# Texas Department of Transportation

# DESIGN-BUILD AGREEMENT GENERAL CONDITIONS Items 1-9

[DATE]

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## ITEM 1 DEFINITIONS OF TERMS

### 1.1 Abbreviations

Unless otherwise specified, wherever the following abbreviations or terms are used in the Contract Documents, they shall have the meanings set forth below:

| | |
|---|---|
| **AAP** | AASHTO Accreditation Program |
| **AASHTO** | American Association of State Highway and Transportation Officials |
| **ACHP** | Advisory Council on Historic Preservation |
| **ACI** | American Concrete Institute |
| **ACM** | Asbestos-containing material |
| **ADA** | Americans with Disabilities Act, 42 U.S.C. § 12101, et seq. |
| **ADT** | Average Daily Traffic |
| **ALJ** | Administrative Law Judge |
| **ANSI** | American National Standards Institute |
| **APS** | Accessible Pedestrian Signal |
| **AREMA** | American Railway Engineering and Maintenance of Way Association |
| **ARI** | Annual Recurrence Interval |
| **ASB** | Asphalt Bond Breaker |
| **ASTM** | American Society of Testing and Materials |
| **ATC** | Alternative Technical Concept |
| **ATP** | Acceptance Test Plan |
| **AWS** | American Welding Society |
| **BMP** | Best Management Practices |
| **CADD** | Computer Aided Drafting and Design |
| **CAP** | (Environmental) Compliance Action Plan |
| **CCI** | Construction Cost Index |
| **CCTV** | Closed Circuit Television |
| **CORS** | Continuous Operating Reference Stations |
| **CEPP** | Comprehensive Environmental Protection Plan |
| **CMP** | Construction Monitoring Plan |
| **CFR** | Code of Federal Regulations |
| **CGP** | Construction General Permit |
| **CLOMR** | Conditional Letters of Map Revisions |
| **CP** | Communication Plan |
| **CPM** | Critical Path Method |
| **CQCM** | Construction Quality Control Manager |
| **CQMP** | Construction Quality Management Plan |
| **CRCP** | Continuously Reinforced Concrete Pavement |
| **CRM** | Comment Resolution Matrix |
| **CSBE** | Cement Stabilized Backfill Embankment |
| **CSJ** | Control Section Job |
| **CTB** | Cement Treatment Base |
| **CTMS** | Computerized Traffic Management System |
| **CWA** | Clean Water Act |
| **DB** | Design-Build |
| **DBA** | Design-Build Agreement |
| **DBC** | Design-Build Contract |

| | |
|---|---|
| **DBE** | Disadvantaged Business Enterprise |
| **DMS** | Dynamic Message Signs |
| **DOT** | U.S. Department of Transportation |
| **DSS** | Decent, Safe and Sanitary (dwelling) |
| **DUC** | DB Contractor Utility Coordinator |
| **ECI** | Environmental Compliance Inspector |
| **ECM** | Environmental Compliance Manager |
| **ECMP** | Environmental Compliance and Mitigation Plan |
| **EDMS** | Electronic Document Management System |
| **EMS** | Environmental Management System |
| **EMT** | Electrical Metallic Tubing |
| **ENR** | Engineering News Record |
| **EOR** | Engineer of Record |
| **EPD** | Escrowed Proposal Documents |
| **EPIC** | Environmental Permits, Issues and Commitments |
| **EPTP** | Environmental Protection Training Program |
| **ESA** | Endangered Species Act of 1973, as amended |
| **ESAL** | Equivalent Single-Axle Load |
| **ESOC** | Early Start of Construction |
| **ET** | Environmental Team |
| **FEIS** | Final Environmental Impact Statement |
| **FEMA** | Federal Emergency Management Agency |
| **FHWA** | Federal Highway Administration |
| **FIS** | Flood Insurance Study |
| **FM** | Farm to Market Road |
| **FPS-21** | Flexible Pavement System version 21 |
| **FWCA** | Fish and Wildlife Coordination Act |
| **GAAP** | Generally Accepted Accounting Principles |
| **GIS** | Geographical Information System |
| **GPK** | GEOPAK |
| **GPS** | Global Positioning System |
| **HCR** | Highway Construction Report |
| **HEC** | Hydraulic Engineering Circular |
| **HEC-RAS** | Hydrologic Engineering Center's – River Analysis System |
| **HMA** | Hot Mix Asphalt |
| **HMMP** | Hazardous Materials Management Plan |
| **HPS** | High Pressure Sodium |
| **HVAC** | Heating Ventilation and Air Conditioning |
| **ID** | Identification |
| **IEMP** | Incident and Emergency Management Plan |
| **IQ** | independent quality |
| **IQF** | Independent Quality Firm |
| **IQFM** | Independent Quality Firm Manager |
| **IRI** | International Roughness Index |
| **ISO** | International Standards Organization |
| **ITP** | Instructions to Proposers |
| **ITS** | Intelligent Transportation System |
| **IWP** | Investigative Work Plan |
| **LAN** | Local Area Network |
| **LIBOR** | London Interbank Offered Rate |
| **LBP** | Lead Based Paint |

| | |
|---|---|
| **LCCA** | Life-Cycle Cost Analysis |
| **LED** | Light-Emitting Diode |
| **LOMR** | Letters of Map Revision |
| **LPA** | Local Public Agency |
| **LRFD** | Load and Resistance Factor Design |
| **MBTA** | Migratory Bird Treaty Act |
| **MDMP** | Maintenance Document Management Plan |
| **MMP** | Maintenance Management Plan |
| **MMS** | Maintenance Management System |
| **MOA** | Memorandum of Agreement |
| **MOT** | Maintenance of Traffic |
| **MOU** | Memorandum of Understanding |
| **MPH** | Miles Per Hour |
| **MPLS** | Multiple Protocol Label Switching |
| **$M_R$** | Resilient Modulus |
| **MS4** | Municipal Separate Storm Sewer System |
| **MSDS** | Material Safety Data Sheet |
| **MSE** | Mechanically Stabilized Earth |
| **NAVD** | North American Vertical Datum |
| **NBI** | National Bridge Inventory |
| **NCHRP** | National Cooperative Highway Research Program |
| **NCR** | Nonconformance Report |
| **NEC** | National Electrical Code |
| **NEPA** | National Environmental Policy Act |
| **NHPA** | National Historical Preservation Act |
| **NOI** | Notice of Intent |
| **NPDES** | National Pollutant Discharge Elimination System |
| **NTCIP** | National Transportation Communications for ITS Protocol |
| **NTP** | Notice to Proceed |
| **NTP1** | Notice to Proceed 1 |
| **NTP2** | Notice to Proceed 2 |
| **OSHA** | Occupational Safety and Health Administration |
| **OSR** | Old San Antonio Road |
| **PA** | Programmatic Agreement |
| **PBS** | Project Baseline Schedule |
| **PBS1** | Preliminary Project Baseline Schedule |
| **PBS2** | Project Baseline Schedule 2 |
| **PBS3** | Project Baseline Schedule 3 |
| **PC** | Point of Curvature |
| **PCC** | Point of Compound Curvature |
| **PCO** | Potential Change Order |
| **PDF** | Portable Document Format |
| **PE** | Registered Professional Engineer |
| **PFC** | Permeable Friction Course |
| **PI** | Plasticity Index or Point of Intersection, as appropriate |
| **PICP** | Public Information and Communications Plan |
| **PM** | Project Manager |
| **PMP** | Project Management Plan |
| **POB** | Point of Beginning |
| **POC** | Point of Commencing |
| **PRC** | Point of Reverse Curvature |

| | |
|---|---|
| **PSL** | Project Specific Location |
| **PSQAF** | Professional Services Quality Assurance Firm |
| **PSQAM** | Professional Services Quality Assurance Manager |
| **PSQCM** | Professional Services Quality Control Manager |
| **PSQMP** | Professional Services Quality Management Plan |
| **PT** | Point of Tangency |
| **PUA** | Possession and Use Agreement |
| **PUAA** | Project Utility Adjustment Agreement |
| **PVC** | Polyvinyl Chloride |
| **PVR** | Potential Vertical Rise |
| **QA** | Quality Assurance |
| **QAP** | Quality Assurance Plan |
| **QC** | Quality Control |
| **QMP** | Quality Management Plan |
| **RCP** | Reinforced Concrete Pipe |
| **RDVCS** | Regional Data and Video Communications System |
| **RFC** | Release (or Released) for Construction |
| **RFI** | Request For Information |
| **RFP** | Request for Proposals |
| **RFQ** | Request for Qualifications |
| **RID** | Reference Information Documents |
| **ROD** | Record of Decision |
| **ROE** | Right of Entry |
| **ROW** | Right of Way |
| **ROWIS** | Right of Way Information System |
| **ROW AM** | Right of Way Acquisition Manager |
| **RP** | Recycling Plan |
| **RPLS** | Registered Professional Land Surveyor |
| **RQD** | Rock-Quality Designation |
| **SDMS** | Single-Line Dynamic Message Signs |
| **SF** | Square Foot |
| **SFHA** | Special Flood Hazard Area |
| **SH** | State Highway |
| **SHPO** | State Historic Preservation Officer |
| **SHSD** | Standard Highway Sign Design for Texas |
| **SI** | System Integrator / Serviceability Index |
| **SICP** | Snow and Ice Control Plan |
| **SIRS** | Site Investigation Reports |
| **SMA** | Stone Matrix Asphalt |
| **SOAH** | Texas State Office of Administrative Hearings |
| **SSTR** | Single Slope Traffic Railing |
| **SUE** | Subsurface Utility Engineering |
| **SW3P** | Storm Water Pollution Prevention Plan |
| **SWEP** | Severe Weather Evacuation Plan |
| **SWMM** | Storm Water Management Model |
| **SWSF** | Storm Water Storage Facilities |
| **TAC** | Texas Administrative Code |
| **TBPLS** | Texas Board of Professional Land Surveying |
| **TCEQ** | Texas Commission on Environmental Quality |
| **TCLP** | Toxicity Characteristic Leaching Procedure |
| **TDLR** | Texas Department of Licensing and Regulation |

| | |
|---|---|
| **TCP** | Traffic Control Plan |
| **THC** | Texas Historical Commission |
| **TIA** | Time Impact Analysis |
| **TMC** | Traffic Management Center |
| **TMP** | Traffic Management Plan |
| **TMUTCD** | Texas Manual on Uniform Traffic Control Devices |
| **TOM** | Thin Overlay Mixture |
| **TPDES** | Texas Pollutant Discharge Elimination System |
| **TPWD** | Texas Parks and Wildlife Department |
| **TREC** | Texas Real Estate Commission |
| **TRM** | Texas Reference Marker |
| **TxDOT** | Texas Department of Transportation |
| **UAAA** | Utility Adjustment Agreement Amendment |
| **UAFM** | Utility Adjustment Field Modification |
| **UAR** | TxDOT Utility Accommodation Rules |
| **UCS** | Unconfined Compressive Strength |
| **UDC** | Utility Design Coordinator |
| **UJUA** | Utility Joint Use Agreement |
| **UM** | Utility Manager |
| **US** | United States Highway |
| **USACE** | United States Army Corps of Engineers |
| **USB** | Universal Serial Bus |
| **USCG** | United States Coast Guard |
| **USEPA** | United States Environmental Protection Agency |
| **USFWS** | United States Fish and Wildlife Service |
| **USPAP** | Uniform Standard of Professional Appraisal Practices |
| **UST** | Underground Storage Tank |
| **UTM** | Universal Transverse Mercator |
| **UTP** | Unshielded Twisted Pair |
| **UTR** | Utility Tracking Report |
| **VAB** | Vehicle Arresting Barrier |
| **VGA/HDMI** | Video Graphics Adaptor/High Definition Multimedia Interface |
| **WBS** | Work Breakdown Structure |
| **XML** | Extensible Markup Language |

## 1.2 Definitions

### 1.2.1 Usage

Capitalized terms used in the General Conditions and Design-Build Specifications not defined in the Design-Build Agreement have the meanings set forth in Section 1.2.2 below. The Design-Build Agreement includes definitions for certain terms that are used in the Design-Build Agreement, as noted in Section 1.2.2 below. If any definition set forth in Section 1.2.2 is also included in Section 1.2 of the Design-Build Agreement, to the extent such definitions conflict, the definition in Section 1.2 of the Design-Build Agreement shall govern and control.

### 1.2.2 Defined Terms

**Abbreviated Utility Assembly** means the collection of plans and other information and materials that DB Contractor is required to submit to TxDOT in connection with each Utility proposed to remain at its original location within the Project ROW, as more particularly described in

Section 14.3.4.5 of the Design-Build Specifications; a single Abbreviated Utility Assembly may address more than one such Utility.

**Acceleration Costs** means those fully documented increased costs reasonably incurred by DB Contractor (that is, costs over and above what DB Contractor would otherwise have incurred) which are directly and solely attributable to increasing the rate at which the Work is performed in an attempt to complete necessary elements of the Work earlier than otherwise anticipated, such as for additional equipment, additional crews, lost productivity, overtime and shift premiums, increased supervision and any unexpected material, equipment or crew movement necessary for re-sequencing in connection with acceleration efforts or a Recovery Schedule.

**Acquisition Packages** means the series of documentation and information for the acquisition of parcels for the Project ROW described in Section 15.3.6 of the Design-Build Specifications.

**Acquisition Survey Document** means the packages of documentation and information for the acquisition of parcels for the Project ROW described in Section 15.3.1 of the Design-Build Specifications.

**Additional Properties** means any real property (which term is inclusive of all permanent estates and interests in real property), improvements and fixtures outside of the Schematic ROW that will be acquired in connection with the Project, including (a) rest area sites, (b) the DB Contractor-Designated ROW, (c) parcels that must be acquired due to a TxDOT-Directed Change, and (d) parcels that must be acquired due to a Necessary Basic Configuration Change, subject to TxDOT's reasonable determination that the property is necessary. The term "Additional Properties" shall include any air space, surface rights and subsurface rights within such additional real property area that TxDOT directs DB Contractor to acquire for the Project. The term specifically excludes: (i) Replacement Utility Property Interests and (ii) any temporary easements or other real property interests that DB Contractor may deem necessary or advisable to acquire, at its own cost and expense, for work space, contractor lay-down areas, material storage areas, borrow sites, or other convenience of DB Contractor.

**Aesthetics and Landscaping Plan** is defined in the Design-Build Agreement.

**Adjacent Work** means any project, work, improvement or development to be planned, designed or constructed that could or does impact the Project or is adjacent to the Project. Examples of Adjacent Work include proposed subdivisions, other roads constructed by Governmental Entities, site grading and drainage and other development improvement plans and Utility projects.

**Adjust** means to perform a Utility Adjustment.

**Adjustment Standards** means the standard specifications, standards of practice, and construction methods that a Utility Owner customarily applies to facilities (comparable to those being Adjusted on account of the Project) constructed by the Utility Owner (or for the Utility Owner by its contractors), at its own expense. Unless the context requires otherwise, references in the Contract Documents to a Utility Owner's "applicable Adjustment Standards" refer to those that are applicable pursuant to Section 4.5.3.5.

**Administrative Settlement Committee** means a committee appointed by the District Engineer or his designee consisting of the ROW Administrator or his designee and two or more members who will analyze pertinent information and reach consensus on whether an administrative settlement should or should not be recommended.

**Affected Third Parties Plan** shall have the meaning set forth in Section 4.2.6.

**Affidavit of Property Interest** means the document describing an Existing Utility Property Interest claimed by a Utility Owner, as more particularly described in Section 14.2.4.1 of the Design-Build Specifications.

**Affiliate** means:

(a) any shareholder, member, partner or joint venture member of DB Contractor,

(b) any Person that directly or indirectly through one or more intermediaries controls, or is controlled by, or is under common control with, DB Contractor or any of its shareholders, members, partners or joint venture members; and

(c) 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 (i) DB Contractor, (ii) any of the shareholders, members, partners or joint venture members of DB Contractor, or (iii) any Affiliate of DB Contractor under clause (b) of this definition.

For purposes of this definition the term "control" means the possession, directly or indirectly, of the power to cause the direction of the management of a Person, whether through voting securities, by contract, family relationship or otherwise.

**Affiliated** means having the status of an Affiliate.

**Alternate Procedure** means the alternate procedure for processing Utility Adjustments for TxDOT, as authorized by the FHWA by letter dated September 19, 2014 (FHWA Risk Based Stewardship and Oversight Modifications).

**Alternate Procedure List** means the list of Utilities to be Adjusted (and related information), as the same may be amended from time to time.

**Alternative Technical Concept (ATC)** shall have the meaning set forth in Section 3.1 of the ITP.

**Antiquities Permit** means the permits required under the Antiquities Code of Texas enacted in 1969, to be obtained from the Texas Historical Commission as per Section 4.2.4.2.9.

**Assembly** means the additional Utility Assembly that DB Contractor shall prepare for any Project Utility Adjustment Agreement to cover all Utility Adjustments addressed in the corresponding Utility Adjustment Agreement Amendment as more particularly described in Section 14.3.4.5 of the Design-Build Specifications.

**Authorized Representative** has the meaning set forth in Section 9.2.1 of the Design-Build Agreement.

**Baseline Inspections** shall have the meaning set forth in Section 27.3.3.1 of the Design-Build Specifications.

**Basic Configuration** is defined in the Design-Build Agreement.

**Basic Costs** means the costs for the following, whether incurred by DB Contractor directly or reimbursed by DB Contractor to a Utility Owner: (i) Professional Services associated with, and

construction of, a Utility Adjustment, plus (ii) acquisition of Replacement Utility Property Interests or compensation to the Utility Owner for relinquishment of Existing Utility Property Interests within the Project ROW, in each case as required for a Utility Adjustment.

**Best Management Practices (BMP)** shall have the meaning set forth in Storm Water Management For Construction Activities: Developing Pollution Prevention Plans and Best Management Practices (EPA Document 832 R 92-005).

**Betterment** has, with respect to a given Utility being Adjusted, the meaning (if any) set forth in the applicable Utility Agreements; in all other cases, "Betterment" means any upgrading of such facility in the course of such Utility Adjustment that is not attributable to the construction of the Project and is made solely for the benefit of and at the election of the Utility Owner, including an increase in the capacity, capability, efficiency or function of an Adjusted Utility over that which was provided by the existing Utility; provided, however, that the following shall not be considered Betterments:

(a) any upgrading that is required for accommodation of the Project;

(b) replacement devices or materials that are of equivalent standards although not identical;

(c) replacement of devices or materials no longer regularly manufactured with an equivalent or next higher grade or size;

(d) any upgrading required by applicable Law;

(e) replacement devices or materials that are used for reasons of economy (e.g., non-stocked items may be uneconomical to purchase);

(f) any upgrading required by the Utility Owner's written "standards" meeting the requirements described in Section 14.1.2.2 of the Design-Build Specifications; or

(g) any discretionary decision by a Utility Owner that is contemplated within a particular standard described in clause (f) above.

For fiber optic Utilities, extension of a Utility Adjustment to the nearest splice boxes shall not be considered a Betterment if required by the Utility Owner in order to maintain its written telephony standards.

**Boycott Israel** has the meaning set forth in Section 7.16(a).

**Broker** has the meaning set forth in Section 4.4.4.2.1.

**Business Days** means days on which TxDOT is officially open for business.

**Category 1 Defect** means those Defects classified as Category 1 Defects in Section 27.3.2.2 of the Design-Build Specifications.

**Category 2 Defect** means those Defects classified as Category 2 Defects in Section 27.3.2.2 of the Design-Build Specifications.

**Certificate of Final Acceptance** means the certificate issued by TxDOT indicating that the Project has achieved the conditions for Final Acceptance.

**Certificate of Substantial Completion** means the certificate issued by TxDOT indicating that the Project has achieved the conditions for Substantial Completion.

**Change in Law** means (a) the adoption of any Law after the Proposal Due Date or (b) any change in any Law or in the interpretation or application thereof by any Governmental Entity after the Proposal Due Date, in each case that is materially inconsistent with Laws in effect on the Proposal Due Date; excluding, however, any such Change in or new Law that also constitutes or causes a change in or new Adjustment Standards, as well as any change in or new Law passed or adopted but not yet effective as of the Proposal Due Date. The term **"Change in Law"** also excludes any change in or new Law relating to DB Contractor's general business operations, including licensing and registration fees, income taxes, gross receipts taxes, social security, Medicare, unemployment and other payroll-related taxes.

**Change of Control** means any assignment, sale, financing, grant of security interest, transfer of interest or other transaction of any type or description, including by or through voting securities, asset transfer, contract, merger, acquisition, succession, dissolution, liquidation, or otherwise that results, directly or indirectly, in a change in possession of the power to direct or control or cause the direction or control of the management of DB Contractor or a material aspect of its business. A Change of Control of a shareholder, member, partner or joint venture member of DB Contractor may constitute a Change of Control of DB Contractor if such shareholder, member, partner or joint venture member possesses the power to direct or control or cause the direction or control of the management of DB Contractor. Notwithstanding the foregoing, the following shall not constitute a Change of Control:

(a) A change in possession of the power to direct or control the management of DB Contractor or a material aspect of its business due solely to a bona fide transaction involving beneficial interests in the ultimate parent organization of a shareholder, member, partner or joint venture member of DB Contractor (but not if the shareholder, member, partner or joint venture member is the ultimate parent organization), unless the transferee in such transaction is, at the time of the transaction, suspended or debarred or subject to a proceeding to suspend or debar from bidding, proposing or contracting with any federal or State department or agency;

(b) An upstream reorganization or transfer of direct or indirect interests in DB Contractor so long as there occurs no change in the entity with ultimate power to direct or control or cause the direction or control of the management of DB Contractor;

(c) A transfer of interests between managed funds that are under common ownership or control other than a change in the management or control of a fund that manages or controls DB Contractor; or

(d) The exercise of minority veto or voting rights (whether provided by applicable Law, by DB Contractor's organizational documents or by related member or shareholder agreements or similar agreements) over major business decisions of DB Contractor, provided that if such minority veto or voting rights are provided by shareholder or similar agreements, TxDOT has received copies of such agreements.

**Change Order** means a written order to DB Contractor executed by TxDOT that meets the requirements of Section 4.6 and delineates changes in the Work within the general scope of the Contract Documents or in the terms and conditions of the Contract Documents and establishing, if appropriate, an adjustment to the Price or a Completion Deadline.

**Claim** means (a) a demand by DB Contractor, which is or potentially could be disputed by TxDOT, for a time extension under the Contract Documents or payment of money or damages from TxDOT to DB Contractor or (b) a demand by TxDOT, which is or potentially could be disputed by DB Contractor, for payment of money or damages from DB Contractor to TxDOT.

**Code** shall have the meaning set forth in Recital A of the Design-Build Agreement.

**Commercial Rules** has the meaning set forth in the Disputes Board Agreement.

**Commission** means the Texas Transportation Commission.

**Completion Deadlines** means the Substantial Completion Deadline or Final Acceptance Deadline set forth in Section 2.4 of the Design-Build Agreement.

**Comprehensive Environmental Protection Plan (CEPP)** means the document obligating DB Contractor to protect the environment and document the measures taken during the performance of the Work to avoid and minimize impacts on the environment as further described in Section 4.2.4.

**Condemnation Packages** means the series of documentation and information for the condemnation of parcels for the Project ROW described in Section 15.4.4 of the Design-Build Specifications.

**Construction Documents** means all Released for Construction Documents, shop drawings, working drawings, fabrication plans, material and hardware descriptions, specifications, construction quality control reports, construction quality assurance reports, and samples necessary or desirable for construction of the Project and/or the Utility Adjustments in accordance with the Contract Documents.

**Construction General Permit (CGP)** means a permit under the TPDES program for the management of storm water discharges from construction sites.

**Construction Manager** means the senior staff member responsible for ensuring that the Project is constructed in accordance with the Project requirements, as more particularly described in Section 4.2.1.1.3.

**Construction Quality Control Manager (CQCM)** means the person assigned by DB Contractor with responsibility to cause the methods and procedures contained in the approved CQMP to be implemented and followed by DB Contractor's construction staff in the performance of the Work, as more particularly described in Table 1 in Attachment 4-2.

**Construction Quality Management Plan (CQMP)** means the plan that establishes quality control and quality assurance procedures for the Construction Work, as more particularly described in Section 4.3.4.

**Construction Work** means all Work required to build or construct, make, form, manufacture, furnish, install, supply, deliver or equip the Project and the Utility Adjustments.

**Contract Documents** has the meaning set forth in Section 1.3 of the Design-Build Agreement.

**Corridor Structure Type Study and Report** means a preliminary bridge type study report to evaluate potential superstructure and substructure configurations that may be suitable for the

proposed bridges based on span lengths, deck widths, soil parameters, hydraulic and scour issues, environmental issues, wetland impacts, safety and maintenance of traffic, highway alignments, constructability, aesthetic requirements, future widening, construction schedule and costs. The Corridor Structure Type Study Report recommends configurations for the proposed bridges based on the above analysis and also provides the rationale for recommending the proposed alternatives as more particularly described in Section 21.2 of the Design-Build Specifications.

**Cost to Cure** means an appraisal method applied to estimate a proper adjustment for damages to a property that can be physically and economically corrected, as described in further detail in the TxDOT *ROW Appraisal and Review Manual*.

**Critical Path** means each critical path on the Project Schedule, which ends on the Substantial Completion Deadline or the Final Acceptance Deadline, as applicable (i.e., the term shall apply only following consumption of all available Float in the schedule). The lower case term "critical path" means the activities and durations associated with the longest chains of logically connected activities through the Project Schedule with the least amount of positive slack or the greatest amount of negative slack.

**Customer Groups** means groups, Persons and entities having a perceived stake or interest in the Project, including: the media, elected officials, Governmental Entities, including regulatory and law enforcement agencies, general public residing or working within the general vicinity of the Project or traveling within or across the limits of the Project, business owners within or adjacent to the Project, Utility Owners, operating railroads, transportation authorities and providers affected by the Project (such as local airports, transit operators, toll authorities, and highway concessionaires), community groups, local groups (neighborhood associations, business groups, chambers of commerce, convention and visitors bureaus, contractors, etc.), major traffic generators that could be affected by closures or construction (including, for example, universities, hospitals and major employers) and sponsors/coordinators of major regional special events, and other Persons or entities affected by the Project, including those identified in the Design-Build Specifications.

**Days** or **days** means calendar days unless otherwise expressly specified.

**DB Contractor** or **Design-Build Contractor** is defined in the Design-Build Agreement.

**DB Contractor Default** has the meaning set forth in Section 8.7.1.1.

**DB Contractor-Designated ROW** means any permanent interest in real property (which term is inclusive of all estates and interests in real property), improvements and fixtures outside of the Schematic ROW that DB Contractor determines is necessary or advisable to be acquired for the Project and which acquisition is approved by TxDOT to be acquired at DB Contractor's cost and expense. The term specifically includes any easements required for drainage for the Project and any air space, surface rights and subsurface rights within the DB Contractor-Designated ROW. The term specifically excludes the Replacement Utility Property Interests, any temporary easements or other temporary real property interests that DB Contractor may deem necessary or advisable to acquire, at its own cost and expense, for excessive work space, contractor lay-down areas, material storage areas, or other convenience of DB Contractor.

**DB Contractor-Related Entities** means: (a) DB Contractor, (b) DB Contractor's shareholders, partners, joint venturers or members, (c) Subcontractors (including Suppliers), (d) any other Persons performing any of the Work, (e) any other Persons for whom DB Contractor may be legally

or contractually responsible, and (f) the employees, agents, officers, directors, shareholders, representatives, consultants, successors, assigns and invitees of any of the foregoing.

**DB Contractor Releases of Hazardous Materials** means: (a) Releases of Hazardous Materials, or the exacerbation of any such releases, attributable to the culpable actions, culpable omissions, negligence, intentional misconduct, or breach of applicable Law or contract by any DB Contractor-Related Entity; (b) Releases of Hazardous Materials arranged to be brought onto the Site or elsewhere by any DB Contractor-Related Entity, regardless of cause; or (c) use, containment, storage, management, handling, transport and disposal of any Hazardous Materials by any DB Contractor-Related Entity in violation of the requirements of the Contract Documents or any applicable Law or Governmental Approval.

**DBE Performance Plan** means DB Contractor's plan for meeting the DBE participation goals set forth in the Design-Build Agreement.

**DBE Special Provisions** means TxDOT's special provisions for the TxDOT Disadvantaged Business Enterprise Program adopted pursuant to 49 CFR Part 26, which special provisions are set forth in Attachment 3-2.

**Decent, Safe and Sanitary (DSS) Dwelling** means the condition of a dwelling such that it meets applicable housing and occupancy codes as defined in 49 CFR Part 24.

**Defect** means, in connection with the Maintenance Work, a deficiency in an Element, whether by design, construction, installation, repair, rehabilitation, reconstruction, operation, damage or wear, affecting the condition, use, functionality or operation of any Element, which would cause or have the potential to cause one or more of the following:

(a) A hazard, nuisance or other risk to public or worker health or safety, including the health and safety of Users of the Project;

(b) A structural deterioration of the affected Element or any other part of the Project affected by it;

(c) Damage to the property or equipment of TxDOT or a third party;

(d) Damage to the environment; or

(e) Failure of the Element to meet the Target for a measurement record as set forth in the columns headed "Target" and "Measurement Record" in the Performance and Measurement Table.

**Defect Remedy Period** means, for a particular Defect, the time period for rectifying such Defect as set forth in either (a) for a Category 1 Defect, the column headed "Cat. 1 Hazard Mitigation" or "Cat. 1 Permanent Remedy," or (b) for a Category 2 Defect, the column headed "Cat. 2 Permanent Repair" in the Performance and Measurement Table.

**Demolition and Abandonment Plan** means the plan prepared by DB Contractor that considers the types and sizes of Utilities and structures that will be abandoned during the Term as more particularly described in Section 18.2 of the Design-Build Specifications.

**Design-Build Contract** or **DBC** means the Design-Build Agreement and these Design-Build Agreement General Conditions, including all exhibits attached hereto, as such may be amended,

supplemented, amended and restated, or otherwise modified from time to time in accordance with the terms of the DBC.

**Design Documents** means all drawings (including plans, profiles, cross-sections, notes, elevations, sections, details and diagrams), specifications, reports, studies, calculations, electronic files, records and Submittals necessary for, or related to, the design of the Project or any Utility Adjustments in accordance with the Contract Documents, the Governmental Approvals, and applicable Law.

**Design Exception** means a deviation from one or more of the 13 controlling criteria found in Chapter 1, Section 2, of the TxDOT *Roadway Design Manual*. The procedures for requesting a Design Exception are found in the TxDOT Project Development Policy Manual.

**Design Firm** means the qualified Registered Professional Engineer's firm responsible for the design of the Project.

**Design Manager** means the individual position responsible for ensuring design Work is completed and design requirements are met, as more particularly described in Section 4.2.1.1.2.

**Design Speed** means the speed used to determine the various geometric design features of the roadway.

**Design Waiver** means a deviation from the minimum requirements in a noncontrolling category as identified in the TxDOT *Roadway Design Manual*.

**Design Work** means all Work of design, engineering or architecture for the Project, Project ROW acquisition or Utility Adjustments.

**Deviations** means (a) any proposed or actual change, deviation, modification, alteration or exception from the Design-Build Specifications or (b) a change in the Work or other requirements of the Contract Documents issued under Section 4.1.2.2.4. "**Deviation**" includes a Design Exception.

**Differing Site Condition** means (a) subsurface or latent conditions encountered at the actual boring holes identified in the geotechnical reports included in the Reference Information Documents listed in Exhibit 3 of the Design-Build Agreement, which differ materially from those conditions indicated in the geotechnical reports for such boring holes or (b) subsurface or surface 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 in the Contract Documents. This term shall specifically exclude all such conditions of which DB Contractor had actual or constructive knowledge as of the Proposal Due Date. The foregoing definition specifically excludes: (i) changes in surface topography; (ii) variations in subsurface moisture content and variations in the water table; (iii) Utility facilities; (iv) Hazardous Materials, including contaminated groundwater; (v) acquisition of real property for drainage purposes; and (vi) any conditions which constitute or are caused by a Relief Event.

**Differing Site Conditions Deductible Cap** is defined in the Design-Build Agreement.

**Differing Site Conditions Deductible** is defined in the Design-Build Agreement.

**Direct Costs** means costs that are clearly associated with the Work and can be accurately traced to an item of Work, including materials and labor. The term "Direct Costs" does not include indirect costs, such as overhead, profit, depreciation, administration costs and salaries of supervisors.

**Directive Letter** means a letter directing DB Contractor's performance of the Work that meets the requirements set forth in Section 4.6.1.2.1.

**Disadvantaged Business Enterprise** or **DBE** shall have the meaning set forth in Attachment 3-2.

**Disclosure Statements** shall have the meaning set forth in the Disputes Board Agreement.

**Dispute** means any Claim, dispute, disagreement or controversy between TxDOT and DB Contractor concerning their respective rights and obligations under the Contract Documents including concerning any alleged breach or failure to perform and remedies.

**Dispute Resolution Procedures** is defined in the Design-Build Agreement. None of the Informal Resolution Procedures are included in the Dispute Resolution Procedures.

**Disputes Review Panel Agreement (Panel Agreement)** means the five-party agreement between the Parties and the Panel described in Section 4.9.2.7 and set forth in Exhibit 22 to the DBA.

**Disputes Review Panel Process** means the process for Dispute escalation and the Dispute Review Panel set forth in Section 4.9.

**Drainage Design Report** means the report documenting all components of the Project's drainage system as more particularly described in Section 20.4 of the Design-Build Specifications.

**Draw Request** means a Draw Request and Certificate in the form of Attachment 9-1.

**Early Start of Construction (ESOC)** means any construction activity performed in accordance with construction packages issued by the DB Contractor for construction without receiving TxDOT's written statement of no exceptions taken with the Design Manager's and PSQAM's certification of compliance of such packages consistent with the requirements in Attachment 4-1, Table 2, QCP-12. Early Start of Construction packages do not constitute RFC documents, and are prepared at the DB Contractor's risk.

**Effective Date** is defined in the Design-Build Agreement.

**Element** means an individual component, system or subsystem of the Project or of a Utility Adjustment included in the Construction Work, and shall include at a minimum a breakdown into the items described in the Performance and Measurement Table, further subdivided by Performance Section where appropriate.

**Emergency** means any unplanned event within the Project Right of Way that (a) presents an immediate or imminent threat to the long-term integrity of any part of the infrastructure of the Project, to the environment, to property adjacent to the Project or to the safety of Users or the public; or (b) is recognized by the Texas Department of Public Safety as an emergency.

**Emergency Services** means law enforcement, ambulance service, and other similar services from agencies with whom DB Contractor establishes protocols for incident response, safety and security procedures, as set forth in the Incident and Emergency Management Plan.

**Engineer** shall have the meaning set forth in Section 2.2.9.2(b).

**Engineer of Record** means the professional described in Table 1 in Attachment 4-2.

**ENR Construction Cost Index** means the 12-month "Construction Cost Index" published by Engineering News-Record, Two Penn Plaza, 9th Floor, New York, NY 10121.

**Environmental Approvals** means all Governmental Approvals arising from or required by any Environmental Law in connection with development of the Project, including New Environmental Approvals, approvals and permits required under NEPA and those approvals identified in Section 12.2 of the Design-Build Specifications.

**Environmental Commitment (Environmental Permits, Issues and Commitments) (EPIC)** means an environmental requirement that must be fulfilled before, during or after construction. Environmental Commitments include commitments to avoid impacts in specified areas, complete environmental investigations before construction impacts, or to perform specified actions after completion of construction.

**Environmental Compliance and Mitigation Plan (ECMP)** means DB Contractor's plan, to be prepared under the CEPP described in the Project Management Plan, for performing all environmental mitigation measures set forth in the Environmental Approvals, and for complying with all other conditions and requirements of the Environmental Approvals, as more particularly described in Section 4.2.4.2.

**Environmental Compliance Inspector ("ECI")** shall have the meaning set forth in Section 12.3.3 of the Design-Build Specifications.

**Environmental Compliance Manager (ECM)** means the person retained or employed by DB Contractor who has the authority and responsibility for monitoring, documenting, and reporting environmental compliance for the Work, as more particularly described in Section 4.2.4.1.1.

**Environmental Law** means any Law applicable to the Project or the Work regulating or imposing liability or standards of conduct that pertains to the environment, Hazardous Materials, contamination of any type whatsoever, or environmental health and safety matters, and any lawful requirements and standards that pertain to the environment, Hazardous Materials, contamination of any type whatsoever, or environmental health and safety matters, set forth in any permits, licenses, approvals, plans, rules, regulations or ordinances adopted, or other criteria and guidelines promulgated, pursuant to Laws applicable to the Project or the Work, as such have been or are amended, modified, or supplemented from time to time (including any present and future amendments thereto and reauthorizations thereof), including those relating to:\

(a) The manufacture, processing, use, distribution, existence, treatment, storage, disposal, generation, and transportation of Hazardous Materials;

(b) Air, soil, surface and subsurface strata, stream sediments, surface water, and groundwater;

(c) Releases of Hazardous Materials;

(d) Protection of wildlife, Threatened or Endangered Species, sensitive species, wetlands, water courses and water bodies, historical, archeological, and paleontological resources, and natural resources;

(e) The operation and closure of underground storage tanks;

(f) The safety of employees and other persons; and

(g) Notification, documentation, and record-keeping requirements relating to the foregoing.

Without limiting the above, the term "Environmental Laws" shall also include the following:

(i) The National Environmental Policy Act (42 U.S.C. §§ 4321 et seq.), as amended;

(ii) The Comprehensive Environmental Response, Compensation, and Liability Act (42 U.S.C. §§ 9601 et seq.), as amended;

(iii) The Solid Waste Disposal Act, as amended by the Resource Conservation and Recovery Act (42 U.S.C. §§ 6901 et seq.);

(iv) The Emergency Planning and Community Right to Know Act of 1986 (42 U.S.C. §§ 11001 et seq.), as amended;

(v) The Clean Air Act (42 U.S.C. §§ 7401 et seq.), as amended;

(vi) The Federal Water Pollution Control Act, as amended by the Clean Water Act (33 U.S.C. §§ 1251 et seq.);

(vii) The Resource Conservation and Recovery Act (42 U.S.C. §§ 6901, et seq.), as amended;

(viii) The Toxic Substances Control Act (15 U.S.C. §§ 2601 et seq.), as amended;

(ix) The Hazardous Materials Transportation Act (49 U.S.C. §§ 1801 et seq.), as amended;

(x) The Oil Pollution Act (33 U.S.C. §§ 2701, et seq.), as amended;

(xi) The Federal Insecticide, Fungicide and Rodenticide Act (7 U.S.C. §§ 136 et seq.), as amended;

(xii) The Federal Safe Drinking Water Act (42 U.S.C. §§ 300 et seq.), as amended;

(xiii) The Federal Radon and Indoor Air Quality Research Act (42 U.S.C. §§ 7401 et seq.), as amended;

(xiv) The Occupational Safety and Health Act (29 U.S.C. §§ 651 et seq.);

(xv) The Endangered Species Act (16 U.S.C. §§ 1531 et seq.), as amended;

(xvi) The Fish and Wildlife Coordination Act (16 U.S.C. §§ 661 et seq.), as amended;

(xvii) The National Historic Preservation Act (16 U.S.C. §§ 470 et seq.), as amended;

(xviii) The Coastal Zone Management Act (33 U.S.C. §§ 1451 et seq.), as amended;

(xix) The Texas Health and Safety Code, including Chapter 382 (the Clean Air Act), Chapter 383 (the Clean Air Financing Act), Chapter 361 (the Texas Solid Waste Disposal Act), Chapter 362 (the Solid Waste Resource Recovery Financing Act), Chapter 363 (the Municipal Solid Waste Act), Chapter 364 (the County Solid Waste Control Act), Chapter 370 (the Texas Toxic Chemical Release Reporting Act), Chapter 371 (the Texas Used Oil Collection, Management, and Recycling Act), Chapter 401 (the Texas Radioactive Materials and Other Sources of Radiation Act), Chapter 402 (the Texas Low-Level Radioactive Waste Disposal Authority Act), Chapter 502 (the Texas Hazard Communication Act), Chapter 505 (the Texas Manufacturing Project Community Right- To-Know-Act), Chapter 506 (the Texas Public Employer Community Right-To-Know-Act), and Chapter 507 (the Texas Non-manufacturing Facilities Community Right-To-Know Act);

(xx) The Texas Natural Resources Code, including Chapter 40 (the Texas Oil Spill Prevention and Response Act of 1991);

(xxi) The Texas Water Code;

(xxii) The Texas Parks and Wildlife Code;

(xxiii) The Texas Agriculture Code, including Chapter 76 (Pesticide and Herbicide Regulation) and Chapter 125 (the Agricultural Hazard Communication Act);

(xxiv) The Texas Asbestos Health Protection Act (Chapter 1954, Texas Occupations Code); and

(xxv) The Surface Coal Mining and Reclamation Act (Chapter 134, Texas Natural Resources Code).

**Environmental Management System (EMS)** means the system and program for environmental compliance as more particularly described in Section 4.2.4.1.

**Environmental Protection Training Plan (EPTP)** means that program to be initiated by DB Contractor and overseen by TxDOT personnel to ensure the Work is conducted in accordance with the Environmental Commitments and environmental requirements set forth in all Environmental Laws and Environmental Approvals applicable to the Project as more particularly described in Section 4.2.4.3.

**Environmental Site Assessment** means a report prepared by an environmental professional as described in Section 15.3.5.1 of the Design-Build Specifications.

**Environmental Team ("ET")** shall have the meaning set forth in Section 12.3.of the Design-Build Specifications.

**Equity Member** means (a) each entity with a direct equity interest in DB Contractor (whether as a member, partner, joint venture member or otherwise) and (b) each entity with a 10% or greater indirect interest in DB Contractor. Notwithstanding the foregoing, if DB Contractor is a publicly

traded company, shareholders with less than a 10% interest in DB Contractor shall not be considered Equity Members.

**Error** means a mistake, miscalculation, error, omission, inconsistency, inaccuracy, deficiency, or other defect.

**Escrowed Proposal Documents** or **EPDs** shall have the meaning set forth in Section 5.13.1.

**Evaluating Party** has the meaning set forth in the Disputes Board Agreement.

**Event of Default** shall have the meaning set forth in Section 8.7.1.3.

**Executive Director** means the executive director of the Texas Department of Transportation, or his or her successor.

**Existing Utility Property Interest** means any right, title or interest in real property (e.g., a fee or an easement) claimed by a Utility Owner as the source of its right to maintain an existing Utility in such real property, which is compensable in eminent domain. This interest includes all rights, whether the property interest is occupied or not and is affected by the Project. This also may include rights purchased by a utility company for a future installation.

**Expendable Materials** means (a) tangible personal property that loses its distinct and separate identity when incorporated into real property (examples include framing lumber, bricks, steel, re-bar, and concrete) and (b) consumable items, defined as nondurable tangible personal property that is used to improve real property and that, after being used once for its intended purpose, is completely used or destroyed so that it has no salvage value (examples include non-reusable concrete forms, non-reusable drop cloths, barricade tape, natural gas, and electricity).

**Fast-Track Dispute** means a dispute so designated by the Parties in respect of Section 4.10.2.

**Federal Requirements** means all Laws applicable to work funded or financed with federal funds and the provisions required to be included in federal-aid or FHWA-assisted contracts, including the provisions set forth in Attachment 3-1.

**Final Acceptance** means the occurrence of all of the events and satisfaction of all of the conditions set forth in Section 5.12, as and when confirmed by TxDOT's issuance of a Certificate of Final Acceptance.

**Final Acceptance Deadline** is defined in the Design-Build Agreement.

**Final Design** means the complete final construction plans, specifications, reports, studies, calculations, electronic files, records, and Submittals released in packages for construction as RFC Documents after receiving TxDOT's written statement of no exceptions taken with the Design Manager's and PSQAM's certification of compliance of the Final Design Submittal packages.

**Final Design Submittal** means the submittal by DB Contractor for review and comment by TxDOT of the complete and final Design Documents along with the required certifications and documentation demonstrating compliance with the Contract Documents and that all TxDOT comments from prior design stages have been addressed in accordance with Section 5.2.1.7.2.

**Final Payment** means payment by TxDOT of the final installment of the Price.

**Final Reconciliation** means the process described in Section 9.7 for determining the undisputed amount owed to DB Contractor after Final Acceptance of the Project, and a schedule for payment of such amount.

**Float** means the amount of time that any given activity or logically connected sequence of activities shown on the Project Schedule may be delayed before it will affect the Substantial Completion Deadline or Final Acceptance Deadline. Such Float is generally identified as the difference between the early completion date and late completion date for activities as shown on the Project Schedule.

**Force Account Change Order** means a Change Order issued in accordance with Section 4.6.8.

**Force Majeure Event** shall have the meaning set forth in Section 4.6.9.3.1.

**Form 1295** shall have the meaning set forth in Section 4.6.5.5.

**Form 1295 Laws** shall have the meaning set forth in Section 4.6.5.5.

**Generally Accepted Accounting Principles (GAAP)** means such accepted accounting practice as, in the opinion of the accountant, conforms at the time to a body of generally accepted accounting principles in the United States.

**Geotechnical Engineering Report** means the reports documenting the assumptions, conditions and results of geotechnical investigations and analysis, as more particularly described in Section 16.2.2 of the Design-Build Specifications.

**Good Industry Practice** means the exercise of the degree of skill, diligence, prudence, and foresight that would reasonably and ordinarily be expected from time to time from a skilled and experienced designer, engineer, constructor or maintenance contractor seeking in good faith to comply with its contractual obligations, complying with all applicable Laws and engaged in the same type of undertaking under the same or similar circumstances and conditions.

**Governmental Approval** means any permit, license, consent, concession, grant, franchise, authorization, waiver, variance or other approval, guidance, protocol, mitigation agreement, or memorandum of agreement/understanding, and any amendment or modification of any of them required to be provided by Governmental Entities to carry out the Work or provided by TxDOT in its capacity as a regulatory agency for issuing State regulatory permits, which authorize or pertain to the Work or the Project, but excluding any such approvals given by or required from any Governmental Entity in its capacity as a Utility Owner.

**Governmental Entity** means any federal, State or local government and any political subdivision or any governmental, quasi-governmental, judicial, public or statutory instrumentality, administrative agency, authority, body or entity other than TxDOT.

**Guaranteed Obligations** shall have the meaning set forth in the Guaranty.

**Guarantor** means each of the entities that provided a guaranty in the form of Exhibit 13 of the Design-Build Agreement of some or all of the obligations of DB Contractor under the Contract Documents.

**Guaranty** means each guaranty executed by a Guarantor guaranteeing some or all of the obligations of DB Contractor under the Contract Documents.

**Hazardous Materials** means any element, chemical, compound, material or substance, whether solid, liquid or gaseous, which at any time is defined, listed, classified or otherwise regulated in any way under any Environmental Laws, or any other such substances or conditions (including mold and other mycotoxins or fungi) that may create any unsafe or hazardous condition or pose any threat to human health and safety. The term "**Hazardous Materials**" includes the following:

(a) Hazardous wastes, hazardous material, hazardous substances, hazardous constituents, and toxic substances or related materials, whether solid, liquid, or gas, including substances defined as or included in the definition of "hazardous substance," "hazardous waste," "hazardous material," "extremely hazardous waste," "acutely hazardous waste," "radioactive waste," "radioactive materials," "bio-hazardous waste," "pollutant," "toxic pollutant," "contaminant," "restricted hazardous waste," "infectious waste," "toxic substance," "toxic waste," "toxic material," or any other term or expression intended to define, list or classify substances by reason of properties harmful to health, safety or the indoor or outdoor environment (including harmful properties such as ignitability, corrosivity, reactivity, carcinogenicity, toxicity, reproductive toxicity, "TCLP toxicity" or "EP toxicity" or words of similar import under any applicable Environmental Laws);

(b) Any petroleum, including crude oil and any fraction thereof, and including any refined petroleum product or any additive thereto or fraction thereof or other petroleum derived substance; and any waste oil or waste petroleum by-product or fraction thereof or additive thereto;

(c) Any drilling fluids, produced waters and other wastes associated with the exploration, development or production of crude oil, natural gas or geothermal resources;

(d) Any flammable substances or explosives;

(e) Any radioactive materials;

(f) Any asbestos or asbestos-containing materials;

(g) Any lead and lead-based paint;

(h) Any radon or radon gas;

(i) Any methane gas or similar gaseous materials;

(j) Any urea formaldehyde foam insulation;

(k) Electrical equipment that contains any oil or dielectric fluid containing regulated levels of polychlorinated biphenyls;

(l) Pesticides;

(m) Any other chemical, material or substance, exposure to which is prohibited, limited or regulated by any Governmental Entity or which may or could pose a hazard to the health and safety of the owners, operators, users or any Persons in the vicinity of the Project or to the indoor or outdoor environment; and

(n) Soil, or surface water or ground water, contaminated with Hazardous Materials as defined above.

**Hazardous Materials Delay** has the meaning set forth in Section 4.6.9.4.2.

**Hazardous Materials Management** means procedures, practices and activities to address and comply with Environmental Laws and Environmental Approvals with respect to Hazardous Materials encountered, impacted, caused by or occurring in connection with the Work, as well as investigation and remediation of such Hazardous Materials. Hazardous Materials Management may include sampling, stockpiling, storage, backfilling in place, asphalt batching, recycling, treatment, clean-up, remediation, transportation or off-site disposal of Hazardous Materials, whichever is the most cost-effective approach authorized under applicable Law.

**Hazardous Materials Management Plan (HMMP)** means the plan prepared by DB Contractor for the safe handling, storage, treatment and disposal of Hazardous Materials both within and outside the Project ROW, as more particularly described in Section 4.2.4.4.

**Hazardous Materials Manager** means the person designated by the DB Contractor to provide expertise in the safe handling of Hazardous Materials, as more particularly described in Section 12.3.4 of the Design-Build Specifications.

**Highway Service Systems** means TxDOT's or Governmental Entity's lighting and electrical systems, traffic control systems, communications systems and irrigation systems, serving street or highway purposes.

**Identified Utility** means any Utility impacted by the Project to which any one or more of the following applies:

(a) The Utility line is shown on the Utility Strip Map (irrespective of whether correct ownership is shown);

(b) The Utility type (e.g., gas, water, communication, electric) is shown on the Utility Strip Map (differences in material, e.g., clay vs. plastic, shall not be considered a difference in type);

(c) The Utility (i) is an overhead Utility, or (ii) has any appurtenance above ground within the Schematic ROW, so long as, in either case, the Utility is existing as of the Proposal Due Date or which commenced installation prior to the Proposal Due Date;

(d) The Utility is an extension of an Identified Utility (including a Service Line extending from an Identified Utility); or

(e) The Utility is located in the same trench as an Identified Utility (e.g., communication duct bank and joint communication cable facilities).

Any appurtenance, including manholes, pedestals, handholes, fire hydrants, foundations and Fxboxes, not shown on the Utility Strip Map that is a component or extension of an Identified Utility is considered a part of the Identified Utility.

If a Utility falls within any of the categories listed above, then it is an Identified Utility regardless of any discrepancy between (i) the information provided on the Utility Strip Map, and (ii) the actual characteristics of that Utility with respect to its size, its horizontal or vertical location, its ownership,

its type (e.g., gas, water, communication, electric), or any other characteristic. Without limiting the generality of the foregoing, if a Utility is shown on the Utility Strip Map as being on the public right of way, and it is in fact located on the private right of way, or vice versa, that discrepancy is of no relevance in determining whether or not that Utility is an Identified Utility.

**Incident** means any unplanned event within the Project ROW that causes a localized disruption to the free flow of traffic on, or safety of users of, the Project.

**Incident and Emergency Management Plan** has the meaning set forth in Section 27.4.1 of the Design-Build Specifications.

**Incidental Utility Adjustment Work** means all of the following work that DB Contractor is responsible for performing, or causing to be performed, at its own expense and that is necessary or determined by DB Contractor to be required for the construction or accommodation of the Project:

(a) Service Line Utility Adjustments including appurtenances (excluding any Service Line Utility Adjustment for which the owner of the affected real property has been compensated pursuant to Section 4.4.2, and provided that DB Contractor shall obtain all temporary rights of entry needed for such adjustments in accordance with Section 4.4.2);

(b) Temporary Utility Adjustments;

(c) Utility Appurtenance Adjustments;

(d) Temporary Protections in Place; and

(e) Resurfacing and re-striping of streets (including sidewalks) and reconstruction of curb, gutter, sidewalks and landscaping where necessary due to Utility Adjustment Work, whether performed by the Utility Owner or by DB Contractor.

