2.2 represents Department final agency action under the Kansas Act for Judicial Review and Civil Enforcement of Agency Actions K.S.A. § 77-601 *et seq.*
  4. Hearing Procedures:
    - a. Informal, settlement hearing: For purposes of this Section 23.2, the Bureau Chief of Construction and Materials may hold an informal hearing by document submission, by phone or web-based meeting (e.g., Webex, Teams, Zoom, etc.), or by meeting with all Parties in person. These informal hearings are considered settlement negotiations. Documents submitted at these meetings and the Department representative's decision are part of the agency record; however, the discussions at these meetings are confidential. Parties may have legal counsel present. There are no formal rules of evidence.
    - b. Formal, final administrative hearing: Such hearing will take the following form, and shall be subject to the following rules and requirements, unless the Parties agree otherwise in writing:
      - 1) Before the hearing, each Party shall submit a written statement to the hearing officer/panel, identifying the issues in dispute (questions of law and questions of fact).
      - 2) A court reporting service will record the hearing. A Party may request a written transcript of the proceeding at that Party's expense.
      - 3) All witnesses will testify under oath.

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- 4) A Party may have legal counsel present. Counsel has the right to examine all witnesses.
  - 5) Formal rules of evidence do not apply. While hearsay is admissible generally, the hearing officer/panel may require further substantiation or authentication of hearsay evidence, and if so required, the Party presenting such hearsay evidence shall further substantiate or authenticate such evidence or withdraw its presentation of such evidence.
  - 6) Legal counsel may present a Party's arguments; however, these arguments are not evidence. Thus, for the hearing officer/panel to consider these arguments, counsel's arguments must be supported by witness testimony, documentation provided to the hearing officer/panel, or both.
  - 7) The agency record will consist of the hearing transcript, all documentation submitted to the hearing officer or panel pertaining to the matter in Dispute, and all documentation the hearing officer or panel and State Transportation Engineer considered in reaching a decision.
5. Time Period for Filing Appeals; Waiver: The Progressive Design-Builder shall file all appeals of the State Transportation Engineer's final agency action within 15 Days after issuance by the State Transportation Engineer's decision, or obtain the reviewing State Transportation Engineer's approval, prior to expiry of such 15 Day period, to file the appeal outside the 15-Day period. If the Progressive Design-Builder fails to file the appeal within the required 15 Days or fails to obtain a time extension, the Progressive Design-Builder waives the right to appeal the Claim and shall be deemed to have accepted the State Transportation Engineer's final agency action.
  6. Time period for Department Decisions; Delay: If the Project Director or Bureau Chief of Construction and Materials fail to issue a decision within the Days permitted under this Section 23.2.2 clause 1, or within any additional time the Progressive Design-Builder and the Department had agreed upon in writing, the Progressive Design-Builder may treat the Claim as denied, and appeal to the next level of review.

### **23.2.3 Additional Requirements for Subcontractor Demands**

For purposes of this Section 23.2, a "Subcontractor Demand" means any claim by a Subcontractor or Supplier of any tier against the Progressive Design-Builder that results directly from Work provided by any such Subcontractor under the Contract Documents. If the Progressive Design-Builder pursues a Claim against the Department that includes a Subcontractor Demand, the following additional conditions shall apply:

1. The Progressive Design-Builder shall identify clearly in all submissions pursuant to this Section 23.2 that portion of the Claim that involves a Subcontractor. Any Claim under this Section 23.2 involving Subcontractor Demands shall be considered incomplete if it is not accompanied by such analysis and the following documents and certificates.
2. The Progressive Design-Builder shall include, as part of its submission pursuant to this Section 23.2, a certification in a form provided by, or acceptable to the Department by the Subcontractor's officer, partner, or authorized representative with authority to bind the Subcontractor and with direct knowledge of the facts underlying the Subcontractor's Demand asserting the factual and contractual basis of the Subcontractor Demand, justification as to entitlement, and amount of money and time sought.
3. The Progressive Design-Builder shall also submit a certification that:

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- a. the Progressive Design-Builder has investigated the basis of the Subcontractor Demand and has determined that all such Subcontractor claims or demands are justified as to entitlement and amount of money and time requested, and has reviewed and verified the adequacy of all back-up documentation;
  - b. the Subcontractor Demand has been prepared and submitted in accordance with the terms of the Contract Documents and applicable Subcontracts and contains all information required by the Contract Documents and applicable Subcontracts; and
  - c. the Progressive Design-Builder has no reason to believe and does not believe that the factual basis for the Subcontractor Demand is falsely represented.
4. At any informal hearing on a Dispute that includes one or more Subcontractor Demands, the Progressive Design-Builder shall require that each Subcontractor that is involved in the Dispute make available an authorized representative with actual knowledge of the facts underlying the Subcontractor Demand to assist in presenting the Dispute and to answer questions raised by the Department's representatives. Such Subcontractor assistance shall be limited to presenting the specific facts underlying the Subcontractor Demand and the answering of questions raised by the Department and Progressive Design-Builder's representatives.
  5. Failure of the Progressive Design-Builder to assert timely and completely a Subcontractor Demand as part of any Claim and on behalf of any Subcontractor or Supplier at the time of submission of Progressive Design-Builder's Claims, as provided hereunder, shall constitute a release of the Department by the Progressive Design-Builder on account of such Subcontractor Demand.
  6. The Progressive Design-Builder shall require in all Subcontracts that all Subcontractors and Suppliers of any tier:
    - a. agree to submit Subcontractor Demands to the Progressive Design-Builder in a proper form and in sufficient time to allow processing by the Progressive Design-Builder in accordance with this Section 23.2;
    - b. agree to be bound by the terms of this Section 23.2 to the extent applicable to Subcontractor Demands;
    - c. agree that, to the extent a Subcontractor Demand is involved, completion of all steps required under this Section 23.2 shall be a condition precedent to pursuit by the Subcontractor of any other remedies permitted by Law; and
    - d. agree that the existence of a Dispute resolution process for Disputes involving Subcontractor Demands shall not be deemed to create any claim, right, or cause of action by any Subcontractor or Supplier against the Department.
  7. Notwithstanding the foregoing, this Section 23.2 shall not apply to the following:
    - a. any Subcontractor claim between Subcontractors and the Progressive Design-Builder that is not actionable by the Progressive Design-Builder against the Department;
    - b. any Subcontractor Demand or claim based on remedies expressly created by statute;
    - c. any Subcontractor Demand that is covered by insurance; or
    - d. any Subcontractor claim that is actionable only against a surety.

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#### **23.2.4 Cooperation**

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

#### **23.2.5 Participation in Other Proceedings**

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

#### **23.2.6 Items Not Subject to the Dispute Resolution Procedures**

The Progressive Design-Builder acknowledges and agrees that the Progressive Design-Builder may not seek recourse under the Dispute Resolution Procedures, nor shall have a claim at Law, for any exercise of the Department's sole discretion (or words of like import), and those oversight and other matters with respect to the Project that result in certain rights in favor of the Department by virtue of the Progressive Design-Builder's Engineer's obligations resulting from its license (i.e., that inure to the benefit of the Department rather than the Progressive Design-Builder).

#### **23.2.7 Waiver of Non-Monetary Relief**

Notwithstanding anything to the contrary in the Contract Documents, and to the maximum extent permitted under applicable Law, the Progressive Design-Builder shall have no right to seek, shall not seek, and irrevocably waives and relinquishes any right to, non-monetary relief against the State, and in particular the Department, and any of its employees, officers, directors, commissioners and officeholders, agents, representatives, consultants, attorneys, successors, and permitted assigns.

### **24 SUSPENSION**

#### **24.1 Suspension for Convenience**

The Department may, at any time and for any reason, by written notice, order the Progressive Design-Builder to suspend all or any part of the Work required under the Contract Documents for the period of time that the Department deems appropriate for the convenience of the Department. The Progressive Design-Builder shall promptly comply with any such written suspension order. The Progressive Design-Builder shall promptly recommence the Work upon receipt of written notice from the Department directing the Progressive Design-Builder to resume Work.

#### **24.2 Suspension for Cause**

The Department has the authority by written order to suspend the Work without liability to the Department wholly or in part for the Progressive Design-Builder's failure to:

1. correct conditions unsafe for the Project personnel or general public;
2. comply with any Governmental Approval, Law, or otherwise carry out the requirements of this Contract;
3. carry out directives or orders of the Department;
4. comply with environmental requirements or requirements contained in an Approved Plan;



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5. remove an employee whom the Department has requested be removed pursuant to Section 6.1 (Employee Performance Requirements); or

### **24.3 Progressive Design-Builder Responsibilities during Suspension**

During periods that Work is suspended, the Progressive Design-Builder shall continue to be responsible for the Work, and shall prevent damage or injury to the Project and other facilities in the Project vicinity, provide for drainage, obtain and maintain compliance with all Governmental Approvals, maintain all Progressive Design-Builder-provided insurance and bonds, and erect necessary temporary structures, signs, or other facilities required to maintain the Project and other facilities in the Project vicinity. During any suspension period, unless otherwise directed by the Department, the Progressive Design-Builder shall continue to be responsible for maintenance of traffic in accordance with the Approved Maintenance of Traffic Plan and any additional requirements in the Construction Phase Amendment or Work Package Amendment and for maintenance during construction in accordance with the Contract. If only part of the Work is suspended, the Progressive Design-Builder shall be entitled to payment for the costs allocated to the Work not suspended.

## **25 BREACH OF CONTRACT**

### **25.1 Breach of Contract by the Progressive Design-Builder: Termination for Cause/Default**

#### **25.1.1 Events of Breach and Default**

The Progressive Design-Builder shall be in breach under the Contract upon the occurrence of any one or more of the following events or conditions:

1. The Progressive Design-Builder fails following authorization by the Department to begin the Work under the Contract Documents.
2. The Progressive Design-Builder fails to perform the Work with sufficient resources to ensure the prompt completion thereof.
3. The Progressive Design-Builder fails to perform the Work in accordance with the Contract Documents, refuses to remove and replace rejected materials or Nonconforming or unacceptable Work, or fails to remove and replace workers as directed by the Department under Section 6.1 (Employee Performance Requirements).
4. The Progressive Design-Builder discontinues or suspends the prosecution of the Work wrongfully or for reasons not permitted in the Contract.
5. The Progressive Design-Builder fails to resume performance of Work, which has been suspended or stopped, within a reasonable time after receipt of notice from the Department to do so or (if applicable) after cessation of the event preventing performance.
6. The Progressive Design-Builder breaches any other agreement, representation, or warranty contained in the Contract Documents, or the Progressive Design-Builder fails to perform any other obligation under the Contract Documents.
7. The Progressive Design-Builder fails to provide and maintain the required insurance, Contract Bond, or other required securities.
8. The Progressive Design-Builder assigns or transfers the Contract Documents or any right or interest therein, contrary to Section 31.2.1 (Assignment).

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9. The Progressive Design-Builder fails, without good cause, to make payment when due for labor, equipment, or materials in accordance with the Contract Documents, its agreements with Subcontractors, and applicable law; fails to comply with any Law or Governmental Approval; or fails to comply with the instructions of the Department consistent with the Contract Documents.
  10. The Progressive Design-Builder fails to discharge or obtain a stay within 10 Days of any final judgment or order for the payment of money against it in excess of \$100,000 in the aggregate arising out of the prosecution of the Work (provided that, for purposes hereof, posting of a bond in the amount of 125 percent of such judgment or order shall be deemed an effective stay).
  11. The Progressive Design-Builder becomes insolvent, generally does not pay its debts as they become due, admits in writing its inability to pay its debts, or makes an assignment for the benefit of creditors.
  12. Insolvency, receivership, reorganization, or bankruptcy proceedings have been commenced by or against the Progressive Design-Builder and not dismissed within 60 Days.
  13. Any representation or warranty made by the Progressive Design-Builder in the Contract Documents or in any certificate, schedule, instrument, or other document delivered pursuant to the Contract Documents shall have been false or materially misleading when made.
  14. The Progressive Design-Builder is a party to fraud.
  15. The Progressive Design-Builder fails to pay Liquidated Damages, erosion control disincentive assessments, or both, due and owing to the Department.

### **25.1.2 Right to Cure**

The Department agrees to provide the Progressive Design-Builder and Surety 10 Days' notice and opportunity to cure any breach before declaring any breach an event of Default, provided that no such notice and opportunity to cure is required for any breach which by its nature cannot be cured or for any breach that poses an immediate and imminent danger to public health or safety. If a breach is curable, but by its nature cannot be cured within 10 Days, as reasonably determined by the Department, the Department agrees not to declare an event of Default provided that the Progressive Design-Builder commences such cure within such 10-Day period and thereafter diligently prosecutes such cure to completion; provided, however, that in no event will such cure period exceed 60 Days in total. The Progressive Design-Builder hereby acknowledges and agrees that the events described in Section 25.1.1 (Events of Breach and Default) clauses 13 and 14 are not curable. If the Progressive Design-Builder does not cure any breach or if the breach is not curable, the Progressive Design-Builder will be in Default and the Department may provide the Progressive Design-Builder and Surety notice of Default.

Notwithstanding the foregoing, if the Department believes a condition affecting the Project poses an immediate and imminent danger to public health or safety, the Department may rectify the condition at the Progressive Design-Builder's cost (excluding costs that would otherwise have been the Department's responsibility under the express terms of the Contract, if any), without notice and without awaiting lapse of any cure period. So long as the Department undertakes to rectify a condition in good faith, even if under a mistaken belief in the occurrence of such Default, such action shall not expose the Department to liability to the Progressive Design-Builder and shall not entitle the Progressive Design-Builder to any other remedy, it being acknowledged that the Department has a paramount public interest in providing and maintaining safe public use of

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and access to the Project. The Department's good faith determination of the existence of such danger shall be deemed conclusive in the absence of clear and convincing evidence to the contrary.

## **25.2 Remedies**

### **25.2.1 Rights of the Department**

If a Default occurs, then, in addition to all other rights and remedies provided by law or equity or available under the Contract or otherwise, including the rights to recover Liquidated Damages and to seek recourse against the Contract Bond, or other performance security required hereby, the Department shall have the following rights and remedies, without further notice, and without prejudice to any of its other rights or remedies, and without waiving or releasing the Progressive Design-Builder and its Surety from any obligations, and the Progressive Design-Builder shall have the following obligations (as applicable):

1. The Department may order the Progressive Design-Builder to suspend or discontinue the Work or any portion of the Work.
2. The Department may terminate the Contract or a portion thereof, in which case, the provisions of Sections 26.1 (*Progressive Design-Builder Responsibilities Upon Termination*) and Section 26.2 (*Responsibility After Notice of Termination*) shall apply.
3. If and as directed by the Department, the Progressive Design-Builder shall withdraw from the Site; and shall remove such materials, equipment, tools and instruments used by, and any debris or waste materials generated by, any Progressive Design-Builder-Related Entity in the performance of the Work.
4. The Progressive Design-Builder shall deliver to the Department possession of any or all facilities of the Progressive Design-Builder located on the Site, as well as any or all Design Documents and all other completed or partially completed drawings (including plans, elevations, details, and diagrams), specifications, records, information, schedules, samples, shop drawings, and other documents, that the Department deems necessary for completion of the Work.
5. The Progressive Design-Builder shall confirm assignment to the Department of Subcontracts requested by the Department, and the Progressive Design-Builder shall terminate, at its cost, all other Subcontracts.
6. The Department may deduct from any amounts payable by the Department to the Progressive Design-Builder such amounts payable by the Progressive Design-Builder to the Department, including Liquidated Damages or other damages payable to the Department under the Contract Documents.
7. The Department, without incurring any liability to the Progressive Design-Builder, shall have the rights to:
  - a. take the performance of all or a portion of the Work from the Progressive Design-Builder (either with or without the use of the Progressive Design-Builder's materials, equipment, tools and instruments), and enter into an agreement with another Person for the completion of such Work;
  - b. require the Surety to take the performance of all or a portion of the Work from the Progressive Design-Builder (either with or without the use of the Progressive Design-Builder's materials, equipment, tools and instruments), and enter into an agreement with another Person for the completion of such Work; or

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- c. use such other methods, as in the opinion of the Department, will be required for the completion of the Project.
8. If the Department exercises any right to perform any obligations of the Progressive Design-Builder, in the exercise of such right the Department may, but is not obligated to, among other things:
    - a. perform or attempt to perform, or cause to be performed, such Work;
    - b. spend such sums as the Department deems necessary and reasonable to employ and pay such architects, engineers, consultants, and contractors, and obtain materials and equipment as may be required for the purpose of completing such Work;
    - c. execute all applications, certificates, and other documents as may be required for completing the Work;
    - d. modify or terminate any contractual arrangements;
    - e. take any and all other actions which it may in its sole discretion consider necessary to complete the Work; and
    - f. prosecute and defend any action or proceeding incident to the Work.

### **25.2.2 Liability of Progressive Design-Builder**

If a breach and subsequent event of default has occurred, the Progressive Design-Builder and Surety shall be liable to the Department (in addition to any other damages under the Contract Documents other than those costs intended to be covered by Liquidated Damages payable hereunder) for all costs reasonably incurred by the Department or any party acting on the Department's behalf in completing the Work or having the Work completed by another Person (including any re-procurement costs, throw away costs for unused portions of the completed Work, and increased financing costs). Upon the occurrence of an event of Default, the Department shall be entitled to withhold all or any portion of further payments to the Progressive Design-Builder until such time as the Department is able to determine how much (if any) remains owing to the Progressive Design-Builder. Promptly upon such determination, the Department shall notify the Progressive Design-Builder in writing of the amount, if any, that the Progressive Design-Builder shall pay the Department or that the Department shall pay the Progressive Design-Builder with respect thereto. All costs and charges incurred by the Department, including attorneys', accountants', and expert witness fees and costs, together with the cost of completing the Work under the Contract Documents, will be deducted from any monies due or which may become due to the Progressive Design-Builder. If such expense exceeds the sum which would have been payable under the Contract, then the Progressive Design-Builder and its Surety shall be liable and shall pay to the Department the amount of such excess.

If a default under Section 25.1.1 (Events of Breach and Default) clause 11 or 12 occurs, the Department shall be entitled to request of the Progressive Design-Builder, or its successor in interest, adequate assurance of future performance in accordance with the terms and conditions hereof. Failure to comply with such request within 10 Days of delivery of the request shall entitle the Department to terminate the Contract and to the accompanying rights set forth above. Pending receipt of adequate assurance of performance and actual performance in accordance therewith, the Department shall be entitled to proceed with the Work with its own forces or with other contractors on a time and material or other appropriate basis, the cost of which will be credited against and deducted from the Department's payment obligations hereunder. The foregoing shall be in addition to all other rights and remedies provided by law or equity and such rights and remedies as are otherwise available under the Contract and the Contract Bond.

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In lieu of the provisions of this Section 25.2.2 for terminating the Contract and completing the Work, the Department may pay the Progressive Design-Builder for the parts already done according to the provisions of the Contract Documents and may treat the parts remaining undone as if they had never been included or contemplated by the Contract. The Progressive Design-Builder will not be allowed to claim prospective profit on, or any other compensation relating to, Work uncompleted by the Progressive Design-Builder under this provision.

If the Contract is terminated for grounds that are later determined not to justify a termination for default, such termination shall be deemed to constitute a termination for convenience pursuant to Section 26 (*Termination for Convenience*).

If the Department suffers damages as a result of the Progressive Design-Builder's breach or failure to perform an obligation under the Contract Documents, then the Department shall be entitled to recovery of such damages from the Progressive Design-Builder, regardless of whether the breach or failure that gives rise to the damages ripens into an event of default.

The exercise or beginning of the exercise by the Department of any one or more rights or remedies under this Section 25.2.2 shall not preclude the simultaneous or later exercise by the Department of any or all other rights or remedies, each of which shall be cumulative, and not exclusive. The rights of the Department include exercise of the Department's set-off rights under K.S.A. 75-6201, et seq.

The Progressive Design-Builder and Surety shall not be relieved of liability for continuing Liquidated Damages on account of a default by the Progressive Design-Builder hereunder or by the Department's declaration of an event of default, or by actions taken by the Department under this Section 25.2.2.

## **26 TERMINATION FOR CONVENIENCE**

The Department may terminate the Contract and the performance of the Work by the Progressive Design-Builder for its own convenience if the Department determines, in its sole discretion, that a termination is in the best public, State, or national interest. The Department shall notify the Progressive Design-Builder of its decision to terminate by delivering to the Professional Design-Builder a written Notice of Termination specifying the extent of termination, its effective date and any remaining Work necessary to place the Project in an acceptable condition, as determined by the Department in its sole discretion. Termination of the Contract shall not relieve any Surety of its obligation for any claims arising out of the Work performed. Termination may occur before or after Work has begun.

### **26.1 Progressive Design-Builder Responsibilities Upon Termination**

After receipt of a Notice of Termination, and except as otherwise directed by the Department, the Progressive Design-Builder shall immediately proceed as follows, regardless of any delay in determining or adjusting any amounts due under this Section 26:

1. Stop Work as specified in the notice.
2. Communicate to all affected Subcontractors such notice of termination and that their Subcontracts are not to be further performed unless otherwise authorized in writing by the Department.

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3. Place no further Subcontracts or orders for materials, services, or facilities, except as necessary to complete the continued portion of the Work, if any, or for mitigation of damages.
  4. Terminate all Subcontracts to the extent that they relate to the Work terminated.
  5. Assign to the Department in the manner, at the times, and as and to the extent directed by the Department, all of the right, title, and interest of the Progressive Design-Builder under the Subcontracts so terminated, in which case the Department will have the right, in its sole discretion, to accept performance, settle, or pay any or all claims arising out of the termination of such Subcontracts.
  6. Settle all outstanding liabilities and claims arising out of such termination of Subcontracts, with the Approval or ratification of the Department, to the extent it may be required, which Approval or ratification shall be final.
  7. Provide the Department with an inventory list of all materials previously produced, purchased, or ordered from Suppliers for use in the Work and not yet used in the Work, including its storage location, as well as any documentation or other property required to be delivered hereunder, which is either in the process of development or previously completed but not yet delivered to the Department, and such other information as the Department may request; and transfer title and deliver to the Department, in the manner, at the times, and as and to the extent, if any, directed by the Department of:
    - a. fabricated or unfabricated parts, the Work in process, completed Work, supplies, and other material produced or acquired for the Work terminated; and
    - b. the Design Documents and all other completed or partially completed drawings (including plans, elevations, sections, details, and diagrams), specifications, records, samples, information, and other property that would have been required to be furnished to the Department if the Work had been completed.
  8. Complete performance, in accordance with the Contract Documents, of all Work not terminated.
  9. Take all action that may be reasonably necessary, or that the Department may direct, for the safety, protection, and preservation of:
    - a. the public, including public and private vehicular movement;
    - b. the Work; and
    - c. the equipment, machinery, materials, and property related to the Contract Documents that is in the possession of the Progressive Design-Builder and in which the Department has or may acquire an interest.
  10. As authorized by the Department in writing, use its best efforts to sell, in a manner, at the times, to the extent, and at the price or prices directed or authorized by the Department, any property of the types referred to in clause 7; provided, however, that the Progressive Design-Builder:
    - a. is not required to extend credit to any purchaser; and
    - b. may acquire the property under the conditions prescribed and at prices Approved by the Department.

The proceeds of any transfer or disposition will be applied to reduce any payments to be made by the Department under the Contract Documents or paid in any other manner directed by the Department.

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11. If requested by the Department, withdraw from the portions of the Site designated by the Department and remove such materials, equipment, tools and instruments used by, and any debris or waste materials generated by, the Progressive Design-Builder and any Subcontractor in the performance of the Work as the Department may direct.
  12. Take other actions directed by the Department.

## **26.2 Responsibility After Notice of Termination**

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

1. The Progressive Design-Builder's responsibility for damage to materials for which partial payment has been made shall end when the Department certifies that those materials have been stored in the manner and at the locations directed by the Department.
2. The Progressive Design-Builder's responsibility for damage to materials purchased by the Department subsequent to the Notice of Termination shall end when title and delivery of those materials has been taken by the Department.

Immediately after the Department determines that the Progressive Design-Builder has completed the Work directed to be completed in accordance with the Notice of Termination and such other work as may have been ordered to secure the Project for termination, the Progressive Design-Builder will not be required to provide for continuing safety, security, and maintenance at the Site. Subsequent to the determination that all materials have been stored in the manner and at the locations directed by the Department, further handling of such materials shall be the responsibility of the Department.

## **26.3 Negotiated Termination Settlement**

### **26.3.1 Settlement Proposal**

After receipt of a Notice of Termination, the Progressive Design-Builder shall submit a final termination settlement proposal to the Department in the form and with the certification prescribed by the Department. The Progressive Design-Builder shall submit the proposal promptly, but no later than 90 Days from the effective date of termination, unless the Progressive Design-Builder has requested a time extension in writing within such 90-Day period and the Department has agreed in writing to allow such an extension. The Department will then review the Progressive Design-Builder's termination settlement proposal and will act upon it, return it with comments or reject it. If the Progressive Design-Builder fails to submit the proposal within the time allowed, the Department may determine, on the basis of information available to it, the amount, if any, due to the Progressive Design-Builder because of the termination and shall pay the Progressive Design-Builder the amount so determined.

### **26.3.2 Negotiated Settlement Amount**

The Progressive Design-Builder and the Department may agree, as provided in Section 26.2 (Responsibility After Notice of Termination) clause 1, upon the whole or any part of the amount or amounts to be paid to the Progressive Design-Builder by reason of Termination of Work pursuant to this Section 26. Such negotiated settlement may include a reasonable allowance for profit solely on Work that has been completed as of the termination date and subsequently accepted by the Department but not an amount for lost, anticipated or unearned profit or other costs disallowed in Section 26.4.2 (Maximum Compensation). Such agreed amount(s), exclusive of settlement costs, shall not exceed the total Contract Price as reduced by the amount of payments otherwise made and as further reduced by the cost of the Work not terminated, as

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determined by the costs allocated to such Work in the Schedule of Values. Upon determination of the settlement amount, the Contract will be amended accordingly, and the Progressive Design-Builder will be paid the agreed amount. If parties are unable to reach a settlement on all termination costs, compensation for those costs not agreed upon will be determined in accordance with Section 26.4 (Determination of Compensation if Negotiations Fail). Unless otherwise agreed to by the Parties as a part of a negotiated settlement, the Department's execution and delivery of any settlement agreement shall not affect any of its rights under the Contract Documents with respect to completed Work, relieve the Progressive Design-Builder from its obligations with respect thereto, including Warranties, or affect the Department's rights under the Contract Bond and payment as to such completed or non-terminated Work.

## **26.4 Determination of Termination Amount if Negotiations Fail**

If the Progressive Design-Builder and the Department fail to agree, as provided in Section 26.2 (Responsibility After Notice of Termination), upon the whole amount to be paid to the Progressive Design-Builder in whole or in part by reason of the termination of Work pursuant to this Section 26, the amount payable (exclusive of interest charges) shall be determined by the Department in accordance with the following, but without duplication of any amounts agreed upon in accordance with Section 26.2.

### **26.4.1 Payment Upon**

Subject to the limitations in Section 26.4.2 (Maximum Compensation), the Department will pay the Progressive Design-Builder the sum of the following amounts for Work performed prior to the effective date of the Notice of Termination, as such amounts are determined by the Department:

1. The Progressive Design-Builder's actual reasonable out-of-pocket cost (without profit and including equipment costs only to the extent permitted by Section 22 (Change Orders) for all Work performed, including mobilization, demobilization, and work done to secure the Project for termination, including reasonable overhead and accounting for any refunds payable with respect to insurance premiums, deposits, or similar items, as established to the Department's satisfaction. In determining the reasonable cost, deductions will be made for the cost of materials to be retained by the Progressive Design-Builder, amounts realized by the sale of materials, and for other appropriate credits. Deductions will also be made for the cost of damaged materials. When, in the opinion of the Department, the cost of an item of Work is excessively high due to costs incurred to remedy or replacement of defective or rejected Work, the reasonable cost to be allowed will be the estimated reasonable cost of performing that Work in compliance with the requirements of the Contract Documents, and the excessive actual cost will be disallowed.
2. As profit on the actual out-of-pocket cost permitted in clause 1 above, a sum determined by the Department to be fair and reasonable; provided, however, that if it appears that the Progressive Design-Builder would have sustained a loss on the entire Contract had it been completed, no profit shall be included or allowed under this Section 26.4.1, and an appropriate adjustment shall be made by reducing the amount of the settlement to reflect the indicated rate of loss.
3. The cost of settling and paying claims arising out of the termination of Work under Subcontracts as provided in Section 26.1 (Progressive Design-Builder's Responsibilities upon Termination) clause 5, exclusive of the amounts paid or payable on account of supplies or materials delivered or services furnished by the Subcontractor prior to the



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effective date of the Notice of Termination under the Contract, which amounts shall be included in the cost on account of which payment is made under clause 1 above.

4. The reasonable out-of-pocket cost (including reasonable overhead) of the preservation and protection of property incurred pursuant to Section 26.1 clause 9, and any other reasonable out-of-pocket cost (including overhead) incidental to termination of Work under the Contract including the reasonable cost to the Progressive Design-Builder of handling material returned to the vendor, delivered to the Department, or otherwise disposed of as directed by the Department, and including a reasonable allowance for the Progressive Design-Builder's administrative costs in determining the amount due to the Progressive Design-Builder as the result of the termination of Work under the Contract.

#### **26.4.2 Maximum Compensation**

The Progressive Design-Builder acknowledges and agrees that it shall not be entitled to any compensation in excess of the value of the Work performed (determined as provided in Section 26.4.1 (Payment Upon)) plus its settlement costs, and that items such as lost, anticipated or unearned profit, unabsorbed overhead, opportunity costs or consequential or other damages shall not be recoverable by the Progressive Design-Builder for itself or for its Subcontractors on account of the termination of the Contract. However, the total amount to be paid to the Progressive Design-Builder, exclusive of costs described in Sections 26.4.1 clauses 3 and 4, may not exceed the total Contract Price less the amount of payments previously made and less the cost of the Work not terminated, as determined by the costs allocated to such Work in the Schedule of Values. Furthermore, if any refund is payable with respect to Project-specific insurance or bond premiums, deposits, or similar items which were previously passed through to the Department by the Progressive Design-Builder, such refund shall be paid directly to the Department or otherwise credited to the Department.

#### **26.4.3 Excluded Sums**

Except for normal spoilage, and except to the extent that the Department will have otherwise expressly assumed the risk of loss, there will be excluded from the amounts payable to the Progressive Design-Builder under Section 26.4.1 (Payment Upon), the fair value, as determined by the Department, of equipment, machinery, materials, and property which is destroyed, lost, stolen, or damaged so as to become undeliverable to the Department, or to a buyer pursuant to Section 26.1 (Progressive Design-Builder's Responsibilities upon Termination) clause 10. The amount set forth in the Proposal by the Progressive Design-Builder for the Work terminated shall be a factor to be analyzed in determining the value of the Work terminated.

#### **26.4.4 Payment Upon Termination amount**

Upon determination of the amount of the termination payment, the Contract shall be amended to reflect the agreed termination payment, and the Progressive Design-Builder shall be paid the agreed amount.

### **26.5 Reduction in Amount of Claim**

The amount otherwise due the Progressive Design-Builder under this Section 26 shall be reduced by:

1. all unliquidated payments for Work or materials not yet performed on or supplied to the Project at the time of the payment, excluding payments made to or on behalf of the Progressive Design-Builder applicable to the terminated portion of the Contract;

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2. the amount of any claim which the Department may have against any Progressive Design-Builder-Related Entity in connection with the Contract;
  3. the agreed price for, or the proceeds of the sale of, any property, materials, supplies, or other things acquired by the Progressive Design-Builder or sold, pursuant to the provisions of this Section 26, and not otherwise recovered by or credited to the Department;
  4. amounts that the Department reasonably deems advisable to retain to cover any existing or threatened claims, Liens, and stop notices relating to the Project, including claims by Utility Owners;
  5. the cost of repairing, replacing or otherwise correcting any Nonconforming Work; and
  6. any amounts due or payable by the Progressive Design-Builder to the Department.

### **26.6 Partial Payments**

The Department may, from time to time, under such terms and conditions as it may prescribe and in its sole discretion, make partial payments on account against costs incurred by the Progressive Design-Builder in connection with the terminated portion of the Contract, whenever, in the opinion of the Department, the aggregate of such payments shall be within the amount to which the Progressive Design-Builder will be entitled under this Section 26. If the total of such payments is in excess of the amount finally agreed or determined to be due under this Section 26, such excess shall be payable by the Progressive Design-Builder to the Department upon demand, together with interest at a rate equal to the average rate at the time being received from the investment of state funds, as determined by the State Treasurer, for the period from the date such excess payment is received by Progressive Design-Builder to the date on which such excess is repaid to the Department.

### **26.7 Inclusion in Subcontracts**

The Progressive Design-Builder shall insert in all Subcontracts a requirement that the Subcontractor shall stop Work on the date and to the extent specified in a Notice of Termination from the Department in accordance with this Section 26 and shall require Subcontractors to insert the same provision in each Subcontract at all tiers.

### **26.8 Limitation on Payments to Subcontractor**

For the purposes of Section 26.3.2 (*Negotiated Settlement Amount*) and Section 26.4 (*Determination of Termination Amount if Negotiations Fail*), upon termination under Section 26.1 (*Progressive Design-Builder's Responsibilities upon Termination*) clause 5, of Work under any Subcontract, the Progressive Design-Builder will not be entitled to reimbursement for that portion of the termination settlement with any such Subcontractor which constitutes lost, anticipated or unearned profit, unabsorbed overhead, opportunity costs or consequential or other damages on account of the termination.

### **26.9 No Unearned Profit or Consequential Damages**

Under no circumstances shall the Progressive Design-Builder be entitled to lost, anticipated or unearned profit, unabsorbed overhead, opportunity costs or consequential or other damages as a result of a termination under this Section 26. The payment to the Progressive Design-Builder determined in accordance with this Section 26 constitutes the Progressive Design-Builder's sole and exclusive remedy for a termination under this Section 26.

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## **26.10 No Waiver**

Anything contained in the Contract to the contrary notwithstanding, a termination under this Section 26 shall not waive any right or claim to damages, which the Department may have, and the Department may pursue any cause of action, which it may have at law or in equity or under the Contract.

## **26.11 Dispute Resolution**

The failure of the parties to agree on amounts due under this Section 26 shall be a Dispute to be resolved in accordance with Section 23 (*Partnering and Disputes*). Under no circumstances shall the Progressive Design-Builder be entitled to anticipatory or unearned profits or consequential or other damages as a result of a termination under this Section 26.

## **26.12 Allowability of Costs**

All costs claimed by the Progressive Design-Builder under this Section 26 shall, at a minimum, be allowable, allocable and reasonable in accordance with the cost principles and procedures of 48 CFR Part 31.

# **27 DAMAGES**

## **27.1 Offset; Withholding; Waiver**

### **27.1.1 Offset**

The Department shall have the right to deduct any amount owed by the Progressive Design-Builder to the Department hereunder from any amounts owed by the Department to the Progressive Design-Builder under this Contract.

### **27.1.2 Withholding**

Without limiting the Department's other remedies hereunder, the Department shall have the right to withhold payment of any amount owed by the Progressive Design-Builder to the Department hereunder for any Progressive Design-Builder Default until cured.

### **27.1.3 No Waiver**

Permitting or requiring the Progressive Design-Builder to continue and finish the Work or any part thereof after a Completion Deadline shall not act as a waiver of the Department's right to receive Delay Charges hereunder or any rights or remedies otherwise available to the Department.

The Department's failure to offset or to withhold any amount shall not constitute a waiver of the Department's right to such amounts.

## **27.2 Payment of Delay Charges**

To the extent Delay Charges are not deducted from any amount owed to the Department by the Progressive Design-Builder, the Department may send Progressive Design-Builder an invoice and the Delay Charges shall be payable by the Progressive Design-Builder to the Department within ten Days after the Progressive Design-Builder's receipt of the invoice therefore.

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## **27.3 Additional Department Costs Due to Progressive Design-Builder Default**

In exercising its remedies for Progressive Design-Builder Default, all costs and charges incurred by the Department, including attorneys', accountants' and expert witness fees and costs, together with the cost of completing the Work under the Contract Documents, will be deducted from any moneys due or which may become due to the Progressive Design-Builder. If such expense exceeds the Contract Price, then the Progressive Design-Builder and its Sureties shall be liable and shall pay to the Department the amount of such excess.

## **28 INDEMNIFICATION**

### **28.1 Indemnifications by Progressive Design-Builder**

#### **28.1.1 General Indemnities**

Subject to Section 28.1.3 (*Losses due to Negligence of Indemnified Parties*), the Progressive Design-Builder shall defend, indemnify, and hold harmless the Department, including their agents, and their respective successors and assigns and their respective shareholders, officers, directors, agents, and employees (collectively referred to as the "Indemnified Parties") from and against any and all third party claims, causes of action, suits, judgments, investigations, legal or administrative proceedings, penalties, fines, damages, losses, liabilities, costs, and expenses, including any injury to or death of persons, or damage to or loss of property (including damage to utility facilities), or economic loss, and including attorneys', accountants', and expert witness fees and defense costs, arising out of, relating to, or resulting from any of the following:

1. The breach of the Contract by any Progressive Design-Builder-Related Entity.
2. The failure by any Progressive Design-Builder-Related Entity to comply with any applicable Laws (including Laws regarding handling, generation, treatment, storage, transportation, and disposal of Hazardous Materials) or Governmental Approvals in performing the Work.
3. Any patent or copyright infringement, or other improper appropriation or use of trade secrets, patents, proprietary information, know-how, copyright rights, or inventions in performance of the Work, or arising out of any use in connection with the Project of methods, processes, designs, information, or other items furnished or communicated to the Department or another Indemnified Party pursuant to the Contract; provided that this indemnity shall not apply to any infringement resulting from the Department's failure to comply with specific written instructions regarding use provided to the Department by the Progressive Design-Builder.
4. The negligent act or omission or willful misconduct of any Progressive Design-Builder-Related Entity.
5. Any and all claims by any governmental or taxing authority claiming taxes based on gross receipts, purchases, or sales, or the use of any property or income of the Progressive Design-Builder or any of its Subcontractors or any of their respective agents, officers, or employees with respect to any payment for the Work made to or earned by any Progressive Design-Builder-Related Entity.
6. Any and all stop notices and/or Liens filed in connection with the Work, including all expenses and attorneys', accountants', and expert witness fees and costs incurred in discharging any stop notice or Lien.

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7. Any spill or release or threatened spill or release of Hazardous Materials (i) attributable to the negligence, willful misconduct, or breach of contract by any Progressive Design-Builder-Related Entity; or (ii) that was brought onto the Site by any Progressive Design-Builder-Related Entity.
  8. The claim or assertion by any contractor of inconvenience, disruption, delay, or loss caused by interference by any Progressive Design-Builder-Related Entity with or hindering the progress or completion of work being performed by other contractors as described in Section 32.8 (*Coordination with other Contractors of the Department*), or failure of any Progressive Design-Builder-Related Entity to cooperate reasonably with other contractors in accordance therewith.

The Progressive Design-Builder's responsibility for attorneys', accountants', and expert witness fees and defense costs shall be triggered upon allegations arising out of, relating to, or resulting from any of the foregoing; however, the Progressive Design-Builder's responsibility for such fees and defense costs will not include fees of attorneys, accountants, and experts retained directly by an Indemnified Party or employed by an Indemnified Party.

### **28.1.2 Design Defects**

Subject to Section 28.1.3 (*Losses due to Negligence of Indemnified Parties*), the Progressive Design-Builder shall defend, indemnify, and hold harmless the Indemnified Parties from and against any and all third party claims, causes of action, suits, judgments, investigations, legal or administrative proceedings, penalties, fines, damages, losses, liabilities, costs and expenses, including any injury to or death of persons, or damage to or loss of property (including damage to utility facilities), or economic loss, and including attorneys', accountants', and expert witness fees and defense costs, arising out of, relating to, or resulting from errors, omissions, ambiguities, inconsistencies, inaccuracies, deficiencies, inadequacies, or other defects in the Design Documents or Reference Information Documents not conforming to the performance standards applicable to the design of the Project detailed in Section 7.1.2 (*Performance Standards*). The Progressive Design-Builder agrees that, because the Reference Information Documents are subject to review and modification by the Progressive Design-Builder, it is appropriate for the Progressive Design-Builder to assume liability for errors, omissions, ambiguities, inconsistencies, inaccuracies, deficiencies, inadequacies or other defects in the completed Project, even though they may be related to errors, omissions, ambiguities, inconsistencies, inaccuracies, deficiencies, inadequacies or other defects in the Reference Information Documents.

The Progressive Design-Builder's responsibility for attorneys', accountants', and expert witness fees and defense costs shall be triggered upon allegations arising out of, relating to, or resulting from any of the foregoing; however, the Progressive Design-Builder's responsibility for such fees and defense costs will not include fees of attorneys, accountants, and experts retained directly by an Indemnified Party or employed by an Indemnified Party.

### **28.1.3 Losses due to Negligence of Indemnified Parties**

Except as otherwise stated in Section 28.1.2 (*Design Defects*), the Progressive Design-Builder's indemnity obligations under Section 28.1.1 (*General Indemnities*) and Section 28.1.2 shall not extend to any loss, damage, or cost to the extent that such loss, damage or cost was caused by the negligence or willful misconduct of such Indemnified Party or its agents, servants, or independent contractors who are directly responsible to such Indemnified Party.

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#### **28.1.4 Claims by Employees**

In claims by an employee of the Progressive Design-Builder, a Subcontractor, anyone directly or indirectly employed by them, or anyone for whose acts they may be liable, the indemnification obligation under this Section 28.1 shall not be limited by any limitation on the amount or type of damages, compensation, or benefits payable by or for the Progressive Design-Builder or a Subcontractor under workers' compensation, disability benefit, or other employee benefits laws.

#### **28.1.5 Reliance on Progressive Design-Builder's Performance**

The Progressive Design-Builder hereby acknowledges and agrees that it is the Progressive Design-Builder's obligation to cause the Project to be designed and constructed in accordance with the Contract Documents and that the Indemnified Parties are fully entitled to rely on the Progressive Design-Builder's performance of such obligation. The Progressive Design-Builder further agrees that any oversight, spot checks, assessments, tests, inspections, review, acceptance, Approval, and/or approval by the Department and/or others hereunder shall not relieve the Progressive Design-Builder of any of its obligations under the Contract Documents or in any way diminish its liability for performance of such obligations or its obligations to provide indemnities hereunder. Such oversight, spot checks, assessments, tests, inspections, reviews, acceptances, Approvals, and/or approvals by Department's employees and consultants are for KDOT's benefit and shall not create a duty to the Progressive Design-Builder or form the basis for a cause of action or claim against the Department under any theory of recovery.

#### **28.1.6 Indemnities in Connection with Utilities & other Third-Parties**

The Progressive Design-Builder is advised that each Utility Agreement included in any Work Package Amendment may contain provisions for the Progressive Design-Builder to indemnify, save, and hold harmless the Utility Owner and its authorized representatives with respect to certain matters. The Progressive Design-Builder hereby agrees to and shall perform and comply with such provisions of the Utility Agreement for the benefit of the Utility Owners, their employees, and agents.

The Progressive Design-Builder is also advised that other Third Party Agreements included in any Work Package Amendment may include certain agreements by the Department to indemnify, defend, and hold harmless the Third Parties with respect to certain matters, including contract performance that the Progressive Design-Builder performs on the Department's behalf. The Progressive Design-Builder's obligation under this Section 28.1 shall automatically apply to require the Progressive Design-Builder to release, indemnify, defend and hold harmless the Third Parties, with respect to all such matters as incorporated into the Contract through Work Package Amendments.

### **28.2 Responsibility of the Department for Certain Hazardous Materials**

#### **28.2.1 Pre-Existing Site Contamination**

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

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1. pre-existing Site contamination, whether known or unknown, except as otherwise provided in Section 11 (Environmental Compliance) or Section 28.1.1(7);
  2. the performance not attributable to the negligence, willful misconduct, or breach of contract by any Progressive Design-Builder-Related Entity in the handling of such Hazardous Materials; and/or
  3. the activities of any Persons not described in clause (ii) above, including the Department.

Accordingly, for the purposes of the Contract only, the Department shall reimburse the Progressive Design-Builder for remediation work (through payment of the Contract Price, as it may be increased by Change Order pursuant to Section 22 (Change Orders)), and will be responsible for any and all claims, damages, losses, liabilities, costs, and expenses, including the Progressive Design-Builder's attorneys' fees, arising out of, or in connection with, bodily injury (including death) to persons, damage to property or environmental removal or response costs arising out of the presence, release, or threatened release of Hazardous Materials on or from the Site, irrespective of whether such substances were generated or introduced on the Site before or after execution of the Contract, and irrespective of whether the Department was aware of, or directly involved in, the generation or introduction of such materials, but specifically excluding from any obligation of responsibility for those conditions for which the Progressive Design-Builder has agreed to be responsible as described in Section 28.1.1(7).

### **28.2.2 Generator Number for Hazardous Waste Remediation**

Except for Hazardous Materials for which the Progressive Design-Builder is responsible as described in Section 28.1.1(7), without contradiction of any assertion by the Department of Third Party liability, and for purposes of the Contract only:

1. The Progressive Design-Builder shall not be required to execute any hazardous waste manifests; and
2. Hazardous Materials encountered in the performance of the Work shall be disposed of, if at all, to a destination facility Approved by the Department utilizing an EPA Identification Number or other appropriate legal device obtained by and carried in the name of the Department or another Person designated by the Department, but only under the express written direction and permission of the Department.

### **28.3 Comprehensive Environmental Response, Compensation, and Liability Act Agreement**

Without limiting their generality, the indemnities set forth in Section 28.1.1(7) are intended to operate as agreements pursuant to Section 107(e) of the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), 42 U.S.C. Section 9607(e), to insure, protect, hold harmless, and indemnify the parties indemnified in Section 28.1.1 (General Indemnities).

## **29 INSURANCE**

### **29.1 General Insurance Requirements**

At a minimum, the Progressive Design-Builder shall procure and keep in effect, or cause to be procured and kept in effect with the Progressive Design-Builder as a named insured, as appropriate, the insurance policies outlined in Exhibit J (Insurance Requirements) and otherwise in accordance with the further requirements of this Section 29 (Insurance). The Progressive Design-Builder's insurance shall cover all of the Work under this Contract, whether the Work is

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performed by the Progressive Design-Builder or its Subcontractors. The Progressive Design-Builder's insurance shall cover the entire Project within the Site as negotiated by the Department and the Progressive Design-Builder, regardless of whether the Progressive Design-Builder is performing Work on a structure within the Site (with the exception of Builder's Risk Insurance).

### **29.1.1 Qualified Insurers**

All insurance companies providing policies obtained to satisfy the insurance requirements herein must, at the time coverage under the applicable policy commences, be authorized to conduct business in the State and have a current policyholder's management and financial size category rating of not less than "A-, VII" according to A.M. Best's Insurance Reports Key Rating Guide.

### **29.1.2 Verification of Coverage**

Each time the Progressive Design-Builder is required to initially obtain insurance coverage and at each annual renewal, the Progressive Design-Builder shall provide the Department with evidence of insurance satisfactory to the Department in accordance with Exhibit J (Insurance Requirements). No Work shall start or continue until proof of insurance acceptable to the Department has been submitted and approved.

Such evidence of insurance shall provide for:

1. 10 Days' prior written notice to the Department of cancellation to the Department for nonpayment of premiums;
2. 30 Days' prior written notice to the Department of any material change in coverage; and
3. 30 Days' prior written notice to the Department of cancellation if cancelled by the insurer for any reason other than nonpayment of premiums, including non-renewal.

Each Insurance Policy shall be endorsed to state that coverage or limits of coverage cannot be canceled, voided, suspended or materially changed by endorsement or other change in policy language (including for non-payment of premium) except after providing the foregoing notices to the Department and during which time no cure, if susceptible to cure, has been affected by any insured.

The Progressive Design-Builder shall delete, and shall cause the deletion of, the phrase "will endeavor to" or words of similar effect preceding all references to provisions of notice by the insurance company in the evidence of insurance.

### **29.1.3 Full Force and Effect**

The Commercial General Liability, Commercial Auto Liability, Excess (Umbrella) Liability, Contractor's Pollution Liability and Professional Liability Insurance coverage requirements will remain in full force and effect until Final Acceptance at which time the Progressive Design-Builder shall maintain Completed Operations Insurance throughout the term of all warranties or as otherwise required by the Contract Documents, whichever is greater.

### **29.1.4 Deductibles; Self-Insured Retentions**

As between the Department and the Progressive Design-Builder, the Progressive Design-Builder shall pay all insurance deductibles in connection with any claim against insurances placed or held pursuant to the requirements of this Contract.



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The Progressive Design-Builder may, upon the Department's prior written consent, use self-insured retentions in lieu of deductibles with respect to insurance policies placed or held pursuant to the requirements of this Contract, so long as the Progressive Design-Builder disclosed all such insurance policies, on a continuing basis, to the Department, and the Department reserves the right to require commercially reasonable deductibles or self-insured retentions without the Progressive Design-Builder having recourse to additional compensation hereunder.

#### **29.1.5 No Recourse**

Without limiting Section 22 (*Change Orders*), there shall be no recourse against the Department for payment of premiums or payment of deductibles, self-insured retentions, or other amounts with respect to the insurance provided by the Progressive Design-Builder, including losses in excess of coverage placed.

#### **29.1.6 Indemnification**

The insurance coverage provided hereunder shall support, but shall not limit, the Progressive Design-Builder's indemnification obligations under Section 28 (*Indemnification*).

#### **29.1.7 Insurance Not Limiting**

Any requirement for insurance imposed upon the Progressive Design-Builder is not intended to be construed as any limit of liability of the Progressive Design-Builder under this Contract.

### **29.2 Progressive Design-Builder Provided Insurance**

#### **29.2.1 Required Coverages**

The Progressive Design-Builder shall procure insurance acceptable to the Department, as identified in Exhibit J (*Insurance Requirements*) and as described in the Contract Documents. The Progressive Design-Builder shall include all insurance costs as separate items for payment.

#### **29.2.2 Inadequacy of Required Coverages**

The Department makes no representation that the scope or limits of insurance coverage specified for any insurance policies or coverages to be carried under this Contract, or approved variances therefrom, are adequate to protect the Progressive Design-Builder against its undertakings under this Contract to the Department, or its liabilities to any third person or party. It is the responsibility of the Progressive Design-Builder and each Subcontractor to determine if any additional coverages or limits are required to adequately protect their respective interests. No such limits of liability or approved variances shall preclude the Department from taking any actions as are available to it under the Contract Documents or otherwise at law or in equity.

#### **29.2.3 Additional Insureds; Separation of Insureds; Primary and Noncontributory**

Each policy of Commercial General Liability, Commercial Auto Liability, Excess Liability (Umbrella), and Contractor's Pollution Liability Insurance shall name the Indemnified Parties as additional insureds. All endorsements adding additional named insureds to required Insurance Policies shall:

1. contain no limitations, conditions, restrictions or exceptions to coverage other than those that apply to all other named insureds, including the first named insured, under the insurance policy; and

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2. state that the interests and protections of each such named insured shall not be affected by any misrepresentation, act or omission of another named insured or any breach by another named insured of any provision in the policy which would otherwise result in forfeiture or reduction or limitation of coverage.

If, in connection with the Project, the Progressive Design-Builder procures any additional or other insurance or expressly self-insures beyond the specifications in the Contract Documents, then the Indemnified Parties shall be named as an additional insured.

Each of such policies shall also contain a separation of insureds condition such that the insurance policy shall be written or endorsed so that:

1. no acts or omissions of an insured shall cancel or diminish coverage of any other insureds; and
2. insurance shall apply separately to each named insured, except with respect to the erosion of the specified limits of the insurer's liability.

Each of such insurance policies shall provide expressly that its coverage is primary and noncontributory with respect to all insureds, except for coverage that is specifically denominated as excess coverage to a specified insurance policy required under the Contract Documents.

The requirements of this Section 29.2.3 shall also apply to insurance policies required of Subcontractors as listed in Exhibit J (Insurance Requirements).

#### **29.2.4 Waiver of Subrogation**

Progressive Design-Builder agrees to waive all rights against the Indemnified Parties for any claims to the extent covered by insurance required herein. Each insurance policy required herein shall include a waiver of subrogation or the insurer's consent to the insured's waiver of recovery in advance of loss. This provision shall also apply to insurance policies required of Subcontractors hereunder.

#### **29.2.5 Application of Insurance Proceeds**

All insurance proceeds received for physical property damage to the Project under any Insurance Policies, other than any business interruption or delay in start-up insurance maintained as part of such Insurance Policies, shall be first applied to repair, restore or replace each part or parts of the Project or the Work with respect to which such proceeds were received.

#### **29.2.6 Insurance Unavailability**

If the Progressive Design-Builder demonstrates to the Department's reasonable satisfaction that it has used diligent efforts in the global insurance and reinsurance markets to procure the insurance policy coverages as and when required hereunder, and if despite such diligent efforts and through no fault of the Progressive Design-Builder any Insurance Unavailability exists or occurs, the Department will consider in good faith alternative insurance packages and programs that provide coverage as comparable to that contemplated in Exhibit J (Insurance Requirements) as is possible under then-existing insurance market conditions.

### **30 PAYMENT AND PERFORMANCE SECURITY**

The Progressive Design-Builder shall provide a Contract Bond to the Department with a penal sum in accordance with Section 30.1 (*Penal Sum*). The Progressive Design-Builder shall maintain the payment and performance obligations of the Contract Bond in full force and effect until

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issuance of Notice of Final Acceptance and then, after Final Acceptance, Progressive Design-Builder may maintain the performance obligations of the Contract Bond or provide a replacement bond or other security for the performance obligations of the Contract Bond in accordance with Section 30.2 (*Replacement of Contract Bond*). The Contract Bond shall list the Department as obligee and shall be provided by a Qualified Surety/Sureties.