**Indemnified Parties** means TxDOT, the State, the Texas Transportation Commission, FHWA, TxDOT consultants, and their respective successors, assigns, officeholders, officers, directors, agents, representatives, consultants and employees.

**Independent Quality Firm (IQF)** means the independent firm identified in the Proposal (or such other firm approved by TxDOT in its discretion) responsible for managing the quality assurance program for the Construction Work and performing independent quality assurance material testing, inspection, and audits of the CQMP.

**Independent Quality Firm Manager (IQFM)** means the person appointed by the IQF who is responsible for management and quality assurance functions, as more particularly described in Table 1 set forth in Attachment 4-2.

**Ineligible Matters** is defined in the Design-Build Agreement.

**Informal Resolution Procedures** has the meaning set forth in Section 4.10.

**Instructions to Proposers (ITP)** means the Instructions to Proposers issued by TxDOT as part of the RFP with respect to the Project, including all exhibits, forms and attachments thereto and any subsequent addenda.

**Intellectual Property** means all current and future legal or equitable rights and interests in know-how, patents (including applications), copyrights (including moral rights), trademarks (registered and unregistered), service marks, trade secrets, designs (registered and unregistered), utility models, circuit layouts, plant varieties, business and domain names, inventions, solutions embodied in technology, and other intellectual activity, and applications of or for any of the foregoing, subsisting in or relating to the Project, Project design data or Project traffic data. Intellectual Property includes toll-setting and traffic management algorithms, and software used in connection with the Project (including software used for management of traffic on the Project), and software source code. Intellectual Property is distinguished from physical construction and equipment itself and from drawings, plans, specifications, layouts, depictions, manuals and other documentation that disclose Intellectual Property.

**Intelligent Transportation System (ITS)** means the system to monitor traffic flow, detect traffic and traffic operational conditions and communicate relevant traffic information to users of the Project as more particularly described in Item 25 of the Design-Build Specifications.

**Investigative Work Plan (IWP)** means a plan prepared by DB Contractor addressing the methods, techniques, and analytical testing requirements to adequately characterize the extent of impacts by Hazardous Materials to an area of concern.

**ITS Implementation Plan** means a plan prepared by DB Contractor for approval as part of the Final Design Submittal to demonstrate system interoperability with other TMCs in the region as more particularly described in Section 25.3.3 of the Design-Build Specifications.

**Job Training Plan** means the plan set forth in Exhibit 5 to the Design-Build Agreement.

**Key Personnel** is defined in the Design-Build Agreement.

**Key Personnel Change Fee** means the fee assessed in accordance with Section 8.3.1.

**Key Personnel Unavailability Liquidated Damages** means the liquidated damages assessed in accordance with Section 8.3.1 herein and Section 7.4 of the Design-Build Agreement.

**Key Subcontractor** means the Subcontractors identified on Exhibit 17 to the Design-Build Agreement.

**Lane Closure** is defined in the Design-Build Agreement.

**Lane Rental Charges** means the fees for certain Lane Closures as specified in Section 8.6.2, and Exhibit 15 to the Design-Build Agreement.

**Law** or **Laws** means (a) any statute, law, code, regulation, ordinance, rule or common law, (b) any binding judgment (other than regarding a Claim or Dispute), (c) any binding judicial or administrative order or decree (other than regarding a Claim or Dispute), (d) any written directive, guideline, policy requirement or other governmental restriction (including those resulting from the initiative or referendum process, but excluding those by TxDOT within the scope of its administration of the Contract Documents) or (e) any similar form of decision of or determination by, or any written interpretation or administration of any of the foregoing by, any Governmental Entity, in each case which is applicable to or has an impact on the Project or the Work, whether taking effect before or after the Effective Date, including Environmental Laws. "**Laws**", however, excludes Governmental Approvals.

**Lead Contractor** means the DB Contractor-Related Entity, whether a single entity, joint venture or newly formed limited liability company, primarily responsible for the construction of the Project. If the Lead Contractor is a joint venture or newly formed limited liability company, each of the joint venture or limited liability company members shall also be considered a Lead Contractor.

**Lead Engineering Firm** means the DB Contractor-Related Entity, whether a single entity or joint venture, primarily responsible for the design and engineering of the Project.

**Lead Maintenance of Traffic Design Engineer** or **Lead MOT Design Engineer** means the person responsible for ensuring the Traffic Management Plan is completed and design criteria are met, as more particularly described in Section 4.2.10 and Section 2.0 of Attachment 4-2.

**Lead MOT Implementation Manager** means the person responsible for ensuring the MOT plans are implemented in the field and are adhered to during their implementation, as more particularly described in Section 26.1.2 of the Design-Build Specifications.

**Lead Roadway Design Engineer** means the person designated by DB Contractor responsible for ensuring the design of the roadway is completed and design criteria requirements are met, as more particularly described in Section 19.1.1 of the Design-Build Specifications.

**Lead Structural Engineer** means the person designated by DB Contractor responsible for overseeing the design and construction of all structural elements of the Project such that each is complete and design requirements are met, as more particularly described in Section 21.1.1 of the Design-Build Specifications.

**License Agreement** means any license agreement for construction, maintenance, and use of railroad ROW between an operating railroad and TxDOT as more particularly described in Section 22.3.1 of the Design-Build Specifications.

**Lien** means any pledge, lien, security interest, mortgage, deed of trust or other charge or encumbrance of any kind, or any other type of preferential arrangement (including any agreement to give any of the foregoing, any conditional sale or other title retention agreement, any lease in the nature of a security instrument and the filing of or agreement to file any financing statement under the Uniform Commercial Code of any jurisdiction).

**Liquidated Damages** is defined in the Design-Build Agreement.

**Liquidated Damages for Lane Closures** means the liquidated damages for certain Lane Closures more particularly described in Section 8.6.2 and Exhibit 15 to the DBA.

**Losses** means any loss, damage, injury, liability, obligation, cost, response cost, expense (including attorneys', accountants' and expert witnesses' fees and expenses (including those incurred in connection with the enforcement of any indemnity or other provision of the Design-Build Contract)), fee, charge, judgment, penalty, fine or Third Party Claims. Losses include injury to or death of persons, damage or loss of property, and harm or damage to natural resources.

**Maintenance Limits** means the limits of DB Contractor's maintenance responsibilities in accordance with Section 27.1.3 of the Design-Build Specifications.

**Maintenance Management Plan (MMP)** means the plan prepared by DB Contractor that defines the processes and procedures for the maintenance of the Project for the Term, as more particularly described in Section 27.2.1 of the Design-Build Specifications.

**Maintenance Manager** shall have the meaning set forth in Section 27.2.3 of the Design-Build Specifications.

**Maintenance Records** means all data in connection with the Maintenance Work, including (a) all inspection and inventory records, whether generated by DB Contractor or a third party, (b) any communication to or from TxDOT or a third party, and (c) any information system (as may be introduced or amended by TxDOT from time to time) in connection with the Maintenance Work that TxDOT requires DB Contractor to use, implement or operate.

**Maintenance Safety Plan** means the safety plan prepared by DB Contractor as part of the Maintenance Management Plan as described in Section 6 of Attachment 27-3 to Item 27 of the Design-Build Specifications.

**Maintenance Work** means the scope of work described in Section 27.1.2 of the Design-Build Specifications.

**Major Subcontractor** means a Subcontractor who has entered into a Major Subcontract with DB Contractor.

**Major Subcontracts** means a Subcontract in excess of 5% of the Price or $20,000,000, whichever is greater.

**Management Plans** means all of the management plans listed in Section 4.2.

**Materials on Hand** means non-perishable materials that do not have a shelf life or characteristics that would materially change when exposed to the elements, and that have been sample tested approved and certified and are ready for incorporation into the Work. Such materials include structural steel, reinforcing steel, pre-cast concrete elements, and illumination poles, or other non-perishable materials at TxDOT discretion. Materials that would not be considered Materials on Hand include cement, fine aggregate, and fill.

**Maximum Payment Schedule** means the table of aggregate amounts included in Exhibit 10 to the Design-Build Agreement and the earliest date by which each such aggregate amount shall become due to DB Contractor, which constitute a cap on the aggregate amount of payments that may be made to DB Contractor hereunder at any specified time.

**Misconduct** means, with respect to any individual who is a Disputes Board Member, any one or more of the following:

(a) Any ex parte communication or discussion between any Disputes Board Member and either Party (or a member of the Conflicts Group on behalf of either Party) or other ex parte communication prohibited under R-10 of the Commercial Rules;

(b) Any offer, solicitation, discussion, agreement or understanding between any Disputes Board Member and any Party or any other Person regarding (i) remuneration conditioned upon the nature or result of a certain Disputes Board Decision or (ii) employment of the Disputes Board Member by any member of the Conflicts Group following termination of such member's services on

the Disputes Board, except for employment as a member of a subsequent Disputes Board or similar disputes board for a project other than the Project;

(c) The rendition of advice or consultative services to either Party or member of the Conflicts Group; or

(d) A material lack of the requisite experience under Section 4.1 of the Disputes Board Agreement that was not and could not reasonably have been discovered by the Nominating Party or the Evaluating Party at the time such individual was proposed and approved for inclusion on the Nominating Party's Disputes Board Member Candidates List, including, by way of example and not limitation, a situation where such individual has materially misrepresented his or her experience to the Parties.

**Mobilization Payment Activity Amount** means the value included in the Proposal (line item 36 of Form M-2.1) and subsequently allocated to the mobilization activity in the Schedule of Values. Such amount shall not exceed 10% of the Price, payable in installments according to Section 9.5.1.

**Necessary Basic Configuration Change** means a material change in the Basic Configuration that (a) is necessary to meet the requirements of the Contract Documents as the direct result of an Error in the TxDOT Schematic Design (with the understanding that a change shall be deemed "necessary" only if the Error creates a situation in which DB Contractor is unable to meet the requirements of the Contract Documents without a material change in the Basic Configuration), (b) necessitates the acquisition of real property falling within clause (d) of the definition of Additional Properties, (c) could not be avoided by the exercise of caution, due diligence, or reasonable efforts by DB Contractor, such as the construction of retaining walls or other reasonable mitigation efforts, and (d) will not be avoided through the granting of a waiver, Deviation or design exception from requirements of the Contract Documents by TxDOT.

**NEPA Approvals** means the final approval(s) issued under the National Environmental Policy Act described in the Design-Build Agreement, and all approved supplements and reevaluations pertaining to the Project, as of the Effective Date.

**New Environmental Approval** means (a) any Environmental Approval required for the Project, other than TxDOT-Provided Approvals, and (b) any revision, modification, or amendment to any TxDOT-Provided Approval, including any such approval, revision, modification, or amendment required for the drainage easements or Additional Properties.

**New Utility** means a Utility installed within the Schematic ROW after the Proposal Due Date, not contained in the Utility Strip Map, and not otherwise known to DB Contractor prior to the Proposal Due Date.

**Nominating Party** has the meaning set forth in the Disputes Board Agreement.

**Nonconformance Report (NCR)** means a report documenting Nonconforming Work and the ultimate disposition of such Nonconforming Work, including the efforts undertaken to repair, replace, or otherwise remediate such work in accordance with the Contract Documents.

**Nonconforming Work** means Work that does not conform to the requirements of the Contract Documents, the Governmental Approvals, applicable Law or the Released for Construction Documents.

**Notice of Intent (NOI)** means the notice of intent prepared and submitted by DB Contractor to the TCEQ under the Construction General Permit for storm water discharges from construction sites.

**Notice of Partial Termination for Convenience** means written notice issued by TxDOT to DB Contractor terminating part of the Work of DB Contractor for convenience under Section 8.8.1.

**Notice of Termination for Convenience** means written notice issued by TxDOT to DB Contractor terminating the Work of DB Contractor for convenience under Section 8.8.1.

**NTP1** means a written notice issued by TxDOT to DB Contractor authorizing DB Contractor to proceed with the portion of the Work described in Section 8.1.1.3.

**NTP1 Maximum Payment Amount** means the maximum amount for which TxDOT may be liable to DB Contractor under the Contract unless and until NTP2 is issued. The NTP1 Maximum Payment Amount is defined in the Design-Build Agreement.

**NTP1 Payment Bond Amount** is defined in the Design-Build Agreement.

**NTP1 Performance Bond Amount** is defined in the Design-Build Agreement.

**NTP2** means a written notice issued by TxDOT to DB Contractor pursuant to Section 8.1.1.4 authorizing DB Contractor to proceed with the remaining Work and other activities pertaining to the Project.

**NTP2 Payment Bond Amount** is defined in the Design-Build Agreement.

**NTP2 Performance Bond Amount** is defined in the Design-Build Agreement.

**Office of Public Involvement** is the headquarters-level office that serves as the central clearinghouse on all guidelines, policies, and procedures regarding public involvement throughout TxDOT.

**Open Book Basis** means providing TxDOT with all underlying assumptions and data associated with pricing or compensation (whether of DB Contractor or TxDOT) or adjustments thereto, including assumptions as to costs of the Work, schedule, composition of equipment spreads, equipment rates, labor rates, productivity, estimating factors, design and productivity allowance, contingency and indirect costs, risk pricing, discount rates, interest rates, and other items reasonably required by TxDOT to satisfy itself as to the reasonableness of the amount.

**Operating Procedures** means the procedures governing the operations of the Panel, as amended by the Panel. The initial Operating Procedures are set forth in Exhibit 21 to the DBA.

**Other Relief Event** shall have the meaning set forth in Section 4.6.9.3.2.

**Panel** shall have the meaning set forth in Section 4.9.1.1.

**Panel Chairperson** shall have the meaning set forth in Section 4.9.2.2.

**Party** means DB Contractor or TxDOT, as the context may require, and "**Parties**" means DB Contractor and TxDOT, collectively.

**Pavement Design Report** means the formal engineering document prepared by a Registered Professional Engineer that details the pavement design analysis, data, policies, and other considerations used in the development of the proposed pavement structure as further described in Section 16.4.1.2 of the Design-Build Specifications.

**Payment Activity** means a Project Baseline Schedule activity with a portion of the Price allocated to it.

**Payment Bond** means the payment bond set forth as Exhibit 12, Appendix 2, to the Design-Build Agreement.

**PCO Notice** shall have the meaning set forth in Section 4.6.3.2.2.

**Performance Bond** means the performance bond set forth as Exhibit 12, Appendix 1, to the Design-Build Agreement.

**Performance and Measurement Table** means the table described in Section 27.3.1 of the Design-Build Specifications.

**Performance Requirements** means, for each Element in connection with the Maintenance Work, requirements set forth in the Performance and Measurement Table. A Performance Requirement is achieved if the stated Target is met or exceeded.

**Performance Section** means a defined section of the Project for the purpose of audit, inspection and measurement during performance of Maintenance Work. A Performance Section includes all travel lanes including mainlanes, ramps and access roads of the roadway operating in one direction over a length of 0.1 miles, together with all Elements associated with such 0.1 mile length.

**Person** means any individual, corporation, joint venture, limited liability company, company, voluntary association, partnership, trust, unincorporated organization or Governmental Entity.

**Plans** means (only where capitalized) contract drawings, working drawings, supplemental drawings, detail sheets or exact reproductions thereof, which show the location, character, dimensions and details of the Construction Work to be done.

**Possession and Use Agreement (PUA)** shall have the meaning set forth in Section 15.4.1 of the Design-Build Specifications.

**Pre-existing Hazardous Materials** means Hazardous Materials that meet all of the following criteria:

(a) The Hazardous Materials are in, on or under the Schematic ROW, or parcels added to the Site by a TxDOT-Directed Change or required due to a Relief Event or Necessary Basic Configuration Change as of the date TxDOT makes available to DB Contractor the affected parcel or detention pond, as applicable; and

(b) The Hazardous Materials are not required to be removed and disposed of due to a DB Contractor Release of Hazardous Materials.

For purposes of this definition, “makes available” means (i) the Effective Date for parcels acquired as of the Effective Date or (ii) as to parcels not yet acquired as of the Effective Date, the date DB Contractor first receives access to the parcel in accordance with the Contract Documents. The

term Pre-existing Hazardous Materials does not include Hazardous Materials falling within paragraph (d) of the definition of "Other Relief Event" set forth in Section 4.6.9.3.2.

**Preliminary Design Submittal** means the Plans, specifications, and reports which capture all major items, elements or portions of the Work such that DB Contractor can demonstrate a comprehensive understanding of the Project.

**Preliminary Project Baseline Schedule (PBS1)** means the original Project Schedule submitted with the Proposal.

**Price** is defined in the Design-Build Agreement.

**Professional Services** means all Work performed under the Contract Documents other than Construction Work, including the following services and Work: (a) design, engineering, and architecture; (b) right of way acquisition services; (c) surveying; (d) Utility Adjustment design; (e) schedule management; (f) DBE management; (g) cost management; (h) administration of insurance, bonds and warranties; (i) public information and communications; and (j) environmental permitting and compliance services.

**Professional Services Quality Assurance Firm (PSQAF)** means the independent firm identified in the Proposal (or such other firm approved by TxDOT in its discretion) responsible for the quality assurance program as set forth in the PSQMP for all Professional Services and performing independent quality assurance reviews of Professional Services submittals and audits of the PSQMP.

**Professional Services Quality Assurance Manager (PSQAM)** means the person appointed by the PSQAF who is responsible for management and quality assurance functions for Professional Services, as more particularly described in Table 1 set forth in Attachment 4-1.

**Professional Services Quality Control Manager (PSQCM)** means the person assigned by DB Contractor with responsibility to cause the methods and procedures contained in the approved PSQMP to be implemented and followed by DB Contractor's design staff in the performance of the Work as more particularly described in Table 1 set forth in Attachment 4-1.

**Professional Services Quality Management Plan (PSQMP)** means the plan prepared by DB Contractor setting forth the internal quality control and quality assurance procedures to be followed during performance of Professional Services, as more particularly described in Attachment 4-1.

**Project** is defined in the Design-Build Agreement.

**Project Baseline Schedule (PBS)** means either PBS2 or PBS3, as more particularly described in Section 8.5.1.2.

**Project Baseline Schedule 2 (PBS2)** means the Project Baseline Schedule that is a condition to NTP2, as more particularly described in Section 8.5.1.2.

**Project Baseline Schedule 3 (PBS3)** means the Project Baseline Schedule that is a condition to commencement of the Construction Work, as more particularly described in Section 8.5.1.2.

**Project Management Plan (PMP)** means the plan developed by DB Contractor and approved by TxDOT, including all component parts, plans and documentation described in Section 4.2.

**Project Manager (PM)** means the individual more particularly described in Section 4.2.1.1.1, designated by DB Contractor and approved in writing by TxDOT in the position to take full responsibility for the prosecution of the Work and will act as a single point of contact on all matters on behalf of DB Contractor.

**Project Right of Way or Project ROW** means the Schematic ROW and the Additional Properties, but excluding therefrom any portion of the Schematic ROW eliminated from the Project by a Change Order.

**Project Schedule** means one or more of the logic-based critical path schedules (the Project Baseline Schedule, the Project Schedule Update and the Project Recovery Schedule) for all Work leading up to and including Final Acceptance of the Project, and for tracking the performance of such Work, as the same may be revised and updated from time to time in accordance with Section 8.5.1. Unless otherwise stated, Project Schedule means the version of the Project Baseline Schedule or the Project Schedule Update most recently approved by TxDOT.

**Project Schedule Update** means the update of the Project Schedule at the level of detail of PBS3 to reflect the current status of the Project, as more particularly described in Section 8.5.1.2.5. The Project Schedule Update shall include, where required, a Recovery Schedule in accordance with Section 8.5.1.3.3.

**Project Specific Locations** means areas in which DB Contractor proposes Project-specific activities in connection with the Work not within the Project ROW boundaries identified in the Environmental Approvals, such as construction work sites, field office locations, temporary work areas, staging areas, storage areas, and earth work material borrow sites.

**Project Utility Adjustment Agreement (PUAA)** means an agreement between DB Contractor and a Utility Owner that sets forth terms and conditions for one or more Utility Adjustments, as the same may be amended or supplemented and as more particularly described in Section 14.1.3.1 of the Design-Build Specifications. A document is a "Project Utility Adjustment Agreement" if it meets the foregoing definition, without regard to the title of the document.

**Project Utility Adjustment Agreement (DB Contractor-Managed)** means a Project Utility Adjustment Agreement providing for design and construction by DB Contractor of the Utility Adjustments addressed therein.

**Project Utility Adjustment Agreement (Owner-Managed)** means a Project Utility Adjustment Agreement providing for design and construction by the Utility Owner of the Utility Adjustments addressed therein.

**Proposal** means DB Contractor's original Proposal submitted in response to the RFP, including any clarifications.

**Proposal Due Date** means the deadline for submission of the Proposal to TxDOT set forth in Recital F of the Design-Build Agreement.

**Proposer** means each entity that was shortlisted based on TxDOT's evaluation of submissions in response to the Request for Qualifications for the Project, as amended.

**Proprietary Intellectual Property** means Intellectual Property created, used, applied or reduced to practice in connection with the Project or the Work that derives commercial value from its protection as a trade secret under applicable Law or from its protection under patent law.

**Protection in Place** means any action taken to avoid damaging a Utility that does not involve removing or relocating that Utility, including staking the location of a Utility, exposing the Utility, avoidance of a Utility's location by construction equipment, installing steel plating or concrete slabs, encasement in concrete, temporarily de-energizing power lines, and installing physical barriers. The term includes both temporary measures and permanent installations meeting the foregoing definition.

**Public Information Act** means the Texas Government Code Chapter 552.001 *et seq*., as amended from time to time.

**Public Information and Communications Plan (PICP)** means the plan setting forth procedures by which DB Contractor works with TxDOT to inform, coordinate with, educate and engage Customer Groups, as more particularly described in Section 4.2.2.

**Public Information Coordinator** means the person designated by DB Contractor to manage DB Contractor's public information activities as more particularly described in Section 11.2.3 of the Design-Build Specifications.

**Punch List** means the itemized list of the Work that remains to be completed after Substantial Completion has been achieved and before Final Acceptance, the existence, correction and completion of which will have no material or adverse effect on the normal and safe use and operation of the Project.

**QAP for DB Projects** means the version of *TxDOT Quality Assurance Program for CDA/Design-Build Projects with a Capital Maintenance Agreement with Three Optional 5-Year Terms* in effect as of the Effective Date.

**Quality Management Plan (QMP)** means the document approved by TxDOT describing quality assurance and quality control activities necessary to manage the development, design, construction, operation and maintenance of the Project and Work, as described in Section 4.3.

**Quitclaim Deed** means a quitclaim deed to be executed by a Utility Owner relinquishing its rights to maintain a Utility in a particular location, as more particularly described in Section 14.2.4.4 of the Design-Build Specifications.

**Recognized Environmental Condition** shall have the meaning set forth in ASTM E-1527-13.

**Record Documents** means an organized, complete set of Project documents that accurately reflect the actual condition of the constructed Work consisting of the Record Drawings, supporting calculations, and details, including all plans, studies, and reports that are prepared, signed, and sealed by a Registered Professional Engineer and delivered to TxDOT after Substantial Completion of the Project.

**Record Drawings** ("as-built plans") means the Released for Construction plans updated to reflect the as-constructed project incorporating documented changes made during construction that accurately reflect the actual condition of the constructed Work, signed and sealed by a Registered Professional Engineer.

**Recovery Schedule** means the schedule included as part of the Project Schedule Update that DB Contractor is required to provide under Section 8.5.1.3.3.

**Reference Information Documents (RID)** is defined in the Design-Build Agreement. Except as expressly provided in the Design-Build Agreement, the Reference Information Documents are not considered Contract Documents and were provided to DB Contractor for informational purposes only and without representation or warranty by TxDOT.

**Registered Professional Engineer (PE)** means a person who is duly licensed and registered by the Texas Board of Professional Engineers to engage in the practice of engineering in the State.

**Registered Professional Land Surveyor (RPLS)** means a person registered by the Texas Board of Professional Land Surveying to practice the profession of land, boundary, or property surveying or other similar professional practices.

**Reimbursable Hazardous Materials Costs** means DB Contractor's actual costs of performance of Hazardous Materials Management, determined in accordance with Section 4.6.9.4, provided that the 25% and 145% markups allowed under Section 4.6.8.1 shall be reduced to 12.5% and 130%, and the 15% markup allowed under Section 4.6.8.2 shall be reduced to 7.5%.

**Release of Hazardous Materials** means any spill, leak, emission, release, discharge, injection, escape, leaching, dumping or disposal of Hazardous Materials into the soil, air, water, groundwater or environment, including any exacerbation of an existing release or condition of Hazardous Materials contamination.

**Released for Construction Documents** means DB Contractor's final Design Documents issued for the purpose of construction after all prior comments by TxDOT have been addressed to TxDOT's reasonable satisfaction.

**Relief Event** means Force Majeure Events and Other Relief Events.

**Relocation Plan** means a documented relocation plan for owner-occupants or tenants' that fulfills the requirement set forth in the TxDOT *Right of Way Manual*, Volume 3, Chapter 8 (Relocation Program Planning and Construction).

**Replacement Housing Calculation** means the opportunity to provide a displaced person with the financial assistance to purchase or rent and occupy a comparable replacement dwelling without involuntarily incurring additional financial means due to the displacement.

**Replacement Utility Property Interest** means any permanent right, title or interest in real property outside of the Project ROW (e.g., a fee or an easement) that is acquired for a Utility being reinstalled in a new location as a part of the Utility Adjustment Work. The term specifically excludes any statutory right of occupancy or permit granted by a Governmental Entity for occupancy of its real property by a Utility.

**Request for Change Order** means a written notice issued by DB Contractor to TxDOT under Section 4.6.4, advising TxDOT that DB Contractor seeks a Change Order.

**Request for Change Proposal** means a written notice issued by TxDOT to DB Contractor under Section 4.6.2.1.1, advising DB Contractor that TxDOT may issue a TxDOT-Directed Change or wishes to evaluate whether to initiate such a change pursuant to Section 4.6.2.1.

**Request for Information (RFI)** means a written request prepared by DB Contractor and submitted to the Engineer of Record after Final Design Documents have been released for construction to seek direction regarding proposed or constructed Work that deviates from the Released for Construction Documents.

**Request for Proposals (RFP)** is defined in the Design-Build Agreement.

**RFP Documents** means all of the information and materials supplied to DB Contractor in connection with the issuance of the RFQ, the RFP, including Instructions to Proposers, the Contract Documents, the Reference Information Documents and any addenda issued in connection therewith.

**RFQ** or **Request for Qualifications** is defined in the Design-Build Agreement.

**Right of Entry Agreement** or **ROE Agreement** means a written agreement between the record title owner and DB Contractor granting TxDOT, DB Contractor or assignees permission to enter the applicable parcel that is to be acquired, as set forth in the Section 15.3.5.1 of the Design-Build Specifications.

**Right of Way Acquisition Manager** or **ROW Acquisition Manager (ROW AM)** means DB Contractor's representative responsible for the preparation and quality review of all documents required for the acquisition of the Project ROW.

**Right of Way Acquisition Management Plan** or **ROW Acquisition Management Plan** means DB Contractor's written plan, approved by TxDOT in accordance with Section 4.2.9, for acquisition of real property for all parcels of land necessary to construct, obtain access to and operate the Project and any Additional Properties, prepared under the Project Management Plan (PMP) approved by TxDOT.

**Right of Way Administrator or ROW Administrator** means TxDOT's representative responsible for the management of all matters pertaining to real property for the Project.

**Right of Way Maps or ROW Maps** means and consists of right of way maps prepared for the Project and contained in the Reference Information Documents, depicting within the boundary lines shown therein the land or property that TxDOT has made or will make available for the Project.

**Rules** means Chapter 9 of Title 43, Texas Administrative Code.

**Safety and Health Plan** shall have the meaning as set forth in Section 4.2.3.

**Safety Manager** means the person assigned by Design-Build Contractor with responsibility to carry out the Safety and Health Plan and all safety-related activities, including training and enforcement of safety operations, as more particularly described in Section 4.2.3.1.

**Schedule of Values** means the Price, as may be amended by Change Orders, broken down and allocated to the Project Baseline Schedule rolled up to a WBS Level 3, 4, or 5 as appropriate.

**Schematic ROW** means any real property (which term is inclusive of all estates and interests in real property), including detention ponds as well as improvements and fixtures, within the proposed ROW lines established on the TxDOT Schematic Design, as such limits may be adjusted from time

to time in accordance with the Contract Documents. The term specifically includes all air space, surface rights, and subsurface rights within the limits of the ROW.

**Service Lines** means a Utility line, up to and including the meter, 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 an individual line to a larger system. However, unless noted otherwise in the Design-Build Specifications, this term excludes any line that supplies an active feed from a Utility Owner's facility(ies) to supply, activate or energize TxDOT's or a Governmental Entity's Highway Service System. Such line, including its actual connection to the Utility facility, shall instead be considered to be part of the applicable Highway Service System.

**Severe Weather Evacuation Plan** shall have the meaning set forth in Section 27.6.3 of the Design-Build Specifications.

**Shift Safety Representative** has the meaning set forth in Section 4.2.3.1.

**Signed and Sealed Engineering Data** means any documents provided by TxDOT to Proposers prior to the Proposal Due Date that are signed and sealed by a registered professional licensed engineer or registered professional land surveyor and are identified as Signed and Sealed Engineering Data in Exhibit 3, Appendix 2 to the Design-Build Agreement.

**Site** means Schematic ROW, Additional Properties, Replacement Utility Property Interests, and any temporary rights or interests that DB Contractor may acquire at its own cost and expense in connection with the Project.

**Site Investigation Report (SIR)** means the report required by Section 4.2.4.4.1.

**Snow and Ice Control Plan (SICP)** shall have the meaning set forth in Section 27.6.2 of the Design-Build Specifications.

**Source Code and Source Code Documentation** means software written in programming languages, such as C and Fortran, including all comments and procedural code, such as job control language statements, in a form intelligible to trained programmers and capable of being translated into object or machine readable code for operation on computer equipment through assembly or compiling, and accompanied by documentation, including flow charts, schematics, statements of principles of operations, architectural standards, and commentary, explanations and instructions for compiling, describing the data flows, data structures, and control logic of the software in sufficient detail to enable a trained programmer through study of such documentation to maintain and modify the software without undue experimentation. Source Code and Source Code Documentation also include all modifications, additions, substitutions, updates, upgrades and corrections made to the foregoing items.

**State** means the State of Texas.

**State Highway (SH)** means a highway designated as part of the state highway system under Section 201.103, Texas Transportation Code.

**Subcontract** means any agreement by DB Contractor with any other Person, Subcontractor or Supplier to perform any part of the Work or provide any materials, equipment or supplies for any part of the Work, or any such agreement at a lower tier, between a Subcontractor and its lower tier Subcontractor or a Supplier and its lower tier Supplier, at all tiers.

**Subcontractor** means any Person with whom DB Contractor has entered into any Subcontract to perform any part of the Work or provide any materials, equipment or supplies for the Project on behalf of DB Contractor and any other Person with whom any Subcontractor has further subcontracted any part of the Work, at all tiers.

**Submittal** means any document, work product or other written or electronic end product or item pertaining to the Work and required under the Contract Documents or the Project Management Plan to be delivered or submitted to TxDOT, except any submitted to TxDOT in connection with applying for, processing or obtaining a Governmental Approval.

**Substantial Completion** means the occurrence of all of the events and satisfaction of all of the conditions set forth in Section 5.11.1.2, as and when confirmed by TxDOT's issuance of a Certificate of Substantial Completion.

**Substantial Completion Deadline** is defined in the Design-Build Agreement.

**Supplier** means any Person not performing work at or on the Site that supplies machinery, equipment, materials, hardware, software, systems or any other appurtenance to the Project to DB Contractor or to 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.

**Supply Chain Disruption Delay** has the meaning set forth in Section 4.6.9.7.1.

**Surety** means each properly licensed surety company, insurance company or other Person approved by TxDOT, which has issued any Payment Bond, Performance Bond, or Warranty Bond.

**Tangible Net Worth** means the difference between (the sum of paid-in capital stock plus preferred stock plus retained earnings) less (the sum of treasury stock plus minority interest plus intangible assets, including goodwill, patents, and licenses), all determined in accordance with Generally Accepted Accounting Principles and as interpreted by the Securities and Exchange Commission in connection with financial statements filed pursuant to the Securities Exchange Act of 1934.

**Targets** means the target value for the measurement record set forth in the column titled "Target" of the Performance and Measurement Table.

**Temporary Work** means portions of the Work that are non-permanent and constructed prior to the permanent elements included in the Released for Construction Documents, as more particularly described in Attachment 4-2.

**Term** means the period of time commencing upon issuance by TxDOT of NTP1 and continuing thereafter through Final Acceptance of the Project, unless terminated earlier in accordance with the Design-Build Contract.

**Termination for Convenience** means a termination of the Design-Build Contract made pursuant to Section 8.8.1.

**Texas Accessibility Standards** means the standards for accessibility and regulations issued by the Texas Department of Licensing and Regulation.

**Texas Cone Penetration** means the test method which determines the relative density or consistency and load bearing capacity of materials encountered in foundation exploration work.

**Third Party Agreement** means any agreement or memorandum of understanding between TxDOT and a third party that governs or impacts the Work and that is described in Section 3.2 and Exhibit 8 of the Design-Build Agreement. The term "Third Party Agreement" does not include Governmental Approvals, agreements with municipalities in their capacity as Utility Owners, or railroad agreements.

**Third Party Claims** means any and all claims, disputes, disagreements, causes of action, demands, suits, actions, judgments, investigations or proceedings brought by a Person that is not a Party with respect to damages, injuries, liabilities, obligations, losses, costs, penalties, fines or expenses (including attorneys' fees and expenses) sustained or incurred by such Person.

**Third Party Release(s) of Hazardous Material** means any and all spills of Hazardous Material on the Schematic ROW by a third party who is not acting in a capacity of a DB Contractor-Related Entity that occurs on or after the date TxDOT makes available to DB Contractor the affected parcel.

**Threatened or Endangered Species** means any species listed by the USFWS as threatened or endangered pursuant to the Endangered Species Act, as amended, 16 U.S.C. §§ 1531, *et seq.* or any species listed as threatened or endangered pursuant to the State endangered species act.

**Time Impact Analysis (TIA)** means a delay analysis performed in accordance with the requirements of Section 4.6.5.2.3.

**Traffic Control Plan** has the meaning set forth in Section 26.2.1 of the Design-Build Specifications.

**Traffic Management Plan** means the plan prepared by DB Contractor for the management of traffic during construction, as more particularly described in Section 4.2.10.

**TREC** means the Texas Real Estate Commission, and any entity succeeding to the powers, authorities and responsibilities of the TREC.

**TxDOT** means the Texas Department of Transportation, any assignee and any other entity succeeding to the powers, authorities and responsibilities of TxDOT invoked by or under the Contract Documents.

**TxDOT Administrative Settlement Committee** means the committee established within TxDOT under the direction of the Right of Way Administrator.

**TxDOT-Caused Delays** means unavoidable delays arising from the following matters and no others, but only to the extent that they (i) materially adversely affect a Critical Path, (ii) are not mitigated by or susceptible to handling by a work around or consumption of Project Float, and (iii) are not due to an act, omission, negligence, recklessness, intentional misconduct, breach of contract, or violation of Law or a Governmental Approval of or by any of the DB Contractor-Related Entities:

(a) TxDOT-Directed Changes;

(b) failure of TxDOT to provide responses to proposed schedules, plans, Design Documents, condemnation and acquisition packages, and other Submittals and matters for which response is required under the Contract Documents as an express prerequisite to DB Contractor's right to proceed or act (which, for the avoidance of doubt, does not include Submittals and matters

governed by Section 5.2.1.3), within the time periods (if any) indicated in the Contract Documents, or if no time period is indicated, within a reasonable time, taking into consideration the nature, importance and complexity of the submittal or matter, following delivery of written notice from DB Contractor requesting such action in accordance with the terms and requirements of the Contract Documents; and

(c) uncovering, removing and restoring Work pursuant to Section 5.10.1.3, if such Work exposed or examined is in conformance with the requirements of the Contract Documents, the Governmental Approvals and applicable Law, unless such conforming Work was performed or materials used without adequate notice to and opportunity for prior inspection by TxDOT.

Any suspension of Work arising from litigation shall not be considered a TxDOT-Caused Delay (although it may qualify as a Other Relief Event under clause (e) of the definition of "Other Relief Event") despite the fact that TxDOT may specifically direct DB Contractor to suspend the Work.

**TxDOT-DB Contractor Communications Plan** means the TxDOT-DB Contractor Communications Plan as described in Section 4.2.5.

**TxDOT Decision** shall have the meaning set forth in Section 4.9.5.2.

**TxDOT-Directed Changes** means (a) any changes in the scope of the Work or terms and conditions of the Contract Documents (including changes in the standards applicable to the Work), which TxDOT has directed DB Contractor to perform as described in and subject to the limitations in Section 4.6.1.2, (b) suspensions of the Work by TxDOT for more than 48 hours per suspension or 96 hours total in accordance with Section 8.4.1, and (c) any changes in the Work due to Errors in the Signed and Sealed Engineering Data, unless such Errors were known to the DB Contractor prior to the Effective Date.

**TxDOT-Provided Approvals** is defined in the Agreement.

**TxDOT's Recoverable Costs** means:

(a) The costs of any assistance, action, activity or Work undertaken by TxDOT that DB Contractor is liable for or is to reimburse under the terms of the Contract Documents, including the charges of third-party contractors and reasonably allocated wages, salaries, compensation and overhead of TxDOT staff and employees performing such action, activity or Work; plus

(b) Third-party costs TxDOT incurs to publicly procure any such third-party contractors; plus

(c) Reasonable fees and costs of attorneys (including the reasonably allocable fees and costs of TxDOT's General Counsel Division or the Texas Attorney General's Office), financial advisors, engineers, architects, insurance brokers and advisors, investigators, traffic and revenue consultants, risk management consultants, other consultants, and expert witnesses, as well as court costs and other litigation costs, in connection with any such assistance, action, activity or Work, including in connection with defending claims by and resolving disputes with third-party contractors; plus

(d) Interest on all the foregoing sums at a floating rate equal to the LIBOR in effect from time to time plus 200 basis points, commencing on the due date under the applicable terms of the Contract Documents and continuing until paid.

**TxDOT Release of Hazardous Material** means, except as provided below, the introduction in, on or under the Project ROW of Hazardous Material directly by TxDOT, or by its contractors, subcontractors, agents or employees acting in such capacity (other than any DB Contractor-Related Entity). TxDOT Release(s) of Hazardous Material excludes, however, (i) any Hazardous Materials so introduced that were in or part of construction materials and equipment incorporated into the Project; and (ii) any Hazardous Materials so introduced that were in, on or under DB Contractor-Designated ROW.

**TxDOT ROW Utility Manual** means the ROW Utility Manual issued by the Right of Way Division of TxDOT on November 5, 1990, as the same may be amended, supplemented or replaced from time to time.

**TxDOT Schematic Design** means the preliminary design plans for the Project identified in the RID.

**TxDOT Standards** shall mean TxDOT policies, procedures, guidelines, manuals, typical practices, and standards of care that are readily available to DB Contractor.

**TxDOT Standard Specifications** means the Texas Department of Transportation Standard Specifications for Construction and Maintenance of Highways, Streets and Bridges, adopted by the Texas Department of Transportation including all revisions thereto applicable on the Effective Date, unless otherwise specified.

**TxDOT Engineering Standard Sheets** means the roadway, bridge and traffic related drawings and standards provided on TxDOT's webpage for Statewide TxDOT CAD Standard Plan Files.

**Unidentified Utility(ies)** means any Utility impacted by the Project (other than a Service Line) that is neither an Identified Utility nor a New Utility, including any Utility that would be a New Utility but for the fact that it is an extension of an Identified Utility.

**Unidentified Utilities Deductible** is defined in the Design-Build Agreement.

**Unidentified Utilities Deductible Cap** is defined in the Design-Build Agreement.

**Uniform Act** means the Federal Uniform Relocation Assistance and Real Property Acquisition Policies Act, P.L. 91-646, as amended.

**Unilateral Change Order** means a written order issued by TxDOT to DB Contractor delineating changes in the Work within the general scope of the Contract Documents or in the terms and conditions of the Contract Documents in accordance with Section 4.6.2.2 and establishing, if appropriate, an adjustment to the Price or a Completion Deadline.

**Users** means the registered owner of a vehicle traveling on the Project or any portion thereof.

**Utility(ies)** or **utility(ies)** means a public, private, cooperative, municipal or government line, facility or system used for the carriage, transmission or distribution of cable television, electric power, telephone, telegraph, water, salt water, gas, oil, petroleum products, steam, chemicals, hydrocarbons, telecommunications, sewage, storm water not connected with the drainage of the Project, and similar substances that directly or indirectly serve the public. The term "Utility(ies)" or "utility(ies)" also includes radio towers or transmission towers (including cellular). Oil and gas

gathering lines and production supply lines are included in this definition and are classified as a Utility.

When used in the context of Utility Adjustments, the term specifically excludes:

(a) Storm water facilities providing drainage for the Project ROW, and

(b) TxDOT's or a Governmental Entity's lighting and electrical systems, traffic control systems, communications systems and irrigation systems serving street or highway purposes (including ITS and intelligent vehicle highway system facilities).

The necessary appurtenances to each Utility facility shall be considered part of such Utility. Without limitation, any Service Line up to and including the meter, connecting directly to a Utility shall be considered an appurtenance to that Utility, regardless of the ownership of such Service Line.

**Utility Accommodation Rules (UAR)** means the Utility Accommodation Rules issued by TxDOT, at 43 Tex. Admin. Code, Part 1, Chapter 21, Subchapter C, as the same may be amended, supplemented or replaced by TxDOT from time to time.

**Utility Adjustment** means each relocation (temporary or permanent), abandonment, Protection in Place, removal (of previously abandoned Utilities as well as of newly abandoned Utilities), replacement, reinstallation, or modification of existing Utilities necessary to accommodate construction, operation, maintenance or use of the Project; provided, however, that the term "**Utility Adjustment**" shall not refer to any of the work associated with facilities owned by any railroad. For any Utility crossing the Project ROW, the Utility Adjustment Work for each crossing of the Project ROW by that Utility shall be considered a separate Utility Adjustment. For any Utility installed longitudinally within the Project ROW, the Utility Adjustment Work for each continuous segment of that Utility located within the Project ROW shall be considered a separate Utility Adjustment.

**Utility Adjustment Agreement Amendment (UAAA)** means an agreement between DB Contractor and the Utility Owner that amends a Project Utility Adjustment Agreement, as more particularly described in Section 14.1.3.2 of the Design-Build Specifications.

**Utility Adjustment Field Modifications** has the meaning set forth in Section 14.4.7 of the Design-Build Specifications.

**Utility Adjustment Concept Plan** means a conceptual design document for Utility Adjustments for the entire Project, which shows all of the approximate existing locations, and DB Contractor's recommendation for all of the Adjusted locations, of each Utility impacted by the Project, as more particularly described in Section 14.3.3 of the Design-Build Specifications.

**Utility Adjustment Plans** means the set of plans, specifications, and cost estimates prepared by DB Contractor and approved by the corresponding Utility Owner in connection with the design work for any Utility Adjustment, as more particularly described in Section 14.3.4 of the Design-Build Specifications.

**Utility Adjustment Submittals** means Submittals, submitted in accordance herewith and with any Project Utility Adjustment Agreement, in each case arising out of or relating to the relevant Utility Adjustments.

**Utility Adjustment Work** means all efforts and costs necessary to accomplish the required Utility Adjustments, including all coordination, design, design review, permitting, construction, inspection, maintenance of records, relinquishment of Existing Utility Property Interests, preparation of Utility Joint Use Acknowledgements, and acquisition of Replacement Utility Property Interests, whether provided by DB Contractor or by the Utility Owners. The term also includes any reimbursement of Utility Owners that is DB Contractor's responsibility pursuant to Section 4.5.6. Any Utility Adjustment Work furnished or performed by DB Contractor is part of the Work; any Utility Adjustment Work furnished or performed by a Utility Owner is not part of the Work.

**Utility Agreement** means a PUAA or UAAA, as the context may require.

**Utility Appurtenance Adjustment** means the adjustment of Utility appurtenances (e.g., manholes, valve boxes, and vaults) for line and grade upon completion of roadway work.

**Utility Assembly** means the collection of agreements, plans and other information and materials that DB Contractor is required to submit to TxDOT in connection with each Utility Adjustment (or group of Utility Adjustments subject to the same Project Utility Adjustment Agreement and any applicable amendments), as more particularly described in Section 14.3.4.5 of the Design-Build Specifications. Depending on the context, the term also refers to UAAAs, supplemental Utility Assemblies and Abbreviated Utility Assemblies.

**Utility Assembly Checklist** means a checklist listing the required components of a Utility Assembly, as referenced in Section 14.3.4.5 of the Design-Build Specifications.

**Utility Assembly Number or Assembly Tracking Number** means the unique number given by DB Contractor to each Utility Assembly using the form "YYY-U-XXXX." The "YYY" shall refer to the assigned number of the highway and "XXXX" shall refer to the 4-digit number assigned to each Utility Assembly (beginning with 0500 and numbered consecutively thereafter). The Utility Assembly Number shall be referenced on each corresponding Utility Agreement.

**Utility Design Coordinator (UDC)** means the Registered Professional Engineer designated by DB Contractor to be responsible to coordinate the Utility Adjustment design with the overall highway design features during the Work, as more particularly described in Section 14.2.3 of the Design-Build Specifications.

**Utility Enhancement** means a Betterment or a Utility Owner Project, as referenced in Section 4.5.2.

**Utility Joint Use Agreement or Utility Joint Use Acknowledgment** means an agreement between TxDOT and a Utility Owner that establishes the rights and obligations of TxDOT and the Utility Owner with respect to occupancy of the Project ROW by a Utility owned by such Utility Owner.

**Utility Management Plan** means the plan setting forth procedures by which DB Contractor will manage the Utility Adjustment Work as more particularly described in Section 4.2.8.

**Utility Manager (UM)** means the senior staff utility administrator designated by DB Contractor to be responsible for coordination and oversight of Utility operations during the Work, as more particularly described in Section 14.2.3 of the Design-Build Specifications.

**Utility Owner** means the owner or operator of any Utility (including both privately held and publicly held entities, cooperative utilities, and municipalities and other governmental agencies).

**Utility Owner Delay** shall have the meaning set forth in Section 4.5.5.2.

**Utility Owner Project** means the design and construction by or at the direction of a Utility Owner (or by DB Contractor pursuant to Section 4.5.2.3) of a new Utility other than as part of a Utility Adjustment. Betterments are not Utility Owner Projects. Utility Owner Projects shall be entirely the financial obligation of the Utility Owner.

**Utility Strip Map** means the map, any SUE information, any other documents, and exhibits depicting any existing Utilities identified by TxDOT that are included in the folder labeled "Utility Strip Map" in the Reference Information Documents.

**Utility Tracking Report** means the report prepared by DB Contractor and that lists all Utilities located within the Project ROW or otherwise potentially affecting the Project as more particularly described in Section 14.5.2 of the Design-Build Specifications.

**Warranty(ies)** shall have the meaning set forth in Section 3.8.1.

**Warranty Bond** shall have the meaning set forth in Section 3.4.7.

**Warranty Term** shall have the meaning set forth in Section 3.8.1.1.

**Work** means all of the work required under the Contract Documents, all administrative, Professional Services, engineering, real property acquisition and occupant relocation, support services, Utility Adjustment Work to be furnished or provided by DB Contractor, reimbursement of Utility Owners for Utility Adjustment Work furnished or provided by such Utility Owners or their contractors and consultants, procurement, professional, manufacturing, supply, installation, construction, landscaping, supervision, management, testing, verification, labor, materials, equipment, maintenance, documentation and other duties and services to be furnished and provided by DB Contractor as required by the Contract Documents, including all efforts necessary or appropriate to achieve Final Acceptance of the Project, except for those efforts that such Contract Documents expressly specify will be performed by Persons other than the DB Contractor-Related Entities.

**Work Breakdown Structure or WBS** means a deliverable-oriented hierarchical structure that breaks the Work into elements that have distinct identification and that contain specific scope characteristics. Each descending WBS level represents an increasingly detailed delineation of elements of the total Project scope. The WBS will contain elements of Professional Services Work and Construction Work. There shall be clearly identifiable linkage between the WBS and activities shown on the Project Schedule. The WBS numbering convention shall be compatible with Project Schedule coding and should be compatible with document control coding.

## ITEM 2 CONTRACT DOCUMENTS AND INTERPRETATION

### 2.1 Contract Documents

The Contract Documents and order of precedence are listed in Section 1.3 of the Design-Build Agreement.

### 2.2 Contract Interpretation

**2.2.1** Interpretation of the Contract Documents:

(a) the singular includes the plural and vice versa;

(b) references to statutes or regulations include all statutory or regulatory provisions consolidating, amending or replacing the statute or regulation referred to;

(c) the words "including," "includes," and "include" shall be deemed to be followed by the words "without limitation" and shall not be considered to set forth an exhaustive list;

(d) unless otherwise indicated, the words "Section", "subsection", "paragraph", "sentence", "clause", "sub-clauses," and "Exhibit" mean and refer to the specified section, subsection, paragraph, sentence, clause, sub-clause, or exhibit of or to the Contract Documents and a reference to a subsection or clause "above" or "below" refers to the denoted subsection or clause within the Section in which the reference appears;

(e) (words such as "herein," "hereby", "hereof", "hereto," and "hereunder" and words of similar import refer to the entire document in which they are contained and not to any particular provision or section;

(f) words not otherwise defined that have well-known technical or construction industry meanings are used in accordance with such recognized meanings;

(g) references to Persons include their respective permitted successors and assigns and, in the case of Governmental Entities, Persons succeeding to their respective functions and capacities;

(h) words of any gender used herein shall include each other gender where appropriate;

(i) unless otherwise specified, lists contained in the Contract Documents defining the Project or the Work shall not be deemed all-inclusive;

(j) the word "discretion" with respect to any Person means the sole and absolute discretion of such Person except as otherwise stated herein;

(k) the word "promptly" means as soon as reasonably practicable in light of then-prevailing circumstances;

(l) unless specified otherwise, a reference to an agreement or other document is considered to be a reference to such agreement or other document (including any schedules or exhibits thereto) as it may be amended, modified, or supplemented from time to time in accordance with its terms;

(m) the division of the Contract Documents into parts, sections, and other subdivisions is for convenience of reference only and shall not affect the construction or interpretation of the Contract Document and the headings in these Contract Documents are not intended to be full or precise descriptions of the text to which they refer and shall not be considered part of the Contract Documents; and

(n) whenever the Contract Documents require or provide for any notice, approval, consent, acceptance, determination, decision, certificate, order, response, waiver, explanation, policy, information, or the like, the same and any request for any of the foregoing must be in writing (unless otherwise waived in writing by the other Party).

**2.2.2** DB Contractor acknowledges and agrees that it had the opportunity and obligation, prior to the Effective Date, to review the terms and conditions of the Contract Documents (including those Reference Information Documents that are referenced in the Contract Documents, and pursuant to Section 1.4.1 of the Design-Build Agreement, are considered Contract Documents) and to bring to the attention of TxDOT any conflicts or ambiguities contained therein. DB Contractor further acknowledges and agrees that it has independently reviewed the Contract Documents with legal counsel, and that it has the requisite experience and sophistication to understand, interpret and agree to the particular language of the provisions of the Contract Documents. Accordingly, in the event of an ambiguity in or dispute regarding the interpretation of the Contract Documents, they shall not be interpreted or construed against the Person that prepared them, and, instead, other rules of interpretation and construction shall be used.

**2.2.3** TxDOT's interim or final answers to the questions posed during the Proposal process for this Design-Build Contract shall in no event be deemed part of the Contract Documents and shall not be relevant in interpreting the Contract Documents except to the extent they may clarify provisions otherwise considered ambiguous.

**2.2.4** On plans, working drawings, and standard plans, calculated dimensions shall take precedence over scaled dimensions.

**2.2.5** Unless specified otherwise, a reference to a Law is considered to be a reference to (a) such Law as it may be amended, modified or supplemented from time to time, (b) all regulations and rules pertaining to or promulgated pursuant to such Law, (c) the successor to the Law resulting from recodification or similar reorganizing of Laws, and (d) all future Laws pertaining to the same or similar subject matter.

**2.2.6 Computation of Periods**

If the date to perform any act or give any notice specified in the Contract Documents (including the last date for performance or provision of notice "within" a specified time period) falls on a non-Business Day, such act or notice may be timely performed on the next succeeding day that is a Business Day. Notwithstanding the foregoing, requirements contained in the Contract Documents relating to actions to be taken in the event of an emergency and 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.

### 2.2.7 Headings

The captions of the articles, sections, and subsections herein are inserted solely for convenience, and under no circumstances are they or any of them to be treated or construed as part of the Design-Build Contract.

### 2.2.8 Explanations; Omissions and Misdescriptions

DB Contractor shall not take advantage of or benefit from any apparent Error in the Contract Documents. Should it appear that the Work to be done or any matter relative thereto is not sufficiently detailed or explained in the Contract Documents, DB Contractor shall request in writing such further written explanations from TxDOT as may be necessary and shall comply with the explanation provided. DB Contractor shall promptly notify TxDOT in writing of all Errors that it may discover in the Contract Documents (including those Reference Information Documents that are referenced in the Contract Documents, and pursuant to Section 1.4.1 of the Design-Build Agreement are considered Contract Documents to the extent so referenced), and shall obtain specific instructions in writing from TxDOT regarding any such Error before proceeding with the Work affected thereby. The fact that the Contract Documents omit or misdescribe any details of any Work that are necessary to carry out the intent of the Contract Documents, or that are customarily performed, shall not relieve DB Contractor from performing such omitted Work (no matter how extensive) or misdescribed details of the Work, and they shall be performed as if fully and correctly set forth and described in the Contract Documents, without entitlement to a Change Order hereunder except as specifically allowed under Section 4.6.

### 2.2.9 Referenced Standards, Policies and Specifications

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

**2.2.9.2** In interpreting standards, policies and specifications referenced in the Design-Build Specifications, the following apply:

(a) References to the project owner means TxDOT.

(b) References to the Engineer in the context of provider of compliance judgment may mean the Professional Services Quality Assurance Manager (PSQAM), the Independent Quality Manager (IQM) or it may mean a TxDOT representative, depending on the context, as determined by TxDOT in its discretion.

(c) References to “plans” means the Released for Construction Documents, unless otherwise indicated.

(d) Cross-references to measurement and payment provisions contained in the referenced standards, policies and specifications shall be deemed to refer to the measurement and payment provisions contained in the Contract Documents.

**2.2.10 Incorporation of ATCs**

**2.2.10.1** If the Contract Documents incorporate any approved ATCs and either (a) DB Contractor does not comply with one or more TxDOT conditions applicable to the ATC or (b) DB Contractor does not obtain a third-party approval required for the ATC, then DB Contractor shall comply with the Contract Document requirements that would have applied but for the ATC, including acquiring DB Contractor-Designated ROW necessary to comply with the Contract Documents, without any increase in the Price, extension of the Completion Deadlines or any other Change Order.

**2.2.10.2** ATCs contained in proposals submitted by unsuccessful proposers and, except for those ATCs included in Appendix 2 to Exhibit 2 to the Design-Build Agreement, DB Contractor ATCs that were approved by TxDOT for inclusion in the Proposal that were not incorporated into the Proposal may be presented to DB Contractor as a Request for Change Proposal in accordance with Section 4.6.2.1.

**2.2.11 Integration of Contract Documents**

TxDOT and DB Contractor agree and expressly intend that, subject to the severability provisions set forth in the Design-Build Agreement, the Design-Build Agreement, the General Conditions and other Contract Documents constitute a single, non-severable, integrated agreement whose terms are interdependent and non-divisible.

**2.2.12 Amendments**

The Contract Documents may be amended only by a written instrument duly executed by the Parties or their respective successors or assigns, except to the extent expressly provided otherwise in the Design-Build Contract. An amendment must be accompanied by a Form 1295, Certificate of Interested Parties completed by DB Contractor, as described in Section 4.6.5.5.

**2.2.13 Waiver**

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

**2.2.13.2** The exercise by a Party of any right or remedy provided under the Contract Documents shall not waive or preclude any other or further exercise thereof or the exercise of any other right or remedy. No waiver by any Party of any right or remedy under the Contract Documents shall be deemed to be a waiver of any other or subsequent right or remedy under the Contract Documents. 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.

**2.2.13.3** Except as provided otherwise in the Contract Documents, 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 hereunder, or to relieve the other Party from the full performance of its obligations under the Contract Documents.

**2.2.13.4** Either Party's waiver of any breach or failure to enforce any of the terms, covenants, conditions or other provisions of the Contract Documents at any time shall not in any way limit or waive that Party's right thereafter to enforce or compel strict compliance with every term, covenant, condition or other provision, any course of dealing or custom of the trade notwithstanding. Furthermore, if the

Parties make and implement any interpretation of the Contract Documents without documenting such interpretation by an instrument in writing signed by both Parties, such interpretation and implementation thereof will not be binding in the event of any future Claims or Disputes.

### 2.2.14 Governing Law

The Contract Documents shall be governed by and construed in accordance with the Laws of the State of Texas.

## ITEM 3 FEDERAL REQUIREMENTS; INSURANCE; PERFORMANCE SECURITY

### 3.1 Federal Requirements

DB Contractor shall comply and require its Subcontractors to comply with all Federal Requirements. In the event of any conflict between any applicable Federal Requirements and the other requirements of the Contract Documents, the Federal Requirements shall prevail, take precedence and be in force over and against any such conflicting provisions.

### 3.2 DBE Requirements

**3.2.1** TxDOT's Disadvantaged Business Enterprise (DBE) Special Provisions applicable to the Project are set forth in Attachment 3-2. The purpose of the DBE Special Provisions is to ensure that DBEs shall have an equal opportunity to participate in the performance of contracts financed in whole or in part with federal funds. DB Contractor shall comply with all applicable requirements set forth in the DBE Special Provisions and TxDOT's Disadvantaged Business Enterprise Program applicable to design-build agreement projects and adopted pursuant to 49 CFR Part 26, and the provisions in DB Contractor's approved DBE Performance Plan, set forth in Exhibit 6 to the Design-Build Agreement. The approved overall DBE participation goal for the Project is established in the Design-Build Agreement.

**3.2.2** DB Contractor shall exercise good faith efforts to achieve such DBE participation goal for the Project through implementation of DB Contractor's approved DBE Performance Plan. DB Contractor shall include provisions to effectuate the requirements of Section 3.2.1 in every Subcontract (including purchase orders and in every subcontract of any DB Contractor-Related Entity for the Work), and shall require that they be included in all Subcontracts, so that such provisions will be binding upon each Subcontractor.

**3.2.3** DB Contractor shall not cancel or terminate any Subcontract with a DBE firm except in accordance with all requirements and provisions applicable to cancellation or termination of Subcontracts with DBE firms set forth in the DBE Special Provisions in Attachment 3-2.

### 3.3 Non-Discrimination; Equal Employment Opportunity

**3.3.1** DB Contractor shall not, and shall cause the Subcontractors to not, discriminate on the basis of race, color, national origin or sex in the performance of the Work under the Contract Documents. DB Contractor shall carry out, and shall cause the Subcontractors to carry out, applicable requirements of 49 CFR Part 26. Failure by DB Contractor to carry out these requirements is a material breach of this Design-Build Contract, which may result in the termination of this Design-Build Contract or such other remedy as TxDOT deems appropriate, which may include, but is not limited to:

1. Withholding monthly progress payments;

2. Assessing sanctions;

3. Liquidated damages; and/or

4. Disqualifying DB Contractor from future bidding as non-responsible.

**3.3.2** DB Contractor shall include Section 3.3.1 in every Subcontract (including purchase orders and in every subcontract of any DB Contractor-Related Entity for the Work), and shall require that they be included in all Subcontracts, so that such provisions will be binding upon each Subcontractor.

**3.3.3** DB Contractor confirms for itself and all Subcontractors that DB Contractor and each Subcontractor has an equal employment opportunity policy ensuring equal employment opportunity without regard to race, color, national origin, sex, age, religion or handicap; and that DB Contractor and each Subcontractor maintains no employee facilities segregated on the basis of race, color, religion or national origin. DB Contractor shall comply with all applicable Laws relating to equal employment opportunity and nondiscrimination, including those set forth in Attachment 3-1, and shall require its Subcontractors to comply with such provisions.

**3.4 Surety Bonds**

DB Contractor shall provide payment, performance and warranty bonds to TxDOT securing DB Contractor's obligations hereunder, and shall maintain such bonds in full force and effect as described below.

**3.4.1** On or before the issuance by TxDOT of NTP1, DB Contractor shall deliver to TxDOT a performance bond in the initial amount of the NTP1 Performance Bond Amount and in the form attached to the Design-Build Agreement.

**3.4.2** On or before the issuance by TxDOT of NTP1, DB Contractor shall deliver to TxDOT a payment bond in the initial amount of the NTP1 Payment Bond Amount and in the form attached to the Design-Build Agreement.

**3.4.3** Upon the issuance by TxDOT of NTP2, the amount of the Performance Bond shall increase to NTP2 Performance Bond Amount, in accordance with the Performance Bond rider included in the Design-Build Agreement effecting such increase. After Final Acceptance of the Project, TxDOT shall provide a written release of the Performance Bond, provided that (and upon such date after Final Acceptance of the Project that) all of the following conditions are met: (a) DB Contractor is not in default under this Design-Build Contract; (b) no event has occurred that with the giving of notice or passage of time would constitute a default by DB Contractor hereunder or under the Contract Documents; and (c) TxDOT has received the Warranty Bond in accordance with Section 3.4.7.

**3.4.4** Upon the issuance by TxDOT of NTP2, the amount of the Payment Bond shall increase to the NTP2 Payment Bond Amount in accordance with the Payment Bond rider included in the Design-Build Agreement effecting such increase. TxDOT will release the Payment Bond upon (a) receipt of (i) evidence satisfactory to TxDOT that all Persons eligible to file a claim against the Payment Bond have been fully paid and (ii) unconditional releases of Liens and stop notices from all Subcontractors who filed a preliminary notice of a claim against the Payment Bond or (b) expiration of the statutory period for Subcontractors to file a claim against the Payment Bond if no claims have been filed.

**3.4.5** Reserved.

**3.4.6** DB Contractor shall not commence or permit or suffer commencement of any Design Work or any Construction Work, until DB Contractor obtains from its Sureties and provides to TxDOT written confirmation that the Performance Bond and Payment Bond amounts have been increased to equal the NTP2 Performance Bond Amount and NTP2 Payment Bond Amount, respectively, in accordance with this Section 3.4.

**3.4.7** After Final Acceptance of the Project and subject to the requirements herein, including Section 3.4.3, DB Contractor may obtain a reduction of the Performance Bond by providing a warranty bond which shall guarantee performance of the Work required to be performed during the Warranty Term, as subject to extension under Section 3.8.2, and which shall also constitute a payment bond guaranteeing payment to Persons performing such Work (the "Warranty Bond"). The Warranty Bond shall be in an amount equal to 10% of the Price and shall be in the form attached to the Design-Build Agreement. Upon Final Acceptance of the Project, DB Contractor may obtain a release of the Performance and Payment Bonds, subject to the requirements of Section 3.4.3 and provided that TxDOT has received the Warranty Bond in accordance with this Section 3.4.7. The Warranty Bond shall be released upon expiration of the Warranty Term, as subject to extension under Section 3.8.2, and (a) receipt of (i) evidence satisfactory to TxDOT that all Persons eligible to file a claim against the Warranty Bond have been fully paid and (ii) unconditional releases of Liens and stop notices from all Subcontractors who filed preliminary notice of a claim against the Warranty Bond and (b) expiration of the statutory period for Subcontractors to file a claim against the Warranty Bond if no claims have been filed.

**3.4.8** Each bond required hereunder shall be issued by a Surety authorized to do business in the State with a rating of at least A minus (A-) or better and Class VIII or better by A.M. Best Company or rated in the top two categories by two nationally recognized rating agencies, or as otherwise approved by TxDOT in its discretion. If any bond previously provided becomes ineffective, or if the Surety that provided the bond no longer meets the requirements hereof, DB Contractor shall provide a replacement bond in the same form issued by a surety meeting the foregoing requirements, or other assurance satisfactory to TxDOT in its discretion. If the Price is increased in connection with a Change Order, TxDOT may, in its discretion, require a corresponding proportionate increase in the amount of each bond or alternative security.

## 3.5 Insurance

DB Contractor shall procure and keep in effect, or cause to be procured and kept in effect with DB Contractor as a named insured, as appropriate, the insurance policies required in accordance with this Section 3.5.

### 3.5.1 General Insurance Requirements

**3.5.1.1** Qualified Insurers

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

(a) Authorized to do business in the State and has a current policyholder's management and financial size category rating of not less that "A – VII" according to A.M. Best's Insurance Reports Key Rating Guide; or

(b) Otherwise approved in writing by TxDOT.

**3.5.1.2** Premiums, Deductibles and Self-Insured Retentions.

DB Contractor shall timely pay the premiums for all insurance required under this Design-Build Contract. Subject to Section 4.6 and except as provided in the DBA, DB Contractor shall be responsible for and TxDOT shall have no liability for any deductibles, self-insured retentions and amounts in excess of the coverage provided. In the event that any required coverage is provided

under a self-insured retention, the entity responsible for the self-insured retention shall have an authorized representative issue a letter to TxDOT, at the same time the insurance policy is to be procured, stating that it shall protect and defend TxDOT to the same extent as if a commercial insurer provided coverage for TxDOT.

**3.5.1.3** Primary and Non-Contributory Coverage

Each insurance policy shall provide that the coverage is primary and noncontributory coverage with respect to all named and additional insureds, except for coverage that by its nature cannot be written as primary. Any insurance or self-insurance beyond that specified in this Design-Build Contract that is maintained by an insured or any such additional insured shall be excess of such insurance and shall not contribute with it.

**3.5.1.4** Verification of Coverage

**3.5.1.4.1** At each time DB Contractor is required to initially obtain or cause to be obtained each insurance policy, including insurance coverage required of Subcontractors, and thereafter not later than 10 days prior to the expiration date of each insurance policy, DB Contractor shall deliver to TxDOT a certificate of insurance. Each required certificate must meet the requirements of Texas Insurance Code Chapter 1811 and, to the extent permitted under applicable Laws, state the identity of all carriers, named insureds and additional insureds required under the Contract Documents, state the type and limits of coverage, deductibles, subrogation waiver, and termination provisions of the policy, include as attachments all additional insured endorsements required under the Contract Documents, and be signed by an authorized representative of the insurance company shown on the certificate or its agent or broker and otherwise be in a form satisfactory to TxDOT. Each such certificate of insurance evidencing policies required to be obtained by DB Contractor shall be accompanied by a letter signed by DB Contractor confirming that the insurances represented in the certificate of insurance fully comply with all provisions of this Section 3.5. DB Contractor certifies to TxDOT by submitting each Subcontractor certificate of insurance that the insurances represented in the certificate fully comply with the requirements of this Section 3.5 that are applicable to Subcontractor policies.

**3.5.1.4.2** In addition, within a reasonable time after receipt of a request by TxDOT for copies of insurance policies required to be obtained by DB Contractor (but not to exceed the later of 15 days after the receipt of the actual policy and the receipt of TxDOT's request), DB Contractor shall deliver to TxDOT (a) a complete certified copy of each such requested insurance policy or modification, or renewal or replacement insurance policy and all endorsements thereto and (b) satisfactory evidence of payment of the premium therefor.

**3.5.1.4.3** If DB Contractor has not provided TxDOT with the foregoing proof of coverage and payment within five days after TxDOT delivers to DB Contractor written notice of an Event of Default under Section 8.7.1.2 and demand for the foregoing proof of coverage, TxDOT may, in addition to any other available remedy, without obligation or liability and without further inquiry as to whether such insurance is actually in force (a) obtain such an insurance policy; and DB Contractor shall reimburse TxDOT for the cost thereof upon demand and (b) suspend all or any portion of Work for cause and close the Project until TxDOT receives from DB Contractor such proofs of coverage in compliance with this Section 3.5.1 (or until TxDOT obtains an insurance policy, if it elects to do so).

**3.5.1.5** Subcontractor Insurance Requirements

**3.5.1.5.1** DB Contractor's obligations regarding Subcontractor's insurance are set forth in Section 3.5.4.9. DB Contractor shall cause each Subcontractor to provide such insurance in the manner and in the form consistent with the requirements contained in Section 3.5.4.9 and also including a requirement to comply with the primary and non-contributory, waiver of subrogation, and notice of cancellation provisions of this Section 3.5.1.

**3.5.1.5.2** If any Subcontractor fails to procure and keep in effect the insurance required of it under Section 3.5.4.9 and TxDOT asserts the same as an Event of Default hereunder, DB Contractor may, within the applicable cure period, cure such Event of Default by (a) causing such Subcontractor to obtain the requisite insurance and providing to TxDOT proof of insurance; (b) procuring the requisite insurance for such Subcontractor and providing to TxDOT proof of insurance; or (c) terminating the Subcontractor and removing its personnel from the Site.

**3.5.1.6** Policies with Insureds in Addition to DB Contractor

All insurance policies that are required to be maintained by DB Contractor under the DBC and that insure Persons (whether as named or additional insureds) in addition to DB Contractor, other than those to be provided by Subcontractors in compliance with Section 3.5.1.5 above, shall comply or be endorsed to comply with the following provisions.

**3.5.1.6.1** The insurance policy shall be written or endorsed so that no acts or omissions of an insured shall vitiate coverage of the other insureds, including any additional insureds, provided that professional liability policies shall not be required to comply with this Section 3.5.1.6.1. Without limiting the foregoing, any failure on the part of a named insured to comply with reporting provisions or other conditions of the insurance policies, any breach of warranty, any action or inaction of a named insured or others, any misrepresentation, act or omission of the named insured, or any change in ownership of all or any portion shall not affect coverage provided to the other named insureds or additional insureds (and their respective members, directors, officers, employees, agents and Project consultants).

**3.5.1.6.2** The insurance shall apply separately to each named insured and additional insured against whom a claim is made or suit is brought, except with respect to the limits of the insurer's liability.

**3.5.1.6.3** All endorsements adding additional insureds to required insurance policies shall contain no limitations, conditions, restrictions or exceptions to coverage in addition to those that apply under the insurance policy generally. To the fullest extent of coverage allowed under Chapter 151 of the Texas Insurance Code, DB Contractor (if applicable) and TxDOT shall be included as additional insureds under the DB Contractor's commercial general liability policy, using ISO Additional Insured Endorsements CG 20 10 04/13 and CG 20 37 04/13, or endorsements providing equivalent coverage, including products-completed operations. The commercial general liability policy shall include completed operations liability coverage.

**3.5.1.7** Additional Terms and Conditions

**3.5.1.7.1** Each insurance policy shall be endorsed to state that coverage cannot be canceled, voided, suspended, adversely modified, or reduced in coverage or in limits (including for non-payment of premium) except after 30 days' prior written notice (or 10 days in the case of cancellation for non-payment of premium), return receipt requested, has been given to TxDOT and each other insured or additional insured party; provided that (a) notice is not required for erosion of limits due to claims

paid and (b) DB Contractor may obtain as comparable an endorsement as possible if it establishes unavailability of this endorsement as set forth in Section 3.5.1.11. Such endorsement shall not include any limitation of liability of the insurer for failure to provide such notice. Should such an endorsement not be available, prior to an insurance policy being canceled, voided, suspended, adversely modified, or reduced in coverage or in limits (including for non-payment of premium), DB Contractor shall require its insurance broker to furnish 30 days' prior written notice (or 10 days in the case of cancellation for non-payment of premium) to TxDOT and each other insured or additional insured party, return receipt requested. DB Contractor's agreement to comply with this requirement shall be provided along with the certificates of insurance.

**3.5.1.7.2** If DB Contractor's or any Subcontractor's activities involve transportation of Hazardous Materials, the automobile liability insurance policy for DB Contractor or such Subcontractor shall be endorsed to include for private, non-commercial vehicles Motor Carrier Act Endorsement-Hazardous Materials Clean up (MCS-90).

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

**3.5.1.8** Waivers of Subrogation

TxDOT waives all rights against DB Contractor-Related Entities, and DB Contractor waives all rights against the Indemnified Parties, for any claims to the extent covered by insurance obtained pursuant to this Section 3.5, except such rights as they may have to the proceeds of such insurance. If DB Contractor is deemed to self-insure a claim or loss under Section 3.5.2.3, then DB Contractor's waiver shall apply as if it carried the required insurance. DB Contractor shall require all Subcontractors to provide similar waivers in writing each in favor of all other Persons enumerated above. Subject to Section 3.5.1.11, each policy, including workers' compensation if permitted under the applicable worker's compensation insurance laws, shall include a waiver of any right of subrogation against the Indemnified Parties or the insurer's consent to the insured's waiver of recovery in advance of loss.

**3.5.1.9** No Recourse

There shall be no recourse against TxDOT for payment of premiums or other amounts with respect to the insurance required to be provided by DB Contractor hereunder, except to the extent such costs are recoverable under Section 4.6.

**3.5.1.10** Support of Indemnifications

The insurance coverage provided hereunder by DB Contractor is not intended to limit DB Contractor's indemnification obligations under the Contract Documents.

**3.5.1.11** Inadequacy or Unavailability of Required Coverages

**3.5.1.11.1** TxDOT makes no representation that the limits of liability specified for any insurance policy to be carried pursuant to this Design-Build Contract or approved variances therefrom are adequate to protect DB Contractor against its undertakings under the Contract Documents, to TxDOT, or any other Person. No such limits of liability or approved variances therefrom shall preclude TxDOT from taking any actions as are available to it under the Contract Documents or otherwise at Law.

**3.5.1.11.2** If DB Contractor demonstrates to TxDOT's reasonable satisfaction that it has used diligent efforts in the global insurance and reinsurance markets to maintain the insurance coverages it is required to provide hereunder, and if, despite such diligent efforts and through no fault of DB Contractor, any of such coverages (or any of the required terms of such coverages, including insurance policy limits) become unavailable during the Term on commercially reasonable terms, TxDOT will grant DB Contractor an interim written variance from such requirements under which DB Contractor shall obtain and maintain or cause to be obtained and maintained alternative insurance packages and programs that provide risk coverage as comparable to that contemplated in this Section 3.5 as is commercially reasonable under then-existing insurance market conditions.

**3.5.1.11.3** DB Contractor shall not be excused from satisfying the insurance requirements of this Section 3.5.1 merely because premiums for such insurance are higher than anticipated. To establish that the required coverages (or required terms of such coverages, including insurance policy limits) are not commercially available, DB Contractor shall bear the burden of proving either that (a) the same is not available at all in the global insurance and reinsurance markets or (b) the premiums for the same have so materially increased over those previously paid for the same coverage that no reasonable and prudent risk manager for a Person seeking to insure comparable risks would conclude that such increased premiums are justified by the risk protection afforded. For the purpose of clause (b), the only increases in premiums that may be considered are those caused by changes in general market conditions in the insurance industry affecting insurance for highway facilities, and DB Contractor shall bear the burden of proving that premium increases are the result of such changes in general market conditions. For the avoidance of doubt, no increase in insurance premiums attributable to particular conditions of the Project or claims or loss experience on the Project or of any DB Contractor-Related Entity or Affiliate, whether under an insurance policy required by this Section 3.5 or in connection with any unrelated work or activity of any DB Contractor-Related Entity or Affiliate, shall be considered in determining whether required insurance is commercially unavailable.

**3.5.1.11.4** DB Contractor shall not be entitled to any increase in the Price for increased costs or any time extension to the Completion Deadlines resulting from the unavailability of coverage and the requirement to provide acceptable alternatives. TxDOT shall be entitled to a reduction in the Price if it agrees to accept alternative policies providing less than equivalent coverage and if DB Contractor is not required to self-insure for such risks, with the amount to be determined by extrapolation using the insurance quotes included in the EPDs (or based on other evidence of insurance premiums as of the Proposal Due Date if the EPDs do not provide adequate information).

**3.5.1.12** Defense Costs

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

**3.5.1.13** Contesting Denial of Coverage

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

**3.5.1.14** Umbrella and Excess Policies

DB Contractor shall have the right to satisfy the requisite insurance coverage amounts for liability insurance through a combination of primary policies and umbrella or excess policies. Umbrella and excess policies shall comply with all insurance requirements, terms and provisions set forth in this Design-Build Contract for the applicable type of coverage.

**3.5.1.15** Additional Insurance Policies

If DB Contractor carries insurance coverage in addition to that required under this Design-Build Contract, then DB Contractor shall, to the extent feasible, include TxDOT and its members, directors, officers, employees, agents and the Indemnified Parties as additional insureds thereunder, if and to the extent they have an insurable interest. The additional insured endorsements shall be as described in Section 3.5.1.6.3 and DB Contractor shall provide to TxDOT the proofs of coverage and copy of the policy described in Section 3.5.1.4. If, however, DB Contractor demonstrates to TxDOT that inclusion of such Persons as additional insureds will increase the premium in a manner that is not cost-effective, TxDOT shall elect either to pay the increase in premium or forego additional insured coverage. The provisions of Sections 3.5.1.4, 3.5.1.6, 3.5.1.8, 3.5.1.9, 3.5.1.13 and 3.5.2 shall apply to all such policies of insurance coverage.

**3.5.2** Prosecution of Claims

**3.5.2.1** Unless otherwise directed by TxDOT in writing with respect to TxDOT's insurance claims, DB Contractor shall be responsible for reporting and processing all potential claims by TxDOT or DB Contractor against the insurance policies required hereunder. DB Contractor agrees to report timely to the insurers under such insurance policies any and all matters which may give rise to an insurance claim by DB Contractor or TxDOT or another Indemnified Party and to promptly and diligently pursue such insurance claims in accordance with the claims procedures specified in such insurance policies, whether for defense or indemnity or both. DB Contractor shall enforce all legal rights against the insurer under the applicable insurance policies and applicable Laws in order to collect thereon, including pursuing necessary litigation and enforcement of judgments, provided that DB Contractor shall be deemed to have satisfied this obligation if a judgment is not collectible through the exercise of lawful and diligent means.

**3.5.2.2** TxDOT agrees to promptly notify DB Contractor of TxDOT's incidents, potential claims against TxDOT, and matters which may give rise to an insurance claim against TxDOT, to tender to the insurer TxDOT's defense of the claim under such insurance policies, and to cooperate with DB Contractor as necessary for DB Contractor to fulfill its duties hereunder. DB Contractor shall ensure that, to the extent covered by DB Contractor's policies:

**3.5.2.2.1** For claims and suits which DB Contractor's insurer reasonably estimates to be within the limits of its available coverage, DB Contractor or its insurer shall communicate and coordinate the defense strategy with TxDOT and the Texas Office of the Attorney General and shall ensure that the insurer does not agree to any settlement without first obtaining the concurrence of the Texas Office of the Attorney General. TxDOT and the Texas Office of the Attorney General shall not unreasonably withhold consent to the strategy and plan communicated by DB Contractor or its insurer to TxDOT and the Texas Office of the Attorney General. Nor shall TxDOT and the Texas Office of the Attorney General unreasonably withhold consent to settlements and compromises proposed by DB Contractor or its insurers which fall within the limits of insurance provided by such insurers.

**3.5.2.2.2** For claims and suits which DB Contractor's insurer reasonably estimates to be in excess of the available insurance provided by DB Contractor's insurers, and implicating the potential for damages which are the financial liability or responsibility of TxDOT or the State of Texas, DB Contractor shall ensure that the defense of the claim is coordinated by the insurer with TxDOT and the Texas Office of the Attorney General and shall ensure that DB Contractor's insurer does not agree to any settlement in excess of DB Contractor's insurer's limits of liability without first obtaining the concurrence of the Texas Office of the Attorney General.

**3.5.2.3** If in any instance DB Contractor has not performed its obligations respecting insurance coverage set forth in this Design-Build Contract or is unable to enforce and collect any such insurance for failure to assert claims in accordance with the terms of the insurance policies or to prosecute claims diligently, then for purposes of determining DB Contractor's liability and the limits thereon or determining reductions in compensation due from TxDOT to DB Contractor on account of available insurance, DB Contractor shall be treated as if it has elected to self-insure up to the full amount of insurance coverage which would have been available had DB Contractor performed such obligations and not committed such failure. Nothing in the Contract Documents shall be construed to treat DB Contractor as electing to self-insure where DB Contractor is unable to collect due to the bankruptcy or insolvency of any insurer which at the time the insurance policy is written meets the rating qualifications set forth in this Section 3.5.

**3.5.2.4** If in any instance DB Contractor has not promptly performed its obligation to report to applicable insurers and process any potential insurance claim tendered by TxDOT or another Indemnified Party, then TxDOT or the other Indemnified Party may, but is not obligated to (a) notify DB Contractor in writing of TxDOT's intent to report the claim directly with the insurer and thereafter process the claim and (b) proceed with reporting and processing the claim if TxDOT or the other Indemnified Party does not receive from DB Contractor, within 10 days after so notifying DB Contractor, written proof that DB Contractor has reported the claim directly to the insurer. TxDOT or the other Indemnified Party may dispense with such notice to DB Contractor if TxDOT or the other Indemnified Party has a good faith belief that more rapid reporting is needed to preserve the claim.

**3.5.2.5** All insurance proceeds received by DB Contractor for any insured loss in excess of $10,000,000 under the builder's risk insurance policies required by this Design-Build Contract shall be paid into a separate insurance proceeds account and shall be held in trust for the purposes of, and to be applied in accordance with, this Design-Build Contract. Any costs under this Design-Build Contract that are covered by insurance proceeds received by (or on behalf of) DB Contractor, shall proportionately reduce any amounts for such costs that would otherwise be owed by TxDOT to DB Contractor under this Design-Build Contract.

**3.5.3 Disclaimer**

**3.5.3.1** DB Contractor and each Subcontractor have the responsibility to make sure that their insurance programs fit their particular needs, and it is their responsibility to arrange for and secure any insurance coverage which they deem advisable, whether or not specified herein.

**3.5.4 Insurance Coverage Requirements**

**3.5.4.1** Builder's Risk Insurance During Construction

At all times during the period from the commencement of Construction Work until Final Acceptance of the Project, DB Contractor shall procure and keep in force a policy of builder's risk insurance as specified below.

**3.5.4.1.1** The policy shall provide coverage for "all risks" of direct physical loss or damage to the portions or elements of the Project under construction including the perils of loss or damage by fire, collapse, lightning, explosion, vandalism and malicious mischief, civil commotion, aircraft, earthquake, earth movement, flood, storm, windstorm, hurricane, and tornado, subsidence and terrorism. Such policy shall contain extensions of coverage that are typical for a project of the nature of the Project including coverage for physical damage resulting from faulty workmanship, and shall contain only those exclusions that are typical for a project of the nature of the Project.

**3.5.4.1.2** The policy shall cover (i) all property, roads, buildings, structures, fixtures, materials, supplies, foundations, pilings, machinery and equipment that are part of or related to the portions of the Project under construction, and the works of improvement, including permanent and temporary works and materials, and including goods intended for incorporation into the works located at the Site, in storage or in the course of inland transit on land to the Site, (ii) all existing property and improvements that are within the construction work zone or are or will be affected by the construction Work, subject to the sublimit set forth in Section 3.5.4.1.3 (iii), and (iii) valuable papers and restoration of data, plans and drawings, subject to the sublimit set forth in Section 3.5.4.1.3 (v).

**3.5.4.1.3** The policy shall provide coverage per occurrence no less than the greater of the maximum probable loss, as determined by the DB Contractor's insurance advisor and agreed to by TxDOT, or $25,000,000, without risk of co-insurance. The policy may include the following sublimits: (i) for earth movement and flood, not less than $5,000,000; (ii) for the peril of named windstorm, not less than $10,000,000; (iii) for existing property and improvements, not less than $2,000,000; (iv) for "soft cost expense" not less than $2,000,000; and (v) for valuable papers and restoration of data, plans and drawings, not less than $250,000.

**3.5.4.1.4** TxDOT shall be named as an insured on the policy as its interests may appear. DB Contractor also may, but is not obligated to, include other Subcontractors as insureds as their respective interests appear. The policy shall be written so that no act or omission of any insured shall vitiate coverage of the other insureds.

**3.5.4.1.5** The policy shall include coverage for (i) foundations, including pilings, but excluding normal settling, shrinkage, or expansion, (ii) physical damage resulting from machinery accidents but excluding normal and natural wear and tear, corrosion, erosion, or inherent vice or latent defect in the machinery, (iii) plans, blueprints and specifications, (iv) physical damage resulting from faulty work or faulty materials, but excluding the cost of making good such faulty work or faulty materials, (v) physical damage resulting from design error or omission but excluding the cost of making good such design error or omission, (vi) demolition and debris removal coverage, (vii) the increased replacement cost due to any change in applicable codes or other Laws, (viii) expense to reduce loss, (ix) building ordinance compliance, with the building ordinance exclusion deleted, and (x) "soft cost expense" (including costs of Governmental Approvals, mitigation costs, attorneys' fees, and other fees and costs associated with such damage or loss or replacement thereof).

**3.5.4.1.6** The policy shall provide a deductible or self-insured retention not exceeding $1,000,000 per occurrence; provided, however, that for the perils of windstorm, flood and earthquake, the deductible may be expressed as a percentage of the policy limit, not to exceed five percent (5%).

**3.5.4.2** Commercial General Liability Insurance

At all times during the performance of the Work, DB Contractor shall procure and keep in force, or cause to be procured and kept in force with DB Contractor as a named insured, commercial general liability insurance as specified below.

**3.5.4.2.1** The policy shall be in form reasonably acceptable to TxDOT, and shall be an occurrence form. The policy shall contain extensions of coverage that are typical for a project of the nature of this Project, and shall contain only those exclusions that are typical for a project of the nature of this Project.

**3.5.4.2.2** The policy shall insure against the legal liability of DB Contractor and the insureds named in Section 3.5.4.2.4, relating to claims by third parties for accidental death, bodily injury or illness, property damage, personal injury and advertising injury, and shall include the following specific coverages:

(a) Contractual liability;

(b) Premises/operations;

(c) Independent contractors;

(d) Products and completed operations (with a minimum of five years after all work is completed on the Project);

(e) Broad form property damage, providing the same coverage as ISO form CG 00 01 12 07 provides;

(f) Hazards commonly referred to as "XCU", including explosion, collapse and underground property damage;

(g) Fellow employee coverage for supervisory personnel;

(h) Incidental medical malpractice;

(i) No exclusion for work performed within 50 feet of a railroad;

(j) No exclusion for claims arising from professional services except CG 22 80 or equivalent;

(k) Broad named insured endorsement; and

(l) Non-owned automobile liability, unless covered by the automobile liability policy pursuant to Section 3.5.4.3.

**3.5.4.2.3** The policy shall have limits of not less than $1,000,000 per occurrence and $2,000,000 in the aggregate per policy period with the general aggregate limit to apply on a per-project basis.

**3.5.4.2.4** TxDOT and the Indemnified Parties shall be named as additional insured's, using ISO Forms CG 20 10 04/13 and ISO form CG 20 37 04/13 or their equivalents. The policy shall be written so that no act or omission of a named insured shall vitiate coverage of the other additional insureds. If requested by any railroad impacted by the Project, such railroad shall also be named as an additional insured in accordance with this clause (d) or otherwise in accordance with the requirements of such railroad.

**3.5.4.2.5** The policy shall have a deductible or self-insured retention no greater than $1,000,000 per occurrence.

**3.5.4.3** Automobile Liability Insurance

At all times during the performance of the Work, DB Contractor shall procure and keep in force comprehensive, business or commercial automobile liability insurance as specified below.

**3.5.4.3.1** Each policy shall cover accidental death, bodily injury and property damage liability arising from the ownership, maintenance or use of all owned, non-owned, borrowed and hired vehicles connected with performance of the Work, including loading and unloading. The policy shall contain extensions of coverage that are typical for a project of the nature of the Project, and shall contain only those exclusions that are typical for a project of the nature of the Project.

**3.5.4.3.2** DB Contractor shall be the named insured under its automobile liability policy.

**3.5.4.3.3** DB Contractor's policy shall have a combined single limit per policy period of not less than $1,000,000.

**3.5.4.3.4** Each policy shall provide a deductible or self-insured retention not exceeding $1,000,000 per occurrence.

**3.5.4.3.5** TxDOT and the Indemnified Parties shall be additional insureds under the policy.

**3.5.4.4** Pollution Liability Insurance

DB Contractor shall procure and maintain during the Term insurance against claims for injuries to persons or damages to property which may arise from or in connection with the performance of the work hereunder by DB Contractor, its agents, representatives, employees or subcontractors. Coverage shall be at least broad as:

**3.5.4.4.1** Contractors Pollution Liability with coverage for losses caused by pollution conditions that arise from the operations of DB Contractor:

(a) Bodily injury, sickness, disease, mental anguish or shock sustained by any person, including death; medical monitoring,

(b) Property damage including physical injury to or destruction of tangible property including the resulting loss of use thereof, clean-up costs, and the loss of use of tangible property that has not been physically injured or destroyed;

(c) Defense including costs, charges and expenses incurred in the investigation, adjustment or defense of claims for such compensatory damages;

(d) Non-owned Disposal Site coverage for specified sites (by endorsement) if contractor is disposing of waste;

(e) Coverage for loss, clean-up costs and related legal expense because of a pollution condition arising from the named insured's goods, products, or waste during the course of transportation by a carrier to or from: (A) A job site where contracting services are being performed; or (B) a covered location, including loading or unloading of such goods,

products or waste, which the insured becomes legally obligated to pay as a result of a claim first made against the insured during the policy period.

**3.5.4.4.2** Coverage shall apply to sudden and non-sudden pollution conditions including the discharge, dispersal, release or escape of smoke, vapors, soot, fumes, acids, alkalis, toxic chemicals, liquids or gases, waste materials or other irritants, contaminants or pollutants into or upon land, the atmosphere or any watercourse or body of water, provided such conditions are not naturally present in the environment in the concentration or amounts discovered, unless such natural conditions are released or dispersed as a result of the performance of covered operations.

**3.5.4.4.3** DB Contractor shall maintain limits no less than $3,000,000 per occurrence/$3,000,000 aggregate for the term of the Design-Build Contract. If coverage is written on a claims-made basis the policy shall include a three-year extended reporting period.

**3.5.4.4.4** The policy shall provide a deductible or self-insured retention not exceeding $1,000,000 per occurrence.

**3.5.4.4.5** TxDOT and the Indemnified Parties shall be named as additional insureds on the policy. The specific scope of services required under the Contract Documents shall be listed on the certificate of insurance.

**3.5.4.5** Professional Liability Insurance

At all times that Professional Services are rendered under the Design-Build Contract respecting design and construction of the Project until five years after the Professional Services have concluded for the Project, DB Contractor shall procure and keep in force, or cause to be procured and kept in force with DB Contractor listed as named insured, professional liability insurance as specified in subparagraphs (a) through (d) below. If the professional liability insurance policy does not list the DB Contractor as a named insured, in addition to the policy or policies specified above, the DB Contractor shall maintain (or procure) and keep in force either a Contractor's Protective Professional Indemnity (CPPI) policy or a Contractor's Professional Liability Insurance policy with coverage of not less than $5,000,000. DB Contractor may satisfy such insurance requirement via either a series of annual practice policies or a project-specific policy covering the period of design and construction and remaining in effect for five years thereafter; however, the coverage need not extend beyond 10 years in total.

**3.5.4.5.1** The insurance policy shall provide coverage of liability of DB Contractor and the party performing the Professional Services arising out of any negligent act, error or omission in the performance of Professional Services or activities for the Project, including for bodily injury or property damage; provided, that such insurance policy need not provide coverage of liability of any party that only performs Professional Services listed in clauses (f), (g), (h), or (i) of the definition of Professional Services.

**3.5.4.5.2** Each policy shall have a limit of not less than $5,000,000 per claim and in the aggregate. If a project-specific policy is purchased, the aggregate limit need not reinstate annually.

**3.5.4.5.3** Each policy shall provide a deductible or self-insured retention not exceeding $1,000,000 per claim.

**3.5.4.5.4** Such insurance shall provide an indemnified party endorsement for the benefit of TxDOT and the Indemnified Parties with regard to third party claims for bodily injury or property damage.

In addition, if not already covered by the project-specific professional liability insurance policy, DB Contractor shall cause each other Subcontractor that provides Professional Services (other than the services listed in clauses (f), (g), (h), or (i) of the definition of Professional Services) for the Project to procure and keep in force professional liability insurance, covering its professional services practice as follows:

| Estimated Total Contract Value | Minimum Limit of Insurance |
|---|---|
| >$10 million | $5 million per claim and aggregate |
| >$5 million to $10 million | $2 million per claim and aggregate |
| $1 million - $5 million | $1 million per claim and aggregate |
| <$1 million | $500,000 per claim and aggregate |

Such insurance to be carried by the subcontractor for the period of design and construction and three years thereafter.

**3.5.4.6** Workers' Compensation and Employer's Liability Insurance

At all times when Work is being performed by any employee of DB Contractor, DB Contractor shall procure and keep in force, or cause to be procured and kept in force, a policy of workers' compensation and employer's liability insurance in conformance with applicable Law. DB Contractor shall be the named insured on this policy. The workers' compensation insurance policy shall contain the following endorsements:

**3.5.4.6.1** A voluntary compensation endorsement;

**3.5.4.6.2** An alternative employer endorsement;

**3.5.4.6.3** An endorsement extending coverage to all states operations on an "if any" basis;

**3.5.4.6.4** U.S. Longshore and Harbor Worker's Compensation Act and Jones Act coverage (if work is over or adjacent to navigable waters); and

**3.5.4.6.5** Employer's liability insurance limits of $1,000,000 per accident or disease.

**3.5.4.7** Umbrella Liability

DB Contractor shall procure and maintain umbrella liability insurance on a following-form basis over the commercial general liability, automobile liability and employer's liability insurance policies. The umbrella policy shall have a per occurrence and aggregate limit of at least $25 million.

**3.5.4.8** Railroad Protective Liability Insurance

DB Contractor shall procure and keep in force, or cause to be procured and kept in force, prior to performing any Work across, under or adjacent to the railroad's tracks or railroad right-of-way, Railroad Protective Liability Insurance Policy with limits and coverage terms and conditions as required by the operating railroad with the railroad as the named insured. DB Contractor shall submit a copy of the railroad protective liability insurance policy to TxDOT prior to any entry by DB Contractor upon operating railroad property.

**3.5.4.9** Subcontractors' Insurance

At all times during the performance of the Work, DB Contractor shall cause each Subcontractor that performs work at the site, any off-site fabrication facilities, and any Subcontractor providing professional services off-site, to provide:

**3.5.4.9.1** Commercial General Liability Insurance with limits of at least $600,000 per occurrence and in the aggregate with the general aggregate limit to apply on a per project basis.

**3.5.4.9.2** Automobile Liability Insurance with a combined single limit of at least $600,000.

**3.5.4.9.3** Workers' Compensation and Employer's Liability Insurance with statutory coverage for worker's compensation and a $500,000 limit per accident or disease for employer's liability. Policy should include, if work is over or next to navigable waters, coverage for U.S. Longshore and Harbor Worker's Compensation Act and Jones Act claims.

The above requirements do not apply to Subcontractors whose sole role on the Project is delivering materials or supplies to the Site. Each subcontractor insurance policy (other than professional liability and workers' compensation) shall include TxDOT and each of the Indemnified Parties as additional insureds. Each such policy shall also be endorsed to provide that coverage is primary and non-contributory and that there is a waiver of subrogation in favor of TxDOT and the Indemnified Parties. Each policy shall also provide that 30 days' notice of non-renewal or cancellation (10 days for non-payment) shall be provided to TxDOT. Each such subcontractor insurance policy must be issued by an insurer authorized to conduct business in Texas and having a minimum 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.

## 3.6 Guaranty

See Section 5.2 of the Design-Build Agreement for requirements regarding guarantees.

## 3.7 No Relief of Liability

Notwithstanding any other provision set forth in the Contract Documents, performance by a Surety or Guarantor of any of the obligations of DB Contractor shall not relieve DB Contractor of any of its obligations hereunder, including the payment of Liquidated Damages, Lane Rental Charges, Key Personnel Change Fees or other deductions, damages or charges payable by DB Contractor under this Design-Build Contract.

## 3.8 Warranties

### 3.8.1 Warranty

DB Contractor warrants that (a) all Work furnished pursuant to the Contract Documents shall conform to Good Industry Practice, (b) the Project shall be free of defects, including design Errors, (c) the Project shall be fit for use for the intended function, (d) materials and equipment furnished under the Contract Documents shall be of good quality and new, and (e) the Work shall meet all of the requirements of the Contract Documents (collectively, the "Warranty" or "Warranties").

**3.8.1.1** Warranty Term

Subject to extension under Section 3.8.2, the Warranty Term shall commence upon Substantial Completion and remain in effect until one year after Final Acceptance of the Project. The Warranty Term for elements of the Project that will be owned by Persons other than TxDOT (such as Utility Owners) shall commence as of the date of acceptance thereof by such Persons and shall end one year thereafter. If TxDOT determines that any of the Work has not met the standards set forth in this Section 3.8.1 at any time within the applicable Warranty Term, then DB Contractor shall correct such Work as specified in this Section 3.8, even if the performance of such corrective Work extends beyond the applicable Warranty Term. TxDOT and DB Contractor shall conduct a walk-through of the Site prior to expiration of the applicable Warranty Term and shall produce a punch list of those items requiring corrective Work.

**3.8.1.2** Remedy

Within seven days of receipt by DB Contractor of notice from TxDOT specifying a failure of any of the Work to satisfy the Warranties, or of the failure of any Subcontractor representation, warranty, guarantee or obligation that DB Contractor is responsible for enforcing, DB Contractor and TxDOT shall mutually agree when and how DB Contractor shall remedy such failure, except that in case of an Emergency requiring immediate curative action or a situation that poses a significant safety risk, DB Contractor shall implement such action as it deems necessary and shall notify TxDOT in writing of the urgency of a decision. DB Contractor and TxDOT shall promptly meet in order to agree on a remedy. If DB Contractor does not use its best efforts to proceed to effectuate such remedy within the agreed time, or should DB Contractor and TxDOT fail to reach such an agreement within such seven-day period (or immediately in the case of Emergency conditions), TxDOT shall have the right, but not the obligation, to perform or have performed by third parties the necessary remedy, and the costs thereof shall be borne by DB Contractor. Reimbursement therefor must be paid to TxDOT by DB Contractor within 10 days after DB Contractor's receipt of an invoice therefor. Alternatively, TxDOT may deduct the amount of such costs and expenses from any sums owed by TxDOT to DB Contractor pursuant to this Design-Build Contract. TxDOT may agree to accept Nonconforming Work in accordance with Section 5.3.2.

**3.8.1.3** Permits and Costs

DB Contractor shall be responsible for obtaining any required encroachment permits and required consents from any other Persons in connection with the performance of Work addressed under this Section 3.8.1. DB Contractor shall bear all costs of such Work, including additional testing and inspections, and DB Contractor shall reimburse TxDOT or pay TxDOT's expenses made necessary thereby including any costs incurred by TxDOT for independent quality assurance or quality control with respect to such Work within 10 days after DB Contractor's receipt of invoices therefor (including, subject to the limitations in Section 8.6.4, any Liquidated Damages for Lane Closures or Lane Rental Charges arising from or relating to such Work). Alternatively, TxDOT may deduct the amount of such costs and expenses from any sums owed by TxDOT to DB Contractor pursuant to this Design-Build Contract.

**3.8.2** Applicability of Warranties to Re-Done Work

The Warranties shall apply to all Work re-done, repaired, corrected or replaced pursuant to the terms of this Design-Build Contract. Following acceptance by TxDOT of re-done, repaired, corrected or replaced Work, the Warranties as to each re-done, repaired, corrected or replaced element of the Work shall extend beyond the original Warranty Term in order that each element of

the Project shall have at least a one-year warranty period (but not to exceed two years from Final Acceptance of the Project).

**3.8.3 Subcontractor Warranties**

**3.8.3.1** Warranty Requirements

**3.8.3.1.1** Without in any way limiting the Warranties and DB Contractor's own representations and warranties and other obligations with respect to all of the Work, DB Contractor shall obtain from all Subcontractors for periods at least coterminous with the Warranties appropriate representations, warranties, guarantees and obligations with respect to design, materials, workmanship, equipment, tools and supplies furnished by such Subcontractors to effectuate the provisions in this Section 3.8.

**3.8.3.1.2** DB Contractor shall cause Subcontractor warranties to be extended to TxDOT and any third parties for whom Work is being performed or equipment, tools, supplies or software is being supplied by such Subcontractor; provided that the foregoing requirement shall not apply to standard, prespecified manufacturer warranties of mass-marketed materials, products (including software products), equipment or supplies where the warranty cannot be extended to TxDOT using commercially reasonable efforts. TxDOT agrees to forbear from exercising remedies under any such warranty so long as DB Contractor is diligently pursuing remedies thereunder.

**3.8.3.1.3** All representations, warranties, guarantees and obligations of Subcontractors shall be written so as to survive all TxDOT inspections, tests and approvals. DB Contractor hereby assigns to TxDOT all of DB Contractor's rights and interest in all extended warranties for periods exceeding the applicable Warranty Term that are received by DB Contractor from any of its Subcontractors. To the extent that any Subcontractor warranty would be voided by reason of DB Contractor's negligence or failure to comply with the Contract Documents in incorporating material or equipment into the Work, DB Contractor shall be responsible for correcting such defect.

**3.8.3.2** Enforcement

Upon receipt from TxDOT of notice of a failure of any of the Work to satisfy any Subcontractor warranty, representation, guarantee or obligation, DB Contractor shall enforce or perform any such representation, warranty, guarantee or obligation, in addition to DB Contractor's other obligations hereunder. TxDOT's rights under this Section 3.8.3.2 commence at the time such representation, warranty, guarantee or obligation is furnished and continue until the expiration of DB Contractor's relevant Warranty Term (including extensions thereof under Section 3.8.2). Until such expiration, the cost of any equipment, material, labor (including re-engineering) or shipping shall be for the account of DB Contractor if such cost is covered by such a representation, warranty, guarantee or obligation, and DB Contractor shall replace or repair defective equipment, material or workmanship furnished by Subcontractors.

**3.8.4 Effect of TxDOT or DB Contractor Activities on Warranties**

DB Contractor acknowledges and agrees that TxDOT and DB Contractor and their respective agents may perform certain maintenance work during the period in which the Warranties are in effect and agrees that the Warranties shall apply notwithstanding such activities; provided, however, that DB Contractor does not hereby waive any rights, claims or remedies to which it may be entitled as a result of such activities.

### 3.8.5 No Limitation of Liability

Subject to Sections 8.6.4 and 8.6.5, the Warranties and Subcontractor warranties are in addition to all rights and remedies available under the Contract Documents or applicable Law or in equity, and shall not limit DB Contractor's liability or responsibility imposed by the Contract Documents or applicable Law or in equity with respect to the Work, including liability for design defects, latent construction defects, strict liability, breach, negligence, intentional misconduct or fraud.

### 3.8.6 Damages for Breach of Warranty

Subject to Section 8.6.4 and in addition to TxDOT's other rights and remedies hereunder, at law or in equity, DB Contractor shall be liable for actual damages resulting from any breach of an express or implied warranty or any defect in the Work, including the cost of performance of such obligations by others.