### **30.1 Penal Sum**

During the Pre-construction Phase, the penal sum of the Contract Bond shall be \$5,000,000. Prior to commencement of any Construction Work, the Progressive Design-Builder shall cause the penal sum for the existing Contract Bond to increase to \$40,000,000 by providing the Construction Rider in the form of Exhibit F (*Form of Contract Bond*). In the event the Total Construction GMP exceeds \$40,000,000, the Progressive Design-Builder shall increase the Penal Sum of the Contract Bond to equal the amount of the Total Construction GMP.

### **30.2 Replacement of Contract Bond**

Provided that all conditions to Final Acceptance have occurred, the Progressive Design-Builder shall have the right to replace the Contract Bond with a replacement performance bond in an amount and in a form satisfactory to the Department in its sole discretion guaranteeing due and punctual performance of all obligations of the Progressive Design-Builder under the Contract Documents that survive Final Acceptance, or with such other security as is Approved by the Department in its sole discretion. Any replacement bond or other security for the Contract Bond shall be effective until the end of the Warranty term and shall not exceed \$10,000,000.

### **30.3 No Relief of Liability**

Notwithstanding any other requirements of the Contract Documents, performance by a Surety of any of the obligations of the Progressive Design-Builder shall not relieve the Progressive Design-Builder of any of its obligations hereunder.

## **31 WARRANTIES**

### **31.1 Warranties by Progressive Design-Builder**

#### **31.1.1 Project Warranties**

The Progressive Design-Builder warrants that:

1. all design and technical services for the Work furnished pursuant to the Contract Documents shall conform to professional standards identified in the Contract Documents and all professional principles and generally accepted Standards of the Industry applicable to design and the scope of the Work, to the extent such principles are not more restrictive than the professional standards specifically identified in the Contract Documents;
2. the Construction Work furnished pursuant to the Contract Documents shall be performed in a workmanlike manner and shall conform to the standards of care and diligence normally practiced by recognized construction firms performing construction of a similar nature in the State;
3. goods, materials, and equipment furnished under the Contract Documents shall be of the quality specified or, if not specified, of good quality and, except if otherwise expressly set forth in the Contract Documents, when installed, shall be new;
4. the Work shall meet all requirements of the Contract Documents;

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5. the specifications and/or drawings selected or prepared for use during construction are suitable for their intended use;
  6. the Project shall be free of construction defects and design defects to the extent that such design defects do not conform to professional standards identified in the Contract Documents and all professional principles and generally accepted Standards of the Industry applicable to design and the scope of the Work, to the extent such principles are not more restrictive than the professional standards specifically identified in the Contract Documents; and
  7. any Work that does not meet the standards referenced in (1) through (6) above is Nonconforming Work.

### **31.1.2 Project Warranty Term**

The Warranty term for the Work shall extend until one year from the Department's issuance of the applicable Notice of Substantial Completion for such Work. If, after the applicable Notice of Substantial Completion, Nonconforming Work is repaired, replaced, or otherwise corrected, the applicable warranty term shall be extended to one year after completion and acceptance of such repair, replacement, or correction.

### **31.1.3 Corrective Work**

Within seven Days of receipt by the Progressive Design-Builder of notice from the Department specifying a failure of any of the Work to satisfy the Progressive Design-Builder's Warranties, or of any Subcontractor representation, warranty, guarantee, or obligation which the Progressive Design-Builder is responsible to enforce, the Progressive Design-Builder and the Department shall mutually agree when and how the Progressive Design-Builder shall remedy such violation; provided, however, that in case of an emergency as indicated by the Department in its notice requiring immediate curative action, the Progressive Design-Builder and the Department shall agree on a remedy immediately upon notice by the Department of such emergency. If the Progressive Design-Builder does not use its best efforts to proceed to effectuate such remedy within the agreed time, or if the Progressive Design-Builder and the Department fail to reach such an agreement within such seven Day period (or immediately, in the case of emergency conditions), then the Department, after notice to the Progressive Design-Builder, shall have the right to perform or have performed by third parties the necessary remedy, and the costs thereof shall be borne by the Progressive Design-Builder. The Progressive Design-Builder shall reimburse the Department for such costs within 30 Days after the Progressive Design-Builder's receipt of invoice therefor. The Department may agree to accept Nonconforming Work in accordance with Section 16.2 (*Nonconforming Work Pay Adjustment*).

The Department and the Progressive Design-Builder shall conduct a walkthrough of the Site prior to expiration of the Warranty period and shall produce a Punch List of those items requiring Warranty Work.

### **31.1.4 Progressive Design-Builder's Costs of Correction of Work**

All costs of correcting such rejected Work, including additional testing and inspections, shall be deemed included in the Work Package GMP for the Work Package applicable to the Work. The Progressive Design-Builder shall reimburse the Department and pay the Department's expenses made necessary thereby within 30 Days after the Progressive Design-Builder's receipt of invoice therefor. The Progressive Design-Builder shall be responsible for obtaining any required Governmental Approvals or other consents from any other Person in connection with the Warranty Work.

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## **31.2 Subcontractor Warranties**

### **31.2.1 Assignment**

Without in any way derogating the Progressive Design-Builder's own representations and warranties (including the Warranties) and other obligations with respect to the Work, the Progressive Design-Builder shall obtain from all Subcontractors and cause to be extended to the Department, appropriate representations, warranties, guarantees, and obligations with respect to the design, materials, workmanship, equipment, tools, and supplies furnished by such Subcontractors, including all such representations, warranties, guarantees, and obligations required to be furnished by Subcontractors pursuant to the Contract Documents. All representations, warranties, guarantees, and obligations of Subcontractors shall:

1. be written so as to survive all the Department and the Progressive Design-Builder inspections, tests, and approvals; and
2. run directly to and be enforceable by the Progressive Design-Builder and/or the Department and their respective successors and assigns.

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

### **31.2.2 Enforcement**

Upon receipt from the Department of notice of a failure of any of the Work to satisfy any Subcontractor warranty, representation, guarantee, or obligation, the Progressive Design-Builder shall enforce or perform any such representation, warranty, guarantee, or obligation, in addition to the Progressive Design-Builder's other obligations hereunder. The Department's rights under this Section 31.2.2 shall commence at the time such representation, warranty, guarantee, or obligation is furnished, and shall continue until the expiration of the Progressive Design-Builder's relevant Warranty (including extensions thereof under Section 31.1.2 (Warranty Term)). Until such expiration, the Progressive Design-Builder shall be responsible for the cost of any equipment, material, labor (including re-engineering), or shipping, and the Progressive Design-Builder shall be required to replace or repair defective equipment, material or workmanship furnished by any Subcontractor.

## **31.3 No Limitation of Liability**

The foregoing Warranties are in addition to all rights and remedies available under the Contract Documents or applicable law, and shall not limit the Progressive Design-Builder's liability or responsibility imposed by the Contract Documents or applicable law with respect to the Work, including liability for design defects, latent construction defects, strict liability, negligence or fraud; provided, however, that, upon expiration of the Warranties, the Progressive Design-Builder shall have no further liability to the Department hereunder for patent construction defects.

## **31.4 Warranty Beneficiaries**

In addition to benefiting the Department and its successors and assigns, the Warranties and Subcontractor warranties provided under this Section 31 shall inure to the benefit of, and shall be directly enforceable by, any local agencies and Utility Owners with respect to those portions of the Work owned or controlled by each such Person.

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## **31.5 Remedies for Breach of Warranty**

In addition to the Department's other rights and remedies hereunder, at law or in equity, the Progressive Design-Builder shall be liable for actual damages resulting from its failure to provide corrective Work in accordance with Section 31.1.3 (*Corrective Work*) and any breach of an express warranty or any defect in the Work, including design defects, latent construction defects, strict liability, negligence, or fraud.

## **31.6 Disputes**

Any disagreement between the Department and the Progressive Design-Builder relating to this Section 31 shall be subject to the dispute resolution provisions contained in Section 23 (*Partnering & Disputes*), provided that the Progressive Design-Builder shall proceed as directed by the Department pending resolution of the dispute.

## **32 ADDITIONAL PROGRESSIVE DESIGN-BUILDER OBLIGATIONS**

### **32.1 Maintenance of Records**

The Progressive Design-Builder shall maintain at the Project Manager's office in the State a complete set of Record Drawings and a complete set of all books, records and documents prepared or employed by the Progressive Design-Builder with respect to the Project.

### **32.2 Audit and Inspection Rights**

The Progressive Design-Builder and its Subcontractors at all tiers shall grant to the Department, FHWA, and the U.S. Comptroller General and their respective authorized representatives, access, audit and inspection rights, with right to copy, any books and records of the Progressive Design-Builder as such Persons may reasonably request from time to time in connection with the issuance of Change Orders, Claims, the resolution of disputes and other matters as such Persons reasonably deem necessary for purposes of complying or verifying compliance with the Contract and Laws, including responding to requests pursuant to the Kansas Open Records Act, K.S.A. §§ 45-215 through 45-223. The Progressive Design-Builder shall grant to Utility Owners and their respective authorized representatives such audit and inspection rights, access and the right to copy such books and records as such Persons may request in connection with the resolution of disputes or other matters, as such Persons reasonably deem necessary for purposes of complying or verifying compliance with the Utility-related contractual or Utility Agreement requirements. The Progressive Design-Builder shall also allow the Department access to all Subcontracts and records regarding Subcontracts.

The Progressive Design-Builder shall insert in all Subcontracts a requirement that the Subcontractor shall permit access, audit, and inspection rights in accordance with this Section 32.2 and shall require Subcontractors to insert the same provision in each Subcontract at all tiers.

### **32.3 Change Order Pricing Data**

For cost and pricing data submitted in connection with pricing Change Orders, unless such pricing is based on adequate price competition, established catalog or market prices of commercial items sold in substantial quantities to the public, or prices set by law or regulation, the Department and its representatives have the right to examine all books, records, documents, and other data of the Progressive Design-Builder related to the negotiation of or performance of Work under such Change Orders for the purpose of evaluating the accuracy, completeness and currency of the cost or pricing data submitted. The right of examination shall extend to all documents deemed

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necessary by such Persons to permit adequate evaluation of the cost or pricing data submitted, along with the computations and projections used therein.

### **32.4 Claims Audits**

All Claims filed against the Department shall be subject to audit at any time following the filing of the Claim. The audit may be performed by employees of the Department, FHWA, U.S. Comptroller General, or by an auditor under contract with any of them. No notice is required before commencing any audit within 60 Days after Final Acceptance. Thereafter, the Department shall provide 20 Days' notice to the Progressive Design-Builder, any Subcontractors or their respective agents before commencing an audit. The Progressive Design-Builder, Subcontractors or their agents shall provide adequate facilities, acceptable to the Department, for the audit during normal business hours. The Progressive Design-Builder, Subcontractors, and their agents shall cooperate with the auditors. Failure of the Progressive Design-Builder, Subcontractors, or their agents to maintain and retain sufficient records to allow the auditors to verify all or a portion of the Claim or to permit the auditors access to the books and records of the Progressive Design-Builder, Subcontractors, or their agents shall constitute a waiver of the Claim and shall bar any recovery there under. At a minimum, the auditors shall have available to them the following documents:

1. daily time sheets and supervisor's daily reports;
2. insurance, welfare, and benefits records;
3. payroll registers;
4. earnings records;
5. payroll tax forms;
6. Material invoices and requisitions;
7. Material cost distribution worksheet;
8. equipment records (list of company equipment, rates, etc.);
9. Subcontractors' (including Suppliers) and agents' invoices;
10. Subcontractors' and agents' payment certificates;
11. canceled checks (payroll and Suppliers);
12. job cost report;
13. job payroll ledger;
14. general ledger;
15. cash disbursements journal;
16. e-mail, letters, and correspondence;
17. network servers, data storage devices, backup media;
18. all documents that relate to each and every Claim together with all documents that support the amount of damages as to each Claim; and
19. work sheets used to prepare the Claim establishing the cost components for items of the Claim.

Full compliance by the Progressive Design-Builder with the provisions of this Section 32.4 is a contractual condition precedent to the Progressive Design-Builder's right to seek relief under this

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Section 32. The Progressive Design-Builder represents and warrants the completeness and accuracy of all information it or its agents provides in connection with this Section 32.4.

## **32.5 Retention of Records**

The Progressive Design-Builder shall maintain all records and documents relating to the Contract (including copies of all original documents delivered to the Department) at the Project Manager's office in the State, or as otherwise agreed by the Department in writing, until five years after the earlier to occur of:

1. the date Final Acceptance is achieved; or
2. the termination date.

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

Notwithstanding the foregoing, all records which relate to Claims being processed or actions brought under the dispute resolution provisions hereof shall be retained and made available until three years after such actions and Claims have been finally resolved. Records to be retained include all books and other evidence bearing on the Progressive Design-Builder's costs and expenses under the Contract Documents. The Progressive Design-Builder shall make these records and documents available for audit and inspection by the Department and/or FHWA, at the Progressive Design-Builder's office, during reasonable business times, without charge, and shall allow such Persons to make copies of such documents (at no expense to the Progressive Design-Builder).

## **32.6 Kansas Open Records Act**

### **32.6.1 Applicability of Act**

The Progressive Design-Builder acknowledges and agrees that all records, documents, drawings, plans, specifications, and other materials in the Department's possession are subject to the provisions of the Kansas Open Records Act (K.S.A. §§ 45-215 through 45-223). The Progressive Design-Builder shall be solely responsible for all determinations made by it under such act and for clearly and prominently marking each and every page or sheet of its materials with "Trade Secret" or "Confidential," and providing any such other required material, as it determines to be appropriate. The Progressive Design-Builder is advised to contact legal counsel concerning the Kansas Open Records Act and its application to the Progressive Design-Builder.

### **32.6.2 Confidential Materials**

If any of the materials submitted by the Progressive Design-Builder to the Department are clearly and prominently labeled "Trade Secret" or "Confidential-Trade Secret" by the Progressive Design-Builder, the Department will endeavor to advise the Progressive Design-Builder of any request for the disclosure of such materials prior to making any such disclosure. Under no circumstances, however, will the Department be responsible or liable to the Progressive Design-Builder or any other Person for the disclosure of any such labeled materials, whether the disclosure is required by law, by court order or occurs through inadvertence, mistake or negligence on the part of the Department.



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### **32.6.3 Progressive Design-Builder to Defend Against Disclosure Request**

In the event of litigation concerning the Department's failure to disclose, at the Progressive Design-Builder's direction, any material submitted by the Progressive Design-Builder to the Department, the Department's sole involvement will be as a stakeholder retaining the material until otherwise ordered by a court, and the Progressive Design-Builder shall be fully responsible for otherwise prosecuting or defending any action concerning the materials at its sole expense and risk and fully responsible for paying any costs, fees, and civil penalties assessed against the Department for failing to disclose such documents in accordance with the Progressive Design-Builder's directions.

### **32.6.4 Cooperation with the Department Regarding Open Records Requests**

In the event the Department receives an Open Records request for covered documents that are in the custody and control of the Progressive Design-Builder, the Progressive Design-Builder shall cooperate with the Department in responding to the request in a timely manner under the Kansas Open Records Act.

## **32.7 Intellectual Property**

### **32.7.1 Proprietary Intellectual Property**

The Progressive Design-Builder shall deliver, or cause to be delivered, to Department copies of all Proprietary Intellectual Property owned by or licensed to Progressive Design-Builder that it uses in providing the Work. As between the Department and the Progressive Design-Builder, all Proprietary Intellectual Property shall remain exclusively the property of the Progressive Design-Builder, notwithstanding any delivery of copies thereof to Department.

Department shall have, and are hereby granted by Progressive Design-Builder, a perpetual, nonexclusive, transferable (to successor Government Entities only), royalty-free, irrevocable, worldwide, fully paid up right and license to use, reproduce, modify, adapt and disclose, and sublicense others (solely designees and only in connection with the Project and retained by or on behalf of the Department) to use, reproduce, modify, adapt and disclose, the Proprietary Intellectual Property of or licensed to the Progressive Design-Builder solely in connection with the Project. Department's rights to exercise the foregoing license shall commence and endure only at the following times:

1. From and after expiration or earlier termination of the Term, for any reason whatsoever; or
2. During any time that a receiver is appointed for Progressive Design-Builder, or during any time that there is pending a voluntary or involuntary proceeding in bankruptcy in which Progressive Design-Builder is the debtor.

The Department will not at any time sell any Proprietary Intellectual Property of or licensed to the Progressive Design-Builder or use, reproduce, modify, adapt and disclose, or allow any party to use, reproduce, modify, adapt and disclose, any such Proprietary Intellectual Property for any other purpose not consistent with this Section 32.7.1 clause 2.

Subject to Section 32.6 (*Kansas Open Records Act*), the Department will not disclose any Proprietary Intellectual Property of or licensed to Progressive Design-Builder to any Person other than authorized transferees and sublicensees who agree to be bound by reasonable

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confidentiality obligations. Notwithstanding the foregoing, in no event shall the Department be liable to Progressive Design-Builder or any licensor to the Progressive Design-Builder for any damages arising out of breach of the confidentiality obligations under this Section 32.7.1 clause 3 and 4 if such breach is not the result of gross negligence or intentional misconduct or is required under the Kansas Open Records Act or a court order or other legal requirement. Progressive Design-Builder hereby irrevocably waives all claims to any such damages.

Nothing in this Contract shall prohibit or limit either Party's use of information:

1. previously known to it without obligation of confidence;
2. independently developed by it;
3. acquired by it from a third party that is not, to its knowledge, under an obligation of confidence with respect to such information; or
4. which is or becomes publicly available through no breach of this Contract.

With respect to any Proprietary Intellectual Property owned by a Person other than Progressive Design-Builder, Progressive Design-Builder shall obtain from such owner, concurrently with execution of any Subcontract with such owner, or with the first use or adaptation of the Proprietary Intellectual Property in connection with the Project, for Progressive Design-Builder, Department, a license of at least identical scope, purpose, duration and applicability as the license granted under this Section 32.7.1.

## **32.7.2 Intellectual Property**

### **32.7.2.1 Owner Intellectual Property**

Except for Proprietary Intellectual Property, all Intellectual Property ("Owner Intellectual Property") has been specially ordered and commissioned by the Department and shall be considered "works made for hire" as such term is defined in Section 101 of Title 17 of the U.S. Code, and accordingly for which the Department owns the copyright.

### **32.7.2.2 Obligation to Assign to Department**

If any such work product and related materials, is/are determined by a court of competent jurisdiction, the U.S. Copyright Office, or the U.S. Patent & Trademark Office not to be a work-made-for-hire or where the Department is not the owner or author, the Progressive Design-Builder agrees to assign to Department, or cause all Subcontractors to assign to the Department, if applicable, all rights, title and interest in all Intellectual Property, excluding Proprietary Intellectual Property, in such work product and related materials.

### **32.7.2.3 Creation**

Design Documents shall become Owner Intellectual Property upon preparation. Construction Documents shall become Owner Intellectual Property upon delivery to Department. All other submittals and other documents prepared or obtained by Progressive Design-Builder or any Progressive Design-Builder-Related Entity in connection with the Project shall become Owner Intellectual Property upon Progressive Design-Builder's or any such Progressive Design-Builder-Related Entity's preparation or receipt thereof.

### **32.7.2.4 Restricted License; Restricted Use**

Department hereby grants to Progressive Design-Builder an irrevocable, non-exclusive, non-transferable, non-sub-licensable (without Department's prior written consent), fully paid up license to use and implement, solely in connection with the performance of the Work and for the Term

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(including any period of Progressive Design-Builder's performance of post-termination or post-expiration obligations), the Owner Intellectual Property; provided that Progressive Design-Builder may sub-license any Owner Intellectual Property solely in connection with the performance of the Work to any Subcontractor performing the Work (but without right to further sub-license).

If Progressive Design-Builder or any Progressive Design-Builder-Related Entity creates or develops any improvements, modifications, enhancements or derivative works to or of the Owner Intellectual Property, any and all such improvements, modifications, enhancements or derivative works created or developed by any Progressive Design-Builder-Related Entity will be deemed to be Owner Intellectual Property under the terms of this Contract.

### **32.8 Coordination with Other Contractors of the Department**

The Department reserves the right to perform and to contract with others to perform other or additional work on or near the Site. The Progressive Design-Builder shall coordinate with the Department, such other contractors, any other third-parties working on or adjacent to the Site, and any other contractors working with such parties to the extent reasonably necessary for the performance by the Department and such other contractors of their work, and shall cause its employees, agents, officers, and Progressive Design-Builder-Related Entities to so coordinate. If other separate contracts are awarded by the Department, the Progressive Design-Builder shall conduct its Work without interfering with or hindering the progress or completion of the work being performed by other contractors.

If the Department exercises its right under Section 2.2.2 (Work Package Amendments) to contract with other contractors to perform outstanding Work on the Project, the Progressive Design-Builder shall coordinate with such other contractors in good faith to facilitate completion of the Project in a timely and effective manner.

### **32.9 Interference by Other Contractors of the Department**

If the Progressive Design-Builder asserts that any of the Department's other contractors have hindered or interfered with the progress or completion of the Work, then the Progressive Design-Builder's sole remedy shall be to seek recourse against such other contractors. The Progressive Design-Builder shall have the right to ask the Project Director to resolve such dispute, provided the other contractor and its sureties have agreed to submit the dispute to the Project Director, and provided that such proceeding shall be conducted at no cost to the Department.

### **32.10 Assignment of Causes of Action**

The Progressive Design-Builder hereby offers and agrees to assign to the Department all rights, title and interest in and to all causes of action it may have under Section 4 of the Clayton Act (15 U.S.C. § 15), arising from purchases of goods, services or materials pursuant to this Contract or any Subcontract. This assignment shall be made and become effective at the time the Department tenders Final Payment to the Progressive Design-Builder, without further action of the Parties.

## **33 REPRESENTATIONS, WARRANTIES, AND COVENANTS**

The Progressive Design-Builder represents, warrants, and covenants for the benefit of the Department as follows:

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### **33.1 Maintenance of Professional Qualifications; Performance By Qualified Personnel**

The Progressive Design-Builder and its Subcontractor(s) have maintained, and throughout the term of this Contract shall maintain, all required authority, license status, applicable licensing standards, certification standards, accrediting standards and accreditations, professional ability, skills and capacity to perform the Work, and shall perform the Work in accordance with the requirements of the Contract Documents.

All Work furnished by the Progressive Design-Builder will be performed by or under the supervision of Persons that hold all necessary, valid licenses to practice in the State of Kansas, by personnel who are skilled, experienced and competent in their respective trades or professions, who are professionally qualified to perform the Work in accordance with the Contract Documents and who shall assume responsibility that the Design Documents, construction documents, and other documents prepared or checked by them, as and when applicable, meet the standards described in the Contract Documents.

The Progressive Design-Builder acknowledges and agrees that the award of this Contract by the Department to the Progressive Design-Builder was based, in part, on the qualifications and experience of the personnel listed in the Proposal, and the Progressive Design-Builder's commitment that such individuals would be available to undertake and perform the Work. In addition to ratifying the representations, warranties, and covenants set forth in the "Key Personnel Commitments" attached to Exhibit C (Progressive Design-Build Team), the Progressive Design-Builder represents, warrants and covenants that such individuals are available for and will fulfill the roles identified for them in the Proposal in connection with the Work. Key Personnel shall commit the amount of time to their applicable roles as set forth in the Contract Documents.

### **33.2 Applicable Laws**

The Progressive Design-Builder has familiarized itself with the requirements of any and all applicable Laws prior to entering into this Contract. The Progressive Design-Builder Progressive Design-Builder has complied and shall comply with the foregoing at its sole cost and without any additional compensation or time extension on account of such compliance, regardless of whether such compliance would require additional time for performance or additional labor, equipment or materials not expressly provided for in the Contract Documents, except, and only to the extent, of any express entitlement to seek relief hereunder.

### **33.3 Governmental Approvals**

The Progressive Design-Builder has no reason to believe that any Governmental Approval required to be obtained by the Progressive Design-Builder under the Contract Documents will not be granted in due course and thereafter remain in effect so as to enable the Work to proceed in accordance with the Contract Documents.

### **33.4 Progression of Work**

The Progressive Design-Builder shall at all times provide for an orderly progression of the Work in accordance with the Baseline Work Package Schedule to thereafter achieve all Completion Deadlines, all at the Progressive Design-Builder's own expense, except as otherwise specifically provided in Section 21 (Relief & Compensation) and Section 22 (Change Orders).

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### **33.5 Feasibility of the Work, Project; Reasonable Investigation**

As of the Effective Date, the Progressive Design-Builder has evaluated the constraints affecting delivery of the Project and has reasonable grounds for believing and does believe that the Project can be designed and built within such constraints and has reasonable grounds for believing and does believe that performance of the Work is feasible and practicable.

As of the effective date of the Construction Phase Amendment, the Progressive Design-Builder:

1. has evaluated the constraints affecting design and construction of the Project, as well as the conditions of the environmental approvals, and has reasonable grounds for believing and does believe that the Project can be designed and built within such constraints; and
2. has conducted a reasonable investigation and otherwise examined the Site as well as surrounding locations, and as a result of such review, inspection, examination, and other activities the Progressive Design-Builder is familiar with, and has satisfied itself as to, the character of the Site, and accepts the physical requirements of the Work, subject only to the Progressive Design-Builder's express rights and bases to seek relief under this Contract.

### **33.6 Power and Authority [NTD: amend for JV members, as need be]**

The Progressive Design-Builder [and each joint venture member] has the requisite power (a) to carry on its business as now conducted or proposed, and (b) to own its properties and assets.

The Progressive Design-Builder [and each joint venture member] has full power, right and authority to execute and deliver the Contract Documents and to perform each and all of the obligations of the Progressive Design-Builder provided for herein and therein.

The Progressive Design-Builder [and each joint venture member] has all requisite power to own its properties and assets and carry on its business as now conducted or proposed to be conducted.

### **33.7 Good Standing [NTD: amend for JV members, as need be]**

The Progressive Design-Builder [, each joint venture member,] and each of the Lead Contractor, Lead Designer, and each Key Personnel Firm is duly qualified to do business, and is in good standing, in the State, and will remain in good standing throughout the term of this Contract and for as long thereafter as any obligations remain outstanding under the Contract Documents.

### **33.8 Authorization [NTD: amend for JV members, as need be]**

The execution, delivery, and performance of this Contract have been duly authorized by all necessary actions of the Progressive Design-Builder, and, if applicable, the Progressive Design-Builder's members, and will not result in a breach or a default under the organizational documents of any such Person or any indenture, loan, credit agreement, or other material agreement or instrument to which any such Person is a party or by which its properties and assets may be bound or affected.

### **33.9 Legal, Valid, and Binding Obligation [NTD: amend for JV members, as need be]**

This Contract constitutes the legal, valid, and binding obligation of the Progressive Design-Builder and, if applicable, of each member of the Progressive Design-Builder, enforceable against the

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Progressive Design-Builder (and, if applicable, each member), in accordance with its terms, subject only to applicable bankruptcy, insolvency and similar laws affecting the enforceability of the rights of creditors generally and the general principles of equity.