## ATTACHMENT 3-1

## FEDERAL REQUIREMENTS

| Exhibit Description | No. of Pages |
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| Exhibit 1 – Federal Requirements for Federal-Aid Construction Projects | 2 |
| Exhibit 2 – FHWA Form 1273 | 24 |
| Exhibit 3 – Wage Determination of the Secretary of Labor | 4 |
| Exhibit 4 – Equal Employment Opportunity | 5 |
| Exhibit 5 – Affirmative Action | 5 |
| Exhibit 6 – Lobbying Certification | 1 |
| Exhibit 7 – Compliance with Buy America Requirements | 2 |
| Exhibit 8 - Certification of Nondiscrimination in Employment | 1 |
| Exhibit 9 - On-the-Job Training Program | 1 |

## EXHIBIT 1 TO ATTACHMENT 3-1

## FEDERAL REQUIREMENTS FOR FEDERAL-AID CONSTRUCTION PROJECTS

GENERAL. — The Work herein proposed will be financed in whole or in part with Federal funds, and therefore all of the statutes, rules and regulations promulgated by the Federal Government and applicable to work financed in whole or in part with Federal funds will apply to such work. The "Required Contract Provisions, Federal-Aid Construction Contracts, Form FHWA 1273," are included in this Attachment 3-1. Whenever in said required contract provisions references are made to:

(a) "contracting officer", or "authorized representative" such references shall be construed to mean TxDOT or its Authorized Representative;

(b) "contractor", "prime contractor", "bidder", "Federal-aid construction contractor", "prospective first tier participant", or "First Tier Participant", such references shall be construed to mean DB Contractor or its authorized representative;

(c) "contract", "prime contract", Federal-aid construction contract" or "design-build contract" such references shall be construed to mean the Design-Build Contract between DB Contractor and TxDOT for the Project;

(d) "subcontractor", "supplier", "vendor", "prospective lower tier participant" "lower tier prospective participant", Lower Tier participant" or "lower tier subcontractor", such references shall be construed to mean any Subcontractor or Supplier; and

(e) "department", "agency", "department or agency with which this transaction originated" or "contracting agency", such references shall be construed to mean TxDOT, except where a different department or agency or officer is specified.

PERFORMANCE OF PREVIOUS CONTRACT. — In addition to the provisions in Section II, "Nondiscrimination," and Section VI, "Subletting or Assigning the Contract," of the Form 1273 required contract provisions, DB Contractor shall comply with the following:

The bidder shall execute the CERTIFICATION WITH REGARD TO THE PERFORMANCE OF PREVIOUS CONTRACTS OR SUBCONTRACTS SUBJECT TO THE EQUAL OPPORTUNITY CLAUSE AND THE FILING OF REQUIRED REPORTS located in the proposal. No request for subletting or assigning any portion of the contract in excess of $10,000 will be considered under the provisions of Section VI of the required contract provisions unless such request is accompanied by the CERTIFICATION referred to above, executed by the proposed subcontractor.

NON-COLLUSION PROVISION. — The provisions in this section are applicable to all contracts except contracts for Federal Aid Secondary Projects. Title 23, United States Code, Section 112, requires as a condition precedent to approval by the Federal Highway Administrator of the contract for this work that each bidder file a sworn statement executed by, or on behalf of, the person, firm, association, or corporation to whom such contract is to be awarded, certifying that such person, firm, association, or corporation has not, either directly or indirectly, entered into any agreement, participated in any collusion, or otherwise taken any action in restraint of free competitive bidding in connection with the submitted bid. A form to make the non-collusion affidavit statement required by Section 112 as a certification under penalty of perjury rather than as a sworn statement as permitted by 28 U.S.C., Sec. 1746, is included in the Proposal.

PARTICIPATION BY DISADVANTAGED BUSINESS ENTERPRISES IN SUBCONTRACTING. — Part 26, Title 49, Code of Federal Regulations applies to the Project. Pertinent sections of said Code are incorporated within other sections of the Contract Documents and the TxDOT Disadvantaged Business Enterprise Program adopted pursuant to 49 CFR Part 26.

CONVICT PRODUCED MATERIALS

a. FHWA Federal-aid projects are subject to 23 CFR § 635.417, Convict produced materials.

b. Materials produced after July 1, 1991, by convict labor may only be incorporated in a Federal aid highway construction project if such materials have been: (i) produced by convicts who are on parole, supervised release, or probation from a prison, or (ii) produced in a prison project in which convicts, during the 12 month period ending July 1, 1987, produced materials for use in Federal aid highway construction projects, and the cumulative annual production amount of such materials for use in Federal aid highway construction does not exceed the amount of such materials produced in such project for use in Federal aid highway construction during the 12 month period ending July 1, 1987.

ACCESS TO RECORDS

a. As required by 49 CFR 18.36(i)(10), DB Contractor and its subcontractors shall allow FHWA and the Comptroller General of the United States, or their duly authorized representatives, access to all books, documents, papers, and records of DB Contractor and subcontractors which are directly pertinent to any grantee or subgrantee contract, for the purpose of making audit, examination, excerpts, and transcriptions thereof. In addition, as required by 49 CFR 18.36(i)(11), DB Contractor and its subcontractors shall retain all such books, documents, papers, and records for three years after final payment is made pursuant to any such contract and all other pending matters are closed.

b. DB Contractor agrees to include this section in each Subcontract at each tier, without modification except as appropriate to identify the subcontractor who will be subject to its provisions.

USE OF UNITED STATES-FLAG VESSELS

a. The DB Contractor shall comply with the requirements of 46 CFR Part 381 whenever transporting by oceanic shipment any equipment, material, or commodities acquired solely for the Project, and not to replenish existing inventories independent of the Design-Build Contract.

b. For such shipments, the DB Contractor agrees:

(i) To utilize privately owned United States-flag commercial vessels to ship at least 50 percent of the gross tonnage (computed separately for dry bulk carriers, dry cargo liners, and tankers) involved, whenever shipping any equipment, material, or commodities pursuant to this Agreement, to the extent such vessels are available at fair and reasonable rates for United States-flag commercial vessels; and

(ii) To furnish within 20 days following the date of loading for shipments originating within the United States or within 30 working days following the date of loading for shipments originating outside the United States, a legible copy of a rated, “on-board” commercial ocean bill-of-lading in English for each shipment of cargo described in paragraph (i) of this section to both TxDOT (through the DB Contractor in the case of subcontractor bills-of-lading) and to the Division of National Cargo, Office of Market Development, Maritime Administration, Washington, DC 20590.

c. The DB Contractor shall insert the substance of this provision in all Subcontracts.

NONDISCRIMINATION AUTHORITIES

During the performance of this contract, the contractor, for itself, its assignees, and successors in interest (hereinafter referred to as the "contractor") agrees to comply with the following nondiscrimination statutes and authorities; including but not limited to:

Pertinent Nondiscrimination Authorities:

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

· The Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, (42 U.S.C. § 4601), (prohibits unfair treatment of persons displaced or whose property has been acquired because of Federal or Federal-aid programs and projects);

· Federal-Aid Highway Act of 1973, (23 U.S.C. § 324 et seq.), (prohibits discrimination on the basis of sex);

· Section 504 of the Rehabilitation Act of 1973, (29 U.S.C. § 794 et seq.), as amended, (prohibits discrimination on the basis of disability); and 49 CFR Part 27;

· The Age Discrimination Act of 1975, as amended, (42 U.S.C. § 6101 et seq.), (prohibits discrimination on the basis of age);

· Airport and Airway Improvement Act of 1982. (49 U.S.C. § 4 71, Section 4 7123), as amended, (prohibits discrimination based on race, creed, color, national origin, or sex);

· The Civil Rights Restoration Act of 1987, (PL 100-209), (Broadened the scope, coverage and applicability of Title VI of the Civil Rights Act of 1964, The Age Discrimination Act of 1975 and Section 504 of the Rehabilitation Act of 1973, by expanding the definition of the terms "programs or activities" to include all of the programs or activities of the Federal-aid recipients, subrecipients and contractors, whether such programs or activities are Federally funded or not);

· Titles II and III of the Americans with Disabilities Act, which prohibit discrimination on the basis of disability in the operation of public entities, public and private transportation systems, places of public accommodation, and certain testing entities (42 U.S.C. §§ 12131-12189) as implemented by Department of Transportation regulations at 49 C.F.R. parts 37 and 38;

· The Federal Aviation Administration's Nondiscrimination statute (49 U.S.C. § 47123) (prohibits discrimination on the basis of race, color, national origin, and sex);

· Executive Order 12898, Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations, which ensures discrimination against minority populations by discouraging programs, policies, and activities with disproportionately high and adverse human health or environmental effects on minority and low-income populations;

· Executive Order 13166, Improving Access to Services for Persons with Limited English Proficiency, and resulting agency guidance, national origin discrimination includes discrimination because of limited English proficiency (LEP). To ensure compliance with Title VI, you must take reasonable steps to ensure that LEP persons have meaningful access to your programs (70 Fed. Reg. at 74087 to 74100);

· Title IX of the Education Amendments 011972, as amended, which prohibits you from discriminating because of sex in education programs or activities (20 U .S.C. 1681 et seq).

## EXHIBIT 2 TO ATTACHMENT 3-1

## REQUIRED CONTRACT PROVISIONS
## FEDERAL-AID CONSTRUCTION CONTRACTS

**FHWA Form 1273**

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REQUIRED CONTRACT PROVISIONS
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ITEMS

A. Employment and Materials Preference for Appalachian Development Highway System or Appalachian Local Access Road Contracts (included in Appalachian contracts only)


I. GENERAL

1. Form FHWA-1273 must be physically incorporated in each construction contract funded under Title 23 (excluding emergency contracts solely intended for debris removal). The contractor (or subcontractor) must insert this form in each subcontract and further require its inclusion in all lower tier subcontracts (excluding purchase orders, rental agreements and other agreements for supplies or services).

The applicable requirements of Form FHWA-1273 are incorporated by reference for work done under any purchase order, rental agreement or agreement for other services. The prime contractor shall be responsible for compliance by any subcontractor, lower-tier subcontractor or service provider.

Form FHWA-1273 must be included in all Federal-aid design-build contracts, in all subcontracts and in lower tier subcontracts (excluding subcontracts for design services, purchase orders, rental agreements and other agreements for supplies or services). The design-builder shall be responsible for compliance by any subcontractor, lower-tier subcontractor or service provider.

Contracting agencies may reference Form FHWA-1273 in bid proposal or request for proposal documents, however, the Form FHWA-1273 must be physically incorporated (not referenced) in all contracts, subcontracts and lower-tier

subcontracts (excluding purchase orders, rental agreements and other agreements for supplies or services related to a construction contract).

2. Subject to the applicability criteria noted in the following sections, these contract provisions shall apply to all work performed on the contract by the contractor's own organization and with the assistance of workers under the contractor's immediate superintendence and to all work performed on the contract by piecework, station work, or by subcontract.

3. A breach of any of the stipulations contained in these Required Contract Provisions may be sufficient grounds for withholding of progress payments, withholding of final payment, termination of the contract, suspension / debarment or any other action determined to be appropriate by the contracting agency and FHWA.

4. Selection of Labor: During the performance of this contract, the contractor shall not use convict labor for any purpose within the limits of a construction project on a Federal-aid highway unless it is labor performed by convicts who are on parole, supervised release, or probation. The term Federal-aid highway does not include roadways functionally classified as local roads or rural minor collectors.

II. NONDISCRIMINATION

The provisions of this section related to 23 CFR Part 230 are applicable to all Federal-aid construction contracts and to all related construction subcontracts of $10,000 or more. The provisions of 23 CFR Part 230 are not applicable to material supply, engineering, or architectural service contracts.

In addition, the contractor and all subcontractors must comply with the following policies: Executive Order 11246, 41 CFR 60, 29 CFR 1625-1627, Title 23 USC Section 140, the Rehabilitation Act of 1973, as amended (29 USC 794), Title VI of the Civil Rights Act of 1964, as amended, and related regulations including 49 CFR Parts 21, 26 and 27; and 23 CFR Parts 200, 230, and 633.

The contractor and all subcontractors must comply with: the requirements of the Equal Opportunity Clause in 41 CFR 60-1.4(b) and, for all construction contracts exceeding $10,000, the Standard Federal Equal Employment Opportunity Construction Contract Specifications in 41 CFR 60-4.3.

Note: The U.S. Department of Labor has exclusive authority to determine compliance with Executive Order 11246 and the policies of the Secretary of Labor including 41 CFR 60, and 29 CFR 1625-1627. The contracting agency and the FHWA have the authority and the responsibility to ensure compliance with Title 23 USC Section 140, the Rehabilitation Act of 1973, as amended (29 USC 794), and Title VI of the Civil Rights Act of 1964, as amended, and related regulations including 49 CFR Parts 21, 26 and 27; and 23 CFR Parts 200, 230, and 633.

The following provision is adopted from 23 CFR 230, Appendix A, with appropriate revisions to conform to the U.S. Department of Labor (US DOL) and FHWA requirements.

1. Equal Employment Opportunity: Equal employment opportunity (EEO) requirements not to discriminate and to take affirmative action to assure equal opportunity as set forth under laws, executive orders, rules, regulations (28 CFR 35, 29 CFR 1630, 29 CFR 1625-1627, 41 CFR 60 and 49 CFR 27) and orders of the Secretary of Labor as modified by the provisions prescribed herein, and imposed pursuant to 23 U.S.C. 140 shall constitute the EEO and specific affirmative action standards for the contractor's project activities under this contract. The provisions of the Americans with Disabilities Act of 1990 (42 U.S.C. 12101 et seq.) set forth under 28 CFR 35 and 29 CFR 1630 are incorporated by reference in this contract. In the execution of this contract, the contractor agrees to comply with the following minimum specific requirement activities of EEO:

a. The contractor will work with the contracting agency and the Federal Government to ensure that it has made every good faith effort to provide equal opportunity with respect to all of its terms and conditions of employment and in their review of activities under the contract.

b. The contractor will accept as its operating policy the following statement:

"It is the policy of this Company to assure that applicants are employed, and that employees are treated during employment, without regard to their race, religion, sex, color, national origin, age or disability. Such action shall include: employment, upgrading, demotion, or transfer; recruitment or recruitment advertising; layoff or termination; rates of pay or other forms of compensation; and selection for training, including apprenticeship, pre-apprenticeship, and/or on-the-job training."

2. EEO Officer: The contractor will designate and make known to the contracting officers an EEO Officer who will have the responsibility for and must be capable of effectively administering and promoting an active EEO program and who must be assigned adequate authority and responsibility to do so.

3. Dissemination of Policy: All members of the contractor's staff who are authorized to hire, supervise, promote, and discharge employees, or who recommend such action, or who are substantially involved in such action, will be made fully cognizant of, and will implement, the contractor's EEO policy and contractual responsibilities to provide EEO in each grade and classification of employment. To ensure that the above agreement will be met, the following actions will be taken as a minimum:

a. Periodic meetings of supervisory and personnel office employees will be conducted before the start of work and then not less often than once every six months, at which time the contractor's EEO policy and its implementation will be reviewed and explained. The meetings will be conducted by the EEO Officer.

b. All new supervisory or personnel office employees will be given a thorough indoctrination by the EEO Officer, covering all major aspects of the contractor's EEO obligations within thirty days following their reporting for duty with the contractor.

c. All personnel who are engaged in direct recruitment for the project will be instructed by the EEO Officer in the contractor's procedures for locating and hiring minorities and women.

d. Notices and posters setting forth the contractor's EEO policy will be placed in areas readily accessible to employees, applicants for employment and potential employees.

e. The contractor's EEO policy and the procedures to implement such policy will be brought to the attention of employees by means of meetings, employee handbooks, or other appropriate means.

4. Recruitment: When advertising for employees, the contractor will include in all advertisements for employees the notation: "An Equal Opportunity Employer." All such advertisements will be placed in publications having a large circulation among minorities and women in the area from which the project work force would normally be derived.

a. The contractor will, unless precluded by a valid bargaining agreement, conduct systematic and direct recruitment through public and private employee referral sources likely to yield qualified minorities and women. To meet this requirement, the contractor will identify sources of potential minority group employees, and establish with such identified sources procedures whereby minority and women applicants may be referred to the contractor for employment consideration.

b. In the event the contractor has a valid bargaining agreement providing for exclusive hiring hall referrals, the contractor is expected to observe the provisions of that agreement to the extent that the system meets the contractor's compliance with EEO contract provisions. Where implementation of such an agreement has the effect of discriminating against minorities or women, or obligates the contractor to do the same, such implementation violates Federal nondiscrimination provisions.

c. The contractor will encourage its present employees to refer minorities and women as applicants for employment. Information and procedures with regard to referring such applicants will be discussed with employees.

5. Personnel Actions: Wages, working conditions, and employee benefits shall be established and administered, and personnel actions of every type, including hiring, upgrading, promotion, transfer, demotion, layoff, and termination, shall be taken without regard to race, color, religion, sex, national origin, age or disability. The following procedures shall be followed:

a. The contractor will conduct periodic inspections of project sites to insure that working conditions and employee facilities do not indicate discriminatory treatment of project site personnel.

b. The contractor will periodically evaluate the spread of wages paid within each classification to determine any evidence of discriminatory wage practices.

c. The contractor will periodically review selected personnel actions in depth to determine whether there is evidence of discrimination. Where evidence is found, the contractor will promptly take corrective action. If the review indicates that the discrimination may extend beyond the actions reviewed, such corrective action shall include all affected persons.

d. The contractor will promptly investigate all complaints of alleged discrimination made to the contractor in connection with its obligations under this contract, will attempt to resolve such complaints, and will take appropriate corrective action within a reasonable time. If the investigation indicates that the discrimination may affect persons other than the complainant, such corrective action shall include such other persons. Upon completion of each investigation, the contractor will inform every complainant of all of their avenues of appeal.

6. Training and Promotion:

a. The contractor will assist in locating, qualifying, and increasing the skills of minorities and women who are applicants for employment or current employees. Such efforts should be aimed at developing full journey level status employees in the type of trade or job classification involved.

b. Consistent with the contractor's work force requirements and as permissible under Federal and State regulations, the contractor shall make full use of training programs, i.e., apprenticeship, and on-the-job training programs for the geographical area of contract performance. In the event a special provision for training is provided under this contract, this subparagraph will be superseded as indicated in the special provision. The contracting agency may reserve training positions for persons who receive welfare assistance in accordance with 23 U.S.C. 140(a).

c. The contractor will advise employees and applicants for employment of available training programs and entrance requirements for each.

d. The contractor will periodically review the training and promotion potential of employees who are minorities and women and will encourage eligible employees to apply for such training and promotion.

7. Unions: If the contractor relies in whole or in part upon unions as a source of employees, the contractor will use good faith efforts to obtain the cooperation of such unions to increase opportunities for minorities and women. Actions by the contractor, either directly or through a contractor's association acting as agent, will include the procedures set forth below:

a. The contractor will use good faith efforts to develop, in cooperation with the unions, joint training programs aimed toward qualifying more minorities and women for membership in the unions and increasing the skills of minorities and women so that they may qualify for higher paying employment.

b. The contractor will use good faith efforts to incorporate an EEO clause into each union agreement to the end that such union will be contractually bound to refer applicants without regard to their race, color, religion, sex, national origin, age or disability.

c. The contractor is to obtain information as to the referral practices and policies of the labor union except that to the extent such information is within the exclusive possession of the labor union and such labor union refuses to furnish such information to the contractor, the contractor shall so certify to the contracting agency and shall set forth what efforts have been made to obtain such information.

d. In the event the union is unable to provide the contractor with a reasonable flow of referrals within the time limit set forth in the collective bargaining agreement, the contractor will, through independent recruitment efforts, fill the employment vacancies without regard to race, color, religion, sex, national origin, age or disability; making full efforts to obtain qualified and/or qualifiable minorities and women. The failure of a union to provide sufficient referrals (even though it is obligated to provide exclusive referrals under the terms of a collective bargaining agreement) does not relieve the contractor from the requirements of this paragraph. In the event the union referral practice prevents the contractor from meeting the obligations pursuant to Executive Order 11246, as amended, and these special provisions, such contractor shall immediately notify the contracting agency.

8. Reasonable Accommodation for Applicants / Employees with Disabilities: The contractor must be familiar with the requirements for and comply with the Americans with Disabilities Act and all rules and regulations established there under. Employers must provide reasonable accommodation in all employment activities unless to do so would cause an undue hardship.

9. Selection of Subcontractors, Procurement of Materials and Leasing of Equipment: The contractor shall not discriminate on the grounds of race, color, religion, sex, national origin, age or disability in the selection and retention of subcontractors, including procurement of materials and leases of equipment. The contractor shall take all necessary and reasonable steps to ensure nondiscrimination in the administration of this contract.

a. The contractor shall notify all potential subcontractors and suppliers and lessors of their EEO obligations under this contract.

b. The contractor will use good faith efforts to ensure subcontractor compliance with their EEO obligations.

10. Assurance Required by 49 CFR 26.13(b):

a. The requirements of 49 CFR Part 26 and the State DOT's U.S. DOT-approved DBE program are incorporated by reference.

b. The contractor or subcontractor shall not discriminate on the basis of race, color, national origin, or sex in the performance of this contract. The contractor shall carry out applicable requirements of 49 CFR Part 26 in the award and administration of DOT-assisted contracts. Failure by the contractor to carry out these requirements is a

material breach of this contract, which may result in the termination of this contract or such other remedy as the contracting agency deems appropriate.

11. Records and Reports: The contractor shall keep such records as necessary to document compliance with the EEO requirements. Such records shall be retained for a period of three years following the date of the final payment to the contractor for all contract work and shall be available at reasonable times and places for inspection by authorized representatives of the contracting agency and the FHWA.

a. The records kept by the contractor shall document the following:

(1) The number and work hours of minority and non-minority group members and women employed in each work classification on the project;

(2) The progress and efforts being made in cooperation with unions, when applicable, to increase employment opportunities for minorities and women; and

(3) The progress and efforts being made in locating, hiring, training, qualifying, and upgrading minorities and women;

b. The contractors and subcontractors will submit an annual report to the contracting agency each July for the duration of the project, indicating the number of minority, women, and non-minority group employees currently engaged in each work classification required by the contract work. This information is to be reported on Form FHWA-1391. The staffing data should represent the project work force on board in all or any part of the last payroll period preceding the end of July. If on-the-job training is being required by special provision, the contractor will be required to collect and report training data. The employment data should reflect the work force on board during all or any part of the last payroll period preceding the end of July.

III. NONSEGREGATED FACILITIES

This provision is applicable to all Federal-aid construction contracts and to all related construction subcontracts of $10,000 or more.

The contractor must ensure that facilities provided for employees are provided in such a manner that segregation on the basis of race, color, religion, sex, or national origin cannot result. The contractor may neither require such segregated use by written or oral policies nor tolerate such use by employee custom. The contractor's obligation extends further to ensure that its employees are not assigned to perform their services at any location, under the contractor's control, where the facilities are segregated. The term "facilities" includes waiting rooms, work areas, restaurants and other eating areas, time clocks, restrooms, washrooms, locker rooms, and other storage or dressing areas, parking lots, drinking fountains, recreation or entertainment areas, transportation, and housing provided for employees. The contractor shall provide separate or single-user restrooms and necessary dressing or sleeping areas to assure privacy between sexes.

IV. DAVIS-BACON AND RELATED ACT PROVISIONS

This section is applicable to all Federal-aid construction projects exceeding $2,000 and to all related subcontracts and lower-tier subcontracts (regardless of subcontract size). The requirements apply to all projects located within the right-of-way of a roadway that is functionally classified as Federal-aid highway. This excludes roadways functionally classified as local roads or rural minor collectors, which are exempt. Contracting agencies may elect to apply these requirements to other projects.

The following provisions are from the U.S. Department of Labor regulations in 29 CFR 5.5 “Contract provisions and related matters” with minor revisions to conform to the FHWA-1273 format and FHWA program requirements.

1. Minimum wages

a. All laborers and mechanics employed or working upon the site of the work, will be paid unconditionally and not less often than once a week, and without subsequent deduction or rebate on any account (except such payroll deductions as are permitted by regulations issued by the Secretary of Labor under the Copeland Act (29 CFR part 3)), the full amount of wages and bona fide fringe benefits (or cash equivalents thereof) due at time of payment computed at rates not less than those contained in the wage determination of the Secretary of Labor which is attached hereto and made a part hereof, regardless of any contractual relationship which may be alleged to exist between the contractor and such laborers and mechanics.

Contributions made or costs reasonably anticipated for bona fide fringe benefits under section 1(b)(2) of the Davis-Bacon Act on behalf of laborers or mechanics are considered wages paid to such laborers or mechanics, subject to the provisions of paragraph 1.d. of this section; also, regular contributions made or costs incurred for more than a weekly period (but not less often than quarterly) under plans, funds, or programs which cover the particular weekly period, are deemed to be constructively made or incurred during such weekly period. Such laborers and mechanics shall be paid the appropriate wage rate and fringe benefits on the wage determination for the classification of work actually performed, without regard to skill, except as provided in 29 CFR 5.5(a)(4). Laborers or mechanics performing work in more than one classification may be compensated at the rate specified for each classification for the time actually worked therein: Provided, That the employer's payroll records accurately set forth the time spent in each classification in which work is performed. The wage determination (including any additional classification and wage rates conformed under paragraph 1.b. of this section) and the Davis-Bacon poster (WH–1321) shall be posted at all times by the contractor and its subcontractors at the site of the work in a prominent and accessible place where it can be easily seen by the workers.

b. (1) The contracting officer shall require that any class of laborers or mechanics, including helpers, which is not listed in the wage determination and which is to be employed under the contract shall be classified in conformance with the wage determination. The contracting officer shall approve an additional classification and wage rate and fringe benefits therefore only when the following criteria have been met:

(i) The work to be performed by the classification requested is not performed by a classification in the wage determination; and

(ii) The classification is utilized in the area by the construction industry; and

(iii) The proposed wage rate, including any bona fide fringe benefits, bears a reasonable relationship to the wage rates contained in the wage determination.

(2) If the contractor and the laborers and mechanics to be employed in the classification (if known), or their representatives, and the contracting officer agree on the classification and wage rate (including the amount designated for fringe benefits where appropriate), a report of the action taken shall be sent by the contracting officer to the Administrator of the Wage and Hour Division, Employment Standards Administration, U.S. Department of Labor, Washington, DC 20210. The Administrator, or an authorized representative, will approve, modify, or disapprove every additional classification action within 30 days of receipt and so advise the contracting officer or will notify the contracting officer within the 30-day period that additional time is necessary.

(3) In the event the contractor, the laborers or mechanics to be employed in the classification or their representatives, and the contracting officer do not agree on the proposed classification and wage rate (including the amount designated for fringe benefits, where appropriate), the contracting officer shall refer the questions, including

the views of all interested parties and the recommendation of the contracting officer, to the Wage and Hour Administrator for determination. The Wage and Hour Administrator, or an authorized representative, will issue a determination within 30 days of receipt and so advise the contracting officer or will notify the contracting officer within the 30-day period that additional time is necessary.

(4) The wage rate (including fringe benefits where appropriate) determined pursuant to paragraphs 1.b.(2) or 1.b.(3) of this section, shall be paid to all workers performing work in the classification under this contract from the first day on which work is performed in the classification.

c. Whenever the minimum wage rate prescribed in the contract for a class of laborers or mechanics includes a fringe benefit which is not expressed as an hourly rate, the contractor shall either pay the benefit as stated in the wage determination or shall pay another bona fide fringe benefit or an hourly cash equivalent thereof.

d. If the contractor does not make payments to a trustee or other third person, the contractor may consider as part of the wages of any laborer or mechanic the amount of any costs reasonably anticipated in providing bona fide fringe benefits under a plan or program, Provided, That the Secretary of Labor has found, upon the written request of the contractor, that the applicable standards of the Davis-Bacon Act have been met. The Secretary of Labor may require the contractor to set aside in a separate account assets for the meeting of obligations under the plan or program.

2. Withholding

The contracting agency shall upon its own action or upon written request of an authorized representative of the Department of Labor, withhold or cause to be withheld from the contractor under this contract, or any other Federal contract with the same prime contractor, or any other federally-assisted contract subject to Davis-Bacon prevailing wage requirements, which is held by the same prime contractor, so much of the accrued payments or advances as may be considered necessary to pay laborers and mechanics, including apprentices, trainees, and helpers, employed by the contractor or any subcontractor the full amount of wages required by the contract. In the event of failure to pay any laborer or mechanic, including any apprentice, trainee, or helper, employed or working on the site of the work, all or part of the wages required by the contract, the contracting agency may, after written notice to the contractor, take such action as may be necessary to cause the suspension of any further payment, advance, or guarantee of funds until such violations have ceased.

3. Payrolls and basic records

a. Payrolls and basic records relating thereto shall be maintained by the contractor during the course of the work and preserved for a period of three years thereafter for all laborers and mechanics working at the site of the work. Such records shall contain the name, address, and social security number of each such worker, his or her correct classification, hourly rates of wages paid (including rates of contributions or costs anticipated for bona fide fringe benefits or cash equivalents thereof of the types described in section 1(b)(2)(B) of the Davis-Bacon Act), daily and weekly number of hours worked, deductions made and actual wages paid. Whenever the Secretary of Labor has found under 29 CFR 5.5(a)(1)(iv) that the wages of any laborer or mechanic include the amount of any costs reasonably anticipated in providing benefits under a plan or program described in section 1(b)(2)(B) of the Davis-Bacon Act, the contractor shall maintain records which show that the commitment to provide such benefits is enforceable, that the plan or program is financially responsible, and that the plan or program has been communicated in writing to the laborers or mechanics affected, and records which show the costs anticipated or the actual cost incurred in providing such benefits. Contractors employing apprentices or trainees under approved programs shall maintain written evidence of the registration of apprenticeship programs and certification of trainee programs, the registration of the apprentices and trainees, and the ratios and wage rates prescribed in the applicable programs.

b. (1) The contractor shall submit weekly for each week in which any contract work is performed a copy of all payrolls to the contracting agency. The payrolls submitted shall set out accurately and completely all of the information required to be maintained under 29 CFR 5.5(a)(3)(i), except that full social security numbers and home addresses shall not be included on weekly transmittals. Instead the payrolls shall only need to include an individually identifying number for each employee (e.g., the last four digits of the employee's social security number). The required weekly payroll information may be submitted in any form desired. Optional Form WH–347 is available for this purpose from the Wage and Hour Division Web site at http://www.dol.gov/esa/whd/forms/wh347instr.htm or its successor site. The prime contractor is responsible for the submission of copies of payrolls by all subcontractors. Contractors and subcontractors shall maintain the full social security number and current address of each covered worker, and shall provide them upon request to the contracting agency for transmission to the State DOT, the FHWA or the Wage and Hour Division of the Department of Labor for purposes of an investigation or audit of compliance with prevailing wage requirements. It is not a violation of this section for a prime contractor to require a subcontractor to provide addresses and social security numbers to the prime contractor for its own records, without weekly submission to the contracting agency.

(2) Each payroll submitted shall be accompanied by a "Statement of Compliance," signed by the contractor or subcontractor or his or her agent who pays or supervises the payment of the persons employed under the contract and shall certify the following:

(i) That the payroll for the payroll period contains the information required to be provided under §5.5 (a)(3)(ii) of Regulations, 29 CFR part 5, the appropriate information is being maintained under §5.5 (a)(3)(i) of Regulations, 29 CFR part 5, and that such information is correct and complete;

(ii) That each laborer or mechanic (including each helper, apprentice, and trainee) employed on the contract during the payroll period has been paid the full weekly wages earned, without rebate, either directly or indirectly, and that no deductions have been made either directly or indirectly from the full wages earned, other than permissible deductions as set forth in Regulations, 29 CFR part 3;

(iii) That each laborer or mechanic has been paid not less than the applicable wage rates and fringe benefits or cash equivalents for the classification of work performed, as specified in the applicable wage determination incorporated into the contract.

(3) The weekly submission of a properly executed certification set forth on the reverse side of Optional Form WH–347 shall satisfy the requirement for submission of the "Statement of Compliance" required by paragraph 3.b.(2) of this section.

(4) The falsification of any of the above certifications may subject the contractor or subcontractor to civil or criminal prosecution under section 1001 of title 18 and section 231 of title 31 of the United States Code.

c. The contractor or subcontractor shall make the records required under paragraph 3.a. of this section available for inspection, copying, or transcription by authorized representatives of the contracting agency, the State DOT, the FHWA, or the Department of Labor, and shall permit such representatives to interview employees during working hours on the job. If the contractor or subcontractor fails to submit the required records or to make them available, the FHWA may, after written notice to the contractor, the contracting agency or the State DOT, take such action as may be necessary to cause the suspension of any further payment, advance, or guarantee of funds. Furthermore, failure to submit the required records upon request or to make such records available may be grounds for debarment action pursuant to 29 CFR 5.12.

4. Apprentices and trainees

a. Apprentices (programs of the USDOL).

Apprentices will be permitted to work at less than the predetermined rate for the work they performed when they are employed pursuant to and individually registered in a bona fide apprenticeship program registered with the U.S. Department of Labor, Employment and Training Administration, Office of Apprenticeship Training, Employer and Labor Services, or with a State Apprenticeship Agency recognized by the Office, or if a person is employed in his or her first 90 days of probationary employment as an apprentice in such an apprenticeship program, who is not individually registered in the program, but who has been certified by the Office of Apprenticeship Training, Employer and Labor Services or a State Apprenticeship Agency (where appropriate) to be eligible for probationary employment as an apprentice.

The allowable ratio of apprentices to journeymen on the job site in any craft classification shall not be greater than the ratio permitted to the contractor as to the entire work force under the registered program. Any worker listed on a payroll at an apprentice wage rate, who is not registered or otherwise employed as stated above, shall be paid not less than the applicable wage rate on the wage determination for the classification of work actually performed. In addition, any apprentice performing work on the job site in excess of the ratio permitted under the registered program shall be paid not less than the applicable wage rate on the wage determination for the work actually performed. Where a contractor is performing construction on a project in a locality other than that in which its program is registered, the ratios and wage rates (expressed in percentages of the journeyman's hourly rate) specified in the contractor's or subcontractor's registered program shall be observed.

Every apprentice must be paid at not less than the rate specified in the registered program for the apprentice's level of progress, expressed as a percentage of the journeymen hourly rate specified in the applicable wage determination. Apprentices shall be paid fringe benefits in accordance with the provisions of the apprenticeship program. If the apprenticeship program does not specify fringe benefits, apprentices must be paid the full amount of fringe benefits listed on the wage determination for the applicable classification. If the Administrator determines that a different practice prevails for the applicable apprentice classification, fringes shall be paid in accordance with that determination.

In the event the Office of Apprenticeship Training, Employer and Labor Services, or a State Apprenticeship Agency recognized by the Office, withdraws approval of an apprenticeship program, the contractor will no longer be permitted to utilize apprentices at less than the applicable predetermined rate for the work performed until an acceptable program is approved.

b. Trainees (programs of the USDOL).

Except as provided in 29 CFR 5.16, trainees will not be permitted to work at less than the predetermined rate for the work performed unless they are employed pursuant to and individually registered in a program which has received prior approval, evidenced by formal certification by the U.S. Department of Labor, Employment and Training Administration.

The ratio of trainees to journeymen on the job site shall not be greater than permitted under the plan approved by the Employment and Training Administration.

Every trainee must be paid at not less than the rate specified in the approved program for the trainee's level of progress, expressed as a percentage of the journeyman hourly rate specified in the applicable wage determination. Trainees shall be paid fringe benefits in accordance with the provisions of the trainee program. If the trainee program does not mention fringe benefits, trainees shall be paid the full amount of fringe benefits listed on the wage determination unless the Administrator of the Wage and Hour Division determines that there is an apprenticeship program associated with the corresponding journeyman wage rate on the wage determination which provides for less than full fringe benefits for apprentices. Any employee listed on the payroll at a trainee rate who is not registered and participating in a training plan approved by the Employment and Training Administration shall be paid not less than the applicable wage rate on the wage determination for the classification of work actually performed. In addition, any

trainee performing work on the job site in excess of the ratio permitted under the registered program shall be paid not less than the applicable wage rate on the wage determination for the work actually performed.

In the event the Employment and Training Administration withdraws approval of a training program, the contractor will no longer be permitted to utilize trainees at less than the applicable predetermined rate for the work performed until an acceptable program is approved.

c. Equal employment opportunity. The utilization of apprentices, trainees and journeymen under this part shall be in conformity with the equal employment opportunity requirements of Executive Order 11246, as amended, and 29 CFR part 30.

d. Apprentices and Trainees (programs of the U.S. DOT).

Apprentices and trainees working under apprenticeship and skill training programs which have been certified by the Secretary of Transportation as promoting EEO in connection with Federal-aid highway construction programs are not subject to the requirements of paragraph 4 of this Section IV. The straight time hourly wage rates for apprentices and trainees under such programs will be established by the particular programs. The ratio of apprentices and trainees to journeymen shall not be greater than permitted by the terms of the particular program.

5. Compliance with Copeland Act requirements. The contractor shall comply with the requirements of 29 CFR part 3, which are incorporated by reference in this contract.

6. Subcontracts. The contractor or subcontractor shall insert Form FHWA-1273 in any subcontracts and also require the subcontractors to include Form FHWA-1273 in any lower tier subcontracts. The prime contractor shall be responsible for the compliance by any subcontractor or lower tier subcontractor with all the contract clauses in 29 CFR 5.5.

7. Contract termination: debarment. A breach of the contract clauses in 29 CFR 5.5 may be grounds for termination of the contract, and for debarment as a contractor and a subcontractor as provided in 29 CFR 5.12.

8. Compliance with Davis-Bacon and Related Act requirements. All rulings and interpretations of the Davis-Bacon and Related Acts contained in 29 CFR parts 1, 3, and 5 are herein incorporated by reference in this contract.

9. Disputes concerning labor standards. Disputes arising out of the labor standards provisions of this contract shall not be subject to the general disputes clause of this contract. Such disputes shall be resolved in accordance with the procedures of the Department of Labor set forth in 29 CFR parts 5, 6, and 7. Disputes within the meaning of this clause include disputes between the contractor (or any of its subcontractors) and the contracting agency, the U.S. Department of Labor, or the employees or their representatives.

10. Certification of eligibility.

a. By entering into this contract, the contractor certifies that neither it (nor he or she) nor any person or firm who has an interest in the contractor's firm is a person or firm ineligible to be awarded Government contracts by virtue of section 3(a) of the Davis-Bacon Act or 29 CFR 5.12(a)(1).

b. No part of this contract shall be subcontracted to any person or firm ineligible for award of a Government contract by virtue of section 3(a) of the Davis-Bacon Act or 29 CFR 5.12(a)(1).

c. The penalty for making false statements is prescribed in the U.S. Criminal Code, 18 U.S.C. 1001.

## V. CONTRACT WORK HOURS AND SAFETY STANDARDS ACT

The following clauses apply to any Federal-aid construction contract in an amount in excess of $100,000 and subject to the overtime provisions of the Contract Work Hours and Safety Standards Act. These clauses shall be inserted in addition to the clauses required by 29 CFR 5.5(a) or 29 CFR 4.6. As used in this paragraph, the terms laborers and mechanics include watchmen and guards.

1. Overtime requirements. No contractor or subcontractor contracting for any part of the contract work which may require or involve the employment of laborers or mechanics shall require or permit any such laborer or mechanic in any workweek in which he or she is employed on such work to work in excess of forty hours in such workweek unless such laborer or mechanic receives compensation at a rate not less than one and one-half times the basic rate of pay for all hours worked in excess of forty hours in such workweek.

2. Violation; liability for unpaid wages; liquidated damages. In the event of any violation of the clause set forth in paragraph (1.) of this section, the contractor and any subcontractor responsible therefor shall be liable for the unpaid wages. In addition, such contractor and subcontractor shall be liable to the United States (in the case of work done under contract for the District of Columbia or a territory, to such District or to such territory), for liquidated damages. Such liquidated damages shall be computed with respect to each individual laborer or mechanic, including watchmen and guards, employed in violation of the clause set forth in paragraph (1.) of this section, in the sum of $10 for each calendar day on which such individual was required or permitted to work in excess of the standard workweek of forty hours without payment of the overtime wages required by the clause set forth in paragraph (1.) of this section.

3. Withholding for unpaid wages and liquidated damages. The FHWA or the contacting agency shall upon its own action or upon written request of an authorized representative of the Department of Labor withhold or cause to be withheld, from any moneys payable on account of work performed by the contractor or subcontractor under any such contract or any other Federal contract with the same prime contractor, or any other federally-assisted contract subject to the Contract Work Hours and Safety Standards Act, which is held by the same prime contractor, such sums as may be determined to be necessary to satisfy any liabilities of such contractor or subcontractor for unpaid wages and liquidated damages as provided in the clause set forth in paragraph (2.) of this section.

4. Subcontracts. The contractor or subcontractor shall insert in any subcontracts the clauses set forth in paragraph (1.) through (4.) of this section and also a clause requiring the subcontractors to include these clauses in any lower tier subcontracts. The prime contractor shall be responsible for compliance by any subcontractor or lower tier subcontractor with the clauses set forth in paragraphs (1.) through (4.) of this section.

## VI. SUBLETTING OR ASSIGNING THE CONTRACT

This provision is applicable to all Federal-aid construction contracts on the National Highway System.

1. The contractor shall perform with its own organization contract work amounting to not less than 30 percent (or a greater percentage if specified elsewhere in the contract) of the total original contract price, excluding any specialty items designated by the contracting agency. Specialty items may be performed by subcontract and the amount of any such specialty items performed may be deducted from the total original contract price before computing the amount of work required to be performed by the contractor's own organization (23 CFR 635.116).

a. The term “perform work with its own organization” refers to workers employed or leased by the prime contractor, and equipment owned or rented by the prime contractor, with or without operators. Such term does not include employees or equipment of a subcontractor or lower tier subcontractor, agents of the prime contractor, or any other assignees. The term may include payments for the costs of hiring leased employees from an employee leasing

firm meeting all relevant Federal and State regulatory requirements. Leased employees may only be included in this term if the prime contractor meets all of the following conditions:

(1) the prime contractor maintains control over the supervision of the day-to-day activities of the leased employees;

(2) the prime contractor remains responsible for the quality of the work of the leased employees;

(3) the prime contractor retains all power to accept or exclude individual employees from work on the project; and

(4) the prime contractor remains ultimately responsible for the payment of predetermined minimum wages, the submission of payrolls, statements of compliance and all other Federal regulatory requirements.

b. "Specialty Items" shall be construed to be limited to work that requires highly specialized knowledge, abilities, or equipment not ordinarily available in the type of contracting organizations qualified and expected to bid or propose on the contract as a whole and in general are to be limited to minor components of the overall contract.

2. The contract amount upon which the requirements set forth in paragraph (1) of Section VI is computed includes the cost of material and manufactured products which are to be purchased or produced by the contractor under the contract provisions.

3. The contractor shall furnish (a) a competent superintendent or supervisor who is employed by the firm, has full authority to direct performance of the work in accordance with the contract requirements, and is in charge of all construction operations (regardless of who performs the work) and (b) such other of its own organizational resources (supervision, management, and engineering services) as the contracting officer determines is necessary to assure the performance of the contract.

4. No portion of the contract shall be sublet, assigned or otherwise disposed of except with the written consent of the contracting officer, or authorized representative, and such consent when given shall not be construed to relieve the contractor of any responsibility for the fulfillment of the contract. Written consent will be given only after the contracting agency has assured that each subcontract is evidenced in writing and that it contains all pertinent provisions and requirements of the prime contract.

5. The 30% self-performance requirement of paragraph (1) is not applicable to design-build contracts; however, contracting agencies may establish their own self-performance requirements.

VII. SAFETY: ACCIDENT PREVENTION

This provision is applicable to all Federal-aid construction contracts and to all related subcontracts.

1. In the performance of this contract the contractor shall comply with all applicable Federal, State, and local laws governing safety, health, and sanitation (23 CFR 635). The contractor shall provide all safeguards, safety devices and protective equipment and take any other needed actions as it determines, or as the contracting officer may determine, to be reasonably necessary to protect the life and health of employees on the job and the safety of the public and to protect property in connection with the performance of the work covered by the contract.

2. It is a condition of this contract, and shall be made a condition of each subcontract, which the contractor enters into pursuant to this contract, that the contractor and any subcontractor shall not permit any employee, in performance of the contract, to work in surroundings or under conditions which are unsanitary, hazardous or

dangerous to his/her health or safety, as determined under construction safety and health standards (29 CFR 1926) promulgated by the Secretary of Labor, in accordance with Section 107 of the Contract Work Hours and Safety Standards Act (40 U.S.C. 3704).

3. Pursuant to 29 CFR 1926.3, it is a condition of this contract that the Secretary of Labor or authorized representative thereof, shall have right of entry to any site of contract performance to inspect or investigate the matter of compliance with the construction safety and health standards and to carry out the duties of the Secretary under Section 107 of the Contract Work Hours and Safety Standards Act (40 U.S.C.3704).

## VIII. FALSE STATEMENTS CONCERNING HIGHWAY PROJECTS

This provision is applicable to all Federal-aid construction contracts and to all related subcontracts.

In order to assure high quality and durable construction in conformity with approved plans and specifications and a high degree of reliability on statements and representations made by engineers, contractors, suppliers, and workers on Federal-aid highway projects, it is essential that all persons concerned with the project perform their functions as carefully, thoroughly, and honestly as possible. Willful falsification, distortion, or misrepresentation with respect to any facts related to the project is a violation of Federal law. To prevent any misunderstanding regarding the seriousness of these and similar acts, Form FHWA-1022 shall be posted on each Federal-aid highway project (23 CFR 635) in one or more places where it is readily available to all persons concerned with the project:

18 U.S.C. 1020 reads as follows:

"Whoever, being an officer, agent, or employee of the United States, or of any State or Territory, or whoever, whether a person, association, firm, or corporation, knowingly makes any false statement, false representation, or false report as to the character, quality, quantity, or cost of the material used or to be used, or the quantity or quality of the work performed or to be performed, or the cost thereof in connection with the submission of plans, maps, specifications, contracts, or costs of construction on any highway or related project submitted for approval to the Secretary of Transportation; or

Whoever knowingly makes any false statement, false representation, false report or false claim with respect to the character, quality, quantity, or cost of any work performed or to be performed, or materials furnished or to be furnished, in connection with the construction of any highway or related project approved by the Secretary of Transportation; or

Whoever knowingly makes any false statement or false representation as to material fact in any statement, certificate, or report submitted pursuant to provisions of the Federal-aid Roads Act approved July 1, 1916, (39 Stat. 355), as amended and supplemented;

Shall be fined under this title or imprisoned not more than 5 years or both."

## IX. IMPLEMENTATION OF CLEAN AIR ACT AND FEDERAL WATER POLLUTION CONTROL ACT

This provision is applicable to all Federal-aid construction contracts and to all related subcontracts.

By submission of this bid/proposal or the execution of this contract, or subcontract, as appropriate, the bidder, proposer, Federal-aid construction contractor, or subcontractor, as appropriate, will be deemed to have stipulated as follows:

1. That any person who is or will be utilized in the performance of this contract is not prohibited from receiving an award due to a violation of Section 508 of the Clean Water Act or Section 306 of the Clean Air Act.

2. That the contractor agrees to include or cause to be included the requirements of paragraph (1) of this Section X in every subcontract, and further agrees to take such action as the contracting agency may direct as a means of enforcing such requirements.

X. CERTIFICATION REGARDING DEBARMENT, SUSPENSION, INELIGIBILITY AND VOLUNTARY EXCLUSION

This provision is applicable to all Federal-aid construction contracts, design-build contracts, subcontracts, lower-tier subcontracts, purchase orders, lease agreements, consultant contracts or any other covered transaction requiring FHWA approval or that is estimated to cost $25,000 or more – as defined in 2 CFR Parts 180 and 1200.

1. Instructions for Certification – First Tier Participants:

a. By signing and submitting this proposal, the prospective first tier participant is providing the certification set out below.

b. The inability of a person to provide the certification set out below will not necessarily result in denial of participation in this covered transaction. The prospective first tier participant shall submit an explanation of why it cannot provide the certification set out below. The certification or explanation will be considered in connection with the department or agency's determination whether to enter into this transaction. However, failure of the prospective first tier participant to furnish a certification or an explanation shall disqualify such a person from participation in this transaction.

c. The certification in this clause is a material representation of fact upon which reliance was placed when the contracting agency determined to enter into this transaction. If it is later determined that the prospective participant knowingly rendered an erroneous certification, in addition to other remedies available to the Federal Government, the contracting agency may terminate this transaction for cause of default.

d. The prospective first tier participant shall provide immediate written notice to the contracting agency to whom this proposal is submitted if any time the prospective first tier participant learns that its certification was erroneous when submitted or has become erroneous by reason of changed circumstances.

e. The terms "covered transaction," "debarred," "suspended," "ineligible," "participant," "person," "principal," and "voluntarily excluded," as used in this clause, are defined in 2 CFR Parts 180 and 1200. “First Tier Covered Transactions” refers to any covered transaction between a grantee or subgrantee of Federal funds and a participant (such as the prime or general contract). “Lower Tier Covered Transactions” refers to any covered transaction under a First Tier Covered Transaction (such as subcontracts). “First Tier Participant” refers to the participant who has entered into a covered transaction with a grantee or subgrantee of Federal funds (such as the prime or general contractor). “Lower Tier Participant” refers any participant who has entered into a covered transaction with a First Tier Participant or other Lower Tier Participants (such as subcontractors and suppliers).

f. The prospective first tier participant agrees by submitting this proposal that, should the proposed covered transaction be entered into, it shall not knowingly enter into any lower tier covered transaction with a person who is debarred, suspended, declared ineligible, or voluntarily excluded from participation in this covered transaction, unless authorized by the department or agency entering into this transaction.

g. The prospective first tier participant further agrees by submitting this proposal that it will include the clause titled "Certification Regarding Debarment, Suspension, Ineligibility and Voluntary Exclusion-Lower Tier Covered Transactions," provided by the department or contracting agency, entering into this covered transaction, without modification, in all lower tier covered transactions and in all solicitations for lower tier covered transactions exceeding the $25,000 threshold.

h. A participant in a covered transaction may rely upon a certification of a prospective participant in a lower tier covered transaction that is not debarred, suspended, ineligible, or voluntarily excluded from the covered transaction, unless it knows that the certification is erroneous. A participant is responsible for ensuring that its principals are not suspended, debarred, or otherwise ineligible to participate in covered transactions. To verify the eligibility of its principals, as well as the eligibility of any lower tier prospective participants, each participant may, but is not required to, check the Excluded Parties List System website (https://www.epls.gov/), which is compiled by the General Services Administration.

i. Nothing contained in the foregoing shall be construed to require the establishment of a system of records in order to render in good faith the certification required by this clause. The knowledge and information of the prospective participant is not required to exceed that which is normally possessed by a prudent person in the ordinary course of business dealings.

j. Except for transactions authorized under paragraph (f) of these instructions, if a participant in a covered transaction knowingly enters into a lower tier covered transaction with a person who is suspended, debarred, ineligible, or voluntarily excluded from participation in this transaction, in addition to other remedies available to the Federal Government, the department or agency may terminate this transaction for cause or default.

* * * * *

2. Certification Regarding Debarment, Suspension, Ineligibility and Voluntary Exclusion – First Tier Participants:

a. The prospective first tier participant certifies to the best of its knowledge and belief, that it and its principals:

(1) Are not presently debarred, suspended, proposed for debarment, declared ineligible, or voluntarily excluded from participating in covered transactions by any Federal department or agency;

(2) Have not within a three-year period preceding this proposal been convicted of or had a civil judgment rendered against them for commission of fraud or a criminal offense in connection with obtaining, attempting to obtain, or performing a public (Federal, State or local) transaction or contract under a public transaction; violation of Federal or State antitrust statutes or commission of embezzlement, theft, forgery, bribery, falsification or destruction of records, making false statements, or receiving stolen property;

(3) Are not presently indicted for or otherwise criminally or civilly charged by a governmental entity (Federal, State or local) with commission of any of the offenses enumerated in paragraph (a)(2) of this certification; and

(4) Have not within a three-year period preceding this application/proposal had one or more public transactions (Federal, State or local) terminated for cause or default.

b. Where the prospective participant is unable to certify to any of the statements in this certification, such prospective participant shall attach an explanation to this proposal.

2. Instructions for Certification - Lower Tier Participants:

(Applicable to all subcontracts, purchase orders and other lower tier transactions requiring prior FHWA approval or estimated to cost $25,000 or more - 2 CFR Parts 180 and 1200)

a. By signing and submitting this proposal, the prospective lower tier is providing the certification set out below.

b. The certification in this clause is a material representation of fact upon which reliance was placed when this transaction was entered into. If it is later determined that the prospective lower tier participant knowingly rendered an

erroneous certification, in addition to other remedies available to the Federal Government, the department, or agency with which this transaction originated may pursue available remedies, including suspension and/or debarment.

c. The prospective lower tier participant shall provide immediate written notice to the person to which this proposal is submitted if at any time the prospective lower tier participant learns that its certification was erroneous by reason of changed circumstances.

d. The terms "covered transaction," "debarred," "suspended," "ineligible," "participant," "person," "principal," and "voluntarily excluded," as used in this clause, are defined in 2 CFR Parts 180 and 1200. You may contact the person to which this proposal is submitted for assistance in obtaining a copy of those regulations. “First Tier Covered Transactions” refers to any covered transaction between a grantee or subgrantee of Federal funds and a participant (such as the prime or general contract). “Lower Tier Covered Transactions” refers to any covered transaction under a First Tier Covered Transaction (such as subcontracts). “First Tier Participant” refers to the participant who has entered into a covered transaction with a grantee or subgrantee of Federal funds (such as the prime or general contractor). “Lower Tier Participant” refers any participant who has entered into a covered transaction with a First Tier Participant or other Lower Tier Participants (such as subcontractors and suppliers).

e. The prospective lower tier participant agrees by submitting this proposal that, should the proposed covered transaction be entered into, it shall not knowingly enter into any lower tier covered transaction with a person who is debarred, suspended, declared ineligible, or voluntarily excluded from participation in this covered transaction, unless authorized by the department or agency with which this transaction originated.

f. The prospective lower tier participant further agrees by submitting this proposal that it will include this clause titled "Certification Regarding Debarment, Suspension, Ineligibility and Voluntary Exclusion-Lower Tier Covered Transaction," without modification, in all lower tier covered transactions and in all solicitations for lower tier covered transactions exceeding the $25,000 threshold.

g. A participant in a covered transaction may rely upon a certification of a prospective participant in a lower tier covered transaction that is not debarred, suspended, ineligible, or voluntarily excluded from the covered transaction, unless it knows that the certification is erroneous. A participant is responsible for ensuring that its principals are not suspended, debarred, or otherwise ineligible to participate in covered transactions. To verify the eligibility of its principals, as well as the eligibility of any lower tier prospective participants, each participant may, but is not required to, check the Excluded Parties List System website (https://www.epls.gov/), which is compiled by the General Services Administration.

h. Nothing contained in the foregoing shall be construed to require establishment of a system of records in order to render in good faith the certification required by this clause. The knowledge and information of participant is not required to exceed that which is normally possessed by a prudent person in the ordinary course of business dealings.

i. Except for transactions authorized under paragraph e of these instructions, if a participant in a covered transaction knowingly enters into a lower tier covered transaction with a person who is suspended, debarred, ineligible, or voluntarily excluded from participation in this transaction, in addition to other remedies available to the Federal Government, the department or agency with which this transaction originated may pursue available remedies, including suspension and/or debarment.

* * * * *

Certification Regarding Debarment, Suspension, Ineligibility and Voluntary Exclusion--Lower Tier Participants:

1. The prospective lower tier participant certifies, by submission of this proposal, that neither it nor its principals is presently debarred, suspended, proposed for debarment, declared ineligible, or voluntarily excluded from participating in covered transactions by any Federal department or agency.

2. Where the prospective lower tier participant is unable to certify to any of the statements in this certification, such prospective participant shall attach an explanation to this proposal.

* * * * *

XI. CERTIFICATION REGARDING USE OF CONTRACT FUNDS FOR LOBBYING

This provision is applicable to all Federal-aid construction contracts and to all related subcontracts which exceed $100,000 (49 CFR 20).

1. The prospective participant certifies, by signing and submitting this bid or proposal, to the best of his or her knowledge and belief, that:

a. No Federal appropriated funds have been paid or will be paid, by or on behalf of the undersigned, to any person for influencing or attempting to influence an officer or employee of any Federal agency, a Member of Congress, an officer or employee of Congress, or an employee of a Member of Congress in connection with the awarding of any Federal contract, the making of any Federal grant, the making of any Federal loan, the entering into of any cooperative agreement, and the extension, continuation, renewal, amendment, or modification of any Federal contract, grant, loan, or cooperative agreement.

b. If any funds other than Federal appropriated funds have been paid or will be paid to any person for influencing or attempting to influence an officer or employee of any Federal agency, a Member of Congress, an officer or employee of Congress, or an employee of a Member of Congress in connection with this Federal contract, grant, loan, or cooperative agreement, the undersigned shall complete and submit Standard Form-LLL, "Disclosure Form to Report Lobbying," in accordance with its instructions.

2. This certification is a material representation of fact upon which reliance was placed when this transaction was made or entered into. Submission of this certification is a prerequisite for making or entering into this transaction imposed by 31 U.S.C. 1352. Any person who fails to file the required certification shall be subject to a civil penalty of not less than $10,000 and not more than $100,000 for each such failure.

3. The prospective participant also agrees by submitting its bid or proposal that the participant shall require that the language of this certification be included in all lower tier subcontracts, which exceed $100,000 and that all such recipients shall certify and disclose accordingly.

## EXHIBIT 3 TO ATTACHMENT 3-1

## FEDERAL PREVAILING WAGE RATE

The prevailing wage rates for this Project are included in Exhibit 7 to the Design-Build Agreement.

# Special Provision to Item 000
# Nondiscrimination

## 1. DESCRIPTION

All recipients of federal financial assistance are required to comply with various nondiscrimination laws including Title VI of the Civil Rights Act of 1964, as amended, (Title VI). Title VI forbids discrimination against anyone in the United States on the grounds of race, color, or national origin by any agency receiving federal funds.

Texas Department of Transportation, as a recipient of Federal financial assistance, and under Title VI and related statutes, ensures that no person shall on the grounds of race, religion (where the primary objective of the financial assistance is to provide employment per 42 U.S.C. § 2000d-3), color, national origin, sex, age or disability be excluded from participation in, be denied the benefits of, or otherwise be subjected to discrimination under any Department programs or activities.

## 2. DEFINITION OF TERMS

Where the term “Contractor” appears in the following six nondiscrimination clauses, the term “Contractor” is understood to include all parties to Contracts or agreements with the Texas Department of Transportation.

## 3. NONDISCRIMINATION PROVISIONS

During the performance of this Contract, the Contractor, for itself, its assignees, and successors in interest (hereinafter referred to as the "Contractor") agrees as follows:

3.1. Compliance with Regulations. The Contractor (hereinafter includes consultants) will comply with the Acts and the Regulations relative to Nondiscrimination in Federally-assisted programs of the U.S. Department of Transportation, the Federal Highway Administration, as they may be amended from time to time, which are herein incorporated by reference and made a part of this Contract.

3.2. Nondiscrimination. The Contractor, with regard to the work performed by it during the Contract, will not discriminate on the grounds of race, color, or national origin in the selection and retention of subcontractors, including procurements of materials and leases of equipment. The Contractor will not participate directly or indirectly in the discrimination prohibited by the Acts and the Regulations, including employment practices when the Contract covers any activity, project, or program set forth in Appendix B of 49 CFR Part 21.

3.3. Solicitations for Subcontracts, Including Procurements of Materials and Equipment: In all solicitations, either by competitive bidding, or negotiation made by the Contractor for work to be performed under a subcontract, including procurements of materials, or leases of equipment, each potential subcontractor or supplier will be notified by the Contractor of the Contractor's obligations

under this Contract and the Acts and the Regulations relative to Nondiscrimination on the grounds of race, color, or national origin.

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

3.5. Sanctions for Noncompliance. In the event of a Contractor's noncompliance with the Nondiscrimination provisions of this Contract, the Recipient will impose such Contract sanctions as it or the Federal Highway Administration may determine to be appropriate, including, but not limited to:

- withholding payments to the Contractor under the Contract until the Contractor complies, and/or
- cancelling, terminating, or suspending a Contract, in whole or in part.

3.6. Incorporation of Provisions. The Contractor will include the provisions of paragraphs (3.1) through (3.6) in every subcontract, including procurements of materials and leases of equipment, unless exempt by the Acts, the Regulations, and directives issued pursuant thereto. The Contractor will take action with respect to any subcontract or procurement as the Recipient or the Federal Highway Administration may direct as a means of enforcing such provisions including sanctions for noncompliance. Provided, that if the Contractor becomes involved in, or is threatened with litigation by a subcontractor, or supplier because of such direction, the Contractor may request the Recipient to enter into any litigation to protect the interests of the Recipient. In addition, the Contractor may request the United States to enter into the litigation to protect the interests of the United States.

## 4. PERTINENT NONDISCRIMINATION AUTHORITIES:

During the performance of this Contract, the Contractor, for itself, its assignees, and successors in interest (hereinafter referred to as the "Contractor") agrees to comply with the following nondiscrimination statutes and authorities; including but not limited to:

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

4.2. The Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, (42 U.S.C. § 4601), (prohibits unfair treatment of persons displaced or whose property has been acquired because of Federal or Federal-aid programs and projects);

4.3. Federal-Aid Highway Act of 1973, (23 U.S.C. § 324 et seq.), (prohibits discrimination on the basis of sex);

4.4. Section 504 of the Rehabilitation Act of 1973, (29 U.S.C. § 794 et seq.), as amended, (prohibits discrimination on the basis of disability); and 49 CFR Part 27;

4.5. The Age Discrimination Act of 1975, as amended, (42 U.S.C. § 6101 et seq.), (prohibits discrimination on the basis of age);

4.6. Airport and Airway Improvement Act of 1982, (49 U.S.C. § 4 71, Section 4 7123), as amended, (prohibits discrimination based on race, creed, color, national origin, or sex);

4.7. The Civil Rights Restoration Act of 1987, (PL 100-209), (Broadened the scope, coverage and applicability of Title VI of the Civil Rights Act of 1964, The Age Discrimination Act of 1975 and Section 504 of the Rehabilitation Act of 1973, by expanding the definition of the terms "programs or activities" to include all of the programs or activities of the Federal-aid recipients, subrecipients and Contractors, whether such programs or activities are Federally funded or not);

4.8. Titles II and III of the Americans with Disabilities Act, which prohibit discrimination on the basis of disability in the operation of public entities, public and private transportation systems, places of public accommodation, and certain testing entities (42 U.S.C. §§ 12131-12189) as implemented by Department of Transportation regulations at 49 C.F.R. parts 37 and 38;

4.9. The Federal Aviation Administration's Nondiscrimination statute (49 U.S.C. § 47123) (prohibits discrimination on the basis of race, color, national origin, and sex);

4.10. Executive Order 12898, Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations, which ensures discrimination against minority populations by discouraging programs, policies, and activities with disproportionately high and adverse human health or environmental effects on minority and low-income populations;

4.11. Executive Order 13166, Improving Access to Services for Persons with Limited English Proficiency, and resulting agency guidance, national origin discrimination includes discrimination because of limited English proficiency (LEP). To ensure compliance with Title VI, you must take reasonable steps to ensure that LEP persons have meaningful access to your programs (70 Fed. Reg. at 74087 to 74100);

4.12. Title IX of the Education Amendments of 1972, as amended, which prohibits you from discriminating because of sex in education programs or activities (20 U .S.C. 1681 et seq).

# Special Provision to Item 000
# Notice of Requirement for Affirmative Action to Ensure Equal Employment Opportunity (Executive Order 11246)

## 1. GENERAL

In addition to the affirmative action requirements of the Special Provision titled "Standard Federal Equal Employment Opportunity Construction Contract Specifications" as set forth elsewhere in this proposal, the Bidder's attention is directed to the specific requirements for utilization of minorities and females as set forth below.

## 2. GOALS

2.1. Goals for minority and female participation are hereby established in accordance with 41 CFR 60-4.

2.2. The goals for minority and female participation expressed in percentage terms for the Contractor's aggregate work force in each trade on all construction work in the covered area are as follows:

| Goals for minority participation in each trade, % | Goals for female participation in each trade, % |
|---|---|
| See Table 1 | 6.9 |

2.3. These goals are applicable to all the Contractor's construction work (whether or not it is Federal or federally assisted) performed in the covered area. If the Contractor performs construction work in a geographical area located outside of the covered area, it will apply the goals established for such geographical area where the work is actually performed. With regard to this second area, the Contractor also is subject to the goals for both its federally involved and non-federally involved construction. The Contractor's compliance with the Executive Order and the regulations in 41 CFR Part 60-4 will be based on its implementation of the Standard Federal Equal Employment Opportunity Construction Contract Specifications Special Provision and its efforts to meet the goals. The hours of minority and female employment and training must be substantially uniform throughout the length of the Contract, and in each trade, and the Contractor must make a good faith effort to employ minorities and women evenly on each of its projects. The transfer of minority and female employees or trainees from Contractor to Contractor or from project to project for the sole purpose of meeting the Contractor's goals will be a violation of the Contract, the Executive Order and the regulations in 41 CFR Part 60-4. Compliance with the goals will be measured against the total work hours performed.

2.4. A Contractor or subcontractor will be considered in compliance with these provisions by participation in the Texas Highway-Heavy Branch, AGC, Statewide Training and Affirmative Action Plan. Provided that each Contractor or subcontractor participating in this plan must individually comply with the equal opportunity clause set forth in 41 CFR 60-1.4 and must make a good faith effort to achieve the goals set forth for each

participating trade in the plan in which it has employees. The overall good performance of other Contractors and subcontractors toward a goal in an approved plan does not excuse any covered Contractor's or subcontractor's failure to make good faith efforts to achieve the goals contained in these provisions. Contractors or subcontractors participating in the plan must be able to demonstrate their participation and document their compliance with the provisions of this Plan.

## 3. SUBCONTRACTING

The Contractor must provide written notification to the Department within 10 working days of award of any construction subcontract in excess of $10,000 at any tier for construction work under the Contract resulting from this solicitation pending concurrence of the Department in the award. The notification will list the names, address and telephone number of the subcontractor; employer identification number; estimated dollar amount of the subcontract; estimated starting and completion dates of the subcontract; and the geographical area in which the Contract is to be performed.

## 4. COVERED AREA

As used in this special provision, and in the Contract resulting from this solicitation, the geographical area covered by these goals for female participation is the State of Texas. The geographical area covered by these goals for other minorities are the counties in the State of Texas as indicated in Table 1.

## 5. REPORTS

The Contractor is hereby notified that he may be subject to the Office of Federal Contract Compliance Programs (OFCCP) reporting and record keeping requirements as provided for under Executive Order 11246 as amended. OFCCP will provide direct notice to the Contractor as to the specific reporting requirements that he will be expected to fulfill.

**Table 1**
**Goals for Minority Participation**

| County | Participation, % | County | Participation, % |
|---|---|---|---|
| Anderson | 22.5 | Brooks | 44.2 |
| Andrews | 18.9 | Brown | 10.9 |
| Angelina | 22.5 | Burleson | 27.4 |
| Aransas | 44.2 | Burnet | 24.2 |
| Archer | 11.0 | Caldwell | 24.2 |
| Armstrong | 11.0 | Calhoun | 27.4 |
| Atascosa | 49.4 | Callahan | 11.6 |
| Austin | 27.4 | Cameron | 71.0 |
| Bailey | 19.5 | Camp | 20.2 |
| Bandera | 49.4 | Carson | 11.0 |
| Bastrop | 24.2 | Cass | 20.2 |
| Baylor | 11.0 | Castro | 11.0 |
| Bee | 44.2 | Chambers | 27.4 |
| Bell | 16.4 | Cherokee | 22.5 |
| Bexar | 47.8 | Childress | 11.0 |
| Blanco | 24.2 | Clay | 12.4 |
| Borden | 19.5 | Cochran | 19.5 |
| Bosque | 18.6 | Coke | 20.0 |
| Bowie | 19.7 | Coleman | 10.9 |
| Brazoria | 27.3 | Collin | 18.2 |
| Brazos | 23.7 | Collingsworth | 11.0 |
| Brewster | 49.0 | Colorado | 27.4 |
| Briscoe | 11.0 | Comal | 47.8 |

| County | Participation, % | County | Participation, % |
|---|---|---|---|
| Comanche | 10.9 | Henderson | 22.5 |
| Concho | 20.0 | Hidalgo | 72.8 |
| Cooke | 17.2 | Hill | 18.6 |
| Coryell | 16.4 | Hockley | 19.5 |
| Cottle | 11.0 | Hood | 18.2 |
| Crane | 18.9 | Hopkins | 17.2 |
| Crockett | 20.0 | Houston | 22.5 |
| Crosby | 19.5 | Howard | 18.9 |
| Culberson | 49.0 | Hudspeth | 49.0 |
| Dallam | 11.0 | Hunt | 17.2 |
| Dallas | 18.2 | Hutchinson | 11.0 |
| Dawson | 19.5 | Irion | 20.0 |
| Deaf Smith | 11.0 | Jack | 17.2 |
| Delta | 17.2 | Jackson | 27.4 |
| Denton | 18.2 | Jasper | 22.6 |
| DeWitt | 27.4 | Jeff Davis | 49.0 |
| Dickens | 19.5 | Jefferson | 22.6 |
| Dimmit | 49.4 | Jim Hogg | 49.4 |
| Donley | 11.0 | Jim Wells | 44.2 |
| Duval | 44.2 | Johnson | 18.2 |
| Eastland | 10.9 | Jones | 11.6 |
| Ector | 15.1 | Karnes | 49.4 |
| Edwards | 49.4 | Kaufman | 18.2 |
| Ellis | 18.2 | Kendall | 49.4 |
| El Paso | 57.8 | Kenedy | 44.2 |
| Erath | 17.2 | Kent | 10.9 |
| Falls | 18.6 | Kerr | 49.4 |
| Fannin | 17.2 | Kimble | 20.0 |
| Fayette | 27.4 | King | 19.5 |
| Fisher | 10.9 | Kinney | 49.4 |
| Floyd | 19.5 | Kleberg | 44.2 |
| Foard | 11.0 | Knox | 10.9 |
| Fort Bend | 27.3 | Lamar | 20.2 |
| Franklin | 17.2 | Lamb | 19.5 |
| Freestone | 18.6 | Lampasas | 18.6 |
| Frio | 49.4 | LaSalle | 49.4 |
| Gaines | 19.5 | Lavaca | 27.4 |
| Galveston | 28.9 | Lee | 24.2 |
| Garza | 19.5 | Leon | 27.4 |
| Gillespie | 49.4 | Liberty | 27.3 |
| Glasscock | 18.9 | Limestone | 18.6 |
| Goliad | 27.4 | Lipscomb | 11.0 |
| Gonzales | 49.4 | Live Oak | 44.2 |
| Gray | 11.0 | Llano | 24.2 |
| Grayson | 9.4 | Loving | 18.9 |
| Gregg | 22.8 | Lubbock | 19.6 |
| Grimes | 27.4 | Lynn | 19.5 |
| Guadalupe | 47.8 | Madison | 27.4 |
| Hale | 19.5 | Marion | 22.5 |
| Hall | 11.0 | Martin | 18.9 |
| Hamilton | 18.6 | Mason | 20.0 |
| Hansford | 11.0 | Matagorda | 27.4 |
| Hardeman | 11.0 | Maverick | 49.4 |
| Hardin | 22.6 | McCulloch | 20.0 |
| Harris | 27.3 | McLennan | 20.7 |
| Harrison | 22.8 | McMullen | 49.4 |
| Hartley | 11.0 | Medina | 49.4 |
| Haskell | 10.9 | Menard | 20.0 |
| Hays | 24.1 | Midland | 19.1 |
| Hemphill | 11.0 | Milam | 18.6 |

| County | Participation, % | County | Participation, % |
|---|---|---|---|
| Mills | 18.6 | Sherman | 11.0 |
| Mitchell | 10.9 | Smith | 23.5 |
| Montague | 17.2 | Somervell | 17.2 |
| Montgomery | 27.3 | Starr | 72.9 |
| Moore | 11.0 | Stephens | 10.9 |
| Morris | 20.2 | Sterling | 20.0 |
| Motley | 19.5 | Stonewall | 10.9 |
| Nacogdoches | 22.5 | Sutton | 20.0 |
| Navarro | 17.2 | Swisher | 11.0 |
| Newton | 22.6 | Tarrant | 18.2 |
| Nolan | 10.9 | Taylor | 11.6 |
| Nueces | 41.7 | Terrell | 20.0 |
| Ochiltree | 11.0 | Terry | 19.5 |
| Oldham | 11.0 | Throckmorton | 10.9 |
| Orange | 22.6 | Titus | 20.2 |
| Palo Pinto | 17.2 | Tom Green | 19.2 |
| Panola | 22.5 | Travis | 24.1 |
| Parker | 18.2 | Trinity | 27.4 |
| Parmer | 11.0 | Tyler | 22.6 |
| Pecos | 18.9 | Upshur | 22.5 |
| Polk | 27.4 | Upton | 18.9 |
| Potter | 9.3 | Uvalde | 49.4 |
| Presidio | 49.0 | Val Verde | 49.4 |
| Randall | 9.3 | Van Zandt | 17.2 |
| Rains | 17.2 | Victoria | 27.4 |
| Reagan | 20.0 | Walker | 27.4 |
| Real | 49.4 | Waller | 27.3 |
| Red River | 20.2 | Ward | 18.9 |
| Reeves | 18.9 | Washington | 27.4 |
| Refugio | 44.2 | Webb | 87.3 |
| Roberts | 11.0 | Wharton | 27.4 |
| Robertson | 27.4 | Wheeler | 11.0 |
| Rockwall | 18.2 | Wichita | 12.4 |
| Runnels | 20.0 | Wilbarger | 11.0 |
| Rusk | 22.5 | Willacy | 72.9 |
| Sabine | 22.6 | Williamson | 24.1 |
| San Augustine | 22.5 | Wilson | 49.4 |
| San Jacinto | 27.4 | Winkler | 18.9 |
| San Patricio | 41.7 | Wise | 18.2 |
| San Saba | 20.0 | Wood | 22.5 |
| Schleicher | 20.0 | Yoakum | 19.5 |
| Scurry | 10.9 | Young | 11.0 |
| Shackelford | 10.9 | Zapata | 49.4 |
| Shelby | 22.5 | Zavala | 49.4 |

## EXHIBIT 6 TO ATTACHMENT 3-1

## CERTIFICATION REGARDING USE OF CONTRACT FUNDS FOR LOBBYING

By signing and submitting its proposal or bid, and by executing the Design-Build Contract or Subcontract, each prospective DB Contractor and subcontractor (at all tiers) shall be deemed to have signed and delivered the following:

1. The prospective DB Contractor/subcontractor certifies, to the best of its knowledge and belief, that:

a. No Federal appropriated funds have been paid or will be paid, by or on behalf of the undersigned, to any person for influencing or attempting to influence an officer or employee of any Federal agency, a Member of Congress, an officer or employee of Congress, or an employee of a Member of Congress in connection with the awarding of any Federal contract, the making of any Federal grant, the making of any Federal loan, the entering into of any cooperative agreement, and the extension, continuation, renewal, amendment, or modification of any Federal contract, grant, loan, or cooperative agreement.

b. If any funds other than Federal appropriated funds have been paid or will be paid to any person for influencing or attempting to influence an officer or employee of any Federal agency, a Member of Congress, an officer or employee of Congress, or an employee of a Member of Congress in connection with any Federal contract, grant, loan, or cooperative agreement, the undersigned shall complete and submit Standard Form-LLL, "Disclosure Form to Report Lobbying," in accordance with its instructions, and shall include a copy of said form in its proposal or bid, or submit it with the executed Agreement or Subcontract.

2. This certification is a material representation of fact upon which reliance was placed when this transaction was made or entered into. Submission of this certification is a prerequisite for making or entering into this transaction imposed by 31 U.S.C. 1352. Any person who fails to file the required certification shall be subject to a civil penalty of not less than $10,000 and not more than $100,000 for each such failure.

3. DB Contractor/subcontractor shall require that the language of this certification be included in all lower tier Subcontracts which exceed $100,000 and that all such recipients shall certify and disclose accordingly.

4. The undersigned certifies or affirms the truthfulness and accuracy of each statement of its certification and disclosure, if any. In addition, the undersigned understands and agrees that the provisions of 31 U.S.C. §3801, et seq., apply to this certification and disclosure, if any.

[Note: Pursuant to 31 U.S.C. §1352(c)(1)-(2)(A), any person who makes a prohibited expenditure or fails to file or amend a required certification or disclosure form shall be subject to a civil penalty of not less than $10,000 and not more than $100,000 for each expenditure or failure.]

## EXHIBIT 7 TO ATTACHMENT 3-1

### COMPLIANCE WITH BUY AMERICA REQUIREMENTS

DB Contractor shall comply with the Federal Highway Administration (FHWA) Buy America Requirement in 23 CFR 635.410, which permits FHWA participation in the Design-Build Contract only if domestic steel and iron will be used on the Project. To be considered domestic, all steel and iron used and all products manufactured from steel and iron must be produced in the United States and all manufacturing processes, including application of a coating, for these materials must occur in the United States. Coating includes all processes that protect or enhance the value of the material to which the coating is applied. This requirement does not preclude a minimal use of foreign steel and iron materials, provided the cost of such materials does not exceed 0.1% of the Price under the Design-Build Contract.

For Utility Adjustments, "de minimus" non-domestic iron and steel materials may be used provided the cost of such materials does not exceed one-tenth of one percent (0.1 %) of the individual Utility Agreement amount or $2,500.00, whichever is greater, per 23 CFR 635.410 (b)(4). The de minimus equation is calculated by the following formula: combined cost of only those materials that are subject to Buy America and are non-compliant (limited to the individual Utility Agreement) divided by the total Utility Adjustment cost (cited in the individual Utility Agreement).

Concurrently with execution of the Design-Build Contract, DB Contractor has completed and submitted, or shall complete and submit, to TxDOT a Buy America Certificate, in format below. After submittal, DB Contractor is bound by its original certification.

A false certification is a criminal act in violation of 18 U.S.C. 1001. Should this Design-Build Contract be investigated, DB Contractor has the burden of proof to establish that it is in compliance.

At DB Contractor's request, TxDOT may, but is not obligated to, seek a waiver of Buy America requirements if grounds for the waiver exist. However, DB Contractor certifies that it will comply with the applicable Buy America requirements if a waiver of those requirements is not available or not pursued by TxDOT. A request for a waiver shall be treated as a Request for Change Order under Section 4.6.3 of these General Conditions.

BUY AMERICA CERTIFICATE

The undersigned certifies on behalf of itself and all proposed Subcontractors (at all tiers) that only domestic steel and iron will be used in the Project.

A. DB Contractor shall comply with the Federal Highway Administration ("FHWA") Buy America Requirements of 23 CFR 635.410, which permits FHWA participation in the Contract only if domestic steel and iron will be used on the Project. To be considered domestic, all steel and iron used and all products manufactured from steel and iron must be produced in the United States, and all manufacturing processes, including application of a coating, for these materials must occur in the United States. Coating includes all processes which protect or enhance the value of the material to which the coating is applied. This requirement does not preclude a minimal use of foreign steel and iron materials, provided the cost of such materials does not exceed 0.1% of the Price.

B. For Utility Adjustments, De Minimus non-domestic iron and steel materials may be used provided the cost of such materials does not exceed one-tenth of one percent (0.1 %) of the individual Utility Agreement amount or $2,500.00, whichever is greater, per 23 CFR 635.410 (b)(4). The De Minimus equation is calculated by the following formula: combined cost of only those materials that are subject to Buy America and are non-compliant (limited to the individual Utility Agreement) divided by the total Utility Adjustment cost (cited in the individual Utility Agreement).

C. A false certification is a criminal act in violation of 18 U.S.C. 1001. Should this Contract be investigated, DB Contractor has the burden of proof to establish that it is in compliance.

D. At DB Contractor's request, TxDOT may, but is not obligated to, seek a waiver of Buy America requirements if grounds for the waiver exist. However, DB Contractor certifies that it will comply with the applicable Buy America requirements if a waiver of those requirements is not available or not pursued by TxDOT.

| | |
|---|---|
| **PROPOSER** | |
| **SIGNATURE** | |
| **NAME (printed or typed)** | |
| **TITLE** | |
| **DATE** | |

## EXHIBIT 8 TO ATTACHMENT 3-1

000-003

**Special Provision to Item 000**

**Certification of Nondiscrimination in Employment**

1. GENERAL

By signing this proposal, the Bidder certifies that Bidder has participated in a previous contract or subcontract subject to the equal opportunity clause, as required by Executive Orders 10925, 11114, or 11246, or if Bidder has not participated in a previous contract of this type, or if Bidder has had previous contract or subcontracts and has not filed, Bidder will file with the Joint Reporting Committee, the Director of the Office of Federal Contract Compliance, a Federal Government contracting or administering agency, or the former President's Committee on Equal Employment Opportunity, all reports due under the applicable filing requirements.

**Note**—The above certification is required by the Equal Employment Opportunity Regulations of the Secretary of Labor (41 CFR 60-1.7(b)(1)), and must be submitted by Bidders and proposed subcontractors only in connection with contracts and subcontracts which are subject to the equal opportunity clause. Contracts and subcontracts which are exempt from the equal opportunity clause are set forth in 41 CFR 60-1.5. (Generally only contracts or subcontracts of $10,000 or under are exempt.)

Currently, Standard Form 100 (EEO-1) is the only report required by the Executive Orders or their implementing regulations.

Proposed prime contractors and subcontractors who have participated in a previous contract or subcontract subject to the Executive Orders and have not filed the required reports should note that 41 CFR 60-1.7(b)(1) prevents the award of contracts and subcontracts unless such contractor submits a report covering the delinquent period or such other period specified by the Federal Highway Administration or by the Director, Office of Federal Contract Compliance, U.S. Department of Labor.

## EXHIBIT 9 TO ATTACHMENT 3-1

## SPECIAL PROVISION

### On-the-Job Training Program for Design-Build and Comprehensive Development Agreement Projects

This training special provision is the Department's implementation of 23 U.S.C. 140 (a). The primary objective of this provision is to train and upgrade minorities and women toward journey worker status. This training commitment is not intended and shall not be used to discriminate against any applicant for training, whether a member of a minority group or not.

By signing the Design-Build Contract, the DB Contractor certifies that it will meet the On-the-Job Training (OJT) goal as stated in the Special Provision or, if the OJT goal as stated in the Special Provision is not met, the DB Contractor will provide acceptable evidence of good faith efforts, including as described in section 6 hereof, to meet the OJT goal.

As part of DB Contractor's equal employment opportunity affirmative action program, training shall be provided as follows:

1. The DB Contractor shall ensure that on-the-job training aimed at developing full journey worker status in the type of trade or job classification involved is provided.

2. The Department has assigned a project-specific trainee goal in accordance with the following guidelines as set forth in 23 C.F.R.§230.111:

    1) Dollar value of the construction services contract;
    2) Duration of the construction work activity;
    3) Geographic location;
    4) Availability of minorities, women, and disadvantaged for training;
    5) The potential for effective training;
    6) Type of work;
    7) Total normal work force that the average proposer could be expected to use;
    8) The need for additional journeymen in the area;
    9) Recognition of the suggested minimum goal for the State; and
    10) A satisfactory ratio of trainees to journeymen expected to be on DB Contractor's work force during normal operations.

| **Construction Cost Estimate** | | |
|---|---|---|
| **From** | **To** | **Trainees** |
| $0 | $9,999,999.99 | 0 |
| $10,000,000 | $19,999,999.99 | 1 |
| $20,000,000 | $39,999,999.99 | 2 |
| $40,000,000 | $59,999,999.99 | 3 |
| $60,000,000 | $79,999,999.99 | 4 |
| $80,000,000 | $99,999,999.99 | 5 |
| $100,000,000 | $119,999,999.99 | 6 |
| Thereafter for each increment of $20 million, goal is increased by one trainee | | |

3. The OJT program trainee goal for this project is [ ] trainees.

4. The DB Contractor will have fulfilled its responsibilities under this provision when acceptable training has been provided to the number of trainees assigned to this project.

5. In the event that DB Contractor subcontracts a portion of the contract work, it shall determine if any of the trainees are to be trained by the subcontractor. The DB Contractor should ensure that this training special provision is made applicable to such subcontract. However, DB Contractor shall retain the primary responsibility for meeting the training requirements imposed by this special provision.

6. The DB Contractor shall make every effort to ensure minorities and women are enrolled and trained in the program. The DB Contractor shall conduct systematic and direct recruitment through public and private sources likely to yield minority and women trainees to the extent that such persons are available within a reasonable area of recruitment.

7. It is the intention of this provision that training is to be provided in the construction crafts. Training is permissible in lower level management positions such as office engineers, estimators, timekeepers, etc., where the training is oriented toward construction applications. Some offsite training is permissible as long as the training is an integral part of an approved training program and does not comprise a significant part of the overall training.

8. The Department and the Federal Highway Administration (FHWA) shall approve a training program if it meets the equal employment opportunity obligations of DB Contractor and aims to train and upgrade employees to journey worker status.

9. The Department's OJT Program has been designed to ensure that the trainee consistently receives the level and quality of training necessary to perform as a journey worker in his/her respective skilled trade classification. Standard training programs for each skilled construction trade classification are located in the OJT program manual.

10. Apprenticeship programs registered with the U.S. Department of Labor, Bureau of Apprenticeship and Training, or with a State apprenticeship agency recognized by the Bureau, or training programs approved but not necessarily sponsored by the U.S. Department of Labor, Manpower Administration, Bureau of Apprenticeship and Training shall also be considered acceptable provided the program is being administered in a manner consistent with the equal employment obligations of Federal-aid highway construction contracts.

11. The number of trainees shall be distributed among the work classifications on the basis of DB Contractor's needs and the availability of journey worker in the various classifications.

12. No employee shall be employed as a trainee in any classification in which he or she has successfully completed a training course leading to journey worker status or in which he or she has been employed as a journey worker. The DB Contractor may satisfy this requirement by including appropriate questions in the employee application or by other suitable means. Regardless of the method used, DB Contractor's records should document the findings in each case.

13. At or before contract execution, DB Contractor must submit the Contractor OJT Plan form to the Department's Civil Rights Division (CIV). The plan shall specify how DB Contractor intends to satisfy its goal by including the following information: the type of apprentice or training program, number of trainees, type of training, and length of training. This becomes Exhibit 5 of the DBA.

14. The trainee(s) shall begin training on the project after start of work and remain on the project as long as training opportunities exist or until the training is completed.

15. The trainees will be paid at minimum, 60 percent of the appropriate journey worker's rate specified in the contract for the first half of the training period, 75 percent for the third quarter of the training period, and 90 percent for the last quarter of the training period. However, if the apprentices or trainees are enrolled in another program approved by the Department of Labor or other agency, such appropriate rates shall apply.

16. CIV must approve all proposed apprentices and trainees before training begins. The DB Contractor must submit the Federal OJT Enrollment Form to SharePoint and CIV. CIV must approve the enrollment in order for training to be counted toward the project goal and be eligible for reimbursement. The DB Contractor shall provide each trainee with a copy of the training program he or she will follow.

17. On a monthly basis, DB Contractor shall submit the Federal OJT Monthly Reporting Form to the District Representative and to CIV. The monthly reporting form will include the number of hours trained and training status. If a trainee is terminated, DB Contractor is required to make a good faith effort to replace the trainee within 30 calendar days of the termination.

18. The DB Contractor shall provide each trainee with a certification showing the type and length of training satisfactorily completed.

19. If requested, DB Contractor may be reimbursed 80 cents per hour of training for each trainee working on this project and whose participation towards the OJT project goal has been approved.

    This reimbursement will be made regardless of whether DB Contractor receives additional training program funds from other sources, provided such other program requirements do not specifically prohibit DB Contractor from receiving other reimbursement. Reimbursement for offsite training indicated above may only be made to DB Contractor if the trainees are concurrently employed on a federal-aid project and when DB Contractor: contributes to the cost of the training, or provides the instruction to the trainee, or pays the trainee's wages during the offsite training period.

    No payment shall be made to DB Contractor if either the failure to provide the required training or the failure to hire the trainee as a journeyman is caused by DB Contractor and evidences a lack of good faith on the part of DB Contractor in meeting the requirements of this Training Special Provision.

20. Compliance: The DB Contractor shall maintain records and submit monthly reports documenting program performance by the 10th of each month. Noncompliance may be cause for corrective and appropriate measures pursuant to Section 8.8 “Termination,” which may be used to comply with the sanctions for noncompliance pursuant to 23 CFR Part 230.

21. Detailed program reporting requirements and procedures, reporting forms, and the list of approved training classifications are found in the OJT program manual, which can be obtained upon request by contacting CIV.

## EXHIBIT 10 TO ATTACHMENT 3-1

## SPECIAL PROVISION

## 000---005

## Standard Federal Equal Employment Opportunity Construction Contract Specifications (Executive Order 11246)

1. As used in these specifications:

   a. "Covered area" means the geographical area described in the solicitation from which this contract resulted;

   b. "Director" means Director, Office of Federal Contract Compliance Programs, United States Department of Labor, or any person to whom the Director delegates authority;

   c. "Employer identification number" means the Federal Social Security number used on the Employer's Quarterly Federal Tax Return, U.S. Treasury Department Form 941.

   d. "Minority" includes:

      (i) Black (all persons having origins in any of the Black African racial groups not of Hispanic origin);

      (ii) Hispanic (all persons of Mexican, Puerto Rican, Cuban, Central or South American or other Spanish Culture or origin, regardless of race);

      (iii) Asian and Pacific Islander (all persons having origins in any of the original peoples of the Far East, Southeast Asia, the Indian Subcontinent, or the Pacific Islands); and

      (iv) American Indian or Alaskan Native (all persons having origins in any of the original peoples of North American and maintaining identifiable tribal affiliations through membership and participation or community identification).

2. Whenever the Contractor, or any Subcontractor at any tier, subcontracts a portion of the work involving any construction trade, it shall physically include in each subcontract in excess of $10,000 the provisions of these specifications and the Notice which contains the applicable goals for minority and female participation and which is set forth in the solicitations from which this contract resulted.

3. If the Contractor is participating (pursuant to 41 CFR 60-4.5) in a Hometown Plan approved by the U. S. Department of Labor in the covered area either individually or through an association, its affirmative action obligations on all work in the Plan area (including goals and timetables) shall be in accordance with that plan for those trades which have unions participating in the Plan. Contractors must be able to demonstrate their participation in and compliance with the provisions of any such Hometown Plan. Each Contractor or Subcontractor participating in an approved Plan is individually required to comply with its obligations under the EEO clause, and to make a good faith effort to achieve each goal under the Plan in each trade in which it has employees. The overall good faith performance by other Contractors or Subcontractors toward a goal in an approved Plan does not excuse any covered Contractor's or Subcontractor's failure to take good faith efforts to achieve the Plan goals and timetables.

4. The Contractor shall implement the specific affirmative action standards provided in paragraphs 7a through p of these specifications. The goals set forth in the solicitation from which this contract resulted are expressed as percentages of the total hours of employment and training of minority and female utilization the Contractor should reasonably be able to achieve in each construction trade in which it has employees in the covered area. Covered construction contractors performing contracts in geographical areas where they do not have a Federal or federally assisted construction contract shall apply the minority and female goals established for the geographical area where the contract is being performed. Goals are published periodically in the Federal Register in notice form and such notices may be obtained from any Office of Federal Contract Compliance Programs office or any Federal procurement contracting officer. The Contractor is expected to make substantially uniform progress toward its goals in each craft during the period specified.

5. Neither the provisions of any collective bargaining agreement, nor the failure by a union with whom the Contractor has a collective bargaining agreement, to refer either minorities or women shall excuse the Contractor's obligations under these specifications, Executive Order 11246, or the regulations promulgated pursuant thereto.

6. In order for the nonworking training hours of apprentices and trainees to be counted in meeting the goals, such apprentices and trainees must be employed by the Contractor during the training period, and the Contractor must have made a commitment to employ the apprentices and trainees at the completion of their training, subject to the availability of employment opportunities. Trainees must be trained pursuant to training programs approved by the U. S. Department of Labor.

7. The Contractor shall take specific affirmative actions to ensure equal employment opportunity. The evaluation of the Contractor's compliance with these specifications shall be based upon its effort to achieve maximum results from its actions. The Contractor shall document these efforts fully, and shall implement affirmative action steps at least as extensive as the following:

    a. Ensure and maintain a working environment free of harassment, intimidation, and coercion at all sites, and in all facilities at which the Contractor's employees are assigned to work. The Contractor, where possible, will assign two or more women to each construction project. The Contractor shall specifically ensure that all foremen, superintendents, and other on-site supervisory personnel are aware of and carry out the Contractor's obligation to maintain such a working environment, with specific attention to minority or female individuals working at such sites or in such facilities.

    b. Establish and maintain a current list of minority and female recruitment sources, provide written notification to minority and female recruitment sources and to community organizations when the Contractor or its unions have employment opportunities available, and maintain a record of the organizations' responses.

    c. Maintain a current file of the names, addresses and telephone numbers of each minority and female off-the-street applicant and minority or female referral from a union, a recruitment source or community organization and of what action was taken with respect to each such individual. If such individual was sent to the union hiring hall for referral and was not referred back to the Contractor by the union or, if referred, not employed by the Contractor, this shall be documented in the file with the reason therefor, along with whatever additional actions the Contractor may have taken.

    d. Provide immediate written notification to the Director when the union or unions with which the Contractor has a collective bargaining agreement has not referred to the Contractor a minority person or woman sent by the Contractor, or when the Contractor has other information that the union referral Process has impeded the Contractor's efforts to meet its obligations.

e. Develop on-the-job training opportunities and/or participate in training programs for the area which expressly include minorities and women, including upgrading programs and apprenticeship and trainee programs relevant to the Contractor's employment needs, especially those programs funded or approved by the Department of Labor. The Contractor shall provide notice of these programs to the sources compiled under 7b above.

f. Disseminate the Contractor's EEO policy by providing notice of the policy to unions and training programs and requesting their cooperation in assisting the Contractor in meeting its EEO obligations; by including it in any policy manual and Collective bargaining agreement; by publicizing it in the company newspaper, annual report, etc.; by specific review of the policy with all management personnel and with all minority and female employees at least once a year; and by posting the company EEO policy on bulletin boards accessible to all employees at each location where construction work is performed.

g. Review, at least annually, the company's EEO policy and affirmative action obligations under these specifications with all employees having any responsibility for hiring, assignment, layoff, termination or other employment decisions including specific review of these items with onsite supervisory personnel such as Superintendents, General Foremen, etc., prior to the initiation of construction work at any job site. A written record shall be made and maintained identifying the time and place of these meetings, persons attending, subject matter discussed, and disposition of the subject matter.

h. Disseminate the Contractor's EEO policy externally by including it in any advertising in the news media, specifically including minority and female news media, and providing written notification to and discussing the Contractor's EEO policy with other Contractors and Subcontractors with whom the Contractor does or anticipates doing business.

i. Direct its recruitment efforts, both oral and written, to minority, female and community organizations, to schools with minority and female students and to minority and female recruitment and training organizations serving the Contractor's recruitment area and employment needs. Not later than one month prior to the date for the acceptance of applications for apprenticeship or other training by any recruitment source, the Contractor shall send written notification to organizations such as the above, describing the openings, screening procedures, and tests to be used in the selection process.

j. Encourage present minority and female employees to recruit other minority persons and women and, where reasonable, provide after school, summer and vacation employment to minority and female youth both on the site and in other areas of a Contractor's workforce.

k. Validate all tests and other selection requirements where there is an obligation to do so under 41 CFR Part 60-3.

l. Conduct, at least annually, an inventory and evaluation at least of all minority and female personnel for promotional opportunities and encourage these employees to seek or to prepare for, through appropriate training, etc., such opportunities.

m. Ensure that seniority practices, job classifications, work assignments and other personnel practices, do not have a discriminatory effect by continually monitoring all personnel and employment related activities to ensure that the EEO policy and the Contractor's obligations under these specifications are being carried out.

n. Ensure that all facilities and company activities are non-segregated except that separate or single-user toilet and necessary changing facilities shall be provided to assure privacy between the sexes.

o. Document and maintain a record of all solicitations of offers for subcontracts from minority and female construction contractors and suppliers, including circulation of solicitations to minority and female contractor associations and other business associations.

p. Conduct a review, at least annually, of all supervisors' adherence to and performance under the Contractor's EEO policies and affirmative action obligations.

8. Contractors are encouraged to participate in voluntary associations which assist in fulfilling one or more of their affirmative action obligations (7a through p). The efforts of a contractor association, joint contractor-union, contractor-community, or other similar group of which the contractor is a member and participant, may be asserted as fulfilling any one or more of its obligations under 7a through p of these Specifications provided that the contractor actively participates in the group, makes every effort to assure that the group has a positive impact on the employment of minorities and women in the industry, ensures that the concrete benefits of the program are reflected in the Contractor's minority and female workforce participation, makes a good faith effort to meet its individual goals and timetables, and can provide access to documentation which demonstrates the effectiveness of actions taken on behalf of the Contractor. The obligation to comply, however, is the Contractor's and failure of such a group to fulfill an obligation shall not be a defense for the Contractor's noncompliance.

9. A single goal for minorities and a separate single goal for women have been established. The Contractor, however, is required to provide equal employment opportunity and to take affirmative action for all minority groups, both male and female, and all women, both minority and non-minority. Consequently, the Contractor may be in violation of the Executive Order if a particular group is employed in a substantially disparate manner (for example, even though the Contractor has achieved its goals for women generally, the Contractor may be in violation of the Executive Order if a specific minority group of women is underutilized).

10. Nondiscrimination programs require that Federal-aid recipients, subrecipients, and contractors prevent discrimination and ensure nondiscrimination in all of their programs and activities, whether those programs and activities are federally funded or not. The factors prohibited from serving as a basis for action or inaction which discriminates include race, color, national origin, sex, age, and handicap/disability. The efforts to prevent discrimination must address, but not be limited to a program's impacts, access, benefits, participation, treatment, services, contracting opportunities, training opportunities, investigations of complaints, allocations of funds, prioritization of projects, and the functions of right-of-way, research, planning, and design.

11. The Contractor shall not enter into any Subcontract with any person or firm debarred from Government contracts pursuant to Executive Order 11246.

12. The Contractor shall carry out such sanctions and penalties for violation of these specifications and of the Equal Opportunity Clause, including suspension, termination and cancellation of existing subcontracts as may be imposed or ordered pursuant to Executive Order 11246, as amended, and its implementing regulations, by the Office of Federal Contract Compliance Programs. Any contractor who fails to carry out such sanctions and penalties shall be in violation of these specifications and Executive Order 11246, as amended.

13. The Contractor, in fulfilling its obligations under these specifications, shall implement specific affirmative action steps, at least as extensive as those standards prescribed in paragraph 7 of these specifications, so as to achieve maximum results from its efforts to ensure equal employment opportunity. If the Contractor

fails to comply with the requirements of the Executive Order, the implementing regulations, or these specifications, the Director shall proceed in accordance with 41 CFR 60-4.8.

14. The Contractor shall designate a responsible official to monitor all employment related activity to ensure that the company EEO policy is being carried out, to submit reports relating to the provisions hereof as may be required by the Government and to keep records. Records shall at least include for each employee the name, address, telephone numbers, construction trade, union affiliation if any, employee identification number when assigned, social security number, race, sex, status (e.g., mechanic, apprentice, trainee, helper, or laborer), dates of changes in status, hours worked per week in the indicated trade, rate of pay, and locations at which the work was performed. Records shall be maintained in an easily understandable and retrievable form; however, to the degree that existing records satisfy this requirement, contractors shall not be required to maintain separate records.

15. Nothing herein provided shall be construed as a limitation upon the application of other laws which establish different standards of compliance or upon the application of requirements for the hiring of local or other area residents (e.g., those under the Public Works Employment Act of 1977 and the Community Development Block Grant Program).

16. In addition to the reporting requirements set forth elsewhere in this contract, the Contractor and the subcontractors holding subcontracts, not including material suppliers, of $10,000 or more, shall submit for every month of July during which work is per-formed, employment data as contained under Form PR 1391 (Appendix C to 23 CFR, Part 230), and in accordance with the instructions included thereon.

**EXHIBIT 11 TO ATTACHMENT 3-1**

000-010

# Special Provision to Item 000

# Important Notice to Contractors

By the 20th day of each month, report to the Engineer the number of incidents and injuries that occurred on the project the previous month. Report:

- the total number of incidents and injuries for the Contractor and all subcontractors, and
- the number of Contractor and subcontractor-related incidents and injuries that involved a third party.

An "incident" is defined as any work-related occurrence that caused damage only to vehicles, equipment, materials, etc.

An "injury" is defined as an OSHA recordable injury.

Acquire an Electronic Project Records System (EPRS) account to report incidents and injuries. Submit an EPRS User Access Request Form (Form 2451) to request an account. This form can be found at http://www.txdot.gov/business/resources/doing-business/prequalification.html.

Report injuries and incidents using the EPRS website located at https://apps.dot.state.tx.us/apps/eprs/InjuryIncident/InjryIncdt.asp.

Failure to submit this information to the Engineers by the 20th day of each month will result in the Department taking actions including, but not limited to withholding estimates and suspending the work. This report will not be paid for directly, but will be considered subsidiary to Items of the contract.

## ATTACHMENT 3-2

## DBE SPECIAL PROVISION
## FOR NON-TRADITIONAL CONTRACTS

### Disadvantaged Business Enterprise in Federal-Aid Contracts

1. DESCRIPTION

The purpose of this Special Provision is to carry out the U.S. Department of Transportation's (DOT) policy of ensuring nondiscrimination in the award and administration of DOT-assisted contracts and creating a level playing field on which firms owned and controlled by individuals who are determined to be socially and economically disadvantaged can compete fairly for DOT-assisted contracts.

2. DISADVANTAGED BUSINESS ENTERPRISE IN FEDERAL-AID CONTRACTS

2.1. **Policy**. It is the policy of the DOT and the Texas Department of Transportation (Department) that DBEs, as defined in 49 CFR Part 26, Subpart A, and the Department's DBE Program, will have the opportunity to participate in the performance of contracts financed in whole or in part with federal funds. The DBE requirements of 49 CFR Part 26 and Department's DBE Program apply to this Design-Build Contract as follows.

The DB Contractor will solicit DBEs through reasonable and available means (reasonable and available means as defined in 49 CFR Part 26, Appendix A and the Department's DBE Program), or show Good Faith Efforts to meet the DBE goal for this Design-Build Contract.

The DB Contractor and its subcontractors shall not discriminate on the basis of race, color, national origin or sex in the performance of this Design-Build Contract. The DB Contractor shall carry out applicable requirements of 49 CFR Part 26 in the award and administration of this Design-Build Contract. Failure to carry out these requirements is a material breach of this Design-Build Contract, which may result in the termination of this Design-Build Contract or such other remedy as the Department deems appropriate.

The requirements of this Special Provision must be physically included in any subcontract including all tiers of subcontracts.

By signing the Design-Build Contract, the DB Contractor certifies that the DBE goal as stated in the Design-Build Contract will be met by obtaining commitments from DBEs or that, if the DBE goal as stated in the Design-Build Contract is not met, the DB Contractor will provide acceptable evidence of Good Faith Efforts to meet the DBE goal.

2.2. **Definitions**. The following terms, when used in this Special Provision, shall have the meanings set forth below. Capitalized terms not defined below shall have the meanings set forth in Item 1 of the General Conditions.

2.2.1. **Administrative Reconsideration**. A process by which the DB Contractor may request reconsideration of the Department's determination that the DBE goal has not been met or the Good Faith Efforts requirements have not been met.

2.2.2. **Commercially Useful Function (CUF)**. A DBE performs a commercially useful function when it is responsible for execution of the work of the contract and is carrying out its responsibilities by actually performing, managing, and supervising the work involved. To perform a commercially useful function, the

DBE must also be responsible, with respect to materials and supplies used on the contract, for negotiating price, determining quality and quantity, ordering the material, and installing (where applicable) and paying for the material itself. (ref. 49 CFR Part 26, Subpart C (26.55))

2.2.3. **DBE Joint Venture**. An association of a DBE firm and one or more other firms to carry out a single business enterprise for profit for which purpose they combine their property, capital, efforts, skills and knowledge, and in which the DBE is responsible for a distinct, clearly defined portion of the work of the Design-Build Contract and whose share in the capital contribution, control, management, risks and profits of the joint venture are commensurate with its ownership interest.