[Each]/[The] individual person executing this Contract and all other such Project related documents, on behalf of the Progressive Design-Builder has been (or at the time of execution will be) duly authorized to execute and deliver each such document on behalf of the Progressive Design-Builder; and the Contract Documents, and all such other Project related documents have been (or will be) duly executed and delivered by the Progressive Design-Builder.

### **33.10 No Breach**

As of the Effective Date, no event that, with the passage of time or the giving of notice, would constitute a breach hereunder has occurred and has not yet been cured.

### **33.11 No Conflicts**

Neither the execution and delivery by the Progressive Design-Builder of the Contract Documents, nor the consummation of the transactions contemplated hereby or thereby, is (or at the time of execution will be):

1. in conflict with or has resulted or will result in a default under or a violation of the governing instruments of the Progressive Design-Builder or any agreement, judgment, or decree to which the Progressive Design-Builder is a party or is bound; or
2. in conflict with any Laws applicable to the Progressive Design-Builder that are valid and in effect on the Effective Date.

### **33.12 No Violation of Law**

As of the Effective Date, the Progressive Design-Builder is not in breach of any applicable Law that would have a material adverse effect on the Work or the performance of any of its obligations under the Contract Documents.

### **33.13 No Suits [NTD: amend for JV members, as need be]**

There is no action, suit, proceeding, investigation or litigation pending and served on the Progressive Design-Builder that challenges the Progressive Design-Builder's authority to execute, deliver or perform, or the validity or enforceability of, the Contract Documents, or that challenges the authority of the Progressive Design-Builder's official executing the Contract Documents; and the Progressive Design-Builder has disclosed to the Department prior to the Effective Date any pending and un-served or threatened action, suit, proceeding, investigation or litigation with respect to such matters of which the Progressive Design-Builder is aware. The Progressive Design-Builder has no current, pending or outstanding criminal, civil, or enforcement actions initiated by the Department or the State of Kansas, and agrees that it will immediately notify the Department of any such actions.

### **33.14 No Organizational Conflicts of Interest; No Gratuities**

The Progressive Design-Builder has disclosed and will disclose to the Department in writing all organizational conflicts of interest of the Progressive Design-Builder and its contractors and subcontractors of which the Progressive Design-Builder was actually aware; and the Progressive Design-Builder has not obtained knowledge of any additional organizational conflict of interest, and there have been no organizational changes to the Progressive Design-Builder or its

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contractors and subcontractors identified in its Proposal that have not been approved in writing by the Department. For this purpose, organizational conflict of interest has the meaning set forth in the RFP.

The Progressive Design-Builder has not previously offered or given any gifts, entertainment, payments, loans, or gratuities in violation of the prohibitions under The Kansas Governmental Ethics law, K.S.A. § 46-215, *et seq.*

### **33.15 No Debarment, Suspension Ineligibility, Exclusion**

As of the Effective Date, neither the Progressive Design-Builder, nor its principals, contractors and subcontractors identified in the Proposal are presently debarred, suspended, proposed for debarment, declared ineligible, or voluntarily excluded from entering into this Contract by any federal agency or by any department, agency or political subdivision of the State of Kansas, including the Department. For purposes of this Section 33.15, the term "principal" for purposes of this Contract means a member, manager, officer, director, share/stockholder, partner, employee, Key Personnel, employee, or other individual person with primary management or supervisory responsibilities, or an individual person who has a critical influence on or substantive control over the operations of the Progressive Design-Builder.

### **33.16 False or Fraudulent Statements and Claims**

The Progressive Design-Builder recognizes that the requirements of the Program Fraud Civil Remedies Act of 1986, as amended, 31 U.S.C. §§ 3801 *et seq.* and the USDOT regulations, "Program Fraud Civil Remedies," 49 C.F.R., Part 31, apply to contracts funded with Federal funds. Accordingly, by signing this Contract, the Progressive Design-Builder certifies or affirms the truthfulness and accuracy of any statement it has made, it makes, or it may make pertaining to this Contract. In addition to other penalties that may be applicable, the Progressive Design-Builder also acknowledges that if it makes a false, fictitious, or fraudulent claim, statement, submission, or certification, the Federal government reserves the right to impose the penalties of the Program Fraud Civil Remedies Act of 1986, as amended, on the Progressive Design-Builder to the extent the Federal government deems appropriate.

## **34 MISCELLANEOUS PROVISIONS**

### **34.1 Amendments**

#### **34.1.1 General Contract Amendments**

This Contract may be amended, notwithstanding its terms, only by a written instrument duly executed by the parties or their respective successors or assigns in the same manner as this Contract was originally executed.

#### **34.1.2 Phase Amendments and Change Orders**

Preconstruction Phase Amendments, the Construction Phase Amendment, Work Package Amendments, and Change Orders shall be executed as described in Section 34.5.2 (*The Department's Representative to Execute Change Orders*).

### **34.2 Waiver**

#### **34.2.1 No Waiver of Subsequent Rights**

Either Party's waiver of any breach or failure to enforce any of the terms, covenants, conditions, or other provisions of the Contract Documents at any time shall not in any way limit or waive that

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Party's right thereafter to enforce or compel strict compliance with every term, covenant, condition, or other provision, any course of dealing or custom of the trade notwithstanding. The consent by one Party to any act by the other Party requiring such consent shall not be deemed to render unnecessary the obtaining of consent to any subsequent act for which consent is required, regardless of whether similar to the act for which consent is given.

### **34.2.2 Custom Does not Constitute Waiver**

No act, delay, or omission done, suffered or permitted by one Party or its agents shall be deemed to waive, exhaust, or impair any right, remedy, or power of such Party under any Contract Document, or to relieve the other Party from the full performance of its obligations under the Contract Documents. No custom or practice between the parties in the administration of the terms of the Contract Documents shall be construed to waive or lessen the right of a Party to insist upon performance by the other Party in strict compliance with the terms of the Contract Documents.

### **34.2.3 Waivers Must be in Writing**

No waiver of any term, covenant, or condition of the Contract Documents shall be valid unless in writing and signed by the Party providing the waiver.

## **34.3 Independent Contractor**

Nothing in the Contract Documents shall be construed as constituting any relationship with the Department other than that of Project owner (the Department) and independent contractor (the Progressive Design-Builder), nor any employer/employee relationship between the Department and the Progressive Design-Builder's employees. Except as otherwise specified in the Contract Documents, the Progressive Design-Builder has sole authority and responsibility to employ, discharge and otherwise control its employees and has complete responsibility as a principal for its agents, for all Subcontractors, and for all other Persons that the Progressive Design-Builder or any Subcontractor hires or engages to perform or assist in performing the Work. The Contract Documents shall not be construed to create a contractual relationship of any kind between the Department and a Subcontractor or any other Person except the Progressive Design-Builder.

## **34.4 Successors and Assigns**

The Contract Documents shall be binding upon and inure to the benefit of the Department and its successors and assigns and to the benefit of the Progressive Design-Builder and its permitted successors, permitted assigns and legal representatives.

### **34.4.1 Assignment by the Department**

The Department may assign all or part of its right, title, and interest in and to this Contract, including rights with respect to the surety bonds required hereunder and any other performance security provided, to any Person that succeeds to the governmental powers and authority of the Department.

### **34.4.2 Assignment by the Progressive Design-Builder; Changes of Control; Change of Organization**

Without limiting Section 5 (*Subcontracting Requirements*), the Progressive Design-Builder shall not otherwise sublet, transfer, assign, or dispose of any portion of this Contract, delegate any of its duties hereunder, or suffer a voluntary or involuntary Change of Control, except in each case, with the Department's prior written Approval, in the Department's sole discretion. Except and after any Approval only, any of the foregoing actions shall be null and void *ab initio* and otherwise



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ineffective to relieve the Progressive Design-Builder of its responsibility for the Work assigned or delegated.

The Progressive Design-Builder shall not change the legal form of its organization in a manner that adversely affects the Department's rights, protections and remedies under the Contract Documents without the prior written Approval of the Department, in the Department's sole discretion. *[NTD: amend for joint ventures]*

## **34.5 Designation of, and Cooperation with Representatives**

### **34.5.1 Designation of Representatives**

Identified below are representatives of the Department and the Progressive Design-Builder who are authorized to make decisions and bind the parties on matters relating to the Contract Documents. Such designations may be changed by a subsequent written notice delivered to the other Party in accordance with Section 34.10 (*Notices and Communication*). The parties may also designate technical representatives who shall be authorized to investigate and report on matters relating to the construction of the Project and negotiate on behalf of each of the parties but who do not have authority to bind the Department or the Progressive Design-Builder.

The Department's representative is the Project Director.

The Progressive Design-Builder's representative is [●].

### **34.5.2 The Department's Representative to Execute Change Orders**

Notwithstanding Section 34.5.1 (*Designation of Representatives*), the only individual person who can execute Pre-Construction Phase Amendments, the Construction Phase Amendment, Work Package Amendments, and Change Orders on behalf of the Department is [●]. Such designation may be changed by a subsequent written notice delivered by the Department to the Progressive Design-Builder in accordance with Section 34.10 (*Notices and Communication*).

## **34.6 Gratuities and Conflicts of Interest**

Neither the Progressive Design-Builder nor any of its employees, agents and representatives shall offer or give to an officer, official, or employee of the Department or the State gifts, entertainment, payments, loans, or gratuities except those permitted by the Kansas Governmental Ethics law, K.S.A. § 46-215 *et seq.*

## **34.7 Survival**

The Dispute Resolution Procedures; the indemnification provisions contained in Section 28 (*Indemnification*) and elsewhere in the Contract Documents; the warranty provisions contained in Section 31 (*Warranties*); the Progressive Design-Builder's obligations post-termination under Section 26.1 (*Progressive Design-Builder Responsibilities Upon Termination*); the Department's obligation to pay termination compensation, if any; any release or waiver by or on behalf of any Progressive Design-Builder-Related Entity; the Progressive Design-Builder's obligations to pay the Department amounts owed hereunder; the Department's rights of offset under Section 27.1 (*Offset; Withholding; Waiver*); the Parties' respective rights and obligations under applicable Law as pertains to this Contract, the Work, or the Project; and all other provisions, which by their inherent character should survive termination of this Contract, shall survive the termination of this Contract.

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## **34.8 Limitation on Third-Party Beneficiaries**

It is not intended by any of the provisions of the Contract Documents to create any third-party beneficiary hereunder, or to authorize Person not a Party to this Contract to maintain a suit for personal injury or property damage pursuant to the terms or provisions hereof, except to the extent that specific provisions (such as the warranty and indemnity provisions) expressly identify third persons or parties and state that they are entitled to benefits hereunder. The duties, obligations, and responsibilities of the parties to the Contract Documents with respect to such third persons or parties shall remain as imposed by Law.

## **34.9 No Personal Liability**

The Department's representatives are acting solely as agents and representatives of the Department when carrying out the provisions of or exercising the power or authority granted to them under the Contract Documents. They shall not be liable either personally or as employees of the Department for actions in their ordinary course of employment.

## **34.10 Notices and Communications**

Notices and all other communications under the Contract Documents shall be in writing and shall be delivered through the Project's DMS and other forms of written notice shall not be considered official notice. A notice shall be considered delivered and received when it is properly submitted to the DMS.

### **34.10.1 Delivery of Notices**

All correspondence with the Progressive Design-Builder shall be addressed to the Project Manager, except as set forth below or as otherwise directed by such Project Manager.

### **34.10.2 Receipt of Notices**

Notices shall be deemed received at the time and date logged by the Department's DMS for the Progressive Design-Builder's posting of a properly submitted notice to the Department's DMS. Notices received after 5:00 p.m. Central Time shall be deemed received on the first Day (other than Saturday, Sunday or a Legal Holiday) following delivery.

## **34.11 Further Assurances**

The Progressive Design-Builder shall promptly execute and deliver to the Department all such instruments and other documents and assurances as are reasonably requested by the Department to further evidence the obligations of the Progressive Design-Builder hereunder.

## **34.12 Construction and Interpretation of the Contract Documents**

The language in all parts of the Contract Documents shall in all cases be construed simply, as a whole and in accordance with its fair meaning and not strictly for or against any Party. The Department's final answers to the questions posed during the SOQ and Proposal preparation processes during the procurement for this Contract shall in not be relevant in interpreting the Contract Documents.

Wherever the word "including," and variants, shall be deemed to be followed by the words "without limitation". Unless otherwise specified, lists contained in the Contract Documents defining the Project or the Work shall not be deemed all-inclusive. "Or" means the inclusive connotation of "or" (i.e., meaning one, some, or all of a number of possibilities). "May," when used in the context of

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a power or right exercisable by the Department (or either's designee) means the power to exercise that right or power in its sole discretion, with no obligation to any Progressive Design-Builder-Related Entity to do so. "May," when used in all other contexts, indicates permission by the Department for the Progressive Design-Builder to do (or refrain from doing) an action.

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

There shall be no double counting in any calculation of any amount payable by a Party, such that the receiving Party would receive more than owed or payable. All monetary amounts and obligations (including use of the symbol "\$") are expressed and payable in U.S. dollars.

Inconsistent or conflicting provisions of the Contract Documents shall not be treated as erroneous provisions under this Section 34.12, but instead shall be governed by Section 1.4 (Phases and *Order of Precedence*). The Progressive Design-Builder shall not take advantage of, or benefit from, any apparent or actual error in the Contract Documents, and the Progressive Design-Builder shall request in writing such further explanations from the Department as may be necessary to clarify any such apparent or actual error. The Progressive Design-Builder agrees to abide by the explanation, and correction of errors shall not in itself be the basis for any contractual relief, or other claim at law or in equity.

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

### **34.13 Computation of Periods**

If the obligation to act or give to give notice (including the last date for performance or notice "within" a specified time period) falls on a non-Business Day, then such act or notice may be timely performed on the next succeeding Business Day. This notwithstanding, requirements relating to actions to be taken in the event of an emergency, requirements under Governmental Approvals or Third-Party Agreements, and any other requirements for which it is clear that performance is intended to occur on a non-Business Day, shall be performed as specified, even though the date in question may fall on a non-Business Day.

### **34.14 Severability**

If any clause, provision, Section or part of this Contract is ruled invalid under Section 23 (*Partnering & Disputes*) or otherwise by a court of competent jurisdiction, then the parties shall:

1. promptly meet and negotiate a substitute for such clause, provision, Section or part, which shall, to the greatest extent legally permissible, effect the original intent of the parties, including an equitable adjustment to the applicable Compensation Cap and Completion Deadline(s); and
2. if necessary or desirable, apply to the court or other decision maker (as applicable) that declared such invalidity for an interpretation of the invalidated portion to guide the negotiations.

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The invalidity or unenforceability of any such clause, provision, Section or part shall not affect the validity or enforceability of the balance of this Contract, which shall be construed and enforced as if this Contract did not contain such invalid or unenforceable clause, provision, Section or part.

**34.15 Headings**

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

**34.16 Governing Law**

The Contract Documents shall be governed by and construed in accordance with the law of the State of Kansas. Venue for any legal action in connection with the Contract shall lie in Topeka, Kansas in the Shawnee County District Court for the State of Kansas.

**34.17 Entire Agreement**

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

**34.18 Counterparts and Electronic Signatures**

This instrument may be executed in two or more counterparts, each of which shall be deemed an original, but all of which together shall constitute one and the same instrument. Signatures may be made and delivered electronically.

IN WITNESS WHEREOF, the Parties have executed this Contract as of the Effective Date.

[ \_\_\_\_\_ ] *[NTD: INSERT PROGRESSIVE DESIGN-BUILDER]*

KANSAS DEPARTMENT OF TRANSPORTATION

By: \_\_\_\_\_  
Signature

By: \_\_\_\_\_  
[Secretary]

\_\_\_\_\_  
Typed or Printed Name

\_\_\_\_\_  
Date

\_\_\_\_\_  
Date

## EXHIBIT A: ACRONYMS, DEFINITIONS, AND SUBMITTALS

As used in the Contract Documents (unless otherwise specified therein), the following acronyms shall have the meanings set forth below.

<b>ACRONYMS</b>	
<b>Abbreviation</b>	<b>Title or Description</b>
AASHTO	American Association of State Highway and Transportation Officials
ANSI	American National Standards Institute
CFR or C.F.R.	Code of Federal Regulations
CQCM	Construction Quality Control Manager
DQAM	Design Quality Assurance Manager
EEO	Equal Employment Opportunity
EPA	Environmental Protection Agency
FAR	Federal Acquisition Regulation
FHWA	Federal Highway Administration
ICE	Independent Cost Estimator
IEEE	Institute of Electrical and Electronics Engineers
ITS	Intelligent Transportation System
KDOT	Kansas Department of Transportation
KSA or K.S.A.	Kansas Statutes Annotated
LRFD	load and resistance factor design
MOT	maintenance of traffic
MS4	Municipal separate storm sewer system
NCHRP	National Cooperative Highway Research Program
NEMA	National Electrical Manufacturers Association Standards
NHI	National Highway Institute
NTE	not-to-exceed
RCO	Request for Change Order
RFC	Released for Construction Documents
RID	Reference Information Documents
ROW	Right of Way
RUS	Rural Utilities Service
TMP	Transportation Management Plan
TRB	Transportation Research Board
US or U.S.	United States of America
USC or U.S.C.	U.S. Code
USDA	United States Department of Agriculture
USDOT	United States Department of Transportation

As used in the Contract Documents (unless otherwise specified therein), the following terms shall have the meanings set forth below. This notwithstanding, unless otherwise defined below, words that have well-known engineering, technical or construction industry meanings are used in this Contract or the other Contract Documents in accordance with such recognized meaning.

<b>DEFINITIONS</b>	
<b>Term</b>	<b>Meaning</b>
"Acceleration Costs"	Those fully documented increased costs reasonably incurred by the Progressive Design-Builder (i.e., costs over and above what the Progressive Design-Builder would otherwise have incurred), which are directly attributable to increasing the performance level of the Work in an attempt to complete necessary activities of the Work earlier than otherwise anticipated, such as for additional equipment, additional crews, lost productivity, overtime and shift premiums, increased supervision, and any unexpected movement of materials, equipment, or crews necessary for resequencing in connection with acceleration efforts.
"Actual Cost"	The Progressive Design-Builder's actual, reasonable, substantiated, direct cost to provide labor, material, equipment (owned or invoiced rental), and administrative overhead necessary for the Work; excluding profit.
"Affiliate"	<ol style="list-style-type: none"> <li>1. Any Person that directly or indirectly, through one or more intermediaries, controls, is controlled by, or is under common control with the Progressive Design-Builder, Lead Contractor (if not Progressive Design-Builder), Lead Designer (if not Progressive Design-Builder), or a Key Personnel Firm; or</li> <li>2. Any Person for which 10 percent or more of the equity interest in such Person is held directly or indirectly, beneficially or of record by any Affiliate under part (1) of this definition.</li> </ol> <p>For purposes of this definition, the term "control" means the possession, directly or indirectly, of the power to cause the direction of the management of a Person, whether through voting securities, by contract, by family relationship, or otherwise.</p>
"Applicable Standards"	The standards included in <u>Exhibit B (Pre-construction Phase Technical Requirements)</u> , subject to modification as described in <u>Exhibit B</u> , and those additional standards included in the Construction Phase Amendment or a Work Package Amendment.
"Application for Final Payment"	The application described in <u>Section 20.4.1 (Application for Final Payment)</u> .
"Approve or Approval" and their variants	The meaning set forth in <u>Section 3.2 (Approval)</u> .
"Approved Plan"	Any of plan under <u>Exhibit B (Pre-construction Phase Technical Requirements)</u> or the Contract that is required to be and has been Approved by the Department.
"Baseline Work Package Schedule"	The initial Approved schedule included in a Work Package Amendment. A "Baseline Work Package Schedule" generally is a "cost-loaded", Critical Path Method schedule, incorporating activities for Work as well as for Provisional Risks (up to the Provisional Sums). References to the "Baseline Work Package Schedule" include the Revised Baseline Work Package Schedule, if thereafter applicable, unless expressly stated otherwise. Each Work Package Amendment has an independent Baseline Work Package Schedule.
"Basis of Construction Plan"	The meaning set forth in <u>Exhibit B (Pre-construction Phase Technical Requirements)</u> .

<b>DEFINITIONS</b>	
<b>Term</b>	<b>Meaning</b>
"Betterment"	<p>As related to Utilities, a Betterment is Utility Work which constitutes upgrading of the adjusted or relocated Utility facility or additional Utility Work that is not required by the Project and is made solely for the Utility Owner's benefit and election or solely for the Progressive Design-Builder's benefit and election; however, a betterment does not include an addition or improvement that:</p> <ol style="list-style-type: none"> <li>1. consists of replacement devices or materials that meet standards equivalent to what is being replaced;</li> <li>2. consists of replacement devices or materials that are no longer manufactured;</li> <li>3. is required to comply with existing government codes; or</li> <li>4. is required by Utility Owner's current design practices and provides a direct benefit to the Project.</li> </ol> <p>As related to Third Parties, other than Utilities, a Betterment is generally defined as an upgrading of the Third Party's facility or additional work that is not required by the Project and is made solely for the Third Party's benefit.</p>
"Business Day"	Any day excluding Saturday, Sunday, Federal and State Legal Holidays.
"Certificate of Final Acceptance"	The meaning set forth in <u>Section 18.3</u> ( <i>Certificate of Final Acceptance of the Project</i> ).

<b>DEFINITIONS</b>	
<b>Term</b>	<b>Meaning</b>
"Change of Control"	<p><b>[NTD: amend for JV participants]</b> Any assignment, sale, financing, grant of security interest, transfer of interest, or other transaction of any type or description, including by or through voting securities, asset transfer, contract, merger, acquisition, succession, dissolution, liquidation, or otherwise, that results, directly or indirectly, in a change in possession of the power to direct or control or cause the direction or control of the management of the Progressive Design-Builder or a material aspect of its business.</p> <p>A change in the power to direct, control, or cause the direction or control of the management of any member, partner, or shareholder of the Progressive Design-Builder may constitute a Change of Control of the Progressive Design-Builder if such member possesses the power to direct or control or cause the direction or control of the management of the Progressive Design-Builder.</p> <p>Notwithstanding the foregoing, the following shall not constitute a Change of Control:</p> <ol style="list-style-type: none"> <li>1. a change in possession of the power to direct or control the management of the Progressive Design-Builder or a material aspect of its business due solely to bona fide open market transactions in securities effected on a recognized public stock exchange, including such transactions involving an initial public offering;</li> <li>2. a change in possession of the power to direct or control the management of the Progressive Design-Builder or a material aspect of its business due solely to a bona fide transaction involving securities or beneficial interests in the ultimate parent organization of a member of the Progressive Design-Builder (but not if the member is the ultimate parent organization), unless the transferee in such transaction is at the time of the transaction suspended or debarred or subject to a proceeding to suspend or debar from bidding, proposing or contracting with any federal or State department or agency;</li> <li>3. an upstream reorganization or transfer of direct or indirect interests in the Progressive Design-Builder so long as there occurs no change in the Person with ultimate power to direct or control or cause the direction or control of the management of the Progressive Design-Builder;</li> <li>4. a transfer of equity interests in the Progressive Design-Builder, where the transferring Equity Member and the transferee are under the same ultimate parent organization ownership, management, and control before and after the transfer; or</li> <li>5. the exercise of minority veto or voting rights (whether provided by applicable Law, by the Progressive Design-Builder's organizational documents, or by related member or shareholder agreements or similar agreements) over major business decisions of the Progressive Design-Builder.</li> </ol> <p>For purposes of this definition, a Person shall be deemed to own shares or membership interests in another Person if such Person owns the legal, beneficial, and equitable interest in their relevant shares or membership interest of the other Person.</p>
"Change Order"	A written amendment to certain terms and conditions of the Contract Documents issued in accordance with <u>Section 22</u> ( <i>Change Orders</i> ).



<b>DEFINITIONS</b>	
<b>Term</b>	<b>Meaning</b>
"Claim"	A request by the Progressive Design-Builder for a time extension disputed by the Department, or payment of money or damages arising from work done by or on behalf of the Progressive Design-Builder in connection with the Contract that is disputed by the Department. A Claim will cease to be a Claim upon resolution thereof, including resolution by execution and delivery by the Parties of a Change Order, a Pre-construction Phase Amendment, or Construction Phase Amendment.
"Completion Deadline(s)"	The deadlines for completion of milestones, if any, identified within a Work Package Amendment as "Completion Deadlines" therein, subject to Liquidated Damages.
"Construction Phase"	The Project phase beginning and ending as set forth in <u>Section 2.2</u> ( <i>Construction Phase</i> ) during which all Construction Work will be completed.
"Construction Phase Amendment"	An amendment establishing the commencement of the Construction Phase and satisfying the requirements set forth in <u>Section 2.2.1</u> ( <i>Construction Phase Amendment</i> ).
"Construction Quality Control Manager"	The person identified by the Progressive Design-Builder responsible for performance of construction quality control services, as set forth in the Approved Quality Plan.
"Construction Work"	All Work other than Pre-construction Work.
"Contract"	The meaning set forth in the Recitals.
"Contract Bond"	The approved security described in <u>Section 30</u> ( <i>Payment and Performance Security</i> ), in the form of <u>Exhibit F</u> (Form of Contract Bond), that the Progressive Design-Builder and the Progressive Design-Builder's surety executes, guaranteeing completion of the Contract (performance of Work and payment of all legal debts for the Work).
"Contract Documents"	Means all Exhibits, Amendments, and Change Orders, whether existing initially or created during the progression of the Contract.
"Contract Price"	The total sum of money to be paid to the Progressive Design-Builder under this Contract.
"Cost Reconciliation Meeting"	The meeting identified in <u>Exhibit B</u> ( <i>Pre-construction Phase Technical Requirements</i> ).
"Critical Path"	<p>The sequence of Baseline Work Package Schedule activities that determine the total minimum duration of the Work Package; the precedence of which activities have a total Float of less than or equal to zero.</p> <p>Generally, the Critical Path is the sequence of Baseline Work Package Schedule activities that must be completed on schedule for the Project to be completed on time in accordance with the Completion Deadlines. This is the longest duration path (or chain), in terms of time, of logically connected Construction Work activities on the Baseline Work Package Schedule, updated in accordance with the Contract and, where relevant to time impact analyses, statused based upon Construction Work completed, corrected for any improper logic, improper activity durations, and errors.</p>
"Critical Path Method"	A scheduling method that utilizes the Precedence Diagram Method to calculate each activity's early dates, late dates, Float values, and establishes the Critical Path through the activity network.
"Daily Road User Costs"	The meaning set forth in <u>Section 15.3</u> ( <i>Daily Road User Costs</i> ).
"Day" or "day"	Each and every day shown on the calendar, beginning at 12:01 a.m. and ending at midnight.

<b>DEFINITIONS</b>	
<b>Term</b>	<b>Meaning</b>
"Default Interest Rate"	The rate of interest on judgements rendered by courts of the State of Kansas published pursuant to K.S.A. § 16-204, as such rate changes from time to time.
"Delay Charges"	Liquidated Damages and Daily Road User Costs.
"Department" (or "Secretary" or "KDOT")	The Kansas Department of Transportation, acting directly or through a representative authorized in writing, who is responsible for administrative supervision of the Project, whichever the context requires.
"Department-Caused Delay"	<p>Any of the following events, or the cumulative effect of any such delays as set forth below having resulted in a delay to then-current Critical Path (as of the date of the event):</p> <ol style="list-style-type: none"> <li>1. a Department-Directed Change;</li> <li>2. failure of the Department to obtain (but not to maintain) any Governmental Approvals for which the Department is responsible for obtaining;</li> <li>3. re-evaluation, modification, or supplement to any Department-provided Governmental Approval issued by the Department acting in its capacity as a Governmental Person, where such re-evaluation, modification, or supplement is not caused by any Progressive Design-Builder-Related Entity;</li> <li>4. failure of the Department to provide a response to a complete, compliant Progressive Design-Builder submittal within the time period committed under <u>Exhibit B (Pre-construction Phase Technical Requirements)</u>;</li> <li>5. failure of the Department to provide any required ROW, Utility Easement, or other real property right by the applicable date identified in a Construction Phase Amendment;</li> <li>6. the occurrence of a Department release of Hazardous Materials;</li> <li>7. any material damage to the Project directly caused by the Department that requires additional Construction Work; or</li> <li>8. any other event that the Contract Documents expressly state shall be treated as a Department-Caused Delay; provided that the Progressive Design-Builder has used commercially reasonable efforts to mitigate the subject Department-Caused Delay; provided, further, that the exercise of any right of the Department hereunder, at law, or in equity is not, nor shall be construed to be, a Department-Caused Delay; and provided, further, that any provision that expressly states that such event or circumstance does not constitute a Department-Caused Delay (or a Department-Directed Change, as relates to this definition of Department-Caused Delay), is not, nor shall be construed to be, a Department-Caused Delay.</li> </ol> <p>The Department shall not take into account Float in calculating the duration of such Department-Caused Delay.</p>
"Department-Directed Changes"	<p>Any changes in the Work (including changes in the standards applicable to the Work) that the Department has directed the Progressive Design-Builder to perform as described in <u>Section 22 (Change Orders)</u>, excepting</p> <ol style="list-style-type: none"> <li>1. any provision that expressly states that such event or circumstances does not constitute a Department-Directed Change; and</li> <li>2. those directives or prerogatives expressly reserved to the Department, and (ii) exercise of any right of the Department, in either case, hereunder, at law, or in equity.</li> </ol>
"Department Risk"	A risk identified as a Department Risk on the Risk Register

<b>DEFINITIONS</b>	
<b>Term</b>	<b>Meaning</b>
"Design Documents"	All drawings, specifications, studies, designs, "architectural work" (as such term is defined in the Architectural Works Copyright Protection Act of 1990), reports, calculations and records, at any stage of development or revision necessary for design of the Project in accordance with the Contract Documents, including electronic files thereof.
"Design Quality Assurance Manager"	The person identified by the Progressive Design-Builder responsible for performance of design quality assurance services, as set forth in <u>the Approved Quality Plan</u> .
"Differing Site Conditions"	<p>Subsurface or latent conditions encountered at the exact boring locations identified in the work product resulting from the Pre-construction Work that differ materially from the information provided in the work product resulting from the Pre-construction Work for such locations; or physical conditions of an unusual nature, differing materially from those ordinarily encountered in the area and generally recognized as inherent in the type of work provided for work product resulting from the Pre-construction Work.</p> <p>The term shall specifically excludes the following:</p> <ol style="list-style-type: none"> <li>1. all such conditions of which the Progressive Design-Builder had, or should have had, actual or constructive knowledge as of the effective date of the Construction Phase Amendment;</li> <li>2. conditions that could have been discovered by reasonable investigation prior to the effective date of the Construction Phase Amendment;</li> <li>3. Utility facilities and all conditions arising out of, relating to, or resulting from Utility Work;</li> <li>4. non-contaminated water;</li> <li>5. variations in soil moisture content or groundwater levels from that indicated in the work product resulting from the Pre-construction Work;</li> <li>6. Hazardous Substances;</li> <li>7. Force Majeure Events, including conditions caused by Force Majeure Events; and</li> <li>8. any other such site conditions that would otherwise qualify for other relief expressly stated, under the terms, and subject to the conditions, of the Contract.</li> </ol>

<b>DEFINITIONS</b>	
<b>Term</b>	<b>Meaning</b>
"Dispute"	<p>Any disagreement between the Department and the Progressive Design-Builder arising out of or relating to the Contract Documents, the Work, or the Project. "Disputes" exclude, and the Dispute Resolution Procedures under <u>Section 23.2 (Dispute Resolution)</u> shall not apply to, and the hearing officer or panel shall not have the authority to consider:</p> <ol style="list-style-type: none"> <li>1. claims that are not actionable against the Department by the Progressive Design-Builder;</li> <li>2. claims arising in tort;</li> <li>3. claims relating to the scope or applicability of indemnities provided under the Contract Documents;</li> <li>4. claims relating to matters within the sole discretion of the Department;</li> <li>5. claims for injunctive relief;</li> <li>6. claims against insurance companies;</li> <li>7. claims which relate to a Utility Agreement or Utility Work;</li> <li>8. claims premised upon the Department's exercise of sole discretion, when permitted hereunder; or</li> <li>9. claims premised upon the Department's exercise of rights expressly reserved to it hereunder.</li> </ol>
"Dispute Resolution Procedures"	The meaning set forth in <u>Section 23.2 (Dispute Resolution)</u> .
"Disruption Damages"	The value, in dollars, of the costs of rearranging the Progressive Design-Builder's plan for the Work, following execution of the Construction Phase Amendment or Work Package (for Construction Work), that is not associated with any extension to the Completion Deadlines. Disruption Damages include the value of (a) a reduction in the expected productivity of labor and equipment and (b) a loss of efficiency or momentum, in either case measured in reduced production of units of work within a given period of time.
"Effective Date"	The date of execution of the Contract by the Department.
"Engineer"	A professional engineer licensed in the State of Kansas who is responsible for engineering and administrative supervision of a portion of the Project on behalf of the Progressive Design-Builder, who is either an employee of the Progressive Design-Builder, or a consulting engineer under contract to the Progressive Design-Builder.
"Engineer of Record"	An Engineer responsible for the final design of an element of the Work for the Progressive Design-Builder. The Engineer of Record is responsible to seal and sign the design plans in accordance with the requirements of State Board.
"Extended Force Majeure"	A Force Majeure Event that occurs during performance of the Construction Work before the Substantial Completion Deadline that results in a continuous, uninterrupted delay of 180 days.
"Federal Acquisition Regulation"	The Federal Acquisition Regulation contained in 48 C.F.R. 1.101 <i>et seq.</i> and all related regulations that implement or supplement the FAR.
"Federal Requirements"	All Laws applicable to work financed with federal funds and the provisions required to be included in FHWA-assisted contracts, including the provisions set forth in <u>Exhibit H (State Labor Requirements)</u> .
"Final Acceptance"	Acceptance of the Project as described in <u>Section 18.4 (Notice of Final Acceptance)</u> .

<b>DEFINITIONS</b>	
<b>Term</b>	<b>Meaning</b>
"Final Acceptance Deadline"	[●]/[The date specified in the Pre-Construction Phase Amendment], as may be adjusted under the terms, and subject to the conditions, of the Contract.
"Final Design Documents"	Plans that meet requirements of the RFC Documents and incorporate all completed RFC Documents required by the Project, except for necessary field design changes.
"Final Payment"	The amount of the final, negotiated Application for Final Payment.
"Final Work Packaging Plan"	The meaning set forth in <u>Exhibit B (Pre-construction Phase Technical Requirements)</u> .
"Float"	<p>The amount of time that any given activity or logically connected sequence of activities shown on a Baseline Work Package Schedule may be delayed before it will affect completion of any Work as required to achieve any Completion Deadline.</p> <p>"Float" generally means the calculated difference between early completion times and late completion times for activities shown on a Baseline Work Package Schedule, including any float contained within an activity.</p>
"Force Majeure Event"	<p>Any of the following acts, events, conditions or occurrences to the extent that the same are beyond the Progressive Design-Builder's reasonable control, which could not have been avoided by the exercise of due diligence, and which has an adverse effect on the Progressive Design-Builder's ability to perform its obligations hereunder:</p> <ol style="list-style-type: none"> <li>1. Fire (that causes direct physical damage to the Project);</li> <li>2. Earthquakes 4.0 or higher on the Richter scale and with an epicenter within 100 miles of the Project (that causes direct physical damage to the Project);</li> <li>3. Tornados classified as EF-2 or greater on the Enhanced Fujita Scale by the National Weather Service (that causes direct physical damage to the Project);</li> <li>4. A local, state, or federally mandated quarantine restriction occurring within the Site;</li> <li>5. War, whether foreign or domestic;</li> <li>6. Acts of terrorists or other public enemies;</li> <li>7. National or statewide (i.e., Kansas-wide) work stoppages, work slowdowns, strikes, labor disputes, or other labor disruptions, that in each case has a direct, material, and adverse impact on the Progressive Design-Builder's ability to staff the Work and the Progressive Design-Builder's express obligations of the Contract or to obtain materials, equipment or labor for the Project, unless in any case, caused by or otherwise under the control or influence of the Progressive Design-Builder occurring within the vicinity of the Project; and</li> <li>8. A blockade or freight embargos.</li> </ol>
"Good Faith Efforts"	The meaning given in 49 C.F.R. 26.5, as amended.
"Governmental Approval"	Any approval, authorization, certification, consent, decision, exemption, filing, lease, license, permit, agreement, concession, grant, franchise, registration or ruling, required by or with any Governmental Person in order to design and construct the Project. "Governmental Approvals" include "New Approvals," except where expressly stated otherwise.

<b>DEFINITIONS</b>	
<b>Term</b>	<b>Meaning</b>
"Governmental Person"	Any federal, state, local or foreign government and any political subdivision or any governmental, quasi-governmental, judicial, public or statutory instrumentality, administrative agency, authority, body or entity. The term includes the State of Kansas and agencies and subdivisions thereof, other than the Department, except where the Department is acting in its regulatory, policy, or statutory capacity of the State of Kansas and not exclusively as counterparty under this Contract.
"Hazardous Materials"	Any of the following: <ol style="list-style-type: none"> <li>1. substance, product, waste or other material of any nature whatsoever which is or becomes listed, regulated, or addressed pursuant to any federal, state or local statute, law, ordinance, resolution, code, rule, regulation, order or decree regulating, relating to, or imposing liability or standards of conduct concerning, any hazardous, toxic or dangerous waste, substance or material, as now or at any time hereafter in effect;</li> <li>2. any substance, product, waste or other material of any nature whatsoever which may give rise to liability under any of the above statutes or under any statutory or common law theory based on negligence, trespass, intentional tort, nuisance or strict liability or under any reported decisions of a state or federal court;</li> <li>3. petroleum or crude oil excluding <i>de minimis</i> amounts and excluding petroleum and petroleum products contained within regularly operated motor vehicles;</li> <li>4. asbestos or asbestos-containing materials in structures and or other improvements on or in the Site (other than mineral asbestos naturally occurring in the ground); and</li> <li>5. lead or lead-containing materials in structures and/or other improvements on or in the Site.</li> </ol>
"Hazardous Materials Report"	The hazardous materials initial site assessment produced as part of the Pre-construction Work.
"Indemnified Parties"	The meaning set forth in <u>Section 28.1</u> ( <i>Indemnifications by Progressive Design-Builder</i> ).
"Independent Cost Estimator"	The Person identified by the Department to the Progressive Design-Builder to perform independent cost estimation services.
"Insurance Unavailability"	Either: <ol style="list-style-type: none"> <li>1. any Insurance Policy coverage required under the Contract Documents is completely unavailable from insurers meeting the financial requirements set forth in <u>Section 29.1.1</u> (<i>Qualified Insurers</i>); or</li> <li>2. provision of all such insurance policy coverages has become unavailable at commercially reasonable rates from insurers meeting such financial requirements, as such rates are determined by the Department in its reasonable discretion, it being the Parties' intent that rates at or below 200% of rates established for policies at the Effective Date (or, if not placed, that which the Department may procure) and otherwise at a rate that a reasonable and prudent risk manager for a Person seeking to insure comparable risks would conclude are justified by the risk protection afforded, are "commercially reasonable rates".</li> </ol>

<b>DEFINITIONS</b>	
<b>Term</b>	<b>Meaning</b>
"Intellectual Property"	<p>All current and future legal and/or equitable rights and interests in know-how (including trade secrets and confidential business information that have been recorded in or on any media), patents (including applications), copyrights (including moral rights), trademarks (registered and unregistered), service marks, trade names, trade dress, trade secrets, trade secret rights, designs (registered and unregistered), other design rights, logos, utility models, circuit layouts, plant varieties, database rights, business and domain names (including fictitious business names), inventions (patentable or not), solutions embodied in technology, other intellectual activity, other proprietary information, all analogous rights in other jurisdictions and applications (drafted or pending) of or for any of the foregoing, subsisting in or relating to the Work, the Project, Project design data or other Project data (including testing data, traffic data and Project Data).</p> <p>"Intellectual Property" includes software used in connection with the Project (including software used for management of traffic on the Project), and Source Code and Source Code Documentation. Intellectual Property is distinguished from submittals, notices, and all such materials generated from the physical construction and from the equipment itself, all data, sketches, charts, calculations, drawings, layouts, plans, depictions, specifications, manuals, electronic files, artwork, records, reports, analyses, studies, correspondence, and other documents and materials created or collected under the terms of, or otherwise under the Contract Documents, and other work product and other related materials that disclose Intellectual Property.</p>
"Intellectual Property Rights"	All patents, copyrights, trademarks, service marks, trade secrets and all similar and related intellectual property rights protected under any Law.
"Items of Archeological or Biological Significance"	Any (a) human remains, (b) artifacts, and/or other items of historical, archaeological, paleontological, or geological significance, or (c) any species listed by the United States Fish and Wildlife Service as threatened or endangered pursuant to the Endangered Species Act, as amended, 16 U.S.C. §§ 1531, <i>et seq.</i> , in each case to the extent that the existence of such item was not disclosed in any of the reports produced as part of the Pre-construction Work.
"Key Personnel"	The individual persons identified on <u>Exhibit C</u> ( <i>Progressive Design-Build Team</i> ), subject to revision in accordance with the Contract Documents.
"Key Personnel Firm"	Each Person that employs or contracts with, if the Key Personnel is a sole proprietorship or individual person a Key Personnel that is not the Lead Contractor, Lead Designer, or the Progressive Design-Builder.
"Laws"	All applicable federal, state and local laws, codes, ordinances, rules, regulations, judgments, decrees, directives, guidelines, policy requirements, orders and decrees of any Governmental Person having jurisdiction over the Project or Site, the practices involved in the Project or Site, any Work, or any Utility Work being performed by a Utility Owner. The term "Laws" includes all consolidations, amendments, extension, or replacements, unless otherwise indicated. The term "Laws" does not include Governmental Approvals or tax laws.
"Lead Contractor"	The entity identified on <u>Exhibit C</u> ( <i>Progressive Design-Build Team</i> ), subject to revision in accordance with the Contract Documents.
"Lead Designer"	The entity identified on <u>Exhibit C</u> ( <i>Progressive Design-Build Team</i> ), subject to revision in accordance with the Contract Documents.
"Legal Holiday"	Legal holidays are defined as State Civil Service holidays, and any other day proclaimed by the Governor of the State of Kansas.

<b>DEFINITIONS</b>	
<b>Term</b>	<b>Meaning</b>
"Lien"	Any pledge, lien, security interest, mortgage, deed of trust or other charge or encumbrance or attempt to make such an encumbrance of any kind, or any other type of preferential arrangement (including any agreement to give any of the foregoing), any conditional sale or other title retention agreement, any lease in the nature of a security instrument, and the filing of or agreement to file any financing statement or other instrument intended to perfect a security interest.
"Liquidated Damages"	The charges described in <u>Section 15.2</u> ( <i>Liquidated Damages</i> ).
"Material Sourcing Plan"	The meaning set forth in <u>Exhibit B</u> ( <i>Pre-construction Phase Technical Requirements</i> ).
"MOT Design Manager"	The individual person identified as such in <u>Exhibit C</u> ( <i>Progressive Design-Build Team</i> ).
"New Approval"	Any of the following: <ol style="list-style-type: none"> <li>1. A new Governmental Approval required pursuant to a reevaluation of some or all of the environmental documents and environmental decision documents; and</li> <li>2. A renewal, revision, modification or amendment to one or more of the Governmental Approvals identified as required within the environmental documents and environmental decision documents.</li> </ol>
"Nonconforming Work"	Work performed that does not meet the requirements of the Contract Documents.
"Notice of Final Acceptance"	The notice delivered to the Progressive Design-Builder under <u>Section 18.4</u> ( <i>Notice of Final Acceptance</i> ) stating that final Department acceptance of the Project has occurred.
"Notice of Substantial Completion"	The notice delivered to the Progressive Design-Builder under <u>Section 18.2</u> ( <i>Notice of Substantial Completion of a Work Package</i> ) stating that Substantial Completion of a Work Package has occurred.
"Notice of Termination"	A notice issued by the Department or the Progressive Design-Builder to terminate the Contract.
"Open Book Basis"	Allowing the Department to review all underlying assumptions, information, documents and data associated with the issue in question, including assumptions as to costs of the Work (including extra work), delay costs, changes in cost, composition of equipment spreads, equipment rates (including rental rates), labor rates and benefits, quotes, estimates, proposals, productivity, estimating factors, design and productivity allowance, contingency and indirect costs, risk pricing, discount rates, interest rates, inflation and deflation rates, gross commercial revenues, insurance rates, insurance proceeds, credits and refunds, letter of credit fees, overhead, profit, and other items reasonably required by the Department to satisfy itself as to the reasonableness and accuracy of any amount.
"Owner Intellectual Property"	The meaning set forth in <u>Section 32.7.2</u> ( <i>Intellectual Property</i> ).
"Party or Parties" (whether capitalized, as context may require)	The Department or the Progressive Design-Builder, as context may require. The "Parties" are both the Department and the Progressive Design-Builder and no other Person.



<b>DEFINITIONS</b>	
<b>Term</b>	<b>Meaning</b>
"Permitting & Environment Mitigation Plan"	The meaning set forth in <u>Exhibit B</u> ( <i>Pre-construction Phase Technical Requirements</i> ).
"Person"	Any individual, corporation, company, voluntary association, partnership, trust, unincorporated organization, or Governmental Person, including the Department.
"Pre-construction Phase"	The Project phase beginning and ending as set forth in <u>Section 2.1</u> ( <i>Pre-construction Phase</i> ) during which Pre-construction Work will be performed.
"Pre-Construction Phase Amendment"	An amendment affording additional or modified Pre-construction Work, extending duration or increasing compensation of the Pre-construction Phase
"Pre-construction Phase Compensation"	The meaning set forth in <u>Section 20.1.2</u> ( <i>Pre-construction Phase Compensation</i> ).
"Pre-construction Work"	All Work necessary in connection with the preparation and finalization of the Construction Phase Amendment or any Work Package Amendment, including any such work described in the Pre-Construction Phase Amendment. For clarity, the Pre-construction Work shall not include any Construction Work authorized by a Work Package Amendment.
"Preliminary Design Submittal"	The meaning set forth in <u>Exhibit B</u> ( <i>Pre-construction Phase Technical Requirements</i> ).
"Preliminary Work Packaging Plan"	The meaning set forth in <u>Exhibit B</u> ( <i>Pre-construction Phase Technical Requirements</i> ).
"Progress Report"	A report on progress of the Construction Work, in form and substance as set forth in the Construction Phase Amendment or Work Package Amendment.
"Progressive Design-Builder"	The meaning set forth in the Recitals.
"Progressive Design-Builder Default"	A Default as described in <u>Section 25.1.1</u> ( <i>Events of Breach and Default</i> ), following notice and opportunity to cure to the extent permitted by <u>Section 25.1.2</u> ( <i>Right to Cure</i> ) and issuance by the Department of notice that a Progressive Design-Builder Default has occurred.
"Progressive Design-Builder-Related Entities"	Progressive Design-Builder, the Lead Contractor, Lead Designer, each Key Personnel Firm, Subcontractors, and each of their respective employees, agents and officers, and all other Persons for whom Progressive Design-Builder may be legally or contractually responsible.
"Project"	De Soto Local Roadway Improvements Project as identified in the recitals to this Contract and as further described by the Contract Documents.
"Project Controls Manager"	The individual person identified as such in <u>Exhibit C</u> ( <i>Progressive Design-Build Team</i> ).
"Project Director"	[•].
"Project Management Plan"	The project management plan developed by the Progressive Design-Builder as part of the Pre-construction Work and Approved by the Department.
"Project Manager"	The individual person identified as such in <u>Exhibit C</u> ( <i>Progressive Design-Build Team</i> ).
"Proposal"	Those documents constituting the Progressive Design-Builder's proposal in response to the RFP, including any supplements to proposals as may have been requested by the Department.
"Proposal Commitment"	The proposal forms, executed by or on behalf of the Progressive Design-Builder, attached at <u>Exhibit K</u> ( <i>Proposal Commitments</i> ).

<b>DEFINITIONS</b>	
<b>Term</b>	<b>Meaning</b>
"Proprietary Intellectual Property"	Intellectual Property created, used, applied or reduced to practice in connection with the Project or the Work that derives commercial value from its protection as a trade secret under applicable Law or from its protection under patent or copyright Laws.
"Provisional Risk"	A risk identified as a Provisional Risk in the Risk Register.
"Provisional Sum"	A fixed sum for a specific line item of Work that is included as an allowance amount in a Work Package GMP upon agreement by the Progressive Design-Builder and the Department. Provisional Sums may be used in instances when the actual price or quantity for such item of work is unknown at the time of agreement on a Work Package GMP. Where agreed as reflected in the Risk Register, Provisional Sums may include a designation of unit pricing and the estimated number of units making up the Provisional Sums.
"Punch List"	The list of Work items with respect to the Project which remain to be completed after achievement of Substantial Completion, generally limited to minor incidental items of Work necessary to correct imperfections that have no adverse effect on the safety or operability of the Project and will not require lane closures to complete.
"Qualified Surety"	A Surety having an A.M. Best rating of A-, VII or better, listed in the current United States Department of the Treasury, Fiscal Service, Department Circular 570, <i>Companies Holding Certificates of Authority as Acceptable Sureties on Federal Bonds and as Acceptable Reinsuring Companies</i>
"Quality Assurance"	All planned and systematic actions by the Progressive Design-Builder necessary to provide confidence and to certify to the Secretary that all Work complies with the requirements of the Contract Documents.
"Quality Control"	The activities performed by the Progressive Design-Builder, designer, producer or manufacturer to ensure and document that a product meets the requirements of the Contract Documents.
"Quality Control Manager"	The individual employed by the Progressive Design-Builder responsible for the overall Quality Control of the Work.
"Quality Plan"	The quality plan developed by the Progressive Design-Builder as part of the Pre-construction Work and Approved by the Department.
"Record Drawings"	Documents that depict the final completed Project, all changes from RFC Documents, and all other relevant data, including any operations and maintenance manuals for mechanical and electrical systems.
"Redeploy" and its variants	Resequencing, reallocating or redeploying forces to other portions of the Work or Site or to other activities unrelated to the Work
"Reference Information Documents" or "RIDs"	The collection of information, data, documents and other materials that the Department has provided to the Progressive Design-Builder, while a proposer during the procurement for the Contract, for general or reference information only.
"Released for Construction Documents" or "RFC Documents"	With respect to any Work Package, all drawings, specifications, revisions, and any other items necessary to construct the Construction Work, signed and sealed by the Engineer of Record.
"Relief Event"	The meaning set forth in <u>Section 21.1.1</u> ( <i>Relief Event Defined</i> ).
"Relief Event Notice"	The meaning set forth in <u>Section 21.2.1</u> ( <i>Relief Event Notice</i> ).
"Relocation" or "Relocate" and their variants	As related to Utilities, each Removal, transfer of location, abandonment and/or protection of existing Utilities as necessary to ensure their continued safe operation and structural integrity (including provision of temporary services as necessary) of any and all Utilities that is necessary or advisable in order to accommodate or permit construction of the Project.

<b>DEFINITIONS</b>	
<b>Term</b>	<b>Meaning</b>
"Remediate" and variants "	Assessment, sampling, containment, remediation and/or off-Site disposal of Hazardous Substances on the Site in accordance with all applicable requirements of Laws and Governmental Approvals regarding the identification, handling, generation, treatment, storage, transfer, and disposal of Hazardous Substances.
"Removal"	Work necessary to remove any Utilities for which leaving the Utilities in-place is not feasible or not permitted, or which the Progressive Design-Builder otherwise proposes to be removed in order to accommodate or permit construction of the Project, regardless of whether or not replacements for such Utilities are being installed in other locations.
"Request for Change Order" or "RCO"	A Progressive Design-Builder initiated request for a change order made pursuant to <u>Section 21 (Relief &amp; Compensation)</u> and <u>Section 22 (Change Orders)</u> .
"Request for Change Proposal"	A proposal issued by the Department under <u>Section 22 (Change Orders)</u> .
"Request for Construction Payment"	A request made by Progressive Design-Builder for payment pursuant to <u>Section 20.2.2.1 (Request for Construction Payment)</u> .
"Review and Comment"	The meaning set forth in <u>Section 3.3 (Review and Comment)</u> .
"Revised Baseline Work Package Schedule"	The adjusted Baseline Work Package Schedule (or prior Revised Baseline Work Package Schedule), further to time impact analyses when the Progressive Design-Builder is granted an extension in time under the Contract Documents, or the Parties otherwise agree in writing. References to the "Baseline Work Package Schedule" mean to the "Revised Baseline Work Package Schedule" if, pursuant to the Contract, the Baseline Work Package Schedule was revised.
"Right of Way"	Land, property or interest (including easements) held by the State, via the Department.
"Risk Register"	The meaning set forth in <u>Section 2.4 (Risk Register)</u> .
"Risk Register Event"	The meaning set forth in <u>Section 2.4 (Risk Register)</u> .
"Risk Workshop"	The meetings held to develop and update the Risk Register, as more fully set forth in <u>Exhibit B (Pre-construction Phase Technical Requirements)</u> .
"Roadway Design Manager"	The individual person identified as such in <u>Exhibit C (Progressive Design-Build Team)</u> .
"ROW Plans"	The meaning set forth in <u>Section 9.1.2 (Obligation to Provide Access to Right of Way)</u> .
"Safety Plan"	The safety plan developed by the Progressive Design-Builder as part of the Pre-construction Work and Approved by the Department.
"Schedule Coordination Plan"	The schedule coordination plan identified in <u>Exhibit B (Pre-construction Phase Technical Requirements)</u> .
"Schedule of Values"	A detailed schedule apportioning a Work Package GMP among payment activities associated with the Construction Work of the applicable Work Package Amendment and any Risk Register Event (in the latter case, as may be allocable).
"Schedule Update"	A schedule submittal provided by the Progressive Design-Builder after a Baseline Work Package Schedule is Approved, generally describing and demonstrating progress in the Construction Work since the last Schedule Update (or for the first, since the Approved Baseline Work Package Schedule).