2.2.4. **Department**. The Texas Department of Transportation.

2.2.5. **Disadvantaged Business Enterprise (DBE)**. A for-profit small business certified through the Texas Unified Certification Program in accordance with 49 CFR Part 26, (a) that is at least 51% owned by one or more socially and economically disadvantaged individuals or, in the case of a publicly owned business, in which at least 51% of the stock is owned by one or more socially and economically disadvantaged individuals, and (b) whose management and daily business operations are controlled by one or more of the socially and economically disadvantaged individuals who own it.

2.2.6. **DOT**. The U.S. Department of Transportation, including the Office of the Secretary, the Federal Highway Administration (FHWA), the Federal Transit Administration (FTA) and the Federal Aviation Administration (FAA).

2.2.7. **Federal-Aid Contract**. Any contract between the Department and a design-build contractor that is paid for in whole or in part with DOT financial assistance.

2.2.8. **Good Faith Effort**. All necessary and reasonable steps to achieve the DBE goal which, by their scope, intensity, and appropriateness to the objective, could reasonably be expected to obtain sufficient DBE participation, even if not fully successful. Good Faith Efforts are evaluated prior to award and throughout performance of the Design-Build Contract. For guidance on good faith efforts, see 49 CFR Part 26, Subpart C and 49 CFR Part 26, Appendix A.

2.2.9. **North American Industry Classification System (NAICS)**. A designation that best describes the primary business of a firm. The NAICS is described in the North American Industry Classification Manual—United States, which is available on the Internet at the U.S. Census Bureau website: http://www.census.gov/eos/www/naics/.

2.2.10. **Prompt Payment** – Federal regulations and state law require DB Contractor and its subcontractors to pay their subcontractors within 10 days of receiving corresponding payment for the applicable scope of the work. This requirement includes the release of retainage when a subcontractor's work is satisfactorily complete, even if final acceptance has not occurred. State law requires that a contractor that withholds retainage on a subcontractor's work shall pay that retainage in full within 10 days after the date of satisfactory completion of all of the subcontractor's work.

2.2.11. **Race-Conscious measure or program**. A measure or program that is focused specifically on assisting only DBEs, including women-owned DBEs.

2.2.12. **Race-Neutral measure or program**. A measure or program that is, or can be, used to assist all small businesses. For the purposes of this part, race-neutral includes gender – neutrality.

2.2.13. **Schedule of Values**. A detailed **schedule** apportioning the subcontract sum among all portions of the work. Each Schedule of Values shall include a description of the work that will be performed, applicable NAICS codes, estimated quantities, unit prices, the total value of the applicable subcontract and break down of the major work activities to support each DBE contract or DBE contract revision.

2.2.14. **Texas Unified Certification Program (TUCP) Directory**. An online directory listing all DBEs currently certified by the TUCP. The Directory identifies DBE firms whose participation on the Design-Build Contract may be counted toward achievement of the assigned DBE goal.

2.3. **DB Contractor's Responsibilities**.

2.3.1. **DBE Liaison Officer**. The DB Contractor shall designate a DBE liaison officer who will administer the DB Contractor's DBE program and who will be responsible for maintenance of records of efforts and contacts made to subcontract with DBEs

2.3.2. **Compliance Monitoring and Tracking System**. This Design-Build Contract is subject to the Department's electronic contract compliance monitoring and tracking system (CMTS). The DB Contractor, DBEs and non DBEs (only if they are in a tiered relationship with a DBE) are required to provide any noted and requested contract compliance-related data in the Department's CMTS, which is accessible at https:/txdot.txdotcms.com/. Such data includes commitments, terminations, payments, substitutions, and evidence of Good Faith Efforts. The DB Contractor and the applicable DBEs are responsible for responding by any noted response date or due date to any Department instructions or requests for information, and checking the Department's CMTS on a regular basis. The DB Contractor is responsible for ensuring all DBEs have completed all requested items and that their contact information is accurate and up-to-date. The Department may require additional information related to the Design-Build Contract to be provided electronically through the Department's CMTS at any time before, during or after award of the Design-Build Contract.

In its sole discretion, the Department may require that contract compliance tracking data be submitted by the DB Contractor and DBEs in an alternative format prescribed by the Department.

2.3.3. DBE Performance Plan. The DB Contractor shall, in consultation with the Department, develop and submit a DBE Performance Plan describing the methods to be employed for achieving the DBE goals for the Design-Build Contract, including DB Contractor's exercise of Good Faith Efforts. Each DBE Performance Plan must at a minimum include the following:

(a) Specific categories of services and work anticipated for DBE participation on the Project;

(b) Schedule for submission of DBE commitment agreements based on the DB Contractor's initial Project schedule and any subsequent revised Project schedule;

(c) A description of the Good Faith Efforts performed prior to the date of execution of the Design-Build Contract;

(d) A description of the Good Faith Efforts that will be exercised by the DB Contractor following execution of the Design-Build Contract to achieve the DBE goal for the Project; and

(e) The name, qualifications, responsibilities and contact information for the DBE Liaison Officer.

The DB Contractor shall update the DBE Performance Plan quarterly or more frequently as requested by the Department.

2.3.4. **DBE Contractor**. If the DB Contractor is a DBE, the DB Contractor may receive credit toward the DBE goal for work performed by its own forces and work subcontracted to DBEs. When a DBE subcontracts part of the work of its contract to another firm, the value of the subcontracted work may be counted toward DBE goals only if the DBE's subcontractor is itself a DBE. Work that a DBE subcontracts to a non-DBE firm does not count toward DBE goals. In the event a DBE subcontracts to a non-DBE, that information must be reported to the Department monthly.

2.3.5. **DBE Commitment**. Only those DBEs certified by the TUCP are eligible to be used for DBE goal attainment. The Department maintains the TUCP DBE Directory at the following Internet address: https://txdot.txdotcms.com/FrontEnd/VendorSearchPublic.asp?TN=txdot&XID=2340.

DB Contractor shall submit completed forms ADP-4901 DBE Program Commitment Agreement form for Alternative Delivery Projects, ADP-4901-MS DBE Program Material Supplier Commitment Agreement Form for Alternative Delivery Projects and ADP-4901-T DBE Program Trucking Commitment Agreement Form for Alternative Delivery Projects as appropriate. A DBE must be certified on the day the DBE commitment is considered by the Department and at time of subcontract execution. It is the DB Contractor's responsibility to ensure firms identified for participation are certified DBE firms and certified with the NAICS code applicable to the kind of work the DBE will be performing on the Project. The DB Contractor is responsible for ensuring that all submittals are accurate. Any and all omissions, deletions and/or errors that may affect the DBE commitment are the sole liabilities of the DB Contractor.

DBE commitments in excess of the DBE goal are considered Race-Neutral commitments.

If the DBE goal has not been met and the DB Contractor has used DBE subcontractors without committing to them, this participation would be counted as Race Neutral (RN). Additionally, if the DBE goal is not achieved by the Race Conscious (RC) subcontractors, the Race Neutral (RN) participation can neither be counted towards the DBE project goal nor considered as a GFE to achieve the DBE project goal.

For all DBE subcontracts including all tiered DBE subcontracts, submit a copy of the executed subcontract agreement.

2.3.6. **Good Faith Effort Requirements**. If the DB Contractor cannot meet the DBE goal, in whole or in part, the DB Contractor must make adequate Good Faith Efforts to obtain DBE participation, as determined by the Department.

2.4. **Administrative Reconsideration**. If the Department determines that the DB Contractor has failed to satisfy the good faith efforts requirement, the Department will notify the DB Contractor of the failure and will give the DB Contractor an opportunity to provide written documentation or argument concerning the issue of whether it met the goal or made adequate good faith efforts to do so.

The DB Contractor must request an administrative reconsideration of that determination within 3 days of the date of receipt of the notice. The request must be submitted directly to the Texas Department of Transportation, Civil Rights Division, 125 East 11th Street, Austin, Texas 78701-2483.

If a request for administrative reconsideration is not filed within the period specified, the determination made is final and further administrative appeal is barred.

If a reconsideration request is timely received, the reconsideration decision will be made by the Department's DBE liaison officer or, if the DBE liaison officer took part in the original determination, the Department's executive director will appoint a department employee to perform the administrative

reconsideration. The employee will hold a senior leadership position and will report directly to the executive director.

The meeting or written documentation must be provided or held within 7 days of the date the request was submitted.

The Department will provide to the DB Contractor a written decision if the DB Contractor did or did not make adequate good faith efforts to meet the contract goal. The reconsideration decision is final and is not administratively appealed to DOT.

2.5. **Determination of DBE Participation**. The work performed by a DBE must be reasonably construed to be included in the work area and NAICS work code identified by the DB Contractor in the approved DBE commitment.

Participation by a DBE will not be counted toward the DBE goal unless (a) a DBE commitment was submitted to the Department prior to the committed DBE commencing work on the project (b) the DBE was certified as a DBE before the execution of the subcontract, (c) the DBE performed a Commercially Useful Function and (d) the amount of the participation has been paid to the DBE.

You may only count the credit towards a RC goal after a commitment is provided. You may only count payments to a DBE as RN before the commitment is submitted, but once a commitment is submitted, then the payments may count as RC moving forward (not retroactive).

The DBE must perform at least 30% of the work with its own forces if the work is to be counted toward the DBE goal. The total amount paid to a DBE for work performed with its own forces is counted toward the DBE goal. When a DBE subcontracts part of the work of its subcontract to another firm, the value of the subcontracted work may be counted toward the DBE goal only if the DBE's subcontractor is a DBE.

DBE goal credit for the DBE subcontractors' leasing of equipment or purchasing of supplies from the DB Contractor, Prime contractor or its affiliates is not allowed. Project materials or supplies acquired from an affiliate of the DB Contractor cannot directly or indirectly (second or lower tier subcontractor) be used for DBE goal credit.

If a DBE firm is declared ineligible due to DBE decertification after the execution of such DBE's subcontract, the firm may complete the work, and the firm's participation will be counted toward the DBE goal. If a DBE firm is decertified before such firm has signed a subcontract, the DB Contractor is obligated to replace the ineligible firm with a DBE or demonstrate that it has made Good Faith Efforts to do so.

The DB Contractor may count 100% of its expenditure to a DBE manufacturer toward the DBE goal. Pursuant to 49 CFR 26.55(e)(1)(i), a manufacturer is a firm that operates or maintains a factory or establishment that produces, on the premises, the materials, supplies, articles, or equipment required under the Design-Build Contract and of the general character described by the specifications.

The DB Contractor may count only 60% of its expenditure to a DBE regular dealer toward the DBE goal. Pursuant to 49 CFR 26.55(e)(2)(i), a regular dealer is a firm that owns, operates, or maintains a store, warehouse, or other establishment in which the materials, supplies, articles, or equipment of the general character described by the specifications and required under the Design-Build Contract are bought, kept in stock, and regularly sold or leased to the public in the usual course of business. A firm may be a regular dealer in such bulk items as petroleum products, steel, cement, gravel, stone, or asphalt without owning, operating, or maintaining a place of business if the firm both owns and operates distribution equipment for the products. Any supplementing of regular dealers' own distribution equipment must be by a long-term

lease agreement and not on an ad hoc or contract-by-contract basis. Long term leases with logistics companies that provide transportation services (logistics, equipment and drivers) do not meet the regulatory dealer intent for goal credit as a bulk regular dealer; however, the transaction fees may be counted as goal credit. Packagers, brokers, manufactures representatives, or other persons who arrange or expedite transactions are not regular dealers.

With respect to materials or supplies purchased from a DBE that is neither a manufacturer nor a regular dealer, the DB Contractor may count the entire amount of fees or commissions charged for assistance in the procurement of the materials and supplies, or fees or transportation charges for the delivery of materials or supplies required on a job site toward the DBE goal.

With respect to trucking, the DBE receives credit for the total value of the transportation services it provides on the contract using trucks it owns, insures, and operates using drivers it employs.

In order to perform a CUF, the DBE trucking firm must own and operate at least one fully licensed, insured and operational truck used on the Design-Build Contract. The DBE may lease trucks from another DBE firm, including an owner-operator who is certified as a DBE. The DBE that leases trucks from another DBE receives credit for the total value of the transportation services the lessee DBE provides on the Design-Build Contract.

The DBE may also lease trucks from a non-DBE firm, including from an owner-operator. The DBE that leases only trucks from a non-DBE and supplies their own fully employed drivers receives credit for the total value of the transportation services the lessee provides on the Design-Build Contract.

The DBE that leases trucks equipped with drivers from a non-DBE is entitled to credit for the total value of transportation services provided by non-DBE leased trucks equipped with drivers not to exceed the value of transportation services on the contract provided by DBE-owned trucks or leased trucks with DBE employee drivers. Additional participation by non-DBE owned trucks equipped with drivers receives DBE goal credit only for the fee or commission the DBE receives as a result of the lease arrangement.

A lease must indicate that the DBE has exclusive use of and control over the truck. This does not preclude the leased truck from working for others during the term of the lease with the consent of the DBE, so long as the lease gives the DBE absolute priority for use of the leased truck. Leased trucks must display the name and identification number of the DBE.

The DB Contractor may count toward the DBE goal the portion of the total value of the Design-Build Contract amount paid to a DBE Joint Venture equal to the distinct, clearly defined portion of the work of the Design-Build Contract performed by the DBE.

2.6. **Commercially Useful Function**. The DB Contractor shall ensure that each DBE used to perform the work of the Design-Build Contract performs a CUF. The Department will monitor performance during the Design-Build Contract to confirm that each DBE is performing a CUF.

With respect to material and supplies used on the Design-Build Contract, in order to perform a CUF, a DBE must be responsible for negotiating price, determining quality and quantity, ordering the material, installing the material, if applicable, and paying for the material itself.

A DBE does not perform a CUF when its role is limited to that of an extra participant in a transaction, contract, or project through which funds are passed in order to obtain the appearance of DBE participation. The Department will evaluate similar transactions involving non-DBEs in order to determine whether a DBE is an extra participant.

If a DBE does not perform or exercise responsibility for at least 30% of the total cost of its contract with its own work force, or if the DBE subcontracts a greater portion of the work than would be expected on the basis of normal industry practice for the type of work involved, the Department will presume that the DBE is not performing a CUF.

If the Department determines that a DBE is not performing a CUF, no work performed by such DBE will count as eligible DBE participation. The Department may make such determination at any time.

In case of the denial of credit for non-performance of a CUF by a DBE, the DB Contractor will be required to provide a substitute DBE to meet the DBE goal or provide an adequate Good Faith Effort when applicable.

2.6.1. **Rebuttal of a Finding of No Commercially Useful Function**. Consistent with the provisions of 49 CFR 26.55(c)(4)&(5), before Department makes a final finding that no CUF has been performed by a DBE, the Department will notify the DBE and provide the DBE the opportunity to provide rebuttal information.

CUF determinations are not subject to administrative appeal to the DOT.

2.6.2. **Joint Check**. The use of joint checks between a DB Contractor and a DBE is allowed with Department approval. Joint checks will not be allowed simply for the convenience of the DB Contractor. To obtain approval, the DB Contractor must submit a completed Form 2178, "DBE Joint Check Approval," to the Department.

The Department will closely monitor the use of joint checks to ensure that such a practice does not erode the independence of the DBE nor inhibit the DBE's ability to perform a CUF. When joint checks are utilized, DBE credit toward the DBE goal will be allowed only when the subcontractor is performing a CUF in accordance with 49 CFR 26.55(c)(1).

Long-term or open-ended joint checking arrangements may be a basis for further scrutiny by the Department and may result in the Department's determination of a lack of participation towards the DBE goal if DBE independence cannot be established.

If the proper procedures are not followed or the Department determines that the arrangements result in a lack of independence for the DBE involved, no credit for the DBE's participation as it relates to the material cost will be used toward the DBE goal, and the DB Contractor shall be required to make up the difference elsewhere on the Project.

2.7. **DBE Termination and Substitution**. No DBE named in the DBE commitment will be terminated for convenience, in whole or part, without the Department's approval. This includes, but is not limited to, instances in which the DB Contractor seeks to perform work originally designated for a DBE subcontractor with its own forces or those of an affiliate, a non-DBE firm or another DBE firm.

Unless the Department's consent is provided, the DB Contractor will not be entitled to any payment for work or material allocated to the DBE in the DBE commitment unless it is performed or supplied by the listed DBE.

In order to terminate a DBE for cause, the DB Contractor must first give written notice to the DBE of its intent to terminate for cause and the reason for the termination. The DB Contractor will copy the Department on such notice of intent to terminate.

The notice of intent to terminate for cause must provide the DBE five (5) calendar days to respond to the DB Contractor's notice, which response must advise the DB Contractor and the Department of the reasons, if

any, why the DBE objects to the proposed termination of its subcontract and why the Department should not approve the DB Contractor's request for termination. If directed by the Department, the notice of intent to terminate may require a response time shorter than (5) days by the DBE if required as a matter of public necessity.

The Department will consider both the DB Contractor's request and DBE's stated position prior to approving the request to terminate. The Department may provide a written approval only if it agrees, for reasons stated in its concurrence document, that the DB Contractor has good cause to terminate the DBE. If the Department does not approve the request, the DB Contractor must continue to use the committed DBE in accordance with the Design-Build Contract. For guidance on what good cause includes, see 49 CFR 26.53.

Good cause does not exist if the DB Contractor seeks to terminate, reduce or substitute a DBE so that the DB Contractor can self-perform the work for which the DBE was engaged.

When a DBE is terminated, the DB Contractor must make Good Faith Efforts to find, as a substitute for the original DBE, another DBE to perform, at least to the extent needed to meet the established DBE goal, the work that the original DBE was to have performed under the Design-Build Contract.

Upon termination of a DBE, the DB Contractor will submit Good Faith Effort documentation to find and secure substitute DBE and must enter associated DBE Termination and Substitution data into the Department's CMTS within seven (7) days, which deadline may be extended for an additional seven (7) days if necessary at the request of the DB Contractor. The Department will provide a written determination to the DB Contractor stating whether or not Good Faith Efforts have been demonstrated. If the Department determines that Good Faith Efforts were not demonstrated, the DB Contractor will have the opportunity to appeal the determination via Administrative Reconsideration.

2.8. **Reports and Records**. The DB Contractor shall promptly provide all information required in the Department's CMTS with respect to any payments made to DBEs. By the 15th of each month and after Work begins, the DB Contractor must report payments in the Department's CMTS (a) to meet the DBE goal and (b) DBE Race Neutral participation toward Race-Neutral measure or program. These payment entries are required until all DBE subcontracting or material supply activity is completed. Zero payment entries are required when no activity has occurred in a monthly period. All such reports must be entered in the Department's CMTS.

DBE forms required for this DB Contract may be found on the Department's website: http://www.txdot.gov/business/resources/doing-business/dbe-forms.html.

On a quarterly basis, DB Contractor must submit to the Department a report setting forth the status of DB Contractor's Good Faith Efforts to satisfy the DBE goal and an updated DBE Performance Plan describing the DB Contractor's plan to solicit additional DBE firms to satisfy such DBE goal.

The DB Contractor shall notify the Department's Project Manager (or such other individual as may be designated by the Department) utilizing the Departments CMTS if payment to any DBE subcontractor is withheld or reduced for Department acceptance. See Section 9.8 of these General Conditions (Payment to Subcontractors) for additional information.

As a condition to receipt of the final payment for the work from the Department, the DB Contractor must indicate a final payment in the Department's CMTS. Such final payment indication includes a summary of all payments made to the DBEs on the Project.

The DB Contractor shall retain all records for a period of three (3) years following completion of the Work. Such records must be available at reasonable times and places for inspection by authorized representatives of Department or the DOT. The DB Contractor shall provide copies of subcontracts or agreements and other documentation upon request by the Department or the DOT.

2.9. **Failure to Comply**. The DB Contractor's failure to comply with the requirements of this Special Provision shall constitute a material breach of this Design-Build Contract. In such a case, the Department reserves the right (a) to terminate the Design-Build Contract, (b) to deduct the amount of the DBE goal not accomplished by DBEs from the compensation due or to become due the DB Contractor, (c) to secure a refund of the amount paid by the Department for the DBE goal not accomplished by DBEs, not as a penalty but as liquidated damages, or (d) such other remedy or remedies as the Department deems appropriate.

2.10. **Investigations**. The Department may conduct reviews or investigations of participants as necessary. All participants are required to cooperate fully and promptly with compliance reviews, investigations and other requests for information.

2.11. **Falsification and Misrepresentation**. If the Department determines that the DB Contractor or subcontractor was a knowing and willing participant in any intended or actual subcontracting arrangement contrived to artificially inflate DBE participation or any other business arrangement determined by the Department to be unallowable, or if the DB Contractor engages in repeated violations, falsification, or misrepresentation, the Department may:

(a) refuse to count any fraudulent or misrepresented DBE participation toward the DBE goal;

(b) withhold progress payments to the DB Contractor commensurate with the violation;

(c) refer the matter to the Office of Inspector General of the DOT for investigation; and/or

(d) seek any other available contractual remedy.

## ITEM 4 SCOPE OF WORK

### 4.1 General Obligations

### 4.1.1 General Obligations of DB Contractor

DB Contractor, in addition to performing all other requirements of the Contract Documents, shall:

**4.1.1.1** Furnish all design and other Professional Services, provide all materials, equipment and labor and undertake all efforts necessary or appropriate (excluding only those materials, services and efforts that the Contract Documents expressly specify will be undertaken by TxDOT or other Persons) to administer, design and construct the Project and maintain it during construction in accordance with the requirements of the Contract Documents so as to achieve Substantial Completion and Final Acceptance by the applicable Completion Deadlines.

**4.1.1.2** At all times provide a Project Manager approved by TxDOT 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 DB Contractor, (c) be present at the Site at all times that Work is performed, and (d) be available to respond to TxDOT or TxDOT's Authorized Representatives.

**4.1.1.3** Comply with, and require that all Subcontractors comply with, all requirements of all applicable Laws, including Environmental Laws and the Americans with Disabilities Act of 1990 (42 U.S.C. § 12101 et seq.), as amended.

**4.1.1.4** Cooperate with TxDOT and Governmental Entities with jurisdiction in all matters relating to the Work, including their review, inspection and oversight of the Work and the design and construction of Utility Adjustments.

**4.1.1.5** Use commercially reasonable efforts to mitigate delay to the Project and mitigate damages due to delay in all circumstances, to the extent possible, including by re-sequencing, reallocating, or redeploying DB Contractor's and its Subcontractors' forces to other work, as appropriate.

**4.1.1.6** Obtain and pay the cost of obtaining all Governmental Approvals required in connection with the Project (except to the extent TxDOT has expressly agreed to be responsible therefor under Section 4.7.1.)

### 4.1.2 Performance Requirements

**4.1.2.1** Performance of Work

**4.1.2.1.1** The Work shall include the design and construction of the Project, conforming to the Basic Configuration as set forth in the TxDOT Schematic Design and otherwise complying with the requirements of the Contract Documents, except as otherwise approved in writing by TxDOT. All materials, services and efforts necessary to achieve Substantial Completion and Final Acceptance on or before the applicable Completion Deadline shall be DB Contractor's sole responsibility, except as otherwise specifically provided in the Contract Documents. DB Contractor shall plan, schedule, and execute all aspects of the Work and shall coordinate its activities with all Persons who are directly impacted by the Work. Subject to the terms of Section 4.6, the costs of all Work, including all necessary materials, services and efforts, are included in the Price.

**4.1.2.2** Performance Standards; Deviations

**4.1.2.2.1** DB Contractor shall furnish all aspects of the Work and shall construct the Project and Utility Adjustments included in the Work as designed, free from defects (except to the extent that such defects are inherent in prescriptive specifications required under the Contract Documents) and in accordance with (a) Good Industry Practice, (b) the requirements, terms and conditions set forth in the Contract Documents, (c) the Project Schedule, (d) all Laws, (e) the requirements, terms and conditions set forth in all Governmental Approvals, (f) the approved Project Management Plan, the Quality Management Plan, and all component plans prepared or to be prepared thereunder, and (g) the Released for Construction Documents, in each case taking into account the Project ROW limits and other constraints affecting the Project.

**4.1.2.2.2** All Work shall be subject to certification pursuant to the procedure contained in the approved Quality Management Plan set forth below in Section 4.3.

**4.1.2.2.3** DB Contractor acknowledges that prior to the Effective Date it had the opportunity to identify any provisions of the Design-Build Specifications that are erroneous, conflicting or create a potentially unsafe condition, and the opportunity and duty to notify TxDOT in writing of such fact and of the changes to the provisions that DB Contractor believed were the minimum necessary to render the provisions correct or to render a potentially unsafe condition safe. If it is reasonable or necessary to adopt changes to the Design-Build Specifications after the Effective Date to make the provisions correct or to correct a potentially unsafe condition, such changes shall not be grounds for any adjustment to the Price, Completion Deadline or other Claim, unless (a) DB Contractor neither knew nor had reason to know prior to the Effective Date that the provision was erroneous or created a potentially unsafe condition or (b) DB Contractor knew of and reported to TxDOT the erroneous or potentially unsafe provision prior to the Effective Date and TxDOT did not adopt reasonable and necessary changes. If DB Contractor commences or continues any Work affected by such a change after the need for the change was discovered or suspected, or should have been discovered or suspected through the exercise of reasonable care, DB Contractor shall bear any additional costs associated with redoing the Work already performed. Inconsistent or conflicting provisions of the Contract Documents shall not be treated as erroneous provisions under this Section 4.1.2.2.3, but instead shall be governed by Section 1.3 of the Design-Build Agreement and Section 2.2 of the General Conditions.

**4.1.2.2.4** DB Contractor may apply for TxDOT's approval of Deviations from applicable Design-Build Specifications regarding the Work in accordance with this Section 4.1.2.2.4. All applications shall be in writing. Where DB Contractor requests a Deviation as part of the submittal of a component plan of the Project Management Plan, DB Contractor shall specifically identify and label the proposed Deviation. TxDOT shall consider in its discretion, but have no obligation to approve, any such application. DB Contractor shall bear the burden of persuading TxDOT that the Deviation sought constitutes sound and safe engineering consistent with Good Industry Practice and achieves TxDOT's applicable safety standards and criteria. No Deviation shall be deemed approved or be effective unless and until stated in writing signed by TxDOT's Authorized Representative. TxDOT's affirmative written approval of a component plan of the Project Management Plan shall constitute (a) approval of the Deviations expressly identified and labeled as Deviations therein, unless TxDOT takes exception to any such Deviation and (b) disapproval of any Deviations not expressly identified and labeled as Deviations therein. TxDOT's lack of issuance of a written approval for any Deviation within 14 days after DB Contractor applies therefor in writing shall be deemed a disapproval of such application. TxDOT's denial or disapproval of a requested Deviation shall be final and not subject to the procedures for resolving Disputes in the

DBC, including the Disputes Review Panel Process, Informal Resolution Procedures and Dispute Resolution Procedures.

**4.1.2.2.5** References in the Design-Build Specifications to manuals or other publications governing the Work shall mean the most recent editions in effect as of the Proposal Due Date, unless expressly provided otherwise. Except as set forth in Section 4.1.2.2.3, any changes to the Design-Build Specifications related to the Work shall be subject to the Change Order process for a TxDOT-Directed Change in accordance with Section 4.6.

**4.1.2.2.6** New or revised statutes or regulations adopted after the Proposal Due Date that change, add to or replace applicable standards, criteria, requirements, conditions, procedures, specifications and other provisions, including safety standards, related to the Work, as well as revisions to Design-Build Specifications to conform to such new or revised statutes or regulations, shall be treated as Changes in Law rather than a TxDOT-Directed Change to Design-Build Specifications; however, the foregoing shall not apply to new or revised statutes or regulations that also cause or constitute changes in Adjustment Standards.

**4.1.2.3** Changes in Basic Configuration

**4.1.2.3.1** Any material change in the Basic Configuration must be approved by TxDOT and authorized by a Change Order in accordance with Section 4.6 and subject to the limitations contained in Section 4.7. A Change Order is required regardless of the reason underlying the change and regardless of whether the change increases, decreases or has no effect on DB Contractor's costs. For the avoidance of doubt, any DB Contractor request for an increase in the Price or an extension of a Completion Deadline in connection with a change to the Basic Configuration constitutes a material change.

**4.1.2.3.2** DB Contractor shall be responsible for any cost increases or delays due to inaccuracies or Errors in the TxDOT Schematic Design, except where such inaccuracies or Errors result in a Necessary Basic Configuration Change in accordance with the requirements and limitations set forth in Section 4.6. Any other changes in the Basic Configuration, including any change due to an Error in the TxDOT Schematic Design that does not result in a Necessary Basic Configuration Change, shall be the responsibility of DB Contractor, with the exception of a TxDOT-Directed Change and subject to the limitations set forth in this Agreement, including Section 4.6.

**4.1.2.3.3** No Change Order shall be required for any non-material changes in the Basic Configuration that (a) have been approved by TxDOT, and (b) for which DB Contractor is not claiming any right to an increase in Price or an extension of any Completion Deadline. DB Contractor acknowledges and agrees that constraints set forth in the TxDOT-Provided Approvals, TxDOT Standard Specifications and other Contract Documents, as well as site conditions and the TxDOT Design Schematic, will impact DB Contractor's ability to make non-material changes in the Basic Configuration.

## 4.2 Project Management

DB Contractor shall establish and maintain an organization that effectively manages all elements of the Work. The Project management effort shall be defined by and follow the Project Management Plan (PMP), which consists of Project administration requirements and a collection of several management plan components (PMP components) shown in Table 4-1 below and as described in this Section 4.2.

The PMP is an umbrella document that describes DB Contractor's managerial approach, strategy, and quality procedures for the design and construction of the Project. The PMP shall achieve all requirements of the Contract Documents and is a living document for the duration of the Term. The PMP shall include the representations in Exhibit 2 to the Design-Build Agreement consistent with Section 1.3 of the Design-Build Agreement. Within the timelines for implementing each component of the PMP, the plan shall include details of external auditing procedures.

DB Contractor shall develop the Project Management Plan and its component parts, plans and other documentation in accordance with the requirements set forth in this Section 4.2 and Good Industry Practice. Prior to submitting any component part, plan or other documentation of the Project Management Plan, DB Contractor shall address any comments received from TxDOT regarding the relevant section of the initial Project Management Plan submitted by DB Contractor prior to the Effective Date.

DB Contractor shall submit to TxDOT for approval in TxDOT's discretion in accordance with the procedures described in Section 5.2.1 and the timing requirements set forth in this Section 4.2 each component part, plan and other documentation of the Project Management Plan and any proposed changes or additions to or revisions of any such component part, plan or other documentation. TxDOT may require any change required to comply with Good Industry Practice or to reflect a change in working practice to be implemented by DB Contractor.

DB Contractor shall not commence or permit the commencement of any aspect of the Work before the relevant component parts, plans, and other documentation of the Project Management Plan applicable to such Work have been submitted to and approved by TxDOT in accordance with the procedures described in Section 5.2.1 and the timing requirements set forth in this Section 4.2.

If any part, plan or other documentation of the Project Management Plan refers to, relies on or incorporates any manual, plan, procedure or like document then all such referenced or incorporated materials shall be submitted to TxDOT for approval in TxDOT's discretion at the time that the relevant part, plan or other documentation of the Project Management Plan or change, addition or revision to the Project Management Plan is submitted to TxDOT.

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

**Table 4-1: Components of the Project Management Plan**

| Component Title | Section of General Conditions That Defines the Component Requirements | TxDOT Approval is a Condition to Issuance of NTP2 | TxDOT Approval is a Condition to Commencement of Construction |
|---|---|---|---|
| **Project Administration** | Section 4.2.1 | Yes | - |
| **Public Information and Communications Plan** | Section 4.2.2 | Yes | - |
| **Safety and Health Plan** | Section 4.2.3 | Yes | - |
| **Comprehensive Environmental Protection Plan** | Section 4.2.4 | Parts as described in referenced sections | Parts as described in referenced sections |
| **TxDOT – DB Contractor Communications Plan** | Section 4.2.5 | Yes | - |
| **Other Affected Third Parties Plan** | Section 4.2.6 | Yes | - |
| **Risk Management Plan** | Section 4.2.7 | Yes | - |
| **Utility Management Plan** | Section 4.2.8 | Yes | - |
| **Right of Way Acquisition Management Plan** | Section 4.2.9 | Parts as described in referenced sections | Parts as described in referenced sections |
| **Traffic Management Plan** | Section 4.2.10 | Yes | - |
| **Maintenance Management Plan** | Section 4.2.11 | Yes | - |

DB Contractor shall include in the PMP all components described in Table 4-1 above, and shall meet the requirements of Table 4-2 in Section 4.2.12.

DB Contractor shall ensure all commitments and requirements contained in the PMP are verifiable and shall allow TxDOT to audit the plans and monitor the activities described in the PMP at all times to assess DB Contractor performance.

### 4.2.1 Project Administration

DB Contractor shall submit for TxDOT approval the project administration component of the PMP that meets the requirements of this Section 4.2.1.

DB Contractor shall include in the project administration component procedures for updating all components of the PMP and quality control to establish and encourage continuous improvement. These shall include:

(a) Procedures for preparation of amendments and submission of amendments to any part of the PMP;

(b) Auditing and management review of DB Contractor's own activities under the PMP;

(c) Auditing and management review of Subcontractor's activities and management procedures; and

(d) Procedures to facilitate review and audit by TxDOT and consultants.

(e) In addition, the Project Administration component of the PMP shall include procedures for establishing required Plans not specifically stated in this Section 4.2 inclusive of the PMP.

#### 4.2.1.1 Management Organization and Personnel

The project administration component of the PMP shall contain DB Contractor's organizational diagram and the names, contact detail, titles, and job descriptions of Key and any other DB Contractor principal personnel. DB Contractor's management organizational structure and personnel shall meet the organizational and reporting requirements in this Section 4.2.1.1 and as described in the Contract Documents.

In addition, the project administration component of the PMP shall contain procedures to establish how DB Contractor will manage Subcontractors.

##### 4.2.1.1.1 DB Contractor Project Manager

DB Contractor shall employ a Project Manager (PM) responsible for the overall design, construction, maintenance, contract administration, safety, and environmental compliance on behalf of DB Contractor during the Term. The PM shall be in the position to take full responsibility for the prosecution of the Work and will act as a single point of contact on all matters on behalf of DB Contractor during the Term. The PM shall be assigned to the Project full time and co-located/on-Site until Final Acceptance. The Project Manager shall be employed by either: (a) an Equity Member, Lead Engineering Firm or Lead Contractor; (b) a controlled subsidiary of such Equity Member, Lead Engineering Firm or Lead Contractor; (c) if the Lead Engineering Firm or Lead Contractor is a joint venture, a member of such joint venture that will perform at least thirty percent (30%) of the relevant work or a controlled subsidiary of such joint venture member; or (d) a parent company of an Equity Member, if such parent company serves as a Guarantor.

**4.2.1.1.2** Design Manager

DB Contractor shall employ a Design Manager responsible for ensuring the Design Work is completed and design criteria requirements are met. The Design Manager shall be co-located wherever design activities for the Project are being performed, provided that the Design Manager shall be available for in person meetings upon request by TxDOT. The Design Manager shall be a Registered Professional Engineer (PE). The Design Manager shall report to DB Contractor's PM. The Design Manager shall be employed by either: (a) an Equity Member, Lead Engineering Firm or Lead Contractor; (b) a controlled subsidiary of such Equity Member, Lead Engineering Firm or Lead Contractor; (c) if the Lead Engineering Firm or Lead Contractor is a joint venture, a member of such joint venture that will perform at least thirty percent (30%) of the relevant work or a controlled subsidiary of such joint venture member; or (d) a parent company of an Equity Member, if such parent company serves as a Guarantor.

**4.2.1.1.3** Construction Manager

DB Contractor shall employ a Construction Manager responsible for ensuring that the Project is constructed in accordance with the Contract Documents. The Construction Manager shall be assigned to the Project full time and co-located/on-Site until Final Acceptance. The Construction Manager shall report to DB Contractor's PM. The Construction Manager shall be employed by either: (a) an Equity Member, Lead Engineering Firm or Lead Contractor; (b) a controlled subsidiary of such Equity Member, Lead Engineering Firm or Lead Contractor; (c) if the Lead Engineering Firm or Lead Contractor is a joint venture, a member of such joint venture that will perform at least thirty percent (30%) of the relevant work or a controlled subsidiary of such joint venture member; or (d) a parent company of an Equity Member, if such parent company serves as a Guarantor.

**4.2.1.2** Document Management

The project administration chapter of the PMP shall contain procedures for document management including the manner in which records will be maintained in compliance with the Design-Build Specifications and any specific systems DB Contractor will use.

All electronic information submitted to TxDOT shall be searchable and legible. The PMP shall describe the controls exercised by DB Contractor to ensure that: documents (including the PMP itself) undergo relevant review and approval prior to release; users have access to current versions of documents; versions of documents are identified; obsolete or superseded documents are so marked and prevented from unintended use; and changes to documents undergo same level of review and approval. Document management plan shall include quality control (QC)/quality assurance (QA) processes.

**4.2.1.2.1** Document and Records Storage and Retrieval Requirements

DB Contractor shall establish and maintain a secure electronic data management system to store, catalog, capture metadata, and retrieve all documents and records created or received by DB Contractor or any DB Contractor-Related Entity for the Project pursuant to the Contract Documents. DB Contractor's secure electronic data management system shall be established and operational by the earlier of 30 days after NTP1, or TxDOT's receipt of the first Submittals from DB Contractor. All Submittals shall be submitted to TxDOT through TxDOT's electronic content management system (SharePoint Site). Unless otherwise directed by TxDOT, DB Contractor's record retention shall comply with the requirements of the Texas State Records Retention

Schedule and TxDOT's file plan. As requested by TxDOT, DB Contractor shall submit other Project related documents and records via TxDOT's electronic content management system at the time of the expiration of the Term or earlier termination of the Agreement.

Construction quality acceptance test results shall be automatically transmitted to TxDOT's I2MS/MATS system using TxDOT's extensible markup language (XML) web service. See TxDOT QAP for DB Projects, Appendix C for IQF Data Transfer Requirements. DB Contractor shall coordinate with TxDOT to obtain the most current version prior to commencing construction quality acceptance testing. The responsible technician and his/her supervisor shall sign the daily test reports. Access to the results of the daily tests shall be provided to TxDOT within 48-hours after test completion.

In the provision of DB Contractor's secure electronic data management system, DB Contractor shall:

- Use data systems, standards, and procedures compatible with those employed by TxDOT and implement any new operating practices required as a result of TxDOT's amendments to any such systems, standards, and procedures;

- Provide a secure location for any interface as may be provided by TxDOT, such that only authorized users have access and that it is protected from loss, theft, damage, unauthorized, or malicious use;

- Employ appropriate standards and procedures, and train DB Contractor personnel to operate any TxDOT's electronic content management system that TxDOT may require in connection with the Project; and

- Provide a mechanism for the electronic transfer of metadata along with the associated PDF images for uploading into an electronic content management system employed by TxDOT.

To allow for disaster recovery, DB Contractor shall back-up all Project-related documents and records on a nightly basis. On a weekly basis, DB Contractor shall back-up and store all Project-related documents and records in a secure off-site location.

DB Contractor shall provide TxDOT at DB Contractor's expense, sufficient access to DB Contractor's secure electronic data management system as deemed necessary by TxDOT.

**4.2.1.2.2** Professional Services Submittal Requirements

DB Contractor shall prepare and provide all Project related Submittals and documents using English units of measure.

DB Contractor shall furnish electronic copies of all Submittals. The electronic copies shall be provided in a useable format or in the format in which the Work was originally created.

DB Contractor shall include with each Submittal a transmittal cover sheet in a form acceptable to TxDOT.

The minimum sheet size for the Submittals (other than plan Submittals) shall be 8.5 inches by 11 inches. The maximum sheet size for the Submittals (other than plan Submittals) shall be 18 inches

by 120 inches. Plan Submittals shall be 11 inches by 17 inches. Every page in a Submittal shall be numbered in sequence.

Unless otherwise directed by TxDOT, DB Contractor shall provide two hard copies of all Submittals.

Each Submittal shall be full and complete and shall be assigned a unique, sequential number, clearly noted on the transmittal cover sheet. Revised Submittals shall bear an alphanumeric designation which consists of the unique Submittal number assigned to the original Submittal followed by a letter of the alphabet to represent that it is a subsequent Submittal of the original.

Any changes made on a revised Submittal, other than those made or requested by TxDOT, shall be identified and noted on the revised Submittal.

Design Submittals shall include a title block, consistent with the standard Project drawing format established as part of the QMP, with the following information:

- Date of issuance and including all prior revision dates;
- Contract title and number;
- The names of DB Contractor and applicable Affiliates and DB Contractor Related Entities;
- Stage of development;
- Reference to applicable technical documents and amendments;
- If required, review and acceptance or approval from a Governmental Entity, prior to submission to TxDOT;
- Review stamp;
- Action block space – All Submittals shall include a sufficient blank space in which DB Contractor may list required actions to be taken;
- When calculations accompany drawings in a Submittal, cross-references from the body of the calculations to the individual drawing to which the pages of the calculations pertain; and.
- Organization of the CADD drawings and associated documents in a logical manner, having a uniform and consistent appearance, and clearly depicting the intention of the design

### 4.2.2 Public Information and Communications Plan

DB Contractor shall submit to TxDOT for approval a comprehensive Public Information and Communications Plan (PICP) as part of the PMP, based upon the preliminary public information and communications plan submitted by DB Contractor prior to the Effective Date, which informs, educates, and engages the Customer Groups throughout the Project. The PICP shall be submitted in both hardcopy form and electronic format compatible with TxDOT software.

Following issuance of NTP1, DB Contractor shall organize a communications planning workshop with TxDOT to discuss development of the PICP and to ensure the contents of the PICP meet

TxDOT expectations. TxDOT and DB Contractor will jointly develop an agenda and determine a suitable location for the workshop.

DB Contractor shall submit the PICP to TxDOT for approval. The PICP shall contain the following information:

(a) Organization

(i) DB Contractor's main contractual arrangements; and

(ii) Organizational structure covering the activities to be performed in accordance with the Contact Documents.

(b) Personnel

(i) DB Contractor's plan to provide experienced Personnel to perform Work in accordance with this Section 4.2.2;

(ii) Arrangements for coordinating and managing staff interaction with TxDOT and its consultants, including colocation of Key Personnel and a description of approach to coordinating work of off-site personnel;

(iii) Names and contact details, titles, job roles and specific experience required for Key Personnel and for other principal personnel; and

(iv) Names and contact details, titles, and job roles of principal personnel for Subcontractors and any third party with which DB Contractor will coordinate his activities.

(c) Subcontractors

(i) Overall control procedures for Subcontractors, including consultants and subconsultants;

(ii) Responsibility of Subcontractors and Affiliates; and

(iii) Steps taken to ensure Subcontractors and suppliers meet the obligations imposed by their respective contracts.

(d) Interfaces

(i) Procedures for liaison with the public, the media, and other Customer Groups in accordance with Item 11 of the Design-Build Specifications and the press media policy of TxDOT; and

(ii) Procedures to coordinate with Project Stakeholders, such as Governmental Entities and other Customer Groups.

(e) Procedures

(i) Procedures describing how the principal activities will be performed.

(f) Quality Control

(i) Quality control procedures including a resource table for monitoring and auditing all public information and communication services;

(ii) Procedures to ensure accuracy, completion, and quality in submittals to TxDOT, Governmental Entities and Customer Groups; and

(iii) Procedures to establish and encourage continuous improvement.

(g) Audit

(i) Name of DB Contractor's representative with defined authority for establishing, maintaining, auditing, and reporting on PMP; and

(ii) Name, title, roles and responsibilities of supporting quality management staff reporting to the person with defined authority.

(h) Document Management

(i) The manner in which records will be maintained in compliance with the Design-Build Specifications, including any specific systems DB Contractor will use; and

(ii) Document management procedures in compliance with Section 4.2.1.2.

The PICP shall identify specific outreach or engagement activities, the frequency of those activities, the modes of communication that will be used, and the processes that will be used in order to measure the effectiveness of the PICP.

DB Contractor shall identify the Customer Groups and develop specific plans to respond to their concerns and needs regarding the Project. DB Contractor shall continually maintain the plans to ensure delivery of high-quality, well-executed communications from approval of the PICP to the end of the Term.

The PICP shall be flexible enough to capture the full magnitude of yet-to-be-determined impacts from Project activities and the public's reaction to these and other impacts.

Together with TxDOT's designated point of contact for the local public information office, DB Contractor shall periodically review the PICP (at least annually) to forecast, plan, and coordinate updates in the plan and strategies needed to effectively accomplish the stated goals and objectives. DB Contractor shall make appropriate changes to the PICP for TxDOT's approval as required to suit the changing goals and needs of the Project and shall cooperate with TxDOT to amend the PICP as required to suit circumstances as yet unknown, including public reaction to the impacts, real or perceived, from the Work and the depth, breadth, and frequency of information necessitated by Customer Groups.

The PICP shall include a general timeline that lists public information activities throughout the Project. This timeline shall be used as an initial guide and shall be updated by DB Contractor as the Project is implemented but no less than on an annual basis.

DB Contractor shall provide sufficient qualified staff to effectively implement the PICP.

In developing the PICP, DB Contractor shall develop appropriate provisions to achieve the following requirements:

- Gain and maintain support or informed consent from Customer Groups, building on existing community partnerships and communication networks.
- Provide Customer Groups with regular opportunities for input early and often throughout the development process.
- Demonstrate to Customer Groups that the Project will be developed pursuant to a well-executed program.
- Notify Customer Groups in advance of key Project ROW acquisition, construction and maintenance activities, and communicate the potential impacts of these activities.
- Provide public information that facilitates alternative trip planning during construction.
- Address the Project-specific concerns of Customer Groups, including interests in Emergency Services vehicle access, business owner and patron driveway access, delivery access, adjacent neighborhood access, changes to bicycle and pedestrian access and neighborhood traffic patterns, changes to mobility access associated with the Americans with Disabilities Act (ADA), construction noise and lighting, and ongoing noise issues.

### 4.2.3 Safety and Health Plan

DB Contractor shall be responsible for the safety and health of its personnel and of the general public affected by the Project. DB Contractor shall prepare and submit to TxDOT for review and concurrence a comprehensive Safety and Health Plan that is consistent with and expands upon the preliminary Safety and Health Plan submitted by DB Contractor prior to the Effective Date. All members of DB Contractor's team shall adhere to DB Contractor's Safety and Health Plan.

DB Contractor shall take full account of the unique attributes of this Project in preparing the Safety and Health Plan, including but not limited to, the urban environment, and the size and scope of the Project. The Safety and Health Plan shall fully describe DB Contractor's policies, plans, training programs, Work Site controls, and Incident response plans to ensure the safety and health of personnel involved in the Project and the general public affected by the Project. The Safety and Health Plan shall cover all phases of the Work, and DB Contractor shall review, evaluate, and update such plan as often as necessary to reflect relevant changes during the Term. The Safety and Health Plan shall contain, at a minimum, the following provisions described below.

#### 4.2.3.1 Safety Management

DB Contractor shall identify the personnel and responsible staff who will implement, maintain, and enforce the Safety and Health Plan policies, plans, and training programs in the Safety and Health Plan. At a minimum, DB Contractor shall provide a full time on-the-job Safety Manager. The Safety Manager's qualifications, at a minimum, shall include:

- Roadway construction and safety enforcement experience;
- Complex, heavy civil construction experience, including safety management experience on complex, heavy civil projects;

- Though not required, certification, at or before the Effective Date, as a Construction Health and Safety Technician by the Board of Certified Safety Professionals, or certification as a Certified Safety & Health Official, may be substituted for safety management experience;

- Completion of the OSHA #500 course – Trainer Course in OSHA Standards for Construction;

- Training and current certification for cardiopulmonary resuscitation (CPR) and first aid;

- Completion of the following training sponsored by an accredited agency;

- Work zone traffic control; and

- Flaggers in work zones.

The Safety Manager shall report directly to DB Contractor's executive management team. The Safety Manager shall have authority to stop all Work on the Project. The Safety Manager shall be co-located/on-site from beginning of construction activities through Final Acceptance. The Safety Manager shall be employed by either: (a) Equity Member, Lead Engineering Firm, or Lead Contractor itself; or (b) a controlled subsidiary of such Equity Member, Lead Engineering Firm, or Lead Contractor, or (c) a parent company of an Equity Member if such parent company serves as a Guarantor.

In addition, DB Contractor's safety management team shall also have the minimum additional personnel. As part of DB Contractor's safety and health management, all Work shifts shall have, as a minimum, an on-Site Shift Safety Representative. The Shift Safety Representative shall have the following minimum qualifications:

- Progressive safety experience and general competency in the construction safety disciplines related to the Work;

- Completion of the OSHA 10-hour safety and health course; and

- Training and current certification for CPR and first aid.

The Safety and Health Plan shall define the role and responsibilities of the Safety Manager and safety staff, the hierarchical relationship between the Safety Manager and other managers, supervisors, and employees, and how responsibility and accountability for safety will be incorporated at all levels on the Project.

The Safety and Health Plan shall set forth the obligations of all personnel in adhering to the Safety and Health Plan, as well as establish and communicate clear goals for safety, security, and health, including defined objectives for meeting the goals. Requirements for evaluating the effectiveness of policies and measuring success in meeting the goals and objectives of the Safety and Health Plan shall be set forth in the Safety and Health Plan and an environment and means for continuous evaluation and improvement shall be established to achieve the Safety and Health Plan goals and to identify deficiencies so that the goals and objectives can be revised as needed to improve the safety and health of DB Contractor's personnel and of the general public affected by the Project.

The Safety and Health Plan shall set forth incident response plans to ensure the safety and health of personnel involved in the Project and the general public affected by the Project. In addition, the Safety and Health Plan shall set forth procedures for immediately notifying TxDOT of all incidents

arising out of or in connection with the performance of the Work, whether on or adjacent to the Project.

**4.2.3.2** Worksite and Jobsite Analysis

The Safety and Health Plan shall establish a reliable system for allowing employees to notify management personnel about conditions that appear hazardous, and to receive timely and appropriate responses, without fear of reprisal.

DB Contractor shall keep readily available at DB Contractor's Project office Site an updated summary of Work related incidents, which may include, at a minimum, a board promoting the number of consecutive incident-free days.

**4.2.3.3** Hazard Prevention and Personal Safety

The Safety and Health Plan shall set forth: (i) the methods and procedures to identify and detail all hazards that may be encountered by personnel while performing the Work, and (ii) practices and procedures that have been developed and implemented to address prevention of identified hazards. DB Contractor shall establish a communications protocol to ensure all employers and employees are aware of hazards in all areas and how to deal with them appropriately. Means shall be provided to evaluate all anticipated and unanticipated activities, and address potential hazards related to these activities.

DB Contractor shall provide the means to ensure personnel understand and comply with safe work practices and procedures through training, positive reinforcement, correction of unsafe performance, and if necessary, enforcement through a clearly communicated disciplinary system established within the Safety and Health Plan.

DB Contractor shall handle Hazardous Materials in compliance with Section 4.8 and the applicable requirements of the Design-Build Specifications.

**4.2.3.4** Training

DB Contractor shall establish methods within the Safety and Health Plan to identify, develop, and provide relevant training for employees and supervisors designed to ensure that all employees understand and are aware of the hazards to which they may be exposed, and are aware of the proper methods for avoiding the hazards.

DB Contractor shall establish methods within the Safety and Health Plan to identify, develop, and provide supervisory training programs to ensure supervisors understand the key role they play in job Site safety and to enable them to carry out their safety and health responsibilities effectively; to analyze the Work under their supervision to anticipate and identify potential hazards; and to maintain physical protection in their work areas, including the establishment of policies that ensure each employee is provided with the equipment necessary to complete assigned tasks safely.

The Safety and Health Plan shall set forth the procedures to plan and prepare for Emergencies, and to conduct training and Emergency drills.

**4.2.3.5** Drug Free Work Zone

The Safety and Health Plan shall set forth the policies and procedures to require adherence to a 100% drug/alcohol free work zone.

**4.2.3.6** Incident and Emergency Management

DB Contractor shall establish procedures within the Safety and Health Plan to achieve at a minimum, the following:

- Maintenance of communication for the exchange of information between DB Contractor, TxDOT, and other involved agencies;
- Coordinated support through interaction with local, State, and federal Governmental Entities, as well as other entities, for safe and efficient construction;
- Discussion and coordination with Emergency response, traffic control, security, and operational issues affecting construction of the Project, and associated system feeders and exits;
- Procedures to update participating agencies regarding status of construction of the Project, and associated system feeders and exits, to assure safe and timely response to Emergency events. As a minimum, this shall include off-Site and on-Site traffic routing changes, and changes to Site access, fire suppression system modifications and in-service availability of standpipes or fire suppression water supply, if applicable, and changes in the Work that may create a greater likelihood of occurrence of a particular type of Emergency;
- Procedures for notifying TxDOT of Incidents arising out of or in connection with the performance of the Work;
- Compliance with the local hurricane evacuation plan.

**4.2.4 Comprehensive Environmental Protection Plan**

As part of the PMP, DB Contractor shall develop and implement a CEPP, applicable throughout the Term to establish the approach, requirements, and procedures to be employed to protect the environment. The CEPP shall be developed in the form of a comprehensive environmental management program incorporating all features and guidelines outlined in ISO 14001. All component parts shall reflect in order of priority: impact avoidance, minimization, and as last resort, mitigation. The CEPP shall satisfy applicable FHWA, TxDOT and resource agency requirements, including those detailed as commitments in any Environmental Approvals.

The CEPP shall outline the overarching plan by which DB Contractor shall meet all Environmental Commitments made during the Environmental Approval and permitting processes and any other environmental requirements. All environmental requirements and commitments shall be reflected, as appropriate, in the design and implemented throughout the Work.

- At a minimum, the CEPP shall include the following component parts:
- Environmental Management System (EMS);
- Environmental Compliance and Mitigation Plan (ECMP);

- Environmental Protection Training Program (EPTP);
- Hazardous Materials Management Plan (HMMP);
- Communication Plan (CP);
- Construction Monitoring Plan (CMP);
- Recycle Plan (RP); and
- Environmental team resumes.

The dates by which component parts comprising the CEPP are to be submitted for TxDOT approval are set forth throughout this Section 4.2.4. Amendments and updates to the CEPP as necessary to address changing conditions and environmental requirements shall be in accordance with the procedures for amendments to the PMP.

**4.2.4.1** Environmental Management System

The EMS is a system of documented plans and procedures in which the roles and responsibilities for the execution of environmental activities are clearly defined including the interaction between those processes. DB Contractor shall utilize the EMS to track on-going issues, identify environmental compliances and non-compliances, and identify actions required/taken to correct any non-compliance.

The EMS shall establish a schedule for periodic CEPP reviews to ensure it is up to date. The EMS shall provide a means to track the reviews and results. At a minimum, the EMS shall require documents in the following list to be on file at the Site and available at any time for TxDOT review:

- CEPP component parts;
- Weekly environmental monitoring reports;
- Investigative Work Plans, Site Investigation Reports (SIRs), and remedial action plans as necessary for hazardous material discovery and remediation;
- Wetland delineations reports and appropriate Section 404 authorized permit application(s);
- Mitigation or resource monitoring reports, as required by resource-specific mitigation plans;
- Design and coordination for wetlands, stream, and floodplain mitigation;
- Texas Pollutant Discharge Elimination System (TPDES) Construction General Permit (TXR150000), Notice of Intent;
- TPDES Construction General Permit (TXR150000), Notice of Termination for Work completed;
- Storm Water Pollution Prevention Plan (SW3P) and amendments, as required to reflect Project development and staging, including off-site plans, controls, and reporting from borrow sites, waste sites, and plant location sites;

- Completed permit applications and permits as issued;
- Pre-construction inspection report;
- Training documentation; and
- DB Contractor's final traffic noise analysis, if different than that included in the TxDOT-Provided Approvals.

**4.2.4.1.1** Environmental Compliance Manager

DB Contractor shall employ a full-time Environmental Compliance Manager (ECM) responsible for overall environmental compliance. The ECM shall report and coordinate all issues directly with TxDOT and DB Contractor's Project Manager. In the event the ECM, in consultation with DB Contractor's Project Manager and TxDOT, is unable to reach satisfactory resolution of environmental issues, the ECM shall provide written notification to DB Contractor and TxDOT outlining the concerns, actions taken in attempt to correct the concerns, and provide a recommendation as to the suggested course of action.

The ECM shall direct the work of the environmental team and shall monitor, document, and report the current status of environmental compliance for the Work. The ECM shall be responsible for implementation and maintenance of the SW3P. The ECM shall report immediately to TxDOT and DB Contractor any violation or non-compliance and shall include with any such report, the appropriate recommendations for corrective action. The ECM shall have the authority to stop Work.

The ECM shall coordinate with TxDOT, DB Contractor, and appropriate Governmental Entities. The ECM shall submit all necessary environmental documentation and monitoring reports to the appropriate Governmental Entities and when applicable, through TxDOT, to the extent necessary to maintain compliance with applicable Environmental Approvals.

DB Contractor shall not have the ability to relieve the ECM of his or her duty without the written consent of TxDOT. Should DB Contractor desire to replace the ECM, DB Contractor shall submit to TxDOT the resume of a replacement candidate. The replacement candidate shall be available fulltime within 30 days after delivery of TxDOT's written acceptance. In the absence of the ECM, DB Contractor's Hazardous Materials Manager shall act as an interim ECM.

The ECM candidate shall have experience successfully managing environmental compliance of highway construction. The ECM shall have the following experience:

(a) Developing and managing a SW3P;

(b) Developing and managing a hazardous substance and petroleum products management plan;

(c) Implementing environmental mitigation plans;

(d) Providing environmental and personal protection training;

(e) Monitoring compliance with the MBTA; and

(f) Monitoring compliance with Section 404/401 permit conditions.

The ECM's qualifying experience must demonstrate the ECM is familiar with:

1. The scope and terminology of American Society of Testing and Materials (ASTM) E 1527-13, Standard Practice for Environmental Site Assessments: Phase I Environmental Site Assessment Process;

2. Provisions of the TPDES CGP (TXR 150000);

3. Requirements of Section 404/401 and permit provisions; and

4. FHWA and TxDOT guidance on NEPA and State environmental compliance.

The ECM shall be employed by (a) an Equity Member; (b) Lead Engineering Firm, Lead Contractor, Independent Quality Firm or DB Contractor's lead maintenance firm; (c) a controlled subsidiary of (a) or (b); (d) if the Lead Engineering Firm, Lead Contractor, Independent Quality Firm or DB Contractor's lead maintenance firm is a joint venture, a member of such joint venture that will perform at least thirty percent (30%) of the relevant work or a controlled subsidiary of such joint venture member; (e) a parent or sister company of an Equity Member, if such parent or sister company serves as a Guarantor; or (f) a first-tier Subcontractor to either the DB Contractor or the Lead Contractor.

**4.2.4.2** Environmental Compliance and Mitigation Plan

The ECMP shall discuss the methods DB Contractor will employ to accomplish the goal of zero environmental violations for the project. The ECMP shall document and fully detail compliance strategies and procedures to be employed by DB Contractor to cause Work performance in accordance with requirements of applicable Environmental Laws and Environmental Approvals. This plan shall establish and document schedules, protocols, and methodologies to be used in accomplishing Work, with an emphasis on monitoring, reporting, corrective actions, and adaptive management. The plan shall include a Compliance Action Plan (CAP).

The CAP shall consist of a decision making matrix, which will define the triggers for initiating or re-initiating environmental compliance actions for construction and maintenance activities, including construction noise mitigation measures and the triggers for initiating mitigation measures. For each trigger, the CAP shall identify the appropriate type or level of environmental study or other compliance action necessary to ensure the ongoing validity of Project Environmental Approvals and commitments. In addition, the ECMP shall detail any mitigation required by Environmental Approvals and DB Contractor's approach to satisfying mitigation requirements, including mitigation requirements identified after completion of the ECMP.

The ECMP shall include the following components as described below.

**4.2.4.2.1** Environmental Permits, Issues, and Commitments Sheets

DB Contractor shall develop and maintain Environmental Permits, Issues, and Commitments (EPIC) construction plan sheets. Applicable permits, issues, and Environmental Commitments shall be identified on EPIC sheets and updated throughout the Term to identify on-Site conditions.

EPIC sheets shall include the Environmental Commitments required to ensure that any discharge from the Project site into a sanitary sewer system complies with appropriate codes and standards of the sanitary sewer owner.

**4.2.4.2.2** Clean Water Act – Sections 404 and 401: Waters and Wetlands of the United States

TxDOT-Provided Approvals may identify Section 404 impacts associated with Project improvements. Based on the NEPA Approvals, the temporary and permanent Section 404 impacts are anticipated to be authorized by Nationwide Permit 14 – Linear Transportation Projects without a Preconstruction Notification.

DB Contractor shall, based on final design, assess impacts to each potentially jurisdictional feature. Based on results of assessment, and if required, DB Contractor shall update the related Section 404 impacts associated with the Project and perform all Work required to procure the necessary Section 404 permits and Section 401 certifications from the U.S. Army Corps of Engineers (USACE) and Texas Commission on Environmental Quality (TCEQ). DB Contractor shall determine Project mitigation requirements, prepare a mitigation plan per 33 CFR Part 332, and deliver all required mitigation.

DB Contractor is responsible for the maintenance and monitoring of any permittee-responsible mitigation sites for the term stipulated within the USACE approved mitigation plan. Project mitigation options shall be provided in accordance with the TxDOT Memorandum dated June 17, 2013 regarding TxDOT's mitigation procurement policy. All coordination with the USACE regarding Section 404 permitting and mitigation shall be disclosed to TxDOT for review and comment before submission to USACE.

DB Contractor shall document how they will identify Section 404 impacts, obtain required Section 404 permits, and comply with the terms and conditions of the Section 404 permits and 401 certifications issued to DB Contractor during the life of the Project. At a minimum, the documentation shall include:

- Process for training personnel to recognize Waters of the U.S. that fall under the jurisdiction of the USACE;
- Process for identifying Section 404 impacts associated with the Project;
- Process for obtaining required Section 404 permits;
- Process for communicating the terms and conditions of all Section 404 permits and TCEQ 401 certifications and other permits as necessary;
- Procedures for carrying out any required Environmental Commitments and mitigation; and
- Procedures for incorporating additional properties outside the original NEPA approved TxDOT Schematic Design and any off-right-of-way Project Specific Locations (PSL) as required by all Section 404 permit(s) issued to either TxDOT or DB Contractor by the USACE.

DB Contractor shall comply with all general and regional conditions set forth by authorized Section 404 nationwide permits as described in TxDOT-Provided Approvals.

**4.2.4.2.3** Clean Water Act – Section 402: Texas Pollutant Discharge Elimination System

DB Contractor shall document how it will comply with Section 402 of the Clean Water Act (CWA). The documentation shall provide that DB Contractor has day-to-day operational control over activities necessary to ensure compliance with the SW3P and has the sole responsibility for any

potential non-compliance issues. The documentation shall also provide that DB Contractor is responsible for submitting a Notice of Intent (NOI) and Notice of Termination (NOT) to TCEQ. At a minimum, the documentation shall include:

- Process for training personnel on the requirements and conditions of the Texas Construction General Permits (GCP) for storm water discharges from Construction Sites;
- Procedures for incorporating Additional Properties outside the original NEPA approved TxDOT Schematic Design and any off-right-of-way PSL within one linear mile of the Project limits to comply with the CGP and the Project's SW3P;
- Procedures for handling non-compliance issues;
- Escalation procedures for SW3P items;
- Procedures for meeting all applicable Municipal Separate Storm Sewer System (MS4) requirements; and
- Procedures for implementing detention Best Management Practices (BMP).

**4.2.4.2.4** Rivers and Harbors Act of 1899 – U.S.C., Title 33

**4.2.4.2.5** State Listed Species and Unregulated Habitat

DB Contractor shall comply with all State laws and regulations relating to State listed threatened and endangered species. Prior to construction, DB Contractor shall review the applicable and most current State threatened and endangered species list to determine if changes to the list (including, but not limited to, addition of species, changes to species habitat range and species listing status) have occurred since authorization of the applicable Environmental Approvals. DB Contractor shall identify all State listed species that have the potential to exist within the Project limits and determine the extent of Project impacts to the listed species during final design. DB Contractor shall perform field surveys to determine the presence of all the State listed species considered to incur impacts by the Project. If the field surveys reveal that State listed species are present within the Project limits, and adverse impacts will occur, DB Contractor shall work with TxDOT to develop mitigation approaches. DB Contractor shall prepare any materials needed for coordination or consultation with regulatory agencies, at TxDOT's direction. TxDOT will conduct coordination or consultation with the applicable State agencies regarding mitigation for the Project. DB Contractor is responsible for any mitigation requirements identified from regulatory agency coordination/consultation.

**4.2.4.2.5.1** Threatened and Endangered Species/Species of Greatest Conservation Need

DB Contractor shall avoid harming wildlife within the entire project area. DB Contractor shall utilize best management practices (BMPs) from the TxDOT/Texas Parks and Wildlife Department (TPWD) Programmatic Agreement (PA) for the listed species that could occur within the study area. DB Contractor shall use wildlife-friendly erosion and sediment control BMPs to stabilize disturbed areas where applicable. DB Contractor shall adhere to the BMPs included which were included in the EPIC sheets.

**4.2.4.2.5.2** Vegetation and Habitat

DB Contractor shall use minimization and avoidance mitigation practices to preserve vegetation communities within the Project to the greatest extent possible. DB Contractor shall reassess unavoidable impacts to all vegetation communities based on the final design in accordance with the September 1, 2013 TxDOT and TPWD Memorandum of Understanding. TxDOT shall determine the need for further coordination/consultation with applicable agencies and perform such coordination. DB Contractor shall perform all studies and prepare the materials necessary to coordinate with applicable agencies, at TxDOT's discretion. DB Contractor shall also perform additional assessments as required through agency consultation. DB Contractor shall identify and implement all best management practices and/or mitigation required during the coordination/consultation process.

DB Contractor shall reseed/re-vegetate all areas of bare ground in accordance with TxDOT standards and Executive Order (EO) 13112 on Invasive Species and the Executive Memorandum on Beneficial Landscaping.

**4.2.4.2.6** Endangered Species Act, Fish and Wildlife Coordination Act and Migratory Bird Treaty Act

DB Contractor shall document how it will comply with the Endangered Species Act (ESA), the Fish and Wildlife Coordination Act (FWCA) and the Migratory Bird Treaty Act (MBTA). The documentation shall reflect that coordination with U.S. Fish and Wildlife Service (USFWS) shall be conducted by TxDOT. At a minimum, the documentation shall include:

- Process for training personnel on the requirements of the ESA, FWCA, and MBTA;
- Process for communicating any commitments regarding ESA, FWCA, and MBTA on the Project; and
- Procedures for complying with any commitments, including mitigation measures or activities.

**4.2.4.2.6.1** Federally Listed Species

DB Contractor shall comply with all federal laws and regulations as related to federally listed threatened and endangered species. Prior to construction, DB Contractor shall review the applicable and most current federal threatened and endangered species list to determine if changes to the lists (including, but not limited to, addition of species, changes to species habitat range, and species listing status) have occurred since authorization of the applicable Environmental Approvals. DB Contractor shall identify all federally listed species with potential to exist within the Project limits and determine the extent of Project impacts to the listed species during final design. DB Contractor shall perform field surveys to determine the presence of all the federally listed species considered to incur impacts by the Project. If it is determined that federally listed species are present within the Project limits, and adverse impacts will occur, DB Contractor shall work with TxDOT to develop mitigation approaches. DB Contractor shall prepare any materials needed for coordination or consultation with regulatory agencies, at TxDOT's direction. TxDOT will conduct coordination or consultation with the applicable federal agencies for the Project. DB Contractor is responsible for any mitigation requirements identified from regulatory agency coordination/consultation.

In accordance with the MBTA, no vegetation or man-made structures containing active nests, eggs, or young shall be removed during construction. In the event migratory birds are encountered

during construction, DB Contractor shall make every effort to avoid adverse impacts to protected migratory birds, active nests, and their young. DB Contractor shall remove all old migratory bird nests between October 1 and February 15 from any vegetation or structure where construction will occur. In addition, DB Contractor shall be prepared to prevent migratory birds from building nests within applicable structures between February 15 and October 1. All proposed prevention methods shall be approved by TxDOT prior to planned use.

**4.2.4.2.7** Traffic Noise

The traffic noise walls proposed for construction will be determined by TxDOT through the public involvement process (polling of adjacent property owners and noise workshops) during the environmental phase of the project, before contract award. DB Contractor shall construct proposed noise walls in the early construction phases of the Project to help minimize construction noise.

In the event that DB Contractor's design requires a re-assessment of the traffic noise impacts, DB Contractor shall document how it will address traffic noise mitigation and how it will perform public involvement associated with noise mitigation (noise workshops). At a minimum, the documentation shall include:

- Process for carrying out noise workshops and noise mitigation measures as identified and discussed in any supplemental noise studies completed by DB Contractor;
- Processes for carrying out noise mitigation measures determined throughout the Term;
- Process for carrying out noise mitigation measures determined throughout the life of the Project; and
- Process to handle changes that may occur to proposed permanent noise mitigation in the TxDOT-Provided Approval and TxDOT Schematic Design.

DB Contractor is responsible for public notification of affected property owners, the surveying/balloting of affected property owners, and final design of approved noise barriers. If noise walls are warranted, DB Contractor shall perform all noise workshops per TxDOT Guidelines for Analysis and Abatement of Highway Traffic Noise and in accordance with Item 11 of the Design-Build Specifications. DB Contractor shall allow 15 Days for adjacent affected property comments after each noise workshop. DB Contractor shall coordinate with TxDOT all results of noise workshops prior to design of noise walls.

To fulfill the commitments of the previously mentioned TxDOT-Provided Approvals, DB Contractor is responsible for implementing all noise mitigation measures to minimize construction and long-term impacts of the Work as prescribed in TxDOT-Provided Approvals and subsequent Environmental Approvals secured by DB Contractor. DB Contractor acknowledges that TxDOT-Provided Approvals and proposed permanent noise mitigation are based on the TxDOT Schematic Design, Schematic ROW, and polling of adjacent property owners (public involvement); consequently, if design changes or additional ROW become necessary, applicable noise analyses may require re-assessment and the proposed permanent noise mitigation may require amending by DB Contractor as the Work progresses. Such amendments shall be submitted to TxDOT for review and approval.

DB Contractor shall communicate any changes to TxDOT's proposed traffic noise mitigation to property owners adjacent to the previously proposed noise walls in accordance with the TxDOT

FHWA approved 2011 Guidelines for Analysis and Abatement of Roadway Traffic Noise. If new noise walls are proposed as a result of the design changes, DB Contractor shall plan and perform a noise workshop to address adjacent property owners concerns about the new noise wall and complete polling of adjacent property owners to determine if the new noise walls are desirable. DB Contractor is responsible for all coordination with adjacent property owners and Governmental Entities necessary to obtain all such amendments to TxDOT-Provided Approvals and for ensuring compliance with the conditions and schedules set forth in any amendment of any TxDOT-Provided Approvals.

**4.2.4.2.8** Water Well Impacts and Requirements

DB Contractor shall document how they will address wells, including, municipal, domestic, irrigation, oil and gas, unplugged, or monitoring and observations wells, encountered during the life of the Project. The documentation shall include that DB Contractor is responsible for plugging and abandoning all wells in accordance with Item 103, Disposal of Wells, from TxDOT Standard Specifications, as well as DB Contractor is responsible for any required remediation efforts. At a minimum, the documentation shall include:

- Process for training personnel on recognition of wells;
- Procedures for handling wells; and
- Procedures for handling contamination of a well that results from DB Contractor's work. Procedures shall include a requirement to notify TxDOT and with TxDOT's concurrence notify appropriate regulatory agencies within 24 hours of the discovery.

**4.2.4.2.9** Cultural Resource Studies

DB Contractor shall be responsible for ensuring compliance with cultural resource Laws and any project Environmental Commitments on the Project through the Term. TxDOT shall perform consultation for the Project according to current procedures for implementing Section 106 of the National Historic Preservation Act, and the Antiquities Code of Texas.

Subsequent to issuance of NTP1, DB Contractor is responsible for performing any necessary cultural resource surveys, evaluations, testing, and mitigation in those areas outside the footprint of the Project ROW shown on the TxDOT Schematic Design as defined in the TxDOT-Provided Approval and within the area of potential effects. DB Contractor shall coordinate all necessary Antiquities Permits through TxDOT. Antiquities Permits shall be obtained from the Texas Historical Commission (THC) for archeological surveys, testing, monitoring, and data recovery.

DB Contractor shall document efforts to avoid impacts to cultural resources that are listed on or determined to meet the eligibility criteria for listing on the National Register of Historic Places (NRHP) as specified in 36 CFR 60.4, or that are designated or determined to meet the criteria for designation as State Antiquities Landmarks as specified in 13 TAC 26.8.

If evidence of possible archeological or historical resources is encountered during the course of the Work, DB Contractor shall immediately cease Work in the immediate area and contact TxDOT to initiate post-review discovery procedures under the provisions of the Programmatic Agreement (PA) among TxDOT, SHPO, FHWA, and Advisory Council on Historic Preservation (ACHP), as well as the MOU between TxDOT and the THC. DB Contractor shall undertake appropriate measures to protect the site from further intrusion to the extent feasible until an appropriate

evaluation of the site can be made by a qualified representative. Work shall not be resumed in the area until DB Contractor receives notification and approval from TxDOT.

**4.2.4.2.10** Public Involvement

DB Contractor shall document how it will comply with all public involvement requirements, including public involvement requirements specifically related to cultural resources. The documentation shall comply with all applicable requirements including, but not limited to, 43 TAC §2.4, Section 106 of the National Historic Preservation Act (36 CFR 800), Chapter 26 of the Texas Parks and Wildlife Code, the Civil Rights Act of 1964, and the Civil Rights Restoration Act of 1987. The documentation shall provide that DB Contractor is responsible for conducting all public involvement requirements for the life of the Project except where TxDOT has agreements with Governmental Entities to perform public involvement requirements. At a minimum, the documentation shall include:

- Process for handling public involvements requirements; and
- Procedures for documenting public involvement.

**4.2.4.2.11** Standard Operating Procedures

DB Contractor shall develop standard operating procedures for the following activities and include them in the ECMP:

- Controlling dust during construction;
- Mitigating noise and vibration during construction;
- Mitigating light intrusion on adjacent properties;
- Managing contaminated soil and groundwater, especially during excavation, treatment, storage, transportation, and disposal;
- Preventing, controlling, and mitigating fugitive noxious or toxic vapors or particulate matter (dust), contaminated soil, and contaminated groundwater during disturbance of noxious or hazardous materials and media;
- Coordinating and communicating with potentially affected public prior to initiating work that may generate emissions or discharges that could cause public concern;
- Managing material coated with lead based paint during demolition, storage, transport, and disposal;
- Managing asbestos containing material during testing, treatment, storage, and removal;
- Managing all other hazardous materials that may be encountered;
- Identifying protected species habitat, and providing species surveys;
- Identifying impacts to special and unique vegetation habitats, and providing mitigation for such impacts; and

- Identifying Section 404 impacts and complying with issued Section 404 permits for the Project.

**4.2.4.3** Environmental Protection Training Plan

DB Contractor shall develop and implement an Environmental Protection Training Program (EPTP) that meets the minimum requirements set forth herein. The EPTP shall include methods and procedures documented in the ECMP to:

- Educate every worker before they begin Work on the Project to:
- Recognize the overall importance of environmental issues to constructing, operating, and maintaining a successful Project;
- Recognition of State or Federally-Listed Species that could occur in the Project area; and
- Appreciate the various environmental sensitivities of the Project.
- Train every worker to:
- Recognize environmentally sensitive resources that may be encountered during the Work;
- Avoid or take appropriate action to minimize environmental impacts from the Work;
- Know the required actions, practices, and procedures regarding regulated resources; and
- Understand protocols for meeting Environmental Commitments for post-review discoveries.
- Foster DB Contractor's management and supervisory personnel's attitude of commitment to the Project's environmental quality;
- Convey to all workers, DB Contractor's management commitment to the Project's environmental quality; and
- Convey to all workers, TxDOT's and DB Contractor's commitment to zero tolerance for violations.

**4.2.4.3.1** EPTP Scope and Content

The goal of the EPTP is to educate Project personnel about the following:

- Overall importance of environmental protection to the Project;
- Compliance responsibility and Governmental Entity authority, including background and environmental issues regulatory overview;
- Overview of DB Contractor's Environmental Commitments and responsibilities at the Project level;
- Worker responsibilities;
- Wetlands and jurisdictional waters of the U.S. identification;

- Environmental Approvals terms and conditions including an overview of the provisions of the ESA, Migratory Bird Treaty Act, and SW3P;
- Best Management Practices (BMP)s for environmental compliance, including pollution prevention, erosion, sedimentation, post construction controls, and dust control measures to maintain water and air quality;
- Required mitigation measures for ESA/FWCA compliance;
- Procedures and precautions in the event of spills of or discovery of Hazardous Materials or unknown chemicals or contamination;
- Procedures and precautions in the event human skeletal remains or other archeological or paleontological resources are discovered;
- Procedures for protection of specific vegetation;
- Procedures for waste reduction and recycling;
- Procedures regarding the relocation of historical markers (i.e. Texas Historical Markers, 1936 Texas Centennial markers, TxDOT markers, DAR Insignia markers, and local/county markers);
- Groundwater protection requirements;
- CWA regulations and surface water protection requirements;
- Overview of noise and residential impact reduction procedures;
- Air quality requirements; and
- Penalties and/or fines for violations of and noncompliance with Environmental Approvals and Environmental Laws, including termination of employment.

DB Contractor shall submit to TxDOT course outlines containing learning objectives designed to achieve stated goals and suggested staff attendance for all anticipated training requirements through the Term. Course outlines shall be submitted prior to NTP2.

**4.2.4.3.2** EPTP Participation

DB Contractor shall require all non-administrative employees to participate in the EPTP and shall keep accurate records documenting attendance, as well as materials presented.

In addition to English, the workers must be provided the opportunity to receive their training and training materials in Spanish.

DB Contractor shall include activities for implementation of the EPTP in the Project Schedule. The length of training sessions and their frequency shall be sufficient to achieve the goals set forth above. Periodic training sessions at key times (e.g., prior to construction, major maintenance in sensitive areas, or construction timing restrictions to protect Threatened or Endangered Species) shall be used to update workers on specific restrictions, conditions, concerns, and/or requirements.

**4.2.4.4** Hazardous Materials Management Plan

DB Contractor shall prepare an HMMP for the safe handling, storage, treatment, and disposal of Hazardous Materials, whether encountered at or brought onto the Project Site by DB Contractor, encountered or brought onto the Project site by a third party, or otherwise, during the Term. DB Contractor shall submit the final HMMP to TxDOT for review and approval in its good faith discretion within 60 Days of NTP1; approval of the Plan by TxDOT shall be a condition of commencement of Construction Work.

The HMMP shall provide the identification and contact information for designated responsible individuals in the management of Hazardous Materials and include procedures compliant with all applicable Environmental Laws and include, at a minimum:

- For all chemicals to be used on the Project, DB Contractor shall keep and update Material Safety Data Sheets (MSDS), per OSHA requirements, for the Term;
- Designated individuals responsible for implementation of the plan;
- Procedures for identifying and documenting potential contaminated sites which might impact Project development;
- Procedures for mitigation of known contaminated sites anticipated to impact construction;
- Procedures for mitigation of unanticipated contaminated sites encountered during construction;
- Procedures for mitigation of contamination during the operation and maintenance of the Project;
- Procedures for developing a detailed spill response plan for the Term;
- Process for training personnel for responding to and mitigating Incidents involving contamination or waste;
- Provisions for appropriate storage and disposal of all waste encountered or disposed of on the Project for the Term;
- Provision for a Hazardous Materials training module as an element of the EPTP component of the CEPP;
- Procedures for preparing an Investigative Work Plan (IWP) and Site Investigation Report (SIR) in the event that Hazardous Materials are discovered during construction; operations or maintenance activities;
- Procedures for maintaining appropriate communication with the public regarding the planned handling and unplanned Incidents involving contamination or Hazardous Materials;
- Identification and contact information for designated responsible individuals; and
- Procedure for notifying TxDOT within two hours of discovering Hazardous Materials.

The HMMP shall include provisions for making all on-site workers aware of and able to recognize the potential Hazardous Materials to which they may be exposed, limiting Subcontractors and other

Site workers' exposure to Hazardous Materials, and providing all necessary personal protection equipment to protect workers from exposure. The HMMP shall require DB Contractor to provide any non-DB Subcontractor personnel who visit the Project with the appropriate personal protection equipment.

The HMMP shall require that all personnel of DB Contractor-Related Entities handling Hazardous Materials be trained and certified at least to the minimum requirements established under the current guidelines of OSHA 1910.120 (HAZWOPER Training).

Further, the HMMP shall include procedures for ensuring that all applicable certifications, licenses, authorizations, and Governmental Approvals for Contractor personnel handling Hazardous Materials are current and valid through the duration of the Work.

**4.2.4.4.1** Investigative Work Plans and Site Investigation Reports

If Hazardous Materials are encountered within any of the Project ROW or Additional Properties used as DB Contractor's staging area, Project office site, plant sites, borrow site, or stockpile location, DB Contractor shall prepare an investigation work plan that addresses the methods, techniques, and analytical testing requirements to adequately characterize the extent of the contaminated media (soil and/or groundwater) potentially impacting the Project. DB Contractor shall locate and assess the likely source of contamination.

A Registered Professional Engineer and other qualified professionals, as needed, shall prepare the IWP and other necessary reports in accordance with applicable, relevant, or appropriate Laws and guidance.

Upon satisfactorily completing the investigative work, DB Contractor shall summarize the findings within a SIR and make recommendations regarding potential response actions necessary for Project development. DB Contractor shall take Hazardous Materials contamination into account during all subsequent phases of Project development, including Additional Properties negotiation and acquisition, property management, design, and construction.

The SIR shall address the following:

- The characterization of the impacted area;
- Sampling efforts and findings;
- Opportunities to avoid the contamination by adjusting the design;
- Level of response action warranted if the contamination cannot be avoided;
- Feasibility of initiating response actions prior to construction;
- Pursuit of cost-reimbursement from responsible parties;
- The need for completing response actions concurrent with construction; and
- The nature of any special specifications and provisions necessary for incorporation into the Project.

DB Contractor may initiate a preventative or corrective action after TxDOT review and approval of the SIR from appropriate Federal or State agencies.

**4.2.4.5** Communication Plan

DB Contractor shall develop a CP which describes in detail the communication hierarchy for information distribution related to the compliance with the CEPP. The CP will include names and contact information, including contact information for use in an Emergency, and the preferred methods of routine communication, and communication during an Emergency.

**4.2.4.6** Construction Monitoring Plan

The CMP shall identify times, locations, and other conditions where monitoring of construction activities are to be performed to maintain and cause compliance with Environmental Laws, Environmental Approvals, and the Contract Documents. The CMP shall establish and/or document schedules, protocols and methodologies to be used for monitoring Work with an emphasis on timely reporting, corrective actions, and adaptive management. The CMP shall establish reporting procedures, identify reporting requirements, and establish controls for report distribution and records retention. All Environmental Monitoring Reports shall be made available for review by TxDOT at TxDOT's request. Should any non-compliance or violation be observed that represents an imminent danger to human health or the environment, the CMP shall include procedures to cause immediate notification of TxDOT.

Prior to NTP2, DB Contractor and TxDOT shall jointly inspect existing facilities, structures, and environmentally sensitive areas in the vicinity of the Site, but not included as part of the Work. DB Contractor shall provide a minimum two-week advance notice to TxDOT of this joint inspection. The post award inspection shall document the pre-construction condition of vegetation, streets, sidewalks, landscaping, residential, and commercial property, creeks, storm drainage, and infrastructure. The purpose of the inspection is to provide a point of reference from which TxDOT can determine if any facility, structure, and environmentally sensitive area damaged during the Work is restored to its pre-construction condition or mitigated according to the ECMP. DB Contractor shall document the inspection with a report that shall include photographs, sketches, maps, and narratives clearly depicting the pre-construction Site condition.

All photographs shall be archival quality and shall be accompanied by a caption describing the date; time of day; location and direction in which the photograph was taken. If the photograph shows existing damage, the damage must be clearly shown and noted in the caption. All sketches and maps must be no larger than 11 inches x 17 inches. All photographs must be 4 inches x 6 inches.

The post award inspection shall inspect the MS4 located within and adjacent to the Site. During the inspection, DB Contractor shall note the following:

- Storm drains, culverts, swales, and other components of the MS4 that DB Contractor verified as free of floatable trash, silt, debris, and functioning as originally intended;
- Storm drains or culverts that do not function or appear not to function as originally intended;
- Siltation of culverts, concrete swales, and other components of the MS4;

- The presence of construction on adjacent, up-gradient, or down-gradient properties. If construction on other properties is noted, DB Contractor shall photographically document the general condition of these properties and their compliance with storm water regulations;

- Pre-existing off-site tracking from the Site or surrounding properties;

- Potential pre-existing contamination (i.e., any areas of soil discoloration or distressed vegetation); and

- Any other pre-existing condition that, by its nature, could be construed as a violation of the TPDES General Construction Permit.

- Within 90 days following Substantial Completion, DB Contractor shall conduct an inspection to monitor and repair any of the above mentioned deficiencies in the storm water system. DB Contractor shall complete all repairs as a condition of Final Acceptance.

**4.2.4.7** Recycling Plan

The recycling plan shall document and fully detail DB Contractor's commitment to recycling, waste minimization, and use of "green products" during all aspects of Work. The recycling plan shall document DB Contractor's recycling initiatives, as well as methods and procedures for maximizing the use of recycled materials in all aspects of the Work. If recyclable materials shall be used in lieu of TxDOT approved construction and maintenance materials, DB Contractor shall follow the TxDOT Material Specification DMS 11000. The recycling plan shall be submitted as part of the CEPP in accordance with the requirements set forth in this Section 4.2.4.

**4.2.5 TxDOT-DB Contractor Communications Plan**

DB Contractor shall submit to TxDOT for approval a TxDOT-DB Contractor Communications Plan that is consistent with and expands upon the preliminary communications plan submitted by DB Contractor prior to the Effective Date. DB Contractor shall maintain and update the plan throughout the Term.

The TxDOT-DB Contractor Communications Plan shall describe the procedures for communication of Project information including notification of Incidents affecting the Project or the traveling public between DB Contractor's organization and TxDOT. The TxDOT-DB Contractor Communications Plan shall describe how DB Contractor's organization will respond to unexpected requests for information, communicate changes or revisions to necessary DB Contractor personnel, and notify affected stakeholders before and after changes are made to the Contract Documents.

**4.2.6 Other Affected Third Parties**

DB Contractor is responsible for coordinating the Work with all third parties potentially affected by the Work. DB Contractor shall prepare a plan, the Affected Third Parties Plan, which describes how the DB Contractor will mitigate the impact of the Work upon potentially-impacted third parties. The plan shall include, at a minimum:

- Name of each third party along with primary contact(s) and contact information. Coordination with third parties may include, but is not limited to, impacts to ROW, utilities, drainage, parks, Railroad, and the Port.

- Description of Work interfaces, such as notices, meetings, permits, approvals, coordination, and inspections.

- Detailed schedule identifying anticipated date of receipt of all permits and approvals required for completion of work. DB Contractor shall show schedule detail either within the Project Schedule or the detailed activities in a fragnet for each third party process and show as a summary bar in the Project Schedule. DB Contractor shall show separate activities for each party listed and a summary description of the actions required.

- As an attachment, a detailed list of all known or anticipated third party-required submittals, including number and type and requested action of third party upon receipt of each submittal.

- List of known and anticipated impacts and interfaces with third parties along with a mitigation plan and mane of point person from DB Contractor assign to manage each.

DB Contractor shall submit the Affected Third Parties Plan to TxDOT for TxDOT's review and approval prior to initiating discussions with potentially-impacted third parties. DB Contractor shall include the Affected Third Parties Plan as part of the PMP.

DB Contractor shall review list of required submittals with each third party for concurrence regarding number and types of submittals required for each specific type of Work. DB Contractor shall continually update this list, included as an attachment in the Plan, and submit at least monthly to TxDOT.

Notwithstanding any other provision in the Contract Documents, DB Contractor shall update and submit the Affected Third Parties Plan on a monthly basis as part of its Draw Request. DB Contractor shall, as part of the monthly Plan submittals, identify any variations to schedule as well as provide mitigation strategies to minimize or eliminate any perceived or actual impact to the Project Schedule.

### 4.2.7 Risk Management Plan

The Risk Management Plan shall describe the approach to identification, management, mitigation, and allocation of Project-specific risks. The Risk Management Plan shall:

- Describe DB Contractor's management team's role and responsibilities in risk management listing and describing positions/roles;

- Describe how DB Contractor will engage with TxDOT and project stakeholders in managing risk;

- Include a detailed work plan and schedule for proposed meetings to discuss risk management;

- Describe strategies for controlling and managing Project risks;

- Describe whether risks will be quantified for potential cost and/or schedule impact and how that will be done;

- Identify and describe strategies to allocate risk to the parties best able to manage their impact;

- Include a risk matrix which shall identify the following at a minimum:

(i) Significant risk categories during the design, construction and maintenance of the Project;

(ii) The prioritized potential consequences of the identified risks;

(iii) The probable likelihood of risks;

(iv) Proposed procedures and tools to conduct a risk sensitivity analysis;

(v) Risk-mitigation strategies to eliminate or reduce the likelihood and impact of specific risks; and

(vi) Contingency plans to cover the remaining and/or unknown risks.

The Risk Management Plan shall be updated throughout the Project as risks are retired or as additional risks are realized.

### 4.2.8 Utility Management Plan

DB Contractor shall prepare and submit to TxDOT no later than 30 days after NTP1, a Utility Management Plan in accordance with the requirements of this Section 4.2.8. TxDOT approval of the Utility Management Plan shall be a condition to the commencement of Design Work. The Utility Management Plan shall include the following:

- DB Contractors organization structure including names, contact details, titles, job roles and qualifications of Utility Key Personnel and other Utility personnel;
- Procedures for coordination with Utility Owners to obtain Utility Assemblies and establishing procedures for Utility Adjustment Concept Plans, Utility Adjustment Field Modifications, Utility strip map, inspection of Utility Owner construction, quality control/quality assurance, emergency procedures with respect to Utility Adjustment Work and close out procedures;
- Integration of the Utility Adjustment Work in the Project Baseline Schedule; and
- Procedures to address a Utility Adjustment Field Modification (UAFM) as described in Section 14.4.7 of the Design-Build Specifications.

### 4.2.9 Right of Way Acquisition Management Plan

DB Contractor shall prepare a ROW Acquisition Management Plan in accordance with the requirements of this Section 4.2.9. The ROW Acquisition Management Plan shall set forth:

- DB Contractor's main contractual arrangements;
- DB Contractor's organizational structure covering the activities to be performed in accordance with the Contract Documents;
- Arrangements for coordinating and managing staff interaction with TxDOT and its consultants, and description of approach to coordinating work of off-site personnel;

- DB Contractor's organization, including names, contact details, titles, job roles, and qualifications of Project ROW and Key Personnel and other Project ROW personnel;

- Integration of the Project ROW schedule into the Project Baseline Schedule; the Project ROW schedule shall contain logic linked ROW acquisition and relocation assistance activities on a parcel-by-parcel basis, including adequate time periods for TxDOT review and condemnation activities in accordance with Item 15 of the Design-Build Specifications;

- Interfacing between DB Contractor, Subcontractors and the IQF during Project ROW acquisition, including interface between design, Project ROW activities, and quality review processes;

- Responsibilities of Subcontractors and Affiliates, DB Contractor's overall control procedures for Subcontractors, including consultants and subconsultants, and steps taken to ensure Subcontractors and Suppliers meet the obligations imposed by their respective Subcontracts;

- Environmental controls including:

    - Control of the interface between environmental requirements (including Hazardous Materials and demolition) and Project ROW acquisition activities;

    - Applicable procedures for the Hazardous Materials Management Plan (HMMP) in accordance with Section 4.2.4.4;

    - Reference to relevant component parts of the Comprehensive Environmental Protection Plan (CEPP) into the ROW Acquisition Management Plan;

- Procedures describing how the principal activities will be performed during the Project ROW acquisition, whether directly undertaken or subcontracted;

- Documentation and reporting, including management procedures in compliance with Section 4.2.1.2;

- Quality control procedures and quality review standards to establish and encourage continuous improvement; and

- Audit procedures including name, title, roles, and responsibilities of supporting quality management staff reporting to the person with defined authority.

The ROW Acquisition Management Plan shall contain, at a minimum, the following:

- The name of TxDOT approved title company(ies) to be used for title services;

- The name and qualifications of the proposed ROW Acquisition Manager (ROW AM); and

- The resumes and qualifications for appraisers, appraisal reviewers, land planners, relocation agents, negotiators, real estate attorneys, eminent domain specialist and ROW personnel specified in Section 15.2.7 of the Design-Build Specifications (ROW Personnel Qualifications).

The ROW Acquisition Management Plan shall describe the specific means by which DB Contractor shall:

- Provide sufficient personnel to achieve, in accordance with the Project Schedule, the goals and milestones established for Project ROW acquisition, relocation assistance, appraisals and appraisal review, and clearance/demolition of the improvements from the Project ROW;
- Provide administrative support;
- Provide for language, visually impaired, or hearing impaired translation, as necessary;
- Provide documentation and reports and the manner in which records will be maintained in compliance with the Design-Build Specifications, including any systems DB Contractor will use;
- Produce and distribute acquisition and relocation brochures as approved by TxDOT;
- Establish, implement, and maintain quality control procedures and quality review standards for the acquisition for Project ROW to ensure accuracy, completion, and quality in Submittals to TxDOT and Governmental Entities;
- Prevent fraud, waste and mismanagement; and
- Perform all items in this Section 4.2.9.

DB Contractor shall update the ROW Acquisition Management Plan regularly, at least quarterly, in accordance with the Contract Documents and when any changes occur to the personnel required by Section 15.2.7 of the Design-Build Specifications (ROW Personnel Qualifications).

### 4.2.10 Traffic Management Plan

DB Contractor shall prepare and implement a Traffic Management Plan (TMP) that includes the following items:

- Descriptions of the qualifications and duties of the Lead Maintenance of Traffic Design Engineer, and other personnel with traffic control responsibilities;
- Procedures to identify and incorporate the needs of transit operators, Utility Owners, Governmental Entities, Emergency Services providers, school districts, business owners, and other related Users, Customer Groups or entities in the Project corridor and surrounding affected areas as it relates to the use of roadway networks;
- Procedures for developing Traffic Control Plans (TCPs), including implementing and maintaining detours, road and Lane Closures, and other traffic pattern modifications with detailed phasing and steps showing the different traffic control phasing;
- Procedures for obtaining approval of TCPs from TxDOT and applicable Governmental Entities including review of TCP submittal timeframes;
- Procedures for signing transitions from one phase to the next and from temporary to permanent signing;

- Procedures for maintenance and replacement of traffic control devices, including pavement markings and traffic barriers, and transitions from one phase to the next and from temporary to permanent placement;

- Procedures to regularly evaluate and modify traffic signal timings, in coordination with local Governmental Entities and TxDOT;

- Procedures for the development, implementation, testing, and maintenance of all affected signals in cooperation with local Governmental Entities and TxDOT;

- Procedures and process for the safe work zone ingress and egress;

- Provisions to provide continuous access to established truck routes and Hazardous Material routes, and to provide suitable detour routes, including obtaining any approvals required by TxDOT and the appropriate Governmental Entities for these uses;

- Procedures to modify TCPs as needed to adapt to current Project circumstances including a contingency plan to alleviate unreasonable construction-related delays that can be implemented immediately upon notification from TxDOT;

- Procedures to communicate TMP information to DB Contractor's and TxDOT's public information personnel and notify the public of maintenance of traffic issues in conjunction with the requirements of Item 11 of the Design-Build Specifications;

- Descriptions of contact methods, a list of TxDOT and DB Contractor personnel contacts, and anticipated response times for any deficiencies or Emergency conditions requiring attention during off-hours in compliance with the approved TxDOT- DB Contractor Communications Plan; and

- Procedures for night Work (thirty minutes after sunset to thirty minutes before sunrise) to include a work zone light system design in accordance with NCHRP Report 498.

DB Contractor shall coordinate with TxDOT and local Governmental Entities regarding the development of the TMP. DB Contractor shall participate in traffic management coordination meetings scheduled by TxDOT or its representatives.

DB Contractor shall submit the TMP as a part of the PMP as required in Section 4.2.

### 4.2.11 Maintenance Management Plan

The MMP is a guidance document that describes DB Contractor's managerial approach, strategy, and quality procedures for the Maintenance Work to achieve all requirements of the Contract Documents. The MMP during construction shall be included as a section of the PMP and may cross reference to appropriate sections of the PMP and shall be consistent with the general maintenance obligations described in Section 27.1.1 of the Design-Build Specifications. The recommended content for the MMP is set forth in Item 27 of the Design-Build Specifications. The MMP during construction is applicable to the Maintenance Work and shall come into effect upon issuance of NTP2 and shall remain in force until Final Acceptance.

DB Contractor shall submit the MMP for TxDOT's sole discretion approval.

### 4.2.12 Submittals

All submittals described in Sections 4.2 and 4.3 shall be submitted to TxDOT in accordance with the schedule and for the purpose (approval, review and comment, for information) set forth in Table 4-2. Acceptable electronic formats are Microsoft Word, Microsoft Excel, or Adobe Acrobat files, unless otherwise indicated.

**Table 4-2: Submittals to TxDOT**

| Submittals | Submittal Schedule | Department Action | Reference Section |
|---|---|---|---|
| PMP – Project Administration Component | After NTP1 | Approval | 4.2.1 |
| Revisions to the QMP | 1. Within 14 days of detection of a substantial or systemic problem; and<br>2. As directed by TxDOT. Prior to implementation | Approval | 4.3 |
| Quality records | When requested | For Information | 4.3.2 |
| Senior management review meeting minutes | Quarterly, within 14 days of meeting | For Information | 4.3.2 |
| Report on QMP effectiveness | Quarterly, within two weeks of senior management review | For Information | 4.3.2 |
| Results of Project quality audits | Within seven days of completion | For Information | Attachments 4-1 and 4-2 |
| DB Contractor Non-conformance Reports | Within 48 hours of both issuance and resolution | For Information | Attachment 4-1 |
| Responses to TxDOT Nonconformance reports | Within 48 hours of receipt | Review and comment | Attachment 4-1 |
| PMP – Professional Services Quality Management Plan | Prior to submitting design packages for TxDOT review | Approval | 4.3.3 |
| Copies of all Design Documents | Upon TxDOT request | For Information | Attachment 4-1 |
| Design Submittal Packaging Plan | Prior to the first Professional Services Submittal | Approval | Attachment 4-1 |
| Technical Working Group meeting minutes | Upon Request | For Information | Attachment 4-1 |
| Pre-Submittal Workshop meeting invitations, supporting materials, and agendas | 5 Business Days prior to the workshop | For Information | Attachment 4-1 |
| Pre-Submittal Workshop meeting minutes | Upon Request | For Information | Attachment 4-1 |
| Preliminary Design package | Prior to development of the Final Design package | Review and comment | Attachment 4-1 |
| Design Exceptions and design standards deviations | Prior to Final Design Submittal | Approval | 4.1.2.2.4, Attachment 4-1 |
| Design Manager's certification | With RFC Documents | Concurrence | Attachment 4-1 |
| Final Design Submittal | As Agreed upon with TxDOT | Review and comment | Attachment 4-1 |
| RFC Documents | As Agreed upon with TxDOT | Concurrence | Attachment 4-1 |
| Requests for Information and copies of Engineer of Record's determination of NDC | As necessary, Access to TxDOT prior to implementation | For Information | Attachment 4-1 |
| Early Start of Construction procedures | Prior to Work | Concurrence | Attachment 4-1 |
| Record Documents | Prior to Final Acceptance | For Information | Attachment 4-1 |
| Manufacturers' warranties, guarantees, instruction sheets, parts lists, and other product data | With the Record Documents | For Information | Attachment 4-1 |
| PMP – Construction Quality Management Plan (CQMP) | Approval prior to NTP2 | Approval | 4.3.4,<br>Attachment 4-2 |

| Submittals | Submittal Schedule | Department Action | Reference Section |
|---|---|---|---|
| IQFM's Monthly Quality Report | Monthly during Construction Period | Review and Comment | Attachment 4-2 |
| Construction Look ahead schedule | Weekly | For information | Attachment 4-2 |
| PMP – Safety and Health Plan | Approval prior to NTP2 | Concurrence | 4.2.3 |
| PMP – TxDOT – DB Contractor Communications Plan | Approval prior to NTP2 | Approval | 4.2.6 |

## 4.3 Quality Management

DB Contractor is responsible for all quality assurance and quality control activities necessary to fulfill all of its obligations under the Contract Documents. DB Contractor shall undertake all aspects of quality assurance and quality control for the Project and Work in accordance with the approved Quality Management Plan and Good Industry Practice.

DB Contractor shall contract for all PSQAF and IQF services through one or more independent firms.

The PSQAF and the IQF shall not be owned at any time during the term of the Design-Build Contract by DB Contractor or any subsidiary or related company affiliated with DB Contractor or the Design Firms unless agreed to in writing by TxDOT at TxDOT's discretion.

DB Contractor shall not terminate its agreement with the PSQAF or IQF, or permit or suffer any substitution or replacement of the PSQAF or IQF, except with TxDOT's prior written approval.

DB Contractor shall cause the Subcontracts to be entered into between DB Contractor and the PSQAF and between DB Contractor and the IQF to provide that: (a) the PSQAF and the IQF shall owe a duty of care to TxDOT in carrying out its obligations in relation to the Project; and (b) the Professional Services Quality Assurance Manager (PSQAM) and the IQFM shall be independent from DB Contractor, including by having authority independent of the Project Manager, and shall not be directed by the Project Manager.

DB Contractor shall prepare and submit a comprehensive Quality Management Plan (QMP) to TxDOT for approval. The QMP shall describe the authority and responsibility for the administration of the QMP and describe how all requirements of the Contract Documents will be met. The QMP shall be consistent with and expand upon the quality approaches and commitments submitted by DB Contractor prior to the Effective Date. DB Contractor shall address any comments received from TxDOT regarding the relevant section of the initial Quality Management Plan submitted by DB Contractor prior to the Effective Date. The Quality Management Plan shall be conformed and updated annually. DB Contractor shall revise its QMP within 14 days of TxDOT or DB Contractor detection of a substantial or systemic problem related to the Work, or as directed by TxDOT. Submissions of the QMP and all updates to the QMP shall include both a clean copy and a copy tracking all changes since the previous approval.

The QMP shall consist of the Professional Services Quality Management Plan (PSQMP) and the Construction Quality Management Plan (CQMP). These distinct plans shall be coordinated with one another such that common quality management system requirements such as document control, process auditing, and corrective and preventive action can be addressed with a single approach. The QMP shall comply with the requirements of the version of the QAP for DB Projects in effect on the Effective Date.

**4.3.1** General Requirements

DB Contractor shall develop, implement, and maintain the QMP for the Term. The QMP shall describe the system, policies, and procedures that ensure the Work meets the requirements of the Contract Documents and provide documented evidence of same. The QMP shall encompass all Work performed by DB Contractor and Sub-contractors of all tiers.

The QMP shall contain detailed procedures for DB Contractor's QC, PSQAF, and IQF activities. DB Contractor's quality process shall incorporate planned and systematic verifications and audits undertaken by an independent party. DB Contractor shall conduct all QC, PSQAF, IQF, performance verification, and design overlay and coordination among design disciplines, all in accordance with the QMP and the requirements of the Contract Documents.