<b>DEFINITIONS</b>	
<b>Term</b>	<b>Meaning</b>
"Secretary" (or the "Department" or "KDOT")	Department.
"Service Line"	As related to Utilities, a Utility line, the function of which is to directly connect the improvements on an individual property to another Utility line located off such property, which other Utility line connects more than one such individual line to a larger system. (The term "Service Line" also includes any Utility on public or private property that services structures located on such property.)
"Shared Provisional Sum"	The meaning set forth in <u>Section 2.4.2</u> ( <i>Provisional Risks</i> ).
"Site"	The parcels of ROW identified on the ROW Plans or upon which the Project is to be constructed and installed as well as all other areas in the vicinity used by the Progressive Design-Builder for construction Work.
"Source Code" and "Source Code Documentation"	<p>Software written in programming languages, such as C and Fortran, including all comments and procedural code, such as job control language statements, in a form intelligible to trained programmers and capable of being translated into object or machine readable code for operation on computer equipment through assembly or compiling, and accompanied by documentation, including flow charts, schematics, statements of principles of operations, architectural standards, and commentary, explanations and instructions for compiling, describing the data flows, data structures, and control logic of the software in sufficient detail to enable a trained programmer through study of such documentation to maintain and/or modify the software without undue experimentation.</p> <p>"Source Code and Source Code Documentation" also include all modifications, revisions, additions, substitutions, replacements, updates, upgrades and corrections made to the foregoing items.</p>
"Standards of the Industry"	<p>Practices, procedures, methods, and standards that:</p> <ol style="list-style-type: none"> <li>1. are consistent with current industry practices established for, or employed by, leading participants in the design, construction, operation, and maintenance industries;</li> <li>2. comply with applicable laws and applicable industry underwriters' and the fire and life safety codes and standards; and</li> <li>3. promote reliability, efficiency, safety and security.</li> </ol> <p>Standards of the Industry include taking reasonable steps to assure that sufficient personnel are employed and available to perform the Work and that such personnel are adequately skilled, experienced, and trained to design, construct, install, operate, and maintain the Work properly and efficiently, and that appropriate coordination, monitoring, and testing is performed to assure that all elements of the Work are designed, constructed, and installed so as to function as required by the Contract Documents.</p>
"State"	The State of Kansas.
"State Board"	The Kansas State Board of Technical Professions, which generally has the responsibility for the licensure and qualifications obligations within the K.S.A. relating to, among other things, Engineers in the State.
"State Transportation Engineer"	Burt Morey, Deputy Secretary, State Transportation Engineer, or his successor.
"Structures Design Manager"	The individual person identified as such in <u>Exhibit C</u> ( <i>Progressive Design-Build Team</i> ).

<b>DEFINITIONS</b>	
<b>Term</b>	<b>Meaning</b>
"Subcontract"	Any subcontract to perform any part of the Work or provide any materials, equipment or supplies for any part of the Work between the Progressive Design-Builder and a Subcontractor, or between any Subcontractor and its lower tier Subcontractor, at any tier, including in each case as such subcontract may be amended or supplemented.
"Subcontracting Plan"	The meaning set forth in <u>Exhibit B (Pre-construction Phase Technical Requirements)</u> .
"Subcontractor"	Any Person with whom the Progressive Design-Builder has entered into any Subcontract, and any other Person with whom any Subcontractor has further subcontracted any part of the Work, at any tier.
"Subcontractor Demand"	A claim as described in <u>Section 23.2.3 (Additional Requirements for Subcontractor Demands)</u> .
"Substantial Completion"	Achievement of all Work with respect to a Work Package as described in <u>Section 18.1 (Substantial Completion of a Work Package)</u>
"Supplier"	Any Person other than employees of the Progressive Design-Builder not performing work at the Site that supplies machinery, equipment, materials or systems to the Progressive Design-Builder or any Subcontractor in connection with the performance of the Work; Persons who merely transport, pick up, deliver, or carry materials, personnel, parts, or equipment or any other items or persons to or from the Site shall not be deemed to be performing Work at the Site.
"Surety"	An individual, partnership, corporation, or other legal entity (not the Progressive Design-Builder), licensed in the State of Kansas, executing a bond provided by the Progressive Design-Builder.
"Term"	The meaning set forth in <u>Section 1.2 (Term)</u> .
"Third Party"	Any Governmental Person, railroad, property owner or other third party (in each case, not a Utility Owner) having regulatory jurisdiction or property rights over or in any aspect of the Project, Work, or the Right of Way.
"Third-Party Agreement"	An agreement between the Department and any Third Party related to the Project.
"Total Construction GMP"	The meaning set forth in <u>Section 20.2 (Total Construction GMP)</u> .
"Transportation Management Plan"	The meaning set forth in <u>Exhibit B (Pre-construction Phase Technical Requirements)</u> .
"Unidentified Utility"	Any existing underground Utility, other than a Service Line, not identified in the Construction Phase Amendment or Work Package Amendment.
"United States Department of Transportation" or "USDOT"	United States Department of Transportation or any executive department or agency thereof, or as the context may require, the USDOT Secretary or other individual person who may at the time be acting in the capacity of Secretary, or an authorized representative or any other person otherwise authorized to perform the functions to be performed hereunder by USDOT.

<b>DEFINITIONS</b>	
<b>Term</b>	<b>Meaning</b>
"Utility" or "utility"	A privately, publicly or cooperatively owned line, facility and/or system for producing, transmitting or distributing communications, power, cable television, electricity, light, heat, gas, oil, crude products, water, steam, waste, and other products that directly or indirectly serve the public. The necessary appurtenances to each utility facility shall be considered part of such utility. Without limitation, any Service Line connecting directly to a utility shall be considered an appurtenance to that utility, regardless of the ownership of such Service Line. The term "Utility" shall specifically exclude privately owned irrigation facilities, existing storm water facilities, traffic signals and street lights, without regard to whether or not such items are included in the definition of "Utility" in the Utility Agreements.
"Utility and Third-Party Coordination Plan"	The meaning set forth in <u>Exhibit B</u> ( <i>Pre-construction Phase Technical Requirements</i> ).
"Utility Agreement"	A "Master Utility Agreement" and/or a "Supplemental Agreement", and other agreements entered into with Utility Owners pursuant to the Utility and Third-Party Coordination Plan.
"Utility Coordinator"	The individual person identified as such in <u>Exhibit C</u> ( <i>Progressive Design-Build Team</i> ).
"Utility Easements"	All permanent easements and/or other permanent interests in real property owned by Utility Owners in connection with existing Utilities.
"Utility Owner"	The owner or operator of any Utility.
"Utility Owner Delay"	Any failure by a Utility Owner to meet any time parameters for performance by such Utility Owner which are set forth in the applicable Utility Agreement, which unexcused failure by the Utility Owner delays a Completion Deadline.
"Utility Work"	The work associated with Removal, Relocation, and protection of existing Utilities, including the design, construction, installation, manufacture, supply, testing and inspection, adjustments (including manholes and valves), and otherwise required by the Contract Documents, including all labor, materials, equipment, supplies, utilities and subcontracted services provided or to be provided by the Progressive Design-Builder and/or the Utility Owners, and including any Betterments added to the Work pursuant to <u>Section 10</u> ( <i>Utility Work</i> ) of this Contract or to a Supplemental Agreement.
"Warranty"	Any warranty made by the Progressive Design-Builder in <u>Section 31.1</u> ( <i>Warranties by Progressive Design-Builder</i> ).
"Warranty Period"	The period(s) described in <u>Section 31.1.2</u> ( <i>Warranty Period</i> ).
"Work"	Depending upon the placement and context of its use, Work shall mean one or more of the Pre-construction Work, Construction Work, or all or any combination of the foregoing. In general, Work shall include, in totality and in each of the Pre-constructing Phase, and Construction Phase, as applicable, all duties, services, and items to be furnished and provided by Progressive Design-Builder as required by the Contract Documents. In certain cases the term is also used to mean the products of the Work.
"Work Package"	The meaning set forth in <u>Section 2.2.2</u> ( <i>Work Package Amendments</i> ).
"Work Package Amendment"	An amendment establishing the commencement of a Work Package and satisfying the requirements set forth in <u>Section 2.2.2</u> ( <i>Work Package Amendment</i> ).
"Work Package GMP"	The maximum amount of compensation identified in any Work Package Amendment.

## EXHIBIT B: PRE-CONSTRUCTION PHASE TECHNICAL REQUIREMENTS

### 1 PROJECT DESCRIPTION

The Project is located generally along the existing footprint of 103rd Street between Evening Star Road and the Lexington Avenue/K-10 interchange and includes approximately one mile of the section on Main Avenue from 103rd Street south to the proposed Panasonic Energy Company electric vehicle battery manufacturing facility. The roadway is currently a two-lane asphalt roadway, and the Project will upgrade the roadway to approximately 4.5 miles of new, divided 4-lane roadway with curb and gutter as well as sidewalks, on-street bike lanes, and a shared-use path. Additionally, three roundabouts are currently being evaluated at Evening Star Road, Edgerton Road, and Main Avenue.

KDOT has initiated planning and preliminary engineering activities, including environmental document preparation, as more fully described in Section 3.3 (*KDOT Project Development Activities*).

### 2 MEETINGS

Within 21 Days following KDOT's authorization of the Pre-construction Phase, KDOT will coordinate a kickoff meeting with the Progressive Design-Builder, Key Personnel, major Subcontractors, Lead Contractor, Lead Designer, and the Independent Cost Estimator (ICE). Key members of the Progressive Design-Builder, including all Key Personnel, shall attend and participate in this meeting.

The Kickoff Meeting is intended to develop a common understanding of purpose, assumptions, and outcomes for the Project. The following is a list of items to discuss during the meeting:

1. Review of existing design-related information;
2. Identification of value engineering ideas;
3. Review of the Project Schedule;
4. Identification of anticipated permits and third-party agreements;
5. Risk assessment and characterization of all baseline Project risks;
6. Review and discussion of the current Project Risk Register; and
7. Discussion of communication and collaboration processes among all parties, including KDOT, Progressive Design-Builder, and ICE.

The Progressive Design-Builder shall participate in various meetings and workshops as described in Table 1 (*Pre-Construction Phase Meetings*)

**Table 1: Pre-Construction Phase Meetings**

<i>Meeting</i>	<i>Description</i>	<i>Frequency</i>
<b>Pre-construction Phase Kickoff Meeting</b>	See this <u>Section 2</u> .	One-time

<b>Meeting</b>	<b>Description</b>	<b>Frequency</b>
<b>Project Status Meeting</b>	Project status meetings shall address general status of the Work in detail, progress made over the prior week, Work planned for the forthcoming two weeks, and all issues with the potential to cause delays or problems and their estimated effect on the Project Schedule. Key Personnel or their designees shall attend Project status meetings such that each management function is represented in every meeting.	Weekly
<b>Design Review Meetings</b>	Design review meetings are intended to allow the Department to stay abreast of Project design status and provide informal opportunities for the Progressive Design-Builder to interact with the Department as its design progresses.	Weekly
<b>Task Force Meetings</b>	Separate task force meetings for Utilities and MOT shall be held.	Weekly
<b>Risk Management &amp; Project Schedule Meetings</b>	Meetings focused on Project Schedule status and consolidating identified risks from other meetings and incorporating this information into the Risk Register.	Monthly
<b>Executive Team Meeting</b>	Leadership meeting to address status of the work and major risks with potential to cause delays or problems and their estimated effect on the Project Schedule.	Quarterly

### **3 DESIGN AND PROJECT DEVELOPMENT CONSIDERATIONS**

#### **3.1 Progressive Design-Builder Directory and Organization**

Following execution of the Contract, the Progressive Design-Builder will submit a directory containing the contact information for all Key Personnel and other appropriate discipline leadership personnel identified by function. The directory will include the following information for each contact:

1. Title/role for the Project;
2. Area of responsibility;
3. E-mail address;
4. Mobile telephone number; and
5. Office information:
  - a. Location/address; and
  - b. Main office telephone number.

The Progressive Design-Builder will also submit an organization chart in electronic format that includes, at a minimum, personnel responsible for the following positions and/or functions:

1. Key Personnel;
2. All Quality Control positions;
3. Environmental compliance;
4. Subcontracts and procurement;
5. Design for each discipline;



6. Coordination lead for each Third Party;
7. Safety positions; and
8. Project controls.

The directory and the organization shall be provided in a location accessible to KDOT (e.g., the document management system). The Progressive Design-Builder will be responsible for management of the directory and the organization chart throughout the course of the Project.

### 3.2 Standards

The Progressive Design-Builder shall complete Work in accordance with the requirements of the standards in Table 2 (*Standards*). Modifications to the standards may be requested for:

1. any portion of the Project where the design does not meet the minimum values or ranges established in the standards provided in Table 2; and
2. any portion of the Project where the design criteria does not meet minimum values or ranges established for the Project as set by the 10 controlling criteria as defined by "AASHTO – A Policy on Geometric Design of Highway and Streets" (i.e., Design Exceptions). KDOT will coordinate FHWA approval of these elements.

The Progressive Design-Builder shall submit requests for modification as they become aware of a need to deviate from the standards described above. Approval is required prior to incorporating the deviation in the Preliminary Design Submittal or the Work Package GMP Design Submittal as described in Section 3.5 (*Design Submittals & Milestones*). The Progressive Design-Builder shall incorporate documentation of Approval into the Work Package Amendments.

The Progressive Design-Builder shall also document any portion of the Project where design criteria does not meet minimum suggested or permissive values or ranges established in the standards provided in Table 2. The Progressive Design-Builder shall include the documentation for these items in the Preliminary Design Submittal and the Work Package GMP Design Submittal described in Section 3.5 (*Design Submittals & Milestones*). The Progressive Design-Builder shall also incorporate the documentation in the Work Package Amendments.

Additional documents may be added to Table 2 during the Pre-Construction Phase prior to execution of Work Package Amendments.

**Table 2: Standards**

<b>Author or Agency</b>	<b>Title</b>
KDOT	2015 Standard Specifications for State Road and Bridge Construction, excluding Division 100 of the Standard Specifications, unless specifically identified in the Contract Documents.
KDOT	Special Provisions to the Standard Specifications, Edition 2015
KDOT	Standard Drawings for State Road and Bridge Construction
KDOT	Design Manual Volume I (Part A & B) Road Section, Revised May 2014 ("Road Manual")
KDOT	Design Manual Volume I (Part C) Road Section: Elements of Drainage & Culvert Design, December 2016 Edition ("Drainage Manual")
KDOT	Design Manual Volume II Bureau of Right of Way, 2020 Edition ("Survey Manual")
KDOT	Design Manual, Volume III Bridge Section (LRFD), December 2021 Edition ("LRFD Bridge Design Manual")

<b>Author or Agency</b>	<b>Title</b>
KDOT	Design Manual, Volume III Bridge Section (LRFD), Chapter 15 Load Rating, January 2016 Edition ("LRFD Bridge Design Manual")
KDOT	Design Manual Volume III Bridge Section U.S. Customary Units (LFD), January 2013 Revision ("LFD Bridge Design Manual")
KDOT	Geotechnical Manual Volume I and Volume II, 2007
KDOT	Construction Manual
KDOT	Kansas Work Zone Safety and Mobility Processes and Procedures
KDOT	Flagger Handbook, Revised in January 2020
KDOT	Policy on The Use of Zinc Coated and Aluminum Coated Corrugated Steel Pipe and Polyethylene and Polyvinyl Chloride Pipe, May 2007
KDOT	Utility Accommodation Policy, 2007, Revised May 2020
KDOT	Access Management Policy, January 2013 (including Errata)
KDOT	Standard Operating Manual (regarding access breaks), December 2005
KDOT	Stormwater Control Measure Manual, Version 1
ATSSA	Quality Guidelines for Temporary Traffic Control Devices and Features
EPA	Developing Your Stormwater Pollution Prevention Plan: A Guide for Construction Sites, May 2007
FHWA	Policy on Access to the Interstate System, May 2017
FHWA	Traffic Analysis Toolbox Volume III: Guidelines for Applying Traffic Microsimulation Modeling Software, April 2019
FHWA	2009 Manual on Uniform Traffic Control Devices with Revision Numbers 1 and 2 incorporated, May 2012
FHWA	Standard Highway Signs, 2004 Edition, and Standard Highway Signs, 2012 Supplement to the 2004 Edition
FHWA	Bridge Scour and Stream Instability Countermeasures (HEC-23), September 2009
FHWA	Evaluating Scour at Bridges (HEC-18), April 2012
FHWA	Design of Riprap Revetment (HEC-11)
FHWA	Hydraulic Design of Energy Dissipaters for Culverts and Channels (HEC-14), July 2006
FHWA	Hydraulic Design of Highway Culvert (HDS-5), April, 2012
FHWA	Stream Stability at Highway Structures (HEC-20), April 2012
FHWA	Urban Drainage Design Manual (HEC-22), September 2009 with 2013 Errata
FHWA	Geotechnical Site Characterization, GEC 5 (FHWA-NHI-16-072)
FHWA	Drilled Shafts: Construction Procedures and LRFD Design Methods, GEC 10, 2018
FHWA	Design and Analysis of Laterally Loaded Deep Foundations, GEC 9, 2018 (FHWA-NHI-18-031)
FHWA	Design and Construction of Mechanically Stabilized Earth Walls and Reinforced Slopes, GEC 11, 2009 (FHWA-NHI-10-024, FHWA-NHI-10-025)
FHWA	Design and Construction of Continuous Flight Auger Piles, GEC 8, 2007 (FHWA-HIF-07-039)
FHWA	Design and Construction of Driven Pile Foundations, GEC 12, July 2016 (FHWA-NHI-16-009, FHWA-NHI-15-010)
FHWA	Soils and Foundations, 2006 (FHWA-NHI-06-088, FHWA-NHI-06-089)
FHWA	Micropile Design and Construction, 2005 (FHWA-NHI-05-039)
FHWA	Soil Nail Walls, GEC 7, 2015 (FHWA-NHI-14-007)
Post-Tensioning Institute	Recommendations for Prestressed Rock and Soil Anchors, 2004 (DC35.1-14)

<b>Author or Agency</b>	<b>Title</b>
FHWA	Shallow Foundations, GEC 6, 2002 (FHWA-IF-02-054)
FHWA	Ground Improvement Technical Summaries, 1998 (FHWA-SA-98-086R)
FHWA	Ground Anchors and Anchored Systems, GEC 4, 1999 (FHWA-IF-99-015)
FHWA	Prefabricated Vertical Drains, 1986 (FHWA-RD-86-168)
FHWA	The Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, as amended by Public Law
AASHTO	A Policy on Design Standards Interstate System, May 2016
AASHTO	A Policy on Geometric Design of Highways and Streets, 2018, 7 <sup>th</sup> Edition with October 2019 Errata
AASHTO	Roadside Design Guide, 4 <sup>th</sup> Edition with July 2015 Errata
AASHTO	Manual for Assessing Safety Hardware, 2016
AASHTO	Guide for the Development of Bicycle Facilities, 4 <sup>th</sup> Edition with February 2017 Errata
AASHTO	Construction Handbook for Bridge Temporary Works, 2 <sup>nd</sup> Edition, 2017
AASHTO	Guide Design Specifications for Bridge Temporary Works, 2 <sup>nd</sup> Edition, with 2020 Interim Revisions
AASHTO	LRFD Bridge Construction Specifications, 4 <sup>th</sup> Edition, with 2020 Interim Revisions
AASHTO	LRFD Bridge Design Specifications, Customary U.S. Units, 9 <sup>th</sup> Edition, 2020
AASHTO	Manual for Bridge Evaluation, 3 <sup>rd</sup> Edition, with 2020 Interim Revisions
AASHTO	Standard Specifications for Highway Bridges, 17 <sup>th</sup> Edition
AASHTO	LRFD Specifications for Structural Supports for Highway Signs, Luminaires, and Traffic Signals, 1 <sup>st</sup> Edition, with 2017-2020 Interim Revisions
AASHTO	Highway Safety Manual, 1 <sup>st</sup> Edition, with 2014 Supplement and 2016 Errata
AASHTO/AWS	D1.5M/D1.5:2020, Bridge Welding Code, 8 <sup>th</sup> Edition
AASHTO	Roadway Lighting Design Guide, 7 <sup>th</sup> Edition 2018
US Access Board	Proposed Accessibility Guidelines for Pedestrian Facilities in the Public Right-of-Way (July 2011)
IEEE	National Electric Safety Code (ANSI C2), 2017
ANSI/IES	Recommended Practice for Design and Maintenance of Roadway and Parking Facility Lighting, RP-8-18
ANSI/TIA	Generic Telecommunications Cabling for Customer Premises (ANSI/TIA-568.0), March 2020
ANSI/TIA	Commercial Building Telecommunications Cabling (ANSI/TIA-568.1-E), March 2020
ANSI/TIA	Optical Fiber Cabling Components Standards (ANSI/TIA-568.3-D), October 2016
ITE	Manual of Traffic Signal Design, 2 <sup>nd</sup> Edition
NEMA	National Electrical Manufacturers Association Standards
NFPA	NFPA 502: Standard for Road Tunnels, Bridges, and Other Limited Access Highways, 2020
NFPA	NFPA 70: National Electrical Code (NEC), 2020
NFPA	NFPA 780: Standard for the Installation of Lightning Protection Systems, 2020 Edition
USDA	USDA RUS Bulletin 1751F-640 Design of Buried Plant, Physical Considerations, 1995
USDA	USDA RUS Bulletin 1751F-802 Electrical Protection Grounding Fundamentals, 1994

<b>Author or Agency</b>	<b>Title</b>
IEEE	3003.1-2019 Recommended Practice for System Grounding of Industrial and Commercial Power Systems
TRB	Highway Capacity Manual, 6 <sup>th</sup> Edition 2016
TRB	NCHRP Report 553, Crashworthy Work-Zone Traffic Control Devices

### 3.3 KDOT Project Development Activities

KDOT has initiated planning activities and environmental document preparation under State environmental regulations. KDOT will retain environmental decision-making responsibilities. KDOT anticipates it will obtain environmental approvals for the Project during the first quarter of calendar year 2023.

KDOT has performed, or may perform, additional activities to varying extents related to Project development. Some activities may be performed by KDOT during the Pre-Construction Phase as described in Table 3 (KDOT Activities).

**Table 3: KDOT Activities**

<b>KDOT Pre-Construction Phase Activities</b>	<b>Additional Information</b>
Retain the services of an ICE.	No Progressive Design-Builder support required.
Obtain survey and mapping information.	Limited supplement by Progressive Design-Builder anticipated.
Initiate development of Utility Agreements.	Progressive Design-Builder will provide feedback and review.
KDOT will support the acquisition of permits as necessary.	Progressive Design-Builder will acquire the following permits, including but not limited to: <ul style="list-style-type: none"> <li>• Kansas Department of Health &amp; Environment NOI Permit</li> <li>• City Right-of-Way Permit</li> <li>• City Floodplain Development Permit</li> <li>• Corps of Engineers 404 Permit</li> <li>• Kansas Department of Agriculture Floodplain Permit</li> </ul>
Initiate development of other agreements (e.g., third-party agreements).	Progressive Design-Builder will provide feedback and review.
Initiate preliminary subsurface utility engineering.	Progressive Design-Builder will review and supplement subsurface utility engineering efforts.
Make available existing geotechnical information.	No Progressive Design-Builder support required.
Initiate subsurface geotechnical investigations for portions of the Project.	Limited initial investigations by KDOT. Progressive Design-Builder to supplement.
Conduct ROW acquisition activities.	KDOT will acquire ROW. Progressive Design-Builder will support development of ROW limits and ROW plans.
Engage in public involvement and outreach activities.	Progressive Design-Builder to support KDOT and perform activities as requested by KDOT.

### 3.4 Progressive Design-Builder Project Development Activities

The Progressive Design-Builder's obligations will generally include all efforts, except for those responsibilities retained by KDOT, required to develop, design, and construct the Project as

authorized by KDOT in accordance with the requirements of the Contract. Work under the Contract will proceed as authorized by amendments issued by KDOT as further described in the Contract Documents.

The Progressive Design-Builder shall collaborate with KDOT and others contracted by KDOT. The Progressive Design-Builder shall be prepared to:

1. Support KDOT's environmental-related responsibilities during the Pre-construction Phase. These activities will be limited generally to producing studies, providing information relevant to the environmental process, or, more generally, providing viewpoints of key Project-related issues;
2. Support KDOT in the advancement of the activities described in Table 3 (KDOT Activities), upon request; and
3. Advance the following Project development activities during the Pre-Construction Phase:
  - a. Survey and mapping;
  - b. Site investigations;
  - c. Roadway design;
  - d. Bridge and other structures (e.g., retaining walls; noise walls, structures related to signs, lighting, and ITS) design;
  - e. Hydrology/hydraulic design;
  - f. Stormwater design;
  - g. Geotechnical investigations, studies, and design;
  - h. Traffic analyses;
  - i. Traffic control design (including signing and pavement marking);
  - j. Maintenance of traffic design;
  - k. ITS design;
  - l. Lighting design;
  - m. Bicycle and pedestrian facilities;
  - n. Third-party coordination;
  - o. Utility coordination; and
  - p. ROW coordination.

In addition to the general Project development and design-related activities described in Section 3.3 (KDOT Project Development Activities), the Progressive Design-Builder shall be aware of and collaborate with KDOT regarding the following Project-specific areas of importance for this Project during the Pre-Construction Phase:

1. Efforts to minimize impacts related to:
  - a. ROW;
  - b. Utilities; and
  - c. Natural environment;

2. Maintenance of traffic during construction;
3. Coordination with regulatory agencies and other third parties regarding permits necessary to construct the Project;
4. Relocation of major Utilities;
5. Impact of MS4 requirements and features needed to meet MS4 requirements; and
6. Construction cost estimates.

### 3.5 Design Submittals & Milestones

The Progressive Design-Builder shall submit design packages to KDOT as described in Table 4 (Design Submittals).

**Table 4: Design Submittals**

<b>Submittal</b>	<b>Description</b>	<b>KDOT Action</b>
<b>Preliminary Design Submittal</b>	Approximately 30 percent complete design. Includes plans and reports that capture all major items, elements, and portions of the Work specific to the design package to confirm sufficiency of the approved environmental footprint and right of way limits. Includes documentation for any deviations of design standards as described in <u>Section 3.2 (Standards)</u> .	Review and Comment
<b>Work Package GMP Design Submittal</b>	Approximately 60-75 percent complete design. Includes plans, specifications, and reports that capture all major items, elements, and portions of the Work specific to the design package such that the Progressive Design-Builder can demonstrate a comprehensive understanding of the Project. Includes documentation for any deviations of design standards as described in <u>Section 3.2 (Standards)</u> .	Approval
<b>RFC Documents</b>	100 percent complete design. Includes plans, specifications, and reports for each respective element and discipline of the design package.	Review and Comment
<b>Final Design Documents</b>	Plans that meet requirements of the RFC Documents and incorporate all completed RFC Documents required by the Project, except for necessary field design changes.	Review and Comment
<b>As-Built Documents</b>	Plans that meet the requirements of the RFC Documents and reflect the actual condition of the final constructed Work and incorporate all as-built survey reports, including incorporation of all field design changes.	Review and Comment

### 3.6 Transportation Management Plan

The Progressive Design-Builder shall develop a Transportation Management Plan (TMP) during the Pre-construction Phase that describes how the Progressive Design-Builder will meet all MOT requirements. MOT requirements will be determined in collaboration between the Progressive Design-Builder and KDOT.

## 4 QUALITY MANAGEMENT

The Progressive Design-Builder is responsible for the quality of the Work.

The Progressive Design-Builder shall perform Quality Assurance independent from production and Quality Control for all design activities. Quality Assurance for design shall include a

documented review of the design processes to assure that all required Quality Control checks and reviews have been performed, that corresponding records are available, and that Quality Control activities were effective to meet requirements.

The Progressive Design-Builder shall plan and perform Quality Control for all Construction Work. The Progressive Design-Builder's Quality Control plan for construction shall include all actions contemplated by the Progressive Design-Builder to ensure all Work meets contract requirements.

During the Pre-Construction Phase, the Progressive Design-Builder shall develop, implement, and maintain a Quality Plan for the Work to document procedures for management, administration, design, and construction of the Project. At a minimum, this shall include a description of the procedures for the following components:

1. The document management system, including routing; filing; and naming conventions;
2. Design and development planning;
3. Quality Control and Quality Assurance for design Work;
4. Construction planning and control points;
5. Resolution of Nonconforming Work;
6. Quality Control for construction Work; and
7. Purchasing.

The Progressive Design-Builder shall identify a Design Quality Assurance Manager (DQAM), a Construction Quality Control Manager (CQCM), and other staff focused on quality functions in the Quality Plan. The DQAM and CQCM shall be required to certify design Work and Construction Work, respectively.

The Progressive Design-Builder shall obtain KDOT's Approval of the Quality Plan in two stages: Stage 1, Approval of all Pre-construction Phase related Work; and Stage 2, Approval of Construction Phase Work. Work on Design Documents shall not commence before KDOT Approval of the Quality Plan (Stage 1). Construction Phase Work shall not commence before KDOT Approval of the Quality Plan (Stage 2).

Following KDOT Approval, any revisions to the Quality Plan shall be Approved by KDOT.

## **5 PROJECT SCHEDULE**

The Progressive Design-Builder shall submit a Schedule Coordination Plan for Approval that addresses coordination with KDOT and assigns responsibilities to positions within the Progressive Design-Builder's organization with respect to the Project Schedule. The Schedule Coordination Plan shall include:

1. A workflow outlining how the Progressive Design-Builder will develop, review, coordinate with KDOT for Approvals, and maintain the Project Schedules; and
2. An organization chart, table, or other appropriate document identifying which positions within the Progressive Design-Builder's organization (including field personnel) will be responsible for developing and progressing the schedules and for Quality Control and Quality Assurance of the schedules, what each individual will be responsible to perform, and how these efforts will be coordinated with each other and with KDOT.

During the Pre-construction Phase the Progressive Design-Builder shall:

1. Develop an initial Pre-construction Phase schedule and submit to KDOT within 30 Days following authorization of the Pre-construction Phase. The Pre-Construction Schedule must include key milestones (including Substantial Completion of the overall Project), Completion Deadlines, and incorporate design and Construction Work through Final Acceptance.
2. Update the Pre-construction Schedule on a monthly basis and submit to KDOT for review and comment throughout the Pre-construction Phase.

## **6 RISK MANAGEMENT**

The Progressive Design-Builder shall collaborate with KDOT and KDOT's representatives for the Project in the development and maintenance of the Risk Register for the Project. The Risk Register will be updated at each Risk Workshop and periodically during Risk Management and Project Schedule Meetings described in Table 1 (*Pre-Construction Phase Meetings*).

The Progressive Design-Builder shall participate in one or more Risk Workshops during the Pre-construction Phase to:

1. identify risks;
2. consolidate risks identified in other meetings;
3. assess probability and impact of risks;
4. prioritize risks
5. discuss possible risk mitigation strategies;
6. explore risk sharing concepts; and
7. update the Risk Register.

Risk Workshops will focus on risk mitigation and how risks may affect bid items. For high-priority risks, associated bid items will be identified and the affected pricing components (production rates, labor, materials cost, etc.) summarized by the Progressive Design-Builder.

## **7 WORK PACKAGING PLAN**

### **7.1 Preliminary Work Packaging Plan**

The Progressive Design-Builder shall identify and describe portions of the Project that are anticipated to be constructed as separate Work Packages to achieve the Project goals. The Progressive Design-Builder shall submit a Preliminary Work Packaging Plan to KDOT for Review and Comment whenever the Progressive Design-Builder believes that additional Work Package Amendments will be advantageous for the Project.

### **7.2 Final Work Packaging Plan**

As a condition precedent to execution of the Construction Phase Amendment, the Progressive Design-Builder shall submit a Final Work Packaging Plan for Approval with additional detail including:

1. Cost estimate of each Work Package;



2. Schedule durations;
3. Summary of any ROW, Utility Relocation, Third-Party Agreements, or other items needed to obtain authorization of construction for the Work Package;
4. Permitting and environmental mitigation plan to complete the Work Package; and
5. Material Sourcing Plan necessary to complete the Work Package.

The Progressive Design-Builder shall submit the Final Work Packaging Plan at least 30 Days prior to submission of the Construction Phase Amendment.

## **8 UTILITY AND THIRD-PARTY COORDINATION PLAN**

The Progressive Design-Builder shall manage and coordinate all activities necessary to perform the Work. The Progressive Design-Builder shall prepare a Utility and Third-Party Coordination Plan within 30 days following authorization of the Pre-construction Phase. The Utility and Third-Party Coordination Plan shall identify known Utility companies and third-parties and detail the approach to coordination with these entities. The Utility and Third-Party Coordination Plan shall be updated within 30 days prior to execution of the Construction Phase Amendment.

## **9 PERMITTING & ENVIRONMENTAL MITIGATION PLAN**

The Progressive Design-Builder shall develop and submit a Permitting & Environmental Mitigation Plan to KDOT within 30 days following authorization of the Pre-construction Phase. The Permitting & Environmental Mitigation Plan shall identify timelines, required information, and approval/signature cycles for each permit. The Plan shall include:

1. A spreadsheet summarizing the necessary permits to construct the Project and any permit-specific plans that must be Approved (e.g., Stormwater Pollution Prevention Plan is a component of the National Pollutant Discharge Elimination System);
2. Known mitigation related to permits;
3. Summary of submittal deadlines; and
4. Summary of signature deadlines.

The Permitting & Environmental Mitigation Plan shall be updated within 30 days following authorization of the Pre-Construction Phase and within 30 days prior to authorization of the Construction Phase Amendment.

## **10 MATERIAL SOURCING PLAN**

The Material Sourcing Plan outlines the materials required for the construction of major items and specialty items required for the construction of the Project. The Progressive Design-Builder shall develop and submit an Initial Materials Sourcing Plan to KDOT for Review and Comment within 90 Days following authorization of the Pre-construction Phase. The Progressive Design-Builder shall submit an updated Material Sourcing Plan with the Final Design Submittal for any Work Packages to KDOT for Review and Comment.

## **11 COST ESTIMATING**

### **11.1 Initial Approach to Construction Cost Development**

Before any pricing of the Construction Work begins, the Progressive Design-Builder, KDOT, and advisors to KDOT will meet to discuss and agree on how the team will develop and evaluate price

for purposes of Work Packages. In addition to reviewing the overall pricing strategy, the Progressive Design-Builder and KDOT will seek agreement on how certain elements of price will be handled. The following issues will be discussed:

1. Definition of fair market price;
2. Acceptable percentage of price difference between the Progressive Design-Builder and KDOT, which may use an estimate prepared by an ICE procured by KDOT;
3. Expectation of progressive design-build cost versus low bid;
4. Overhead and profit margins (includes management labor above project manager level, audited home office overhead rate, and profit margin);
5. Labor and equipment rates;
6. Subcontractor quotes and self-performed work; and
7. Number of pricing milestones and bid submittals.

## **11.2 Cost Model**

The Progressive Design-Builder shall develop a cost model on an Open Book Basis. The Progressive Design-Builder shall submit the cost model to KDOT for Review and Comment prior to the Preliminary Design Submittal. The cost model shall include:

1. Quantity take-offs;
2. Material costs, subcontracted work costs, equipment rates, labor rates (labor rates shall include employee benefits, payroll taxes, and other payroll burdens), crew sizes, shifts per day, hours per shift, and production rates for direct costs;
3. Risk assumptions, assignment of risks, and schedule and cost contingencies associated with each risk;
4. Costs to mobilize equipment and materials to construct the Project and other facility related costs necessary for the proper execution of the Work;
5. Copies of quotations from Subcontractors and Suppliers;
6. Field indirect costs, bonds, taxes, and insurance; and
7. A written narrative regarding the cost model that identifies the means, methods, assumptions, and risks that were used to price the Work.

## **11.3 Construction Cost Estimates**

In accordance with the cost model, the Progressive Design-Builder shall develop and submit an opinion of probable construction cost (OPCC) estimate to KDOT for any Work Packages at the Preliminary Design Submittal and at other times as determined by KDOT during the Pre-Construction Phase. The construction cost estimate shall also be provided with the Work Package GMP Design Submittal. The cost estimate shall include quantity calculations and unit cost justification for all pay items, provide the justification of construction production rates, and any assumptions used to determine the unit costs for the pay items.

KDOT, or its advisors, will then compare the costs for each item in the Progressive Design-Builder's construction cost estimate and highlight any items that vary from the independent cost estimate by more than the divergence percentage identified in accordance with [Section 11.1 \(Initial Approach to Construction Cost Development\)](#). Additionally, the total cost of each OPCC

will be compared by the Department to ensure that the OPCCs are within the Project budget. The Department will then return the spreadsheet to the Progressive Design-Builder.

#### **11.4 Construction Cost Reconciliation Meetings**

The Progressive Design-Builder shall meet with KDOT to discuss the assumptions for items that have a discrepancy greater than the KDOT-determined divergence factor. The factors that contribute to the costs will be shared by the Progressive Design-Builder and discussed. The goal of the Cost Reconciliation Meeting is to clarify and resolve differences, where possible, between estimates. The goal is that the cost of the Construction Work for the Work Package be consistent with the principles described in Section 11.1 (Initial Approach to Construction Cost Development) at the time the Work Package GMP is determined.

### **12 SAFETY**

The Progressive Design-Builder shall develop and submit its Safety Plan to KDOT for Review and Comment within 30 Days following authorization of the Pre-construction Phase. The Progressive Design-Builder's Safety Plan shall address safety in connection with the Project, all Laws, and the Contract Documents.

### **13 BASIS OF CONSTRUCTION PLAN (APPROACH, MEANS AND METHODS)**

The Basis of Construction Plan contains the Project narrative describing the Progressive Design-Builder's approach to Construction Work and includes planning, coordinating, scheduling, sequencing, means and methods, and resourcing of the Work. The Progressive Design-Builder shall submit a draft Basis of Construction Plan to KDOT for Review and Comment at least 60 Days prior to submitting the Construction Phase Amendment. The Progressive Design-Builder shall resolve all comments and submit the Final Basis of Construction Plan to KDOT for Approval at least 14 Days prior to the submittal of the Construction Phase Amendment.

### **14 SUBCONTRACTING PLAN**

#### **14.1 General Subcontracting Plan Requirements**

The Subcontracting Plan identifies the Progressive Design-Builder's subcontracting process for the Construction Phase. The Subcontracting Plan shall include:

1. Details of the Progressive Design-Builder's contracting plans and Subcontractor plans;
2. Progressive Design-Builder's competitive selection process;
3. Approach to advertise subcontracting opportunities;
4. Procurement process; and
5. Information regarding subcontractor availability and local economic conditions.

The Progressive Design-Builder shall submit the draft Subcontracting Plan to KDOT within 30 Days following authorization of the Pre-construction Phase. The Progressive Design-Builder shall have an Approved Subcontracting Plan from KDOT prior to soliciting offers for Subcontractors for Construction Work.

## **15 PUBLIC INFORMATION/COMMUNICATIONS SUPPORT**

The Progressive Design-Builder shall provide support to KDOT-led public involvement and communication processes. KDOT will be the primary media spokesperson for the Project. Generally, the Progressive Design-Builder shall be required to:

1. Maintain effective working relationships with KDOT's public involvement staff;
2. Provide timely, accurate, and responsive information to KDOT; and
3. Provide support for events, materials, and activities.

The Progressive Design-Builder shall coordinate with the Department to understand the level of support that will be needed during the Construction Phase and submit a Public Information Plan to KDOT for Approval.

## **16 CONSTRUCTION PHASE AMENDMENT**

The Construction Phase Amendment shall include:

1. The Approved Quality Plan
2. The Approved Schedule Coordination Plan
3. The Approved Subcontracting Plan
4. The Approved Permitting and Environmental Mitigation Plan
5. The Approved Utility and Third-Party Coordination Plan
6. The Approved Material Sourcing Plan
7. The Approved Safety Plan
8. The Approved Final Work Packaging Plan
9. The Approved Public Information Plan
10. The Baseline Work Package Schedule
11. The Transportation Management Plan

## **17 WORK PACKAGE AMENDMENTS**

All Work Package Amendments shall include:

1. The estimated cost of additional Construction Work required to reach Final Acceptance not accounted for in executed Work Package Amendments
2. A schedule of meetings and identification of attendees
3. Updates to the Transportation Management Plan specific to the Work Package
4. The Basis of Construction Plan
5. The Approved Material Sourcing Plan
6. A Schedule of Values allocating the applicable Work Package GMP for Construction Work
7. A Baseline Work Package Schedule in accordance with the Contract Documents
8. Updates to the Permitting and Environmental Mitigation Plan

9. The Design Documents
10. Standards and requirements for the Construction Work
11. Description of agreed Liquidated Damages and Daily Road User Costs, if any
12. Any increase to policy limits, additional endorsements, or additional insurance as required by the Contract
13. Any other documentation and information required by KDOT

## EXHIBIT C: PROGRESSIVE DESIGN-BUILD TEAM

<b><i>Entities/Joint Ventures</i></b>	
Lead Contractor	
Lead Designer	
<b><i>Key Personnel/Committed Personnel</i></b>	
Project Manager	
Design Manager	
Construction Manager	
Roadway Design Manager	
Project Controls Manager	

Progressive Design-Builder hereby ratifies the Key Personnel commitments included within the Proposal and attached here.

[See attached.]

## **EXHIBIT D: HOURLY RATES**

[To include fully loaded hourly rates proposed under Attachment 1 to Exhibit E of the ITP.]

**EXHIBIT E: PRE-CONSTRUCTION PHASE SCOPE AND COMPENSATION CAP**

[INSERT]



**EXHIBIT F: FORM OF CONTRACT BOND**

Bond No. \_\_\_\_\_

**KANSAS DEPARTMENT OF TRANSPORTATION**

**CONTRACT BOND**

We, [Progressive Design-Builder] as Principal and [Surety] duly authorized to transact the business of suretyship in the State of Kansas, as Surety, are held and firmly bound to the State of Kansas for \$5,000,000.00, subject to increase in accordance with the Construction Phase Rider, to be paid to the Secretary of Transportation of the State of Kansas, and under which payment we bind ourselves, our heirs, legal representatives, successors, and assigns, jointly and severally by this contract.

**CONDITIONS OF THIS OBLIGATION:**

The Principal has entered into a Progressive Design-Build Contract with the Secretary of Transportation of the State of Kansas, dated [DATE], for the delivery of certain improvements, known as the De Soto Local Roadway Improvements Progressive Design-Build Project in Johnson County, Kansas (the "Project"), contract No. [X].

This obligation shall remain in effect until the Principal fully and faithfully performs all of the following: Complete all requirements and execute the Work under the provisions of said Progressive Design-Build Contract, for the Planning and Pre-construction Phases including compliance with any Progressive Design-Build Contract modifications made which may be made without notice to or consent of the surety;

Perform all Project operations agreed to by the Principal within the Contract time limit in said Progressive Design-Build Contract or within any additional time granted by the Secretary of Transportation of the State of Kansas;

Pay all indebtedness incurred for supplies, materials, or labor furnished, used in the performance of the Planning and Pre-construction Phase Work of the Project, including but not limited to gasoline, lubricating oils, fuel oils, greases, coal, and similar items used in directly carrying out the provisions of the Contract;

Indemnify and compensate the Secretary of Transportation of the State of Kansas for any loss, cost, damage or expense, for which it may suffer or be held responsible, due to any negligence, defective condition, default, failure, or miscarriage in the performance of the contract whether by the Progressive Design-Builder, its subcontractors or subconsultants, or any Progressive Design-Builder-Related Entity.

Signed and Sealed this day of \_\_\_\_\_.

\_\_\_\_\_  
Principal.

\_\_\_\_\_  
Surety.

[Seal]

(Note: Certified copy of Resolution or Power of Attorney authorizing the execution of this instrument on behalf of the Surety must be attached.)

## CONSTRUCTION PHASE RIDER

This Rider shall be attached to and form a part of Bond No. [X] ("Contract Bond").

Principal and Surety have agreed to execute and deliver this Rider to the Contract Bond as a condition precedent to the approval of the Construction Phase Amendment.

Nothing contained in this Rider shall be interpreted to change, alter or vary the terms of the attached Contract Bond except as set forth in this Rider. In the event of a conflict between the Contract Bond and this Rider, this Rider shall govern.

We, [Progressive Design-Builder] as Principal and [Surety] duly authorized to transact the business of suretyship in the State of Kansas, as Surety, are held and firmly bound to the State of Kansas for \$ [Construction Phase Bonded Amount], to be paid to the Secretary of Transportation of the State of Kansas, and under which payment we bind ourselves, our heirs, legal representatives, successors, and assigns, jointly and severally by this contract.

### CONDITIONS OF THIS OBLIGATION:

The Principal has entered into a Progressive Design-Build Contract with the Secretary of Transportation of the State of Kansas, dated [Date], for the delivery of certain improvements, known as the De Soto Local Roadway Improvements Project Progressive Design-Build Project in Johnson County, Kansas (the "Project"), contract No. [X].

This obligation shall remain in effect until the Principal fully and faithfully performs all of the following:

Complete all requirements and execute the Construction Phase Work under the provisions of said Contract, the plans, specifications, and any Contract modifications made within the specifications' time limits which may be made without notice to or consent of the surety;

Perform all Project operations agreed to by the Principal within the Contract time limit in said Contract or within any additional time granted by the Secretary of Transportation of the State of Kansas;

Pay all indebtedness incurred for supplies, materials, or labor furnished, used in the design and construction of the Project, including but not limited to gasoline, lubricating oils, fuel oils, greases, coal, and similar items used in directly carrying out the provisions of the Contract;

Indemnify and compensate the Secretary of Transportation of the State of Kansas for any loss, cost, damage or expense, for which it may suffer or be held responsible, due to any negligence, defective condition, default, failure, or miscarriage in the performance of the contract whether by the Progressive Design-Builder, its subcontractors or subconsultants, or any Progressive Design-Builder-Related Entity.

Signed and Sealed this day of \_\_\_\_\_.

\_\_\_\_\_  
Principal.

\_\_\_\_\_  
Surety.

[Seal]

(Note: Certified copy of Resolution or Power of Attorney authorizing the execution of this instrument on behalf of the Surety must be attached.)

**EXHIBIT G: RESERVED**

## EXHIBIT H: STATE LABOR REQUIREMENTS

<b><u>Attachment Description</u></b>	<b><u>NO. of Pages</u></b>
Attachment 1 – EEO	6
Attachment 2 –Prevailing Wage Requirements	1

## ATTACHMENT 1 TO EXHIBIT H

### SPECIFIC EQUAL EMPLOYMENT OPPORTUNITY CONTRACTUAL REQUIREMENT FOR STATE FUNDED PROJECTS

#### 1 GENERAL:

Equal employment opportunity requirements to NOT discriminate and to take affirmative action to assure equal employment opportunity shall apply to all Contractors, subcontractors and suppliers who have a contract, subcontract or purchase order that equals or exceeds \$10,000.

The specific affirmative action requirement for these contracts are imposed pursuant to the Kansas Act Against Discrimination, K.S.A. 44-1001 et seq. as amended and the rules and regulations promulgated thereunder.

The Contractor agrees: (a) to comply with the Kansas Act Against Discrimination (K.S.A. 44-1001 et seq.); the Kansas Age Discrimination in Employment Act (K.S.A. 44-1111 et seq.) and the applicable provisions of the Americans With Disabilities Act (42 U.S.C. 12101 et seq.)(ADA) and to not discriminate against any person because of race religion, color, sex, disability, national origin or ancestry, or age in the admission or access to, or treatment or employment in, its programs or activities; (b) to include in all solicitations or advertisements for employees, the phrase "equal opportunity employer"; (c) to comply with the reporting requirements set out at K.S.A. 44-1031 and K.S.A. 44- 1116; (d) to include those provisions in every subcontract or purchase order so that they are bind upon such subcontractor or vendor; (e) that a failure to comply with the reporting requirements set forth herein or if the Contractor is found guilty of any violation of such acts by the Kansas Human Rights Commission, such violation shall constitute a breach of contract and the contract may be cancelled, terminated or suspended, in whole or in part, by the Kansas Department of Transportation (KDOT) or the Kansas Department of Administration; (f) if it is determined that the Contractor has violated applicable provisions of ADA, such violation shall constitute a breach of contract and the contract may be cancelled, terminated or suspended, in whole or in part, by the KDOT or the Kansas Department of Administration. The provisions of this paragraph, with the exception of those relating to the ADA, are not applicable to a Contractor who employs fewer than four employees during the term of such contract or whose contracts with KDOT cumulatively total \$5,000 or less during the fiscal year.

#### 2 EQUAL EMPLOYMENT OPPORTUNITY (EEO) POLICY:

1. The Contractor will accept as a minimum 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, age, sex, color, disability, national origin, or veteran status. Such action shall include: employment, upgrade, demotion, transfer, recruitment, recruitment advertising, layoff, termination, wages, benefits, and selection for training including preapprenticeship, apprenticeship and on the job training."*

All other EEO requirements will need to be incorporated by each Contractor into their policy.

2. Annually the Contractor will send to the KDOT Office of Civil Rights (OCR) one copy of the company's EEO policy signed and dated by the company's Policy Officer. The EEO Policy must be approved by the KDOT before the award of a contract, subcontract or purchase order over \$10,000. Contractors are encouraged to submit their policies for approval before bidding projects so as not to delay contract or subcontract award. Firms with more than 50 employees must also submit an Affirmative Action (AA) plan.
3. To comply with requirements of TEA 21, all Contractors and subcontractors must annually provide information on the firm's age, gross receipts, and work type. This information will be due on the same date as the EEO policy, and is required before a Contractor can perform work.

### **3 CONTENTS OF EEO POLICY/AA PLAN:**

1. The minimum operating statement listed in 2.A and additions designated by the company to comply with all relevant laws.
2. The designation of the EEO Officer responsible and capable of effectively administering and promoting an active EEO program and the designation of the full authority to do so.
3. The company's recruitment policy with specific actions to be taken for the coming year, relevant to the current work force.
4. Certification that the Contractor does not maintain or permit any segregation of its facilities and that no employee will be denied access to any facility based on sex or disability.
5. The company's training and promotion policy to upgrade the skills of minorities and women.
6. The Company's personnel actions in regard to job site inspection, wages, benefits, transfers, demotions, layoffs, terminations, promotions, new hires and upgrades, and the company's complaint procedure.

### **4 DISSEMINATION OF EEO POLICY /AA PLAN:**

1. 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 equal employment opportunity in each grade and classification of employment. To confirm that the above agreement will be met, the following actions will be taken and documented as a minimum:
  - a. Periodic meetings of supervisory and personnel office employees will be conducted before the start of work and then not less often than once every six months, at which time the Contractor's EEO policy and its implementation will be reviewed and explained. The meetings will be conducted by the EEO Officer or other knowledgeable company official.
  - b. All new supervisory or personnel employees will be given a thorough indoctrination by the EEO Officer or other knowledgeable company official, covering all major aspects of the Contractor's equal employment opportunity obligations within thirty days following 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 or appropriate company official in the Contractor's procedures for locating and hiring minority group employees.
2. In order to make the Contractor's EEO policy known to all employees, prospective employees and potential sources of employees, i.e., schools, employment agencies, labor unions (where appropriate), college placement officers, etc., the Contractor will take the following actions:
  - a. 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.
  - b. The Contractor's EEO policy and the procedures to implement such policy will be brought to the attention of employees by meetings, employee handbooks, and other appropriate means. Meetings should be conducted periodically and documented to confirm new employees are included.

## **5 UNIONS:**

If the Contractor relies in whole or in part upon unions as a source of employees, the Contractor will use best efforts to obtain the cooperation of such unions to increase opportunities for minorities 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:

1. 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.
2. The Contractor will use best efforts to incorporate an equal employment opportunity 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, age, sex, disability, national origin, or veteran status.
3. 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 KDOT and shall set forth what efforts have been made to obtain such information.
4. In the event the union is unable to provide the Contractor with a reasonable flow of minority and female 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, age, sex, disability, national origin, or veteran status; making full efforts to obtain qualified and/or qualifiable minority group members and women. (The U.S. Department of Labor 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, for federal or federal-aid construction projects, and these special provisions, such Contractor shall immediately notify the KDOT.

## 6 SUBCONTRACTING:

The Contractor, when seeking to subcontract a portion of the work on this project, is encouraged to take affirmative action to consider DBEs as potential subcontractors. In the event assistance is needed to locate or obtain a list of potential DBEs, the KDOT's Plans and Proposals Section and the OCR may be contacted.

"Disadvantaged Business Enterprises" are businesses which have been certified as disadvantaged by the OCR and are listed in the current DBE directory which is also available at [www.ksdot.org](http://www.ksdot.org).

The Contractor will certify on DOT Form 260 that all EEO provisions applicable to this contract are included in all subcontracts.

## 7 REQUIRED NOTICES AND POSTERS:

1. Unemployment Insurance Notice K-CNS 405
2. Workers Compensation Law K-WC 40
3. Kansas Equal Opportunity
4. Child Labor K-ESLR 100

## 8 NONCOMPLIANCE WITH EEO/AA REQUIREMENTS:

1. KDOT will not award a contract, approve a subcontract or sign a purchase order until the required EEO/AA policy has been submitted to and approved by the KDOT Civil Rights Administrator in the OCR.
2. If discrimination, harassment or a hostile work environment exists on any project, the KDOT will take every action needed to confirm the problem is corrected in a timely manner. KDOT will also monitor the project to determine if retaliation is taken against any employee who files a complaint.
3. Contract Compliance reviews are conducted by OCR on selected federal aid contracts. A Contractor can expect to be reviewed once every three years or more often if any deficiencies had been previously found. During a Compliance Review all areas listed previously in items 2-7 will be verified for compliance. *The compliance review is the Contractor's ONLY opportunity to provide documentation of ALL efforts undertaken to meet or exceed all EEO/AA requirements of the contract. It is IMPORTANT that all relevant documentation be provided at this time. During any subsequent appeal process new documentation not previously submitted to the OCR will NOT be considered in the appeal.* A deficiency occurs when the Contractor fails to comply with a requirement and/or fails to document every good faith effort to comply. A Voluntary Corrective Action Plan (VCAP) is required to correct certain deficiencies that do not directly affect a protected group or result in discrimination. A follow up review is conducted to confirm that the VCAP was enacted and determine if it is effective.
4. When a Contractor's action or inaction adversely affects a protected group member (discrimination) or when a Contractor has failed to provide written documentation of every good faith effort to provide equal opportunity and to take affirmative action, these procedures will follow:
  - a. For the first documented occurrence of such a deficiency the OCR will discuss the deficiency with the Contractor's representative during the compliance meeting or at an

- exit conference held shortly after the compliance meeting. Within 15 days a written notice of a show cause hearing is sent to the Contractor. The show cause hearing is an informal hearing providing the Contractor's opportunity to submit a Corrective Action Plan (CAP) for the immediate correction of the noted deficiency and to eliminate any future reoccurrence. The hearing is chaired by the Chief of the Bureau of Construction and Materials and attended by a staff of OCR and an FHWA representative. KDOT (the Chief of the Bureau of Construction and Materials and the Civil Rights Administrator) must approve and the FHWA representative must concur that the CAP will achieve compliance before it is accepted.
- b. For the second documented occurrence of the same deficiency within 3 years the OCR will discuss the deficiency with the Contractor's representative during the compliance meeting or at an exit conference held shortly after the compliance meeting. Within 15 days the KDOT Compliance Review Committee consisting of the Chief of the Bureau of Construction and Materials, the Director of Project Delivery and the District Engineer will review the Contractor's documentations and the findings of the OCR and either concur or disagree with those findings. Upon concurrence by the Compliance Review Committee a notification of monetary assessment will be sent to the Contractor with a copy to KDOT's Prequalification Committee and the field office, and the assessment will begin on the date of the letter. As noted above, *the Contractor's opportunity to document every good faith effort is during the compliance review*. The applicable monetary assessments are listed in Table 1. The assessment will be collected for a minimum of five days or so long as the Contractor remains in non-compliance.
  - c. For the third documented occurrence of the same deficiency within 3 years of the second deficiency the OCR will discuss the deficiency with the Contractor's representative during the compliance meeting or at an exit conference held shortly after the compliance meeting. Within 15 days the KDOT Compliance Review Committee consisting of the Chief of the Bureau of Construction and Materials, the Director of Project Delivery and the District Engineer will review the Contractor's documentations and the findings of the staff of OCR and either concur or disagree with those findings. Upon concurrence the Compliance Review Committee sets a debarment period of up to six months and notification is sent to the Contractor, KDOT's Prequalification Committee and other interested agencies. During the debarment period the Contractor will not be eligible to request KDOT plans, submit a bid as prime or subcontractor or otherwise acquire new work on KDOT projects. Any work currently in progress can be completed.
  - d. For the fourth documented occurrence of the same deficiency within 3 years of the third deficiency the OCR will discuss the deficiency with the Contractor's representative during the compliance meeting or at an exit conference held shortly after the compliance meeting. Within 15 days the KDOT Compliance Review Committee consisting of the Chief of the Bureau of Construction and Materials, the Director of Project Delivery and the District Engineer will review the Contractor's documentations and the findings of the OCR and either concur or disagree with those findings. Upon concurrence the Compliance Review Committee sets a debarment period of one year and notification is sent to the Contractor, KDOT's Prequalification Committee and other interested agencies. During the debarment period the Contractor will not be eligible to request KDOT plans, submit a bid as prime or subcontractor or otherwise acquire new work on KDOT projects. Any work currently in progress can be completed.

- e. The Contractor may request an appeal to the KDOT Compliance Appeal Board (CAB) within five days of the receipt of the notice of assessment or debarment (2, 3 or 4 above). The request is made to the Deputy Secretary for Engineering & State Transportation Engineer (Deputy Secretary) who chairs the CAB. The two other members include one member named by the Deputy Secretary and one member named by the Contractor within 5 days of the appeal request. A date and time will be set by the Deputy Secretary for hearing the appeal and will notify the Contractor, FHWA, KDOT's Civil Rights Administrator and the CAB members. The CAB reviews the documents previously submitted by the Contractor and the previous decision of the Compliance Review Committee. The Contractor presents verbal or written statements to the CAB as to why they disagree with the finding of noncompliance. *The CAB cannot consider any new documentation at this time because its purpose is to concur or disagree with the findings previously made.* The Deputy Secretary will advise the Secretary of Transportation of the decision of the CAB and the final administrative decision will be issued by the Secretary and made known to all concerned parties. During the appeal process the Contractor is not relieved from taking corrective action to eliminate noted deficiencies and the sanction imposed remains in place pending the decision.

<b>TABLE 1</b>		
<b>SCHEDULE OF DAILY MONETARY ASSESSMENTS</b>		
<b>Original Contract Amount Range</b>		<b>Amount of Assessment to be Deducted for Each Day of Non-Compliance</b>
\$0.00	\$100,000.00	\$200.00
\$100,000.01	\$500,000.00	\$400.00
\$500,000.01	\$1,000,000.00	\$800.00
\$1,000,000.01	\$2,500,000.00	\$1,000.00
\$2,500,000.01	\$5,000,000.00	\$1,500.00
\$5,000,000.01	\$10,000,000.00	\$2,000.00
\$10,000,000.01	\$25,000,000.00	\$2,500.00
Over \$25,000,000.01		\$3,000.00

## ATTACHMENT 2 TO EXHIBIT H

### Prevailing Wage Requirements

The Contract is subject to prevailing wage requirements. Employees of the Progressive Design-Builder and any Subcontractors shall be paid prevailing wages determined in accordance with wage areas, job classifications, and wage rates determined under the federal Davis-Bacon Act. The applicable wages will be those set forth in the Davis Bacon General Wage Determination (WD) for use on Kansas Highway Construction Projects in Johnson County, Kansas as published at the time of execution of the Construction Phase Amendment. For reference only, the existing prevailing wage is WD # KS20220140, Modification 5.

## EXHIBIT I: CHANGE ORDER PRICING

Without limiting the Progressive Design-Builder's general obligation under Section 22.2 (Contents of Change Orders) of the Contract, the Department and the Progressive Design-Builder (on its own behalf and on behalf of its Subcontractors) shall endeavor to conform the general the price of a Change Order pertaining to Construction Work in accordance with this Exhibit I. Except as expressly stated otherwise, all references to "Work" in what follows within this Exhibit I shall mean "Construction Work".

### 1 LABOR COSTS

The cost of labor shall be separated into construction-related Work and non-construction-related Work as described below, in each case, solely as relates to Construction Work. The use of a labor classification that would increase the Change Order cost will not be permitted unless the Progressive Design-Builder establishes the necessity for such additional costs. The cost of labor shall be calculated based on straight time for all hours worked, unless the Progressive Design-Builder obtains the Department's prior Approval for overtime.

1. Construction Labor: The cost of labor for workers used in the actual and direct performance of construction-related Work, and the field management required up to but not including a superintendent, according to the Progressive Design-Builder's standard work practices, whether provided by the Progressive Design-Builder or a Subcontractor, will equal the sum of the following: (i) actual unburdened wages (i.e., the base wage paid to the employee exclusive of any fringe benefits); plus (ii) the Actual Costs paid to, or on behalf of, employees, including health and welfare benefits required by the collective bargaining agreements or other employment contract generally applicable to the classes of labor employed on the work; plus (iii) 20 percent of the sum of items (i) and (ii) for overhead and profit; plus (iv) 35 percent of the sum of items (i) and (ii) for labor surcharges; plus (v) bond/insurance premiums.
2. Non-Construction Labor: The cost of labor for non-construction-related Work, including Quality Assurance, whether provided by the Progressive Design-Builder or a Subcontractor, will equal the sum of the following: (i) actual wages (i.e., the base wage paid to the employee exclusive of any fringe benefits); plus (ii) the Subcontractor's FAR-audited overhead rate or 110 percent if the Subcontractor does not have a FAR-audited overhead rate.

### 2 MATERIAL COSTS

Material costs shall be the cost of all materials to be used in the performance of construction Work, including normal wastage allowance as per industry standards, subject to the requirements set forth in Section 22 (Change Orders) of the Contract. Material prices shall be supported by valid quotes and invoices from Suppliers. The cost shall include applicable sales taxes, freight and delivery charges, and any allowable discounts (exclusive of machinery rentals). The Department reserves the right to Approve materials and sources of supply of materials to be furnished by the Progressive Design-Builder or Subcontractors and shall have the right to furnish such materials as it deems advisable.

1. The price allowed for materials shall be adjusted as follows:
  - a. If the materials are obtained from a supply or source owned in whole or in part by the Progressive Design-Builder or a Subcontractor, the cost of such materials shall not

- exceed the lesser of the lowest price charged by the Progressive Design-Builder or such Subcontractor (as applicable) for similar materials furnished to other jobs or the current wholesale price for such materials delivered to the Site.
- b. If the cost of such materials is, in the opinion of the Department, excessive, then the cost of such materials shall be deemed to be the lowest current wholesale price at which such materials were available, in the quantities needed and delivered to the Site.
  - c. If the Progressive Design-Builder does not furnish satisfactory evidence of the cost of such materials from the actual supplier thereof within 60 Days after the date of delivery of the material, the Department reserves the right to establish the cost of such materials at the lowest current wholesale prices at which such materials were available, in the quantities needed and delivered to the Site.
2. The Progressive Design-Builder will be paid an additional 10 percent of material costs, which is for overhead and profit.

### **3 EQUIPMENT**

1. Progressive Design-Builder will be paid for the use of equipment owned or rented by Progressive Design-Builder or any Subcontractor for actual use in construction of the Project at the Actual Costs or at an hourly rate derived from the most recently published Rental Rate Blue Book for Construction Equipment by Dataquest, Inc., San Jose, California (the "Blue Book") that is in effect at the time of commencement of the changed Work, whichever is less.
2. The total hourly rates derived from the above publication are computed from equipment costs currently in effect. The rates derived do not include costs for operating personnel. The rates require adjustment by a Regional Factor and a Depreciation Factor found in the front of each chapter in the Blue Book.
3. Equipment use rates fall in the following two categories:
  - a. Operating Rate: This rate applies to those hours the equipment is actually in use, includes ownership and operating costs, and shall equal the Blue Book monthly rate adjusted for year of manufacture divided by 176 times the Regional Factor of 0.945 plus the estimated hourly operating costs from the Blue Book.
  - b. Standby Rate: This rate applies to equipment required to be at the Site but not operating, includes ownership costs only, and shall equal the Blue Book monthly rate adjusted for year of manufacture divided by 176 times the Regional Factor of 0.945, the sum of which is multiplied by 0.5. The duration of allowable standby time is to be Approved in writing by the Department with a maximum of eight hours per day or 40 hours in a normal week.
4. When the "manufacturer's rated capacity" falls between those shown in the Blue Book, the closest rated capacity will be used, without interpolation. All rates shall be agreed upon in writing before work is begun. Payment will not be made for pickup trucks used solely for transportation.
5. In cases where the equipment to be used is specialized in nature and is not available in Progressive Design-Builder's inventory and is rented or leased from an outside agency, a 10 percent allowance will be added on the first \$5,000 plus 5 percent of the balance in excess of \$5,000 for overhead for all rented or leased equipment paid for by invoices. Where the rate charged by the agency exceeds the rate determined by the Blue Book, the

rental or lease agreement shall be submitted to the Department for Approval. The equipment operating costs from the Blue Book will be paid for rented or leased equipment for each hour the equipment was actually used.

6. In those cases where the required equipment is in the Progressive Design-Builder's or Subcontractor's available inventory but not on the Site, the equipment may be rented from a local source. The Department may Approve rental rates for equipment obtained from local sources when such rates are within 10 percent of rates in the Blue Book. When the equipment use is of short duration (less than a week) "move in" and "move out" costs for equipment owned by the Progressive Design-Builder or Subcontractors may be considered when comparing rental costs of equipment obtained from local sources. This option will only be allowed when the cost of locally rented equipment would be less than using owned equipment, including "move in" and "move out" charges. Such rentals must be supported by a cost analysis indicating the method used was the least expensive. Should equipment be rented, even though it is of a type that is in the Progressive Design-Builder's or Subcontractor's inventory and the rental costs exceed that allowed by this paragraph, the Progressive Design-Builder will be reimbursed for such equipment based on the rates in the Blue Book.
7. The rates paid as above provided shall be deemed to include compensation for the cost of fuel, oil, lubricants, supplies, small tools, necessary attachments, repairs and maintenance of all kinds, depreciation, storage, insurance, and all incidentals. Individual pieces of equipment or tools not listed in the Blue Book and having an individual replacement value of \$1,000 or less, whether or not consumed by use, shall be considered to be small tools. Equipment rental rates not provided by the Blue Book must be Approved by the Department before the start of any Change Order Work.
8. The Progressive Design-Builder will be paid an additional 10 percent on the equipment costs, which is for overhead and profit.
9. Equipment operators will be paid for as stipulated in Section 1.
10. All equipment shall be in good working condition and suitable for the purpose for which the equipment is to be used.
11. Unless otherwise specified, manufacturer's ratings and manufacturer-approved modifications shall be used to classify equipment for the determination of applicable rental rates. Equipment, which has no direct power unit, shall be powered by a unit of at least the minimum rating recommended by the manufacturer of that equipment.
12. The time to be paid for use of equipment on the Site shall be the time the equipment is in operation on the Change Order Work being performed. The time shall include the reasonable time required to move the equipment to the location of the Change Order Work and return it to the original location or to another location requiring no more time than that required to return it to its original location. Moving time will not be paid for if the equipment is also used at the Site other than for Change Order Work. Loading and transporting costs will be allowed, in lieu of moving time, when the equipment is moved by means other than its own power. No payment for loading and transporting will be made if the equipment is also used at the Site other than for Change Order Work. Time will be computed in half and full hours. In computing the time for use of equipment, less than 30 minutes shall be considered one-half hour.



## 4 PERMIT FEES

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

The Progressive Design-Builder will be paid an additional 5 percent on the additional permit fees, which is for overhead.

## 5 SUBCONTRACTED WORK

For administration and all overhead costs in connection with Subcontract Work, the Progressive Design-Builder will receive an amount equal to 3.5 percent of the total Subcontract cost, notwithstanding the actual number of and tiers of Subcontractors performing the work. This shall fully compensate the Progressive Design-Builder (and all Subcontractors) for administration, general superintendence, overhead, profit and expenses not otherwise recoverable with respect to subcontracted Work. No markup is allowed for (i) Subcontracts with Affiliates; or (ii) Subcontracts with Suppliers.

## 6 OVERHEAD AND PROFIT

Items included in Overhead and Profit: Unless otherwise indicated in this Section 6, the overhead and profit and labor surcharges under this Section 6 are full and complete compensation for all indirect costs of the added or changed Work, as well as for profit thereon. The Progressive Design-Builder's overhead and profit percentages and labor surcharges under this Section 6 shall be considered to include, among other costs, salary and expenses of executive officers, supervising officers or supervising employees (excluding only direct labor costs permitted under Section 1), clerical employees, charges for minor equipment, such as small tools, and other miscellaneous supplies and services, incidental job burdens, bonuses not otherwise covered, field, jobsite and general home office expenses of all types (including timekeepers, bookkeepers, and other general office help), supervisory expenses of all types (excluding only direct labor costs permitted under Section 1), design and construction risk, and all other overhead, general condition and indirect costs, and expenses and profit. With respect to non-construction related labor costs, overhead provided in Section 1 and includes accessories such as computer-assisted drafting and design systems, computers, facsimile transmission machines, scanners, and plotters, among other items.

Payment of Overhead and Profit: The foregoing overhead and profit and labor surcharges will be paid to the Progressive Design-Builder only for Work it performs; in the case of Work that is subcontracted, the additional payment for Subcontract administration will be allowed to the Progressive Design-Builder as described in Section 5 and all other overhead and profit and labor surcharges will be allowed to the Subcontractor who actually performs the Work.

Materials and Equipment: No overhead, profit or other surcharges will be paid to the Progressive Design-Builder for any materials or equipment furnished by the Department.

Deductive Changes: Where the Progressive Design-Builder's or any Subcontractor's portion of a change involves a deductive change, the Progressive Design-Builder shall include all Progressive Design-Builder's and Subcontractor's overhead and profit in computing the value of the credit.

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

## **7 COMPLIANCE WITH FEDERAL REGULATIONS**

All costs claimed by the Progressive Design-Builder under Section 22 (*Change Orders*) of the Contract shall, at a minimum, be allowable, allocable, and reasonable in conformity with generally accepted accounting principles and the cost principles and procedures of Title 48 of the Code of Federal Regulations, and Title 23 of the Code of Federal Regulations. The Department will not pay for disallowed costs. Disallowed costs include costs the Department determines are unreasonable; not actually incurred; caused by the Progressive Design-Builder's failure to comply with its Contract obligations; caused by the Progressive Design-Builder's negligent acts, errors, or omissions; or otherwise unallowable.

## EXHIBIT J: INSURANCE REQUIREMENTS

### 1 GENERAL INSURANCE REQUIREMENTS

#### 1.1 Evidence of Insurance

The Progressive Design-Builder shall obtain insurance and provide evidence of such insurance as proof of compliance for all insurance requirements contained in this Exhibit J. Unless stated otherwise, these insurance requirements are applicable to the Progressive Design-Builder. When the Progressive Design-Builder requires a Subcontractor to obtain insurance coverage, the types and minimum limits of coverage may be different than those required in this Exhibit J. The Progressive Design-Builder's insurance shall cover all Work under this Contract, whether the Work is performed by the Progressive Design-Builder or its Subcontractors. The Progressive Design-Builder's insurance shall cover the entire Project. The evidence of insurance shall provide for 30 Days written notice of any material change in coverage or cancellation for any reason, including non-renewal. The Progressive Design-Builder shall delete the phrase "will endeavor to" preceding all references to provisions of notice by the insurance company in the evidence of insurance. Unless stated otherwise in this Exhibit J, the Progressive Design-Builder shall provide a Certificate of Insurance contemporaneously with execution of this Contract to the Department indicating that coverage complying with this Exhibit J is in effect. The Department reserves the right to request a complete certified copy of one or more of the policies, at the Department's sole discretion. If the insurance required by this Exhibit J become no longer commercially reasonable, as defined by Insurance Unavailability in Exhibit A of the Contract, the Department will work with the Progressive Design-Builder to find commercially reasonable alternatives to the required coverages that are acceptable to the Department.

##### 1.1.1 A.M. Best Rating

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

##### 1.1.2 Full Force and Effect

The commercial general liability, excess (umbrella) liability, Progressive Design-Builder's pollution liability, and professional liability insurance coverage requirements will remain in full force and effect until Final Acceptance at which time the Progressive Design-Builder shall maintain completed operations insurance throughout the term of all warranties or as otherwise required by the Contract Documents, whichever is greater.

##### 1.1.3 No Recourse

There shall be no recourse against the Department for payment of premiums or other amounts with respect to the insurance provided by the Progressive Design-Builder, or for deductibles under these policies. This provision does not affect any rights the Progressive Design-Builder is entitled to pursuant to Section 21 (Relief & Compensation) and Section 22 (Change Orders).

##### 1.1.4 Indemnification

The insurance coverage provided hereunder shall support, but is not intended to limit, the Progressive Design-Builder's indemnification obligations under Section 28 (Indemnification).

### **1.1.5 Insurance No Limit of Liability**

Any requirement for insurance imposed upon the Progressive Design-Builder is not intended to be construed as any limit of liability of the Progressive Design-Builder under this Contract.

## **2 PROGRESSIVE DESIGN-BUILDER PROVIDED INSURANCE**

The Progressive Design-Builder shall procure insurance acceptable to the Department, as identified in this Exhibit J and as described in the Contract Documents. The Progressive Design-Builder shall include all insurance costs in each Work Package GMP. When through one or more claims or pending claims, the remaining coverage or potential remaining coverage of any insurance policy required in this Section 2 and its subsections is or may be reduced to \$1 million or less in any policy period, the Progressive Design-Builder shall provide written notice to the Department of such remaining coverage or potential remaining coverage. The Progressive Design-Builder shall provide this notice within 15 Days after the Progressive Design-Builder has knowledge of the claim that reduces or may reduce the remaining coverage or potential remaining coverage to \$1 million or less.

### **2.1 Workers' Compensation and Employer's Liability Coverage**

The Progressive Design-Builder shall furnish evidence to the Department that, with respect to the Work, the Progressive Design-Builder carries workers' compensation insurance, or is qualified to by the Kansas Division of Workers' Compensation as self-insured and carries insurance for employer's liability sufficient to comply with all obligations under State laws relating to workers' compensation and employer's liability. The Progressive Design-Builder shall require each Subcontractor to make the same evidence available to the Department at the Department's request. This evidence shall be furnished to and Approved by the Department prior to the time the Progressive Design-Builder commences Work on the Site or furnished and Approved by the Department at the time it is requested for a Subcontractor.

### **2.2 Commercial General Liability Insurance**

The Progressive Design-Builder shall obtain and maintain a policy of commercial general liability broad form coverage for bodily injury, death, property damage, personal injury, and advertising liability written on an occurrence form that shall be no less comprehensive or more restrictive than the coverage provided by Insurance Services Office (ISO) for CG 00 01 10 01.

1. Limits of liability; general liability:
  - a. \$1 million - each occurrence.
  - b. \$2 million - general aggregate (annually).
  - c. \$1 million - personal injury.
  - d. \$2 million - products/completed operations liability.
2. Such insurance shall include, by its terms or appropriate endorsements, bodily injury, death, property damage, legal liability, personal injury, blanket contractual, independent Progressive Design-Builder, premises, operations and products, and completed operations. Such insurance shall also include blanket coverage for explosion, collapse, and underground (XCU) hazards.
3. Products and completed operations coverage shall be continued for a minimum of five years from Final Acceptance.

4. The Department shall be an additional insured with respect to liability caused in whole or in part out of acts or omissions of the Progressive Design-Builder or its Subcontractors, whether on or off the Site.

The commercial general liability insurance shall be primary and non-contributory coverage, rather than excess coverage or contributing to any insurance maintained by any other Person. The limits of the commercial general liability insurance may be satisfied with a practice policy, or a combination of a practice policy and Project specific policy that is also primary and non-contributory.

### **2.3 Automobile Liability Insurance**

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

The following limits of liability and other requirements shall apply:

1. \$1 million combined single limit for bodily injury and property damage liability.
2. Coverage shall be provided on ISO form number CA 00 01 10 01 or equivalent.
3. The policy shall be endorsed to include Motor Carrier Act endorsement – Hazardous Materials Cleanup (MCS-90), if applicable.

The limits of the commercial automobile liability insurance may be satisfied with a practice policy, or a combination of a practice policy and Project specific policy.

### **2.4 Excess (Umbrella) Liability Insurance**

The Progressive Design-Builder shall obtain and maintain a policy of umbrella or excess liability insurance with limits of not less than \$5 million per occurrence and \$5 million annual aggregate which will provide bodily injury, death, personal injury, and property damage liability at least as broad as the primary coverages set forth above, including employer's liability, commercial general liability, and commercial automobile liability, as set forth in Section 2.1 (Workers' Compensation and Employer's Liability Coverage), Section 2.2 (Commercial General Liability Insurance), and Section 2.3 (Automobile Liability Insurance). The excess (umbrella) liability insurance shall be primary and non-contributory coverage, rather than excess or contributing, to any insurance maintained by any other Person.

### **2.5 Pollution Liability Coverage**

The Progressive Design-Builder shall obtain and maintain contractor's pollution liability coverage. The following limits and conditions shall apply:

1. The limit of liability per occurrence shall be not less than \$1 million and the total Project aggregate shall be \$2 million. The limits of the contractor's pollution liability coverage may be satisfied with either a Project specific policy or a combination of a practice policy and Project specific excess endorsement to the practice policy.
2. The Department shall be named as an additional insured (to the extent commercially available as determined by the Department).
3. The policy form shall be written on an occurrence-based form.

## **2.6 Additional Insureds**

Each policy of commercial general liability insurance, commercial auto liability, and excess liability (umbrella) insurance shall name the State of Kansas, the Department, the City of De Soto, Johnson County, and their officials, agents, and employees as additional insureds and furnish a waiver of subrogation in favor of each. Each of such policies shall also contain a separation of insureds condition. The insurance afforded by the Progressive Design-Builder shall be primary and non-contributory insurance.

## **2.7 Professional Liability Insurance**

Unless the Progressive Design-Builder and Department mutually agree before Contract execution to allow professional liability insurance to be provided through the Lead Designer's practice policy, the Lead Designer shall maintain project specific professional liability insurance coverage for the Designer's operations on the Project, as follows:

1. Limits of Liability shall be not less than \$1 million per claim, an annual aggregate of \$1 million, and a Project aggregate of \$2 million.
2. The policy shall have a five-year extended reporting period from Final Acceptance with respect to all events that occurred, but were not reported, during the term of the policy.
3. The policy shall protect against any negligent act, error, or omission arising out of the Designer's design or engineering activities with respect to the Project.
4. The policy shall have a retroactive date of no later than the execution date of this Contract.
5. The policy shall be primary and non-contributory with any other professional liability policies on the Project.

Each entity that performs design or engineering activities with respect to the Project shall maintain practice professional liability insurance coverage for its operations on the Project, with limits of liability of not less than \$1 million per claim and an annual aggregate of \$1 million. The contract with each such entity shall require the entity to renew the policy annually for five years following Final Acceptance, or provide a new policy with a retroactive date of the date the entity first performed design or other engineering activities on the Project, or a combination of the two types of policies to ensure that a practice professional liability policy is in place to cover that professional's liability on the Project during the Project and for five years following Final Acceptance. Any entity (other than the Designer) may be relieved from providing a practice professional liability insurance policy if that entity is insured under another entity's practice professional liability policy.

## **2.8 Builder's Risk**

The Progressive Design-Builder is not required to carry a builder's risk insurance policy; however, the Progressive Design-Builder shall be responsible for all builder's risk claims and the Department shall have no responsibility for any item for which the Progressive Design-Builder could have obtained coverage under a builder's risk policy.

## EXHIBIT K: PROPOSAL COMMITMENTS

[INSERT **Form M** (Israel Boycott Restriction Certification), **Form N** (Sexual Harassment Acknowledgement Form), **Form F** (Debarment, etc.) from Proposal.]