Inspections, reviews, and testing shall only be performed by personnel with appropriate training and qualifications, for each appropriate item of Work (items produced on and off the Project Site) using appropriate equipment that is accurately calibrated and maintained in good operating condition and accredited in compliance with TxDOT's QAP for DB Projects.

DB Contractor shall regularly maintain the QMP to contain current versions of the following information:

- The organizational chart that identifies all quality management personnel, their roles, authorities and line reporting relationships. Personnel relationships relating to quality shall comply with the requirements in this Section 4.3;

- Names, contact details, titles, description of roles responsibilities, and specific experience of all quality management Key Personnel, other quality management personnel and those who have the authority to stop Work;

- Identification of testing agencies, including information on each agency's capability to provide the specific services required for the Work, certifications held, equipment used, and location of laboratories for products produced both on and off the Site; and

- Identification of what products or services are to be subcontracted, updated when new Subcontractor or Supplier contracts are implemented.

QMP procedures shall: (i) ensure DB Contractor personnel, including Subcontractor personnel, are familiar with all the provisions of the Contract Documents concerning their respective responsibilities; (ii) provide for the education, training and certification, as appropriate, of personnel performing activities affecting or assessing the quality of the Work to assure such personnel achieve and maintain the required proficiency; and (iii) ensure the Work is performed according to the QMP, Good Industry Practice, and the Contract Documents. DB Contractor shall plan the training required for each individual and maintain a register demonstrating the QMP training record of all personnel affecting quality.

DB Contractor shall make all quality records immediately available to TxDOT for review. DB Contractor shall provide TxDOT with a copy of any and all quality records when requested.

**4.3.2 DB Contractor's Senior Management Reviews**

DB Contractor's senior management shall conduct a management review of the quality program identified in the QMP at least quarterly, and more frequently if necessary or upon written request by TxDOT. As used in this Section, "senior management" means DB Contractor personnel who provide resources and delegate authority and who coordinate, direct, and control DB Contractor's Project Manager and DB Contractor's organization. TxDOT shall be invited to participate in the senior management reviews. Senior management reviews shall focus on ensuring continued suitability and effectiveness in satisfying the project requirements and DB Contractor's quality policy and objectives as stated in the QMP. DB Contractor shall provide TxDOT five days' notice prior to holding senior management review meetings.

Each senior management review shall document, in a report on the QMP effectiveness, and assess, at a minimum: the results of DB Contractor and TxDOT audits; corrective and preventive actions taken; trends in Nonconforming Work; stakeholder feedback; status of previous management review actions; timeliness of responses and resolutions; and quality management successes and failures. The output of senior management reviews shall include any decisions and actions related to: improvement of the effectiveness of the QMP and its processes; improvement of the Work; and resource needs.

As one of the inputs to measurement of the performance of the QMP, DB Contractor shall monitor, record, and act upon all communication from TxDOT and third parties regarding the performance of DB Contractor. The methods for obtaining and using this information shall be described in the QMP.

### 4.3.3 Professional Services Quality Management Plan

DB Contractor shall prepare a PSQMP that describes its policies, procedures, and staffing (including Subcontractors) to manage Professional Services quality in accordance with Attachment 4-1 to these General Conditions.

### 4.3.4 Construction Quality Management Plan

DB Contractor shall prepare a CQMP that describes its policies and procedures to manage Construction Work quality (including that of subcontractors) consisting of construction QC and IQF activities and materials acceptance procedures in accordance with Attachment 4-2 to the General Conditions and TxDOT's QAP for DB Projects

## 4.4 Right of Way

### 4.4.1 Acquisition of Project ROW

**4.4.1.1** All Project ROW, including Additional Properties but excluding temporary interests in property for Project Specific Locations, shall be acquired by DB Contractor in the name of the State. DB Contractor shall undertake and complete the acquisition of all Project ROW, including Additional Properties, in accordance with Item 15 of the Design-Build Specifications, the approved Right of Way Acquisition Management Plan and all applicable Laws relating to such acquisition, including the Uniform Act. DB Contractor shall also be responsible for submitting the completed files in accordance with the closeout procedures as defined by TxDOT in Section 15.2.11 of the Design-Build Specifications.

**4.4.1.2** DB Contractor may commence the following ROW acquisition services upon issuance by TxDOT of NTP1: developing subcontracts, obtaining title commitments, appraisal research and coordination

with TxDOT to enter onto non-TxDOT properties to conduct survey and Environmental Site Assessments, subject to limitations and conditions determined by TxDOT. DB Contractor may also commence negotiating Utility Agreements with the Utility Owners; provided, however, DB Contractor shall not execute any Project Utility Adjustment Agreements until issuance of NTP2.

**4.4.1.3** TxDOT shall (a) provide review and approval or disapproval of Acquisition Packages and Condemnation Packages for Project ROW, (b) except as provided below, undertake eminent domain proceedings, if necessary, for Project ROW in accordance with the procedures and time frames established in Item 15 of the Design-Build Specifications and the approved Right of Way Acquisition Management Plan, and (c) provide review and approval for the following Submittals: payment Submittals, relocation Submittals, administrative settlement Submittals and closing Submittals for Project ROW in accordance with the procedures and time frames established in the Design-Build Specifications and the approved ROW Acquisition Management Plan. TxDOT shall also provide review and approval for final closeout procedures established in Section 15.2.12 of the Design-Build Specifications.

**4.4.1.4** Except as otherwise agreed to by TxDOT in its discretion, for temporary Project Specific Locations, (a) TxDOT shall not be obligated to exercise its power of eminent domain in connection with DB Contractor's acquisition of any such temporary right or interest, (b) TxDOT shall have no obligations or responsibilities with respect to the acquisition, maintenance or disposition of such temporary rights or interests, and (c) DB Contractor shall have no obligation to submit Acquisition Packages to TxDOT for, or obtain TxDOT's approval of DB Contractor's acquisition of, any such temporary right or interest. All costs and expenses for the acquisition of any temporary right or interest in real property, including Project Specific Locations, that DB Contractor determines necessary or desirable for its convenience in constructing the Project, such as for work space, contractor laydown areas, materials storage areas or temporary Utility Adjustments, or for any permanent interest in real property that DB Contractor may wish to acquire for its convenience that will not be part of the Project ROW, shall be DB Contractor's sole responsibility, to be undertaken at DB Contractor's sole cost and expense. TxDOT shall have no obligations or responsibilities with respect to the acquisition, maintenance or disposition of such rights or interests or the condition of such rights or interests, and shall not be obligated to use its powers of eminent domain in connection therewith. DB Contractor shall comply with all applicable Governmental Approvals and Laws in acquiring and maintaining or disposing of any such property rights or interests. DB Contractor shall cause the documentation of any such property interest to contain the grantor's express acknowledgment that TxDOT shall have no liability with respect thereto.

### 4.4.2 Costs of Acquisition

**4.4.2.1** For real property needed for ROW within the Schematic ROW, TxDOT shall be responsible for (a) the purchase price of such real property, (b) any market rental consideration paid in connection with PUAs in accordance with Section 15.4.1 of the Design-Build Specifications, (c) relocation assistance payments required in connection with such real property and (d) title insurance for such real property. Subject to the immediately preceding sentence and Section 4.4.2.6, DB Contractor shall be responsible for the performance and the costs of all right of way engineering, surveying, appraisals, administration, acquisition, relocation assistance, environmental permitting (other than certain mitigation requirements expressly excluded under Section 4.7.1) and related services for all such parcels, including all costs and expenses of negotiation. If TxDOT incurs and pays any such costs and expenses on DB Contractor's behalf, DB Contractor shall reimburse TxDOT within 10 days of TxDOT's submittal to DB Contractor of an invoice for such TxDOT costs and expenses. Alternatively, TxDOT may deduct the amount of such costs and expenses from any sums owed by TxDOT to DB Contractor pursuant to this Design-Build Contract. For any parcels within the

Schematic ROW that require acquisition by eminent domain, DB Contractor shall be responsible for the performance of support services for the condemnation proceedings described in Item 15 of the Design-Build Specifications; provided, however, that DB contractor shall be entitled to reimbursement for DB Contractor's reasonable out-of-pocket costs for providing such services to the extent allowed in accordance with DBA Exhibit 11. Such costs may be included in any Draw Request after the services are provided and incurred by DB Contractor. DB Contractor's responsibility for such support services shall terminate upon Final Acceptance of the Project. Notwithstanding the foregoing, TxDOT shall be responsible for the legal costs for the Office of the Attorney General or fees for private counsel retained as directed by the Office of the Attorney General in connection with any condemnation actions, except for such legal fees and costs that arise out of the acts, omissions, negligence, intentional misconduct, or breach of applicable Law, contract or Governmental Approval of a DB Contractor-Related Entity in the performance of its obligations under the Contract Documents.

**4.4.2.2** TxDOT shall (a) be responsible for the purchase price, market rental consideration for PUAs, any relocation assistance payments and title insurance premiums for any Additional Properties outside the Schematic ROW that must be acquired due to a TxDOT-Directed Change or a Necessary Basic Configuration Change or a Relief Event, subject to TxDOT's reasonable determination that the property is necessary and (b) for Additional Properties that must be acquired due to a TxDOT-Directed Change or a Relief Event, any other costs and expenses incurred by DB Contractor to acquire such real property, subject to the limitations in Section 4.6. DB Contractor shall perform all right of way engineering, surveying, appraisals, administration, acquisition, relocation assistance, archaeological surveys, environmental and other permitting and related services for such property, including any services related to reevaluation or modification to any TxDOT-Provided Approval, if necessary. Except as required as a direct result of a TxDOT-Directed Change, Relief Event or a Necessary Basic Configuration Change, property outside of the Schematic ROW that is acquired for drainage easements hereunder shall be treated as DB Contractor-Designated ROW.

**4.4.2.3** DB Contractor shall be responsible for and directly pay all costs and expenses in connection with acquiring all DB Contractor-Designated ROW, including (a) the cost of acquisition services and document preparation; (b) the cost of condemnation proceedings required by the Office of the Attorney General, including private attorneys' fees and expert witness fees, and all fees and expenses for exhibits, transcripts, photos and other documents and materials production, other than the Attorney General's direct fees; (c) the purchase prices, court awards or judgments, and Special Commissioner's awards for all DB Contractor-Designated ROW (to be paid by DB Contractor at the time of closing, Special Commissioner's award or final judgment, as applicable); (d) the cost of permitting; (e) closing costs associated with parcel purchases including title insurance, in accordance with the Uniform Act and TxDOT policies; (f) property outside of the Schematic ROW that is acquired for drainage easements; (g) relocation assistance payments and costs, in accordance with the Uniform Act; (h) the cost for separate property surveys in addition to the Schematic ROW surveys in accordance with Section 15.3.1 of the Design-Build Specifications; and (i) the market rental consideration for PUAs. If a jury trial or final judgment is expected to occur after Final Acceptance of the Project, then a payment by DB Contractor to TxDOT for the amount of the acquisition cost exposure, to be determined by TxDOT, shall be made prior to Final Acceptance of the Project. If TxDOT incurs or pays any such costs and expenses on DB Contractor's behalf, DB Contractor shall reimburse TxDOT within 10 days of TxDOT's submittal to DB Contractor of an invoice for such TxDOT costs and expenses. Alternatively, TxDOT may deduct the amount of such costs and expenses from any sums owed by TxDOT to DB Contractor pursuant to this Design-Build Contract.

**4.4.2.4** DB Contractor shall not be entitled to any increase in the Price or any time extension as a result of (a) Site conditions associated with any DB Contractor-Designated ROW (including those relating to Hazardous Materials, Differing Site Conditions or Utilities) and (b) any delay, inability or cost associated with the acquisition of any DB Contractor-Designated ROW, including DB Contractor-Designated ROW required to implement any ATCs.

**4.4.2.5** If any DB Contractor-Related Entity holds a real property interest, including a fee, easement or option to purchase, in a parcel located in the Schematic ROW, a mitigation site or a parcel on which a drainage easement shall be located, TxDOT, in its discretion, may elect to perform some or all of the real property acquisition services required under the Contract Documents that are associated with such parcel. In such event, TxDOT shall be entitled to deduct TxDOT's Recoverable Costs incurred in performing such services. Any risk of delay associated with the acquisition of the real property encumbered by the DB Contractor-Related Entity's property interest, including delay caused by condemnation proceedings, shall be borne by DB Contractor and shall not be eligible for time extension. The price paid by the DB Contractor-Related Entity for the real property interest acquired in such parcel may, in TxDOT's discretion, be disregarded as a comparable price for purposes of appraisal or condemnation of such parcel.

**4.4.2.6** If a parcel acquired by TxDOT includes (a) property for which TxDOT is responsible for paying the price of acquisition (i.e., Schematic ROW) and (b) property for which DB Contractor is responsible for paying the price of acquisition (i.e., DB Contractor-Designated ROW), DB Contractor shall reimburse TxDOT a pro rata share of the parcel's total purchase price and related fees and costs based on the physical area of the property referenced in clause (b) of this Section 4.4.2.6 as a proportion of the combined physical area of the properties referenced in clauses (a) and (b) of this Section 4.4.2.6 that is acquired by TxDOT.

**4.4.3 Limiting Acquisition of Certain Additional Properties**

**4.4.3.1** DB Contractor shall use its best efforts to restrict and limit additional costs to the Project associated with acquisitions related to TxDOT-Directed Changes, Relief Events and Necessary Basic Configuration Changes. To the extent reasonably possible, consideration shall be given to using retaining walls or making other engineering adjustments as an alternative to such acquisition. If it would be possible to use a retaining wall or other engineering adjustment to accommodate a TxDOT-Directed Change, Relief Event or Necessary Basic Configuration Change, as an alternative to such acquisition, DB Contractor shall support its recommendation to acquire such Additional Properties in lieu of constructing a retaining wall or otherwise modifying the TxDOT Schematic Design with an analysis demonstrating cost or time savings or other justification.

**4.4.3.2** DB Contractor shall support any requests for Change Orders for acquisitions related to DB Contractor-Designated ROW with such information as may be reasonably required by TxDOT.

**4.4.3.3** In all cases, DB Contractor shall exercise particular care to avoid acquisition of land owned by a public entity and used for a use inconsistent with highway use.

**4.4.4 Representations by DB Contractor**

**4.4.4.1** DB Contractor's designated Right of Way Acquisition Manager ("ROW Acquisition Manager") shall be entitled to undertake the right of way acquisition services described in Item 15 of the Design-Build Specifications on behalf of TxDOT as its agent for such limited purpose, subject to the conditions and limitations of Section 4.4.2.5 and this Section 4.4.4.

**4.4.4.2** In performing such activities, the ROW Acquisition Manager shall at all times follow the standard of care and conduct and be subject to all Laws applicable to a licensed real estate broker licensed in the State, and shall at all times conform with applicable Law (including, to the extent applicable, the Uniform Act) in all communications and interactions with the owners or occupants of the Project ROW or any other real property in which DB Contractor seeks to obtain any right or interest.

**4.4.4.2.1** Except as provided in Section 4.4.4.2.2, any person or entity identified by DB Contractor to represent the State and who is to contact owners of real property interests, to make offers to or negotiate the purchase of such real property interests, or otherwise to perform services as agent for the State in the acquisition of real property interests, shall be licensed as a real estate broker by the Texas Real Estate Commission ("TREC") prior to and during all times such person or entity represents the State. The person or entity so identified by DB Contractor shall be the "Broker." Prior to any contact by the Broker with the owner of any real property interest, DB Contractor shall submit to TxDOT a copy of the current, active license of each person or entity that will perform these tasks, in accordance with Item 15 of the Design-Build Specifications.

**4.4.4.2.2** Other persons or entities may carry out the obligations of the Broker provided that such person or entity meets one of the following requirements:

(a) **Broker**. If the person is licensed by TREC as a real estate broker, such person shall be either employed by the Broker, or have a written agreement with the Broker that sets out the terms and obligations of such person to represent the State in the performance of services as agent. Prior to any contact with the owner of any real property interest, the Broker shall deliver to TxDOT a copy of the person's real estate broker's license and, in the event of an agreement, a copy of the agreement between the Broker and the person licensed as a real estate broker.

(b) **Entity**. If an entity is licensed by the TREC as a real estate broker, such entity shall have a written agreement with the Broker that sets out the terms and obligations of such entity to represent the State in the performance of services as agent. Prior to any contact with the owner of any real property interest, the Broker shall deliver to TxDOT a copy of the entity's real estate broker's license and a copy of the agreement between the Broker and the entity licensed as a real estate broker.

(c) **Salesperson**. If a person is licensed by TREC as a real estate salesperson, such person shall be either sponsored and employed by the Broker, or be employed by and sponsored by a person or entity licensed as a broker by TREC, which broker has a written agreement with the Broker that sets out the terms and obligations of the broker to represent the State in the performance of services as an agent. Prior to any contact with the owner of any real property interest, the Broker shall deliver to TxDOT a copy of the person's real estate salesperson's license.

**4.4.4.2.3** DB Contractor shall not be entitled to a Change Order or Claim as a result of the acts, omissions, negligence, intentional misconduct, or breach of applicable Law, contract or Governmental Approval by the ROW Acquisition Manager in connection with the ROW Acquisition Manager's activities in carrying out the limited agency provided herein.

**4.4.5 Negotiations and Condemnation Proceedings**

**4.4.5.1** Negotiations for any Project ROW shall be undertaken as set forth in the Contract Documents, including Section 15.4.1 of the Design-Build Specifications. DB Contractor shall obtain TxDOT's

written approval of any offer to be extended to an owner of any interest in Project ROW prior to making such offer, in accordance with Section 15.3.6 of the Design-Build Specifications. DB Contractor shall notify TxDOT in writing, for its concurrence, of the failure of negotiations with respect to the acquisition of any parcel included in the Project ROW and shall submit to TxDOT for approval a Condemnation Package for the parcel as described in Section 15.4.4 of the Design-Build Specifications. TxDOT shall have 10 Business Days either to (a) approve the Condemnation Package or (b) provide its comments or request for additional information to DB Contractor if TxDOT determines that the Condemnation Package is incomplete or otherwise deficient. DB Contractor shall incorporate any suggested changes and provide any additional information requested by TxDOT and shall resubmit the Condemnation Package to TxDOT for review and approval. TxDOT shall have 10 Business Days to approve or provide comments to DB Contractor on any resubmittals.

**4.4.5.2** Condemnation proceedings for any Project ROW will be brought by TxDOT within a reasonable time following approval by TxDOT of a complete Condemnation Package for the parcel as described in Section 15.4.4 of the Design-Build Specifications. TxDOT will deliver the petition for the parcel to DB Contractor within 105 days from the date of approval of the Condemnation Package. TxDOT will provide the payment for the parcel within 45 days from the date the Special Commissioners' award is filed with the court. Subject to the cost reimbursement provisions in Exhibit 11 to the DBA, DB Contractor shall cooperate in all respects with TxDOT and shall cause all expert witnesses, appraisers, surveyors, land planners and other consultants utilized by DB Contractor in connection with the acquisition of the Project ROW subject to condemnation to be available to and assist TxDOT in connection with the condemnation proceedings, including discovery, depositions, prehearing preparation, Special Commissioner's hearing, jury trial, or other proceedings. Counsel engaged for settlement and condemnation proceedings shall be from the Office of the Attorney General representing TxDOT.

**4.4.5.3** Except as provided in Section 4.4.2.5, DB Contractor shall be entitled to a Change Order in accordance with Section 4.6.9.5 for delays to the Critical Path due to failure of TxDOT to make available the portion of the Schematic ROW or any Additional Properties that must be acquired due to a TxDOT-Directed Change, Relief Event, or a Necessary Basic Configuration Change, described in a condemnation packet within 365 days after approval of the Condemnation Package, excluding any delay caused in whole or in part by an act, omission, negligence, intentional misconduct, or breach of applicable Law, contract or Governmental Approval by any DB Contractor-Related Entity in performing the services required under the Contract Documents; provided, however, that the risk of delay following the expiration of such 365-day period, on an individual parcel basis, shall be borne equally by each Party for the first 100 days thereafter (i.e., for each parcel, DB Contractor shall be entitled to one day of time extension for every two days of delay). Following the expiration of the first 100 days after the initial 365-day period, DB Contractor shall be entitled to one day of time extension for each day of eligible delay. The term "make available," as used herein, means to make available for (a) relocation of occupants and personal property, for occupied parcels, (b) demolition, for unoccupied, improved parcels, or (c) construction, for unoccupied, unimproved parcels. DB Contractor through due diligence shall initiate, cooperate and be responsible for all efforts necessary for the processing of the administrative portion of the condemnation action, up to and including the deposit of the award of Special Commissioners.

### 4.4.6 Physical Possession and Transfer of Title

TxDOT shall notify DB Contractor of the availability of Project ROW within 10 Business Days after TxDOT has received access to such Project ROW. DB Contractor shall be responsible for being informed of and complying with any access restrictions that may be set forth in any documents

granting access to any Project ROW. Upon obtaining knowledge of any anticipated delay in the dates for acquisition of any Project ROW, the Party obtaining knowledge shall promptly notify the other party in writing. In such event, DB Contractor shall immediately determine whether the delay impacts the Critical Path and, if so, to what extent it might be possible to avoid such delay through resequencing, reallocation or other alternative construction methods or otherwise. DB Contractor shall promptly meet with TxDOT to determine the best course of action and prepare a written report setting forth its recommendations, which shall be subject to the written approval of TxDOT. DB Contractor shall accept such transfer of title and shall assume all responsibility associated with such improvements upon transfer to DB Contractor. Any value attributed to the transferred saleable improvements has been reflected in the Price, as set forth in Section 15.2.11 of the Design-Build Specifications.

### 4.4.7 Access to Project ROW

To the extent that DB Contractor has not been provided with access to portions of the Project ROW on or prior to the date set forth on the Project Schedule, DB Contractor shall work around such Project ROW with the goals of minimizing delay to the completion of the Project. Except for delays caused by an event described in Section 4.4.5.3, DB Contractor shall not be entitled to any increase in the Price or time extension for delays caused by the failure or inability of TxDOT to provide Project ROW. Where DB Contractor makes a written request for access or rights of entry for any Project ROW for which access has not yet been acquired, DB Contractor may, with TxDOT's prior written consent, which may be withheld or withdrawn at any time, in TxDOT's discretion, and subject to the provisions of Section 4.4.6 above and Item 15 of the Design-Build Specifications, negotiate with property owners or occupants for early access or temporary use of land, provided that any such negotiations shall comply in all respects with applicable Law, including the Uniform Act. DB Contractor's negotiations with property owners or occupants for early rights-of-entry shall occur only under such terms and conditions as are stipulated by TxDOT. TxDOT shall not be bound by the terms and conditions agreed upon by DB Contractor and any property owner or occupant until such time as TxDOT has expressly so indicated in writing (and then only to the extent expressly set forth therein).

## 4.5 Utilities

DB Contractor is responsible for causing, in accordance with the Project Schedule, all Utility Adjustment Work necessary to accommodate the design and construction of the Project. All Utility Adjustment Work performed by DB Contractor shall comply with the Contract Documents. DB Contractor shall coordinate, monitor, and otherwise undertake the necessary efforts to cause Utility Owners performing Utility Adjustment Work to perform such work timely, in coordination with the Work, and in compliance with the standards applicable to the Professional Services and Construction Work and other applicable requirements specified in the Contract Documents. However, regardless of the arrangements made with the Utility Owners and except as otherwise provided in Section 4.6, DB Contractor shall continue to be the responsible party to TxDOT for timely performance of all Utility Adjustment Work so that upon completion of the Work, all Utilities that might impact or be impacted by the Project (whether located within or outside the Project ROW) are compatible with the Project. DB Contractor agrees that (a) the Price (as it may be modified hereunder) covers all of the Utility Adjustment Work to be furnished, performed or paid for by DB Contractor, (b) it is feasible to obtain and perform all necessary Utility Adjustments within the time deadlines of the Contract Documents (as they may be modified pursuant to Section 4.6), and (c) the Price includes contingencies deemed adequate by DB Contractor to account for the potential risks of additional costs and delays relating to Utility Adjustments, except to the extent

that an adjustment to the Price is permitted under this Section 4.5 and in accordance with Section 4.6.

**4.5.1 New Utilities and Unidentified Utilities**

DB Contractor's entitlement to Change Orders for additional compensation or extension of time on account of New Utilities and omissions or inaccuracies in the Utility Strip Map shall be limited as set forth in this Section 4.5.1 and Section 4.6.9.2. DB Contractor shall use its best efforts to minimize costs for which DB Contractor is entitled to compensation pursuant to this Section 4.5.1, and to minimize any delay for which DB Contractor is entitled to an extension in the Completion Deadline pursuant to this Section 4.5.1 and Section 4.6.9.2, subject to DB Contractor's obligation to comply with all applicable requirements of the Contract Documents, including the Utility Accommodation Rules (UAR).

**4.5.2 Utility Enhancements**

DB Contractor shall be responsible for addressing any requests by Utility Owners that DB Contractor design or construct a Betterment or Utility Owner Project (collectively, "Utility Enhancements").

**4.5.2.1** If a Utility Owner requests that DB Contractor design or construct a Betterment, then subject to Section 4.5.3.4, DB Contractor shall use its best efforts to negotiate in good faith an agreement with the Utility Owner providing for DB Contractor to perform such work at the Utility Owner's expense, with payments to be made directly by the Utility Owner to DB Contractor. Any such agreement shall be set forth in the applicable Utility Agreement. Any such Betterment shall be deemed added to the scope of the Work only upon execution by the Utility Owner and DB Contractor and approval by TxDOT of a Utility Agreement identifying and providing for performance of such Betterment. Any change in the scope of the Work pursuant to this Section 4.5.2.1 shall not be treated as a TxDOT-Directed Change or extend the Completion Deadlines.

**4.5.2.2** The Price shall not be increased on account of any Betterment added to the Work. Instead, DB Contractor shall have the right to collect payment for such work directly from the Utility Owner, subject to the provisions of the applicable Utility Agreement. The amount of compensation payable by the Utility Owner to DB Contractor for a Betterment shall be determined pursuant to the process set forth in the applicable Utility Agreement. DB Contractor shall submit to TxDOT a copy of each invoice delivered to a Utility Owner pursuant to this Section 4.5.2.2, concurrently with its delivery to the Utility Owner.

**4.5.2.3** If a Utility Owner requests that DB Contractor design or construct a Utility Owner Project, then subject to Section 4.5.3.4, DB Contractor shall use its best efforts to negotiate in good faith an agreement with the Utility Owner providing for DB Contractor to perform such work at the Utility Owner's expense, with payments to be made directly by the Utility Owner to DB Contractor. Any such agreement shall be a separate contract between DB Contractor and the Utility Owner; and any such Utility Owner Project shall be performed outside of this Design-Build Contract and the Work, without any impact on the Price and the Completion Deadlines and shall be subject to Section 4.5.8. The compensation payable by the Utility Owner to DB Contractor for a Utility Owner Project shall be determined in a manner acceptable to both DB Contractor and the Utility Owner.

**4.5.2.4** DB Contractor is fully responsible for coordinating its efforts with Utility Owners and for addressing requests by Utility Owners that DB Contractor design or construct Utility Enhancements. Any Betterment performed as part of a Utility Adjustment, whether by DB Contractor or by the Utility

Owner, shall be subject to the same standards and requirements as if it were a necessary Utility Adjustment, and shall be addressed in the appropriate Utility Agreement. Under no circumstances shall DB Contractor proceed with any Utility Enhancement that is incompatible with the Project or that cannot be performed within the other constraints of applicable Law, the Governmental Approvals and the Contract Documents, including the Completion Deadlines. Under no circumstances will DB Contractor be entitled to any Price increase or time extension hereunder as the result of any Utility Enhancement, whether performed by DB Contractor or by the Utility Owner. DB Contractor may, but is not obligated to, design and construct Utility Enhancements. DB Contractor shall promptly notify TxDOT of any requests by Utility Owners that DB Contractor considers to be Betterments, and shall keep TxDOT informed as to the status of negotiations with Utility Owners concerning such requests. DB Contractor shall provide TxDOT with such information, analyses, and certificates as may be requested by TxDOT in order to determine compliance with this Section 4.5.2.

**4.5.3 Utility Agreements**

**4.5.3.1** As described in the Design-Build Specifications, DB Contractor is responsible for preparing and entering into Utility Agreements with the Utility Owners, and TxDOT agrees to cooperate as reasonably requested by DB Contractor in pursuing Utility Agreements, including attendance at negotiation sessions and review of Utility Agreements. TxDOT is not providing any assurances to DB Contractor that the Utility Owners will accept, without modification, the standard Utility Agreement forms specified in the Design-Build Specifications. DB Contractor is solely responsible for the terms and conditions of all PUAAs and UAAAs into which it enters (subject to the requirements of the Contract Documents, including Section 14.1.3 of the Design-Build Specifications). Utility Agreements entered into by DB Contractor shall not be considered Contract Documents. DB Contractor shall not be entitled to any increase in the Price or to any time extension on account of the terms of any Utility Agreement (including those related to any Betterment).

**4.5.3.2** TxDOT will not be a party to the Utility Agreements; however, DB Contractor shall cause the Utility Agreements to designate TxDOT as an intended third-party beneficiary thereof and to permit assignment of DB Contractor's right, title and interest thereunder to TxDOT without necessity for Utility Owner consent. DB Contractor shall not enter into any agreement with a Utility Owner that purports to bind TxDOT in any way, unless TxDOT has executed such agreement as a party thereto. However, TxDOT's signature indicating approval or review of an agreement between DB Contractor and a Utility Owner, or its status as a third-party beneficiary, shall not bind TxDOT as a party to such agreement.

**4.5.3.3** If a conflict occurs between the terms of a Utility Agreement and those of the Contract Documents, the terms that establish the higher quality, manner or method of performing Utility Adjustment Work, establish better Good Industry Practice, or use more stringent standards shall prevail between DB Contractor and TxDOT.

**4.5.3.4** DB Contractor shall comply with and timely perform all obligations imposed on DB Contractor by any Utility Agreement.

**4.5.3.5** Each Utility Adjustment (whether performed by DB Contractor or by the Utility Owner) shall comply with the Adjustment Standards in effect as of the Proposal Due Date, together with any subsequent amendments and additions to those standards that (a) are necessary to conform to applicable Law or (b) are adopted by the Utility Owner and affect the Utility Adjustment pursuant to the applicable Utility Agreements. DB Contractor is solely responsible for negotiating any terms and conditions of

its Utility Agreements that might limit a Utility Owner's amendments and additions to its Adjustment Standards after the Proposal Due Date. In addition, all Utility Adjustment Work shall comply with all applicable Laws, the applicable Utility Agreements, and all other requirements specified in the Contract Documents.

**4.5.4 Failure of Utility Owners to Cooperate**

**4.5.4.1** DB Contractor shall use best efforts to obtain the cooperation of each Utility Owner as necessary for the Utility Adjustment. DB Contractor shall notify TxDOT immediately if (a) DB Contractor is unable (or anticipates that it will be unable), after diligent efforts, to reach agreement with a Utility Owner on a necessary Utility Agreement within a reasonable time, (b) DB Contractor reasonably believes for any other reason that any Utility Owner would not undertake or permit a Utility Adjustment in a manner consistent with the timely completion of the Project, (c) DB Contractor becomes aware that any Utility Owner is not cooperating in a timely manner to provide agreed-upon work or approvals, or (d) any other dispute arises between DB Contractor and a Utility Owner with respect to the Project, despite DB Contractor's diligent efforts to obtain such Utility Owner's cooperation or otherwise resolve such dispute. Such notice may include a request that TxDOT assist in resolving the dispute or in otherwise obtaining the Utility Owner's timely cooperation. DB Contractor shall provide TxDOT with such information as TxDOT requests regarding the Utility Owner's failure to cooperate and the effect of any resulting delay on the Project Schedule. After delivering to TxDOT any notice or request for assistance, DB Contractor shall continue to use diligent efforts to pursue the Utility Owner's cooperation.

**4.5.4.2** If DB Contractor requests TxDOT's assistance pursuant to Section 4.5.4.1, DB Contractor shall provide evidence reasonably satisfactory to TxDOT that (a) the Utility Adjustment is necessary, (b) the time for completion of the Utility Adjustment in the Project Schedule was, in its inception, a reasonable amount of time for completion of such work, (c) DB Contractor has made diligent efforts to obtain the Utility Owner's cooperation, and (d) the Utility Owner is not cooperating (the foregoing items (a) through (d) are referred to herein as the "conditions to assistance"). Following TxDOT's receipt of satisfactory evidence, TxDOT shall take such reasonable steps as may be requested by DB Contractor to obtain the cooperation of the Utility Owner or resolve the dispute; provided, however, that TxDOT shall have no obligation to prosecute eminent domain or other legal proceedings, or to exercise any other remedy available to it under applicable Law or existing contract, unless TxDOT elects to do so in its discretion. If TxDOT holds contractual rights that might be used to enforce the Utility Owner's obligation to cooperate and TxDOT elects in its discretion not to exercise those rights, then TxDOT shall assign those rights to DB Contractor upon DB Contractor's request; provided, however, that such assignment shall be without any representation or warranty as to either the assignability or the enforceability of such rights. DB Contractor shall reimburse TxDOT for TxDOT's Recoverable Costs in connection with providing such assistance to DB Contractor. Any assistance provided by TxDOT shall not relieve DB Contractor of its sole and primary responsibility for the satisfactory compliance with its obligations and timely completion of all Utility Adjustment Work, except as otherwise expressly set forth in this Section 4.5.4.

**4.5.4.3** If TxDOT objects in writing to a request for assistance pursuant to Section 4.5.4.1, based on DB Contractor's failure to satisfy one or both of the conditions to assistance described in Sections 4.5.4.2(a) and (b), then DB Contractor shall take such action as is appropriate to satisfy the conditions and shall then have the right to submit another request for assistance on the same subject matter. If TxDOT objects in writing to a request for assistance pursuant to Section 4.5.4.1 based on DB Contractor's failure to satisfy one or both of the conditions to assistance described in Sections 4.5.4.2(c) and (d), then DB Contractor shall take such action as DB Contractor deems

advisable during the next 30 days to obtain the Utility Owner's cooperation and shall then have the right to submit another request for assistance on the same subject matter. Notwithstanding the foregoing, no resubmittal will be accepted unless all TxDOT objections have been addressed in accordance with the preceding two sentences. This process shall be followed until DB Contractor succeeds in obtaining the Utility Owner's cooperation or in otherwise resolving the dispute or until TxDOT determines, based on evidence DB Contractor presents, that the conditions to assistance have been satisfied. DB Contractor shall have the right to submit the question of the reasonableness of TxDOT's determination through the dispute resolution process described in Section 4.9, Section 4.10 and DBA Exhibit 20.

**4.5.5 Delays by Utility Owners**

**4.5.5.1** DB Contractor shall bear 100% of the risk of Critical Path delays caused by a Utility Owner's failure to timely comply with the requirements of a Utility Agreement that has been executed by DB Contractor and such Utility Owner.

**4.5.5.2** The term "Utility Owner Delay" means a delay to a Critical Path that is directly attributable to a Utility Owner's failure to cooperate with DB Contractor in performing Utility Adjustment Work within the time period reasonably scheduled by DB Contractor for performance of such work, where DB Contractor and Utility Owner have not yet executed a Utility Agreement addressing such Utility Adjustment Work. DB Contractor shall bear 100% of the risk of each Utility Owner Delay prior to and during the first 90 days of any such Utility Owner Delay, provided that such 90-day period shall not commence until TxDOT has received evidence required by Section 4.5.4.2 that is reasonably satisfactory to TxDOT and DB Contractor has complied with all other requirements for a Change Order under this Design-Build Contract, including Section 4.6. The risk of any Utility Owner Delay after such 90-day period shall be borne equally by each Party (i.e., any affected Completion Deadline shall be extended by one day for every two full days of Utility Owner Delay occurring after expiration of the 90-day period). If a Utility Owner Delay is concurrent with another delay which is DB Contractor's responsibility hereunder, DB Contractor shall not be entitled to a time extension on account of such Utility Owner Delay. If a Utility Owner Delay is concurrent with another Utility Owner Delay by the same Utility Owner or by another Utility Owner, only one of the delays shall be counted. If a Utility Owner Delay is concurrent with any other delay for which DB Contractor is entitled to a time extension under Section 4.6, the delay shall be deemed a Utility Owner Delay and the provisions of this Section 4.5.5 shall apply.

**4.5.5.3** No Change Order for delay to a Critical Path shall be allowable pursuant to Section 4.5.5.2 unless all of the following criteria are met:

(a) the general requirements and conditions for Change Orders set forth in Section 4.6 have been met;

(b) DB Contractor has provided evidence reasonably satisfactory to TxDOT that (i) DB Contractor took advantage of Float time available early in the Project Schedule for coordination activities with respect to the affected Utility and (ii) DB Contractor has made diligent efforts to obtain the Utility Owner's cooperation but has been unable to obtain such cooperation;

(c) if applicable, DB Contractor has provided a reasonable Utility Adjustment plan to the Utility Owner;

(d) DB Contractor or the Utility Owner has obtained, or is in a position to timely obtain, all applicable approvals, authorizations, certifications, consents, exemptions, filings, leases, licenses, permits, registrations, opinions and rulings required by or with any Person in order to design and construct such Utility Adjustment;

(e) no other circumstance exists that would delay the affected Utility Adjustment even if the Utility Owner were cooperative; and

(f) the delay is allowable under Section 4.6.5.3.

**4.5.5.4** Except as set forth in Section 4.5.5.2 with respect to certain Utility Owner Delays, DB Contractor shall not be entitled to an extension of any Completion Deadline on account of any delays caused by a Utility Owner. DB Contractor shall not be entitled to any increase of the Price or reimbursement of any additional costs which it may incur as a result of any delays caused by a Utility Owner, regardless of whether DB Contractor is entitled to an extension of any Completion Deadlines on account of such delays pursuant to Section 4.5.5.2. Any action or inaction by TxDOT as described in Section 4.5.4.2 shall have no bearing on the restriction set forth in this Section 4.5.5.4.

**4.5.6 Utility Adjustment Costs**

**4.5.6.1** Subject to Section 4.5.1, DB Contractor is responsible for all costs of the Utility Adjustment Work, including costs of acquiring Replacement Utility Property Interests and costs with respect to relinquishment or acquisition of Existing Utility Property Interests, but excluding costs attributable to Betterments and any other costs for which the Utility Owner is responsible under applicable Law. DB Contractor shall fulfill this responsibility either by performing the Utility Adjustment Work itself at its own cost (except that any assistance provided by any DB Contractor-Related Entity to the Utility Owner in acquiring Replacement Utility Property Interests shall be provided outside of the Work, in compliance with Section 14.2.4 of the Design-Build Specifications), or by reimbursing the Utility Owner for its Utility Adjustment Work (however, DB Contractor has no obligation to reimburse Utility Adjustment costs for any Service Line Utility Adjustment for which the affected property owner has been compensated pursuant to Section 4.4.2). DB Contractor is solely responsible for collecting directly from the Utility Owner any reimbursement due to DB Contractor for Betterment costs or other costs incurred by DB Contractor for which the Utility Owner is responsible under applicable Law.

**4.5.6.2** For each Utility Adjustment, the eligibility of Utility Owner costs (both indirect and direct) for reimbursement by DB Contractor, as well as the determination of any Betterment or other costs due to DB Contractor, shall be established in accordance with applicable Law and the applicable Utility Agreements, all of which shall incorporate by reference 23 CFR Part 645 Subpart A.

**4.5.6.3** For each Utility Adjustment, DB Contractor shall (a) compensate the Utility Owner for the market value of each Existing Utility Property Interest relinquished pursuant to Section 14.2.4 of the Design-Build Specifications, to the extent TxDOT would be required to do so by applicable Law and provided that TxDOT has approved the Utility Owner's claim or (b) reimburse the Utility Owner's reasonable acquisition costs for a Replacement Utility Property Interest. The Utility Owner will determine which method of compensation is satisfactory. DB Contractor shall pay any compensation due to the Utility Owner and all costs and expenses associated therewith (including any incurred by TxDOT on DB Contractor's behalf for eminent domain proceedings or otherwise) in accordance with Section 4.4.2. DB Contractor shall be responsible for all eligible costs of right of way engineering, surveying, appraisals, administration, acquisition, environmental permitting and

related services for compensating the Utility Owner or replacing each Existing Utility Property Interest, including all costs and expenses associated with negotiation and condemnation action. DB Contractor shall also carry out the duties in Section 14.2.4.2 of the Design-Build Specifications.

**4.5.6.4** If for any reason DB Contractor is unable to collect any amounts owed to DB Contractor by any Utility Owner, then (a) TxDOT shall have no liability for such amounts; (b) DB Contractor shall have no right to collect such amounts from TxDOT or to offset such amounts against amounts otherwise owing to DB Contractor from TxDOT; and (c) DB Contractor shall have no right to stop work or to exercise any other remedies against TxDOT on account of such Utility Owner's failure to pay DB Contractor.

**4.5.6.5** If any local Governmental Entity is participating in any portion of Utility Adjustment costs, DB Contractor shall coordinate with TxDOT and such local Governmental Entity regarding accounting for and approval of those costs.

**4.5.6.6** DB Contractor shall maintain a complete set of records for the costs of each Utility Adjustment (whether incurred by DB Contractor or by the Utility Owner), in a format compatible with the estimate attached to the applicable Utility Agreement and in sufficient detail for analysis. For both Utility Owner costs and DB Contractor costs, the totals for each cost category shall be shown in such manner as to permit comparison with the categories stated on the estimate. DB Contractor also shall indicate in these records the source of funds used for each Utility Adjustment. All records with respect to Utility Adjustment Work shall comply with the record keeping and audit requirements of the Contract Documents. This Work includes the deliverables identified in the final closeout procedures of Section 14.5.3 of the Design-Build Specifications.

**4.5.7 FHWA Utility Requirements**

**4.5.7.1** Unless TxDOT advises DB Contractor otherwise, the following provisions apply to Utility Adjustments.

**4.5.7.2** The Project will be subject to 23 CFR Part 645 Subpart A (including its requirements as to plans, specifications, estimates, charges, tracking of costs, credits, billings, records retention, and audit) and 23 CFR Section 635.410 (Buy America) and FHWA associated policies. DB Contractor shall comply (and shall require the Utility Owners to comply) with 23 CFR Part 645 Subpart A and 23 CFR Section 635.410. DB Contractor acknowledges, however, that without regard to whether such compliance is required, (a) it is not anticipated that DB Contractor will be eligible for FHWA reimbursement of any Utility Adjustment outlays and (b) DB Contractor will not have any share in any reimbursement from FHWA or other federal financing or funding that TxDOT may receive on account of Utility Adjustments.

**4.5.7.3** DB Contractor shall prepare and deliver to TxDOT the Alternate Procedure List in appropriate format, together with all other documentation required by FHWA or TxDOT for compliance with the FHWA Alternate Procedure.

**4.5.7.4** Promptly upon determining that any Utility Owner not referenced on the Alternate Procedure List is impacted by the Project, DB Contractor shall submit to TxDOT all documentation required by FHWA or TxDOT to add these Utilities to the Alternate Procedure List.

**4.5.7.5** TxDOT will forward the approved list to DB Contractor.

**4.5.8 Applications for Utility Permits**

**4.5.8.1** It is anticipated that during the Work, Utility Owners will apply for utility permits to install Utilities that would cross or longitudinally occupy the Project ROW, or to modify, upgrade, relocate or expand existing Utilities within the Project ROW for reasons other than accommodation of the Project. The provisions of this Section 4.5.8 shall apply to all such permit applications. TxDOT shall provide DB Contractor with a copy of each such permit application received after the Effective Date, within 30 days after TxDOT's receipt of such application.

**4.5.8.2** For all such utility permit applications pending as of or submitted after the Effective Date, DB Contractor shall furnish the most recent Project design information or as-built plans, as applicable, to the applicants, and shall assist each applicant with information regarding the location of other proposed and existing Utilities.

**4.5.8.3** DB Contractor shall assist TxDOT in deciding whether to approve a permit described in Section 4.5.8.1. Within a time period that will enable TxDOT to timely respond to the application, DB Contractor shall analyze each application and provide to TxDOT a recommendation (together with supporting analysis) as to whether the permit should be approved, denied, or approved subject to conditions. As part of the recommendation process, DB Contractor shall furnish to TxDOT Utility No Conflict Sign-Off Forms, signed by both DB Contractor's Utility Design Coordinator (UDC) and DB Contractor's Utility Manager (UM), using the standard forms included in the Contract Documents. DB Contractor shall limit the grounds for its recommendation to the grounds on which TxDOT is legally entitled to approve or deny the application or to impose conditions on its approval. However, TxDOT shall have the right to issue Utility permits in its discretion. Applications for Utility permits and associated coordination described in this Section 4.5.8 shall not be subject to a Change Order and are not considered a New Utility or Unidentified Utility as described in Section 4.5.1.

**4.5.9 Security for Utility Adjustment Costs; Insurance**

**4.5.9.1** Upon request from a Utility Owner entitled to reimbursement of Utility Adjustment costs, DB Contractor shall, at its sole cost, provide security for such reimbursement by way of a payment bond, letter of credit or retention account, in such amount and on such terms as are negotiated in good faith between DB Contractor and the Utility Owner.

**4.5.9.2** DB Contractor may satisfy a Utility Owner's requirement that DB Contractor provide liability insurance by naming such Utility Owner as an additional insured on the insurance provided by DB Contractor or any Subcontractor pursuant to Section 3.5.

**4.5.10 Additional Restrictions on Change Orders for Utility Adjustments**

**4.5.10.1** In addition to all of the other requirements and limitations contained in this Section 4.5 and in Section 4.6 the entitlement of DB Contractor to any Change Order under this Section 4.5 shall be subject to the restrictions and limitations set forth in this Section 4.5.10.

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

**4.5.10.3** As part of the Work, DB Contractor is responsible for causing all Utility Adjustment Work and Incidental Utility Adjustment Work to occur, for reimbursing the Utility Owners for their costs of performing or furnishing Utility Adjustment Work and Incidental Utility Adjustment Work, and, subject to Section 4.5.5.2, for scheduling all Utility Adjustment Work and Incidental Utility Adjustment Work (whether performed by DB Contractor or the affected Utility Owner) so as to meet the Completion Deadlines herein. Accordingly, if a Utility Owner performs or furnishes Utility Adjustment Work or Incidental Utility Adjustment Work that was initially anticipated to be performed or furnished by DB Contractor, or if DB Contractor performs or furnishes Utility Adjustment Work or Incidental Utility Adjustment Work that was initially anticipated to be performed or furnished by the Utility Owner, there shall be no resulting time extension and no resulting change in the Price. The foregoing shall not affect TxDOT's right to any credit that may be owing under Section 4.6.

**4.5.10.4** DB Contractor shall not be entitled to a Change Order for any costs or delays that are attributable to (a) any errors, omissions, inaccuracies, inconsistencies or other defects in designs furnished by any Utility Owner, including any failure of such designs to comply with the requirements of Section 14.3 of the Design-Build Specifications or (b) any defect in construction performed by any Utility Owner or other failure of such construction to comply with the requirements of Section 14.4 of the Design-Build Specifications.

**4.5.10.5** DB Contractor shall not be entitled to a Change Order for any costs or delays resulting from the performance of Incidental Utility Adjustment Work by DB Contractor or any Utility Owner (including with respect to New Utilities for which DB Contractor is otherwise entitled to a Change Order under Section 4.5.1 and 4.6.9.2).

**4.5.10.6** Any Change Order increasing the Price pursuant to this Section 4.5 shall include only the incremental costs arising from the circumstances giving rise to such Change Order.

**4.5.10.7** DB Contractor shall not be entitled to any increase in the Price for any costs of coordinating with Utility Owners (including with respect to New Utilities for which DB Contractor is otherwise entitled to a Change Order under Section 4.5.1).

**4.5.10.8** Any information with respect to Utilities provided in the Reference Information Documents is for DB Contractor's reference only, has not been verified, and shall not be relied upon by DB Contractor. Without limiting the generality of the foregoing, DB Contractor acknowledges that such information does not identify most of the Service Lines that may be impacted by the Project and that there may be other facilities impacted by the Project that are not identified in such information. DB Contractor shall verify all information with respect to Utilities included in the Reference Information Documents and shall perform its own investigations as provided in Sections 14.3.1 and 14.4.2 of the Design-Build Specifications. Accordingly, there shall be no changes in the Price and no time extensions on account of any inaccuracies in the Reference Information Documents with respect to any Utilities. Except as provided in Section 4.5.1, DB Contractor shall not be entitled to any increase in the Price or time extension as a result of any of the following:

(a) any increase in the extent or change in the character of the Utility Adjustment Work necessary to Adjust any Utility from that anticipated by DB Contractor;

(b) any difference in the cost to Adjust a Utility from that anticipated by DB Contractor;

(c) any inaccuracy in the information included in the Reference Information Documents as to the existence, location, ownership, type, or any other characteristic of any Utility;

(d) any inaccuracy in the Reference Information Documents as to whether any Utility is located within privately owned property or public right of way; or

(e) any inaccuracy in the Reference Information Documents as to the existence or nature of any rights or interest relating to the occupancy of any real property by any Utility.

**4.5.10.9** Inasmuch as DB Contractor is both furnishing the design of and constructing the Project, DB Contractor may have opportunities to reduce the costs of certain portions of the Work, which may increase the costs of certain other portions of the Work. In considering each such opportunity, DB Contractor shall consider the impact of design changes on Utility Adjustments to the extent practical. Accordingly, except as otherwise provided in Section 4.6 with respect to TxDOT-Directed Changes, the following provisions shall apply with respect to any increase or decrease in the cost of the Work and any delay associated with design changes during the course of the Project which either reduce the nature or extent of or eliminate any Utility Adjustment, or result in unanticipated Utility Adjustments or an increase in the nature or extent of anticipated Utility Adjustments:

(a) DB Contractor shall not be entitled to extension of any Completion Deadline on account of delays resulting from any such design changes.

(b) DB Contractor shall not be entitled to any increase in the Price for any such additional costs that DB Contractor incurs (including both additional costs of Utility Adjustment Work and the costs of any additional Work on other aspects of the Project undertaken in order to avoid or minimize Utility Adjustments).

(c) If TxDOT incurs any such additional costs, then DB Contractor shall reimburse TxDOT for such costs within 10 days after receipt of TxDOT's invoice therefor, or in TxDOT's discretion, TxDOT may deduct the amount of reimbursement due from any payment due to DB Contractor under this Design-Build Contract.

(d) TxDOT shall not be entitled to a credit on account of reductions in the cost of the Work due to any such avoided or minimized Utility Adjustments.

**4.5.10.10** If DB Contractor elects to make payments to Utility Owners or to undertake any other efforts which are not required by the terms of the Contract Documents, DB Contractor shall not be entitled to a Change Order in connection therewith. DB Contractor shall promptly notify TxDOT of the terms of any such arrangements.

**4.5.10.11** Except as specified in this Section 4.5 or in Section 4.6, DB Contractor shall not be entitled to any Change Order with respect to any Utility Adjustments, including any act or omission of any Utility Owner that may result in a delay to the Project Schedule or in DB Contractor's incurring costs not included in the Price.

## 4.6 Changes

This Section 4.6 sets forth the requirements for obtaining all Change Orders under this Design-Build Contract. DB Contractor hereby acknowledges and agrees that the Price constitutes full compensation for performance of all of the Work, subject only to those exceptions specified in this Section 4.6 and DB Contractor's right to collect certain payments from Utility Owners for Betterments as specified in Section 4.5.2, and that TxDOT is subject to constraints limiting its ability to increase the Price or extend the Completion Deadlines. DB Contractor unconditionally and irrevocably waives the right to any Claim for a time extension or for any monetary compensation in

addition to the Price and other compensation specified in this Design-Build Contract, except in accordance with this Section 4.6. To the extent that any other provision of this Design-Build Contract expressly provides for a Change Order to be issued, such provision is incorporated into and subject to this Section 4.6.

**4.6.1 Circumstances Under Which Change Orders May Be Issued**

**4.6.1.1** Definition of and Requirements Relating to Change Orders

The term "Change Order" means a written amendment to the terms and conditions of the Contract Documents issued in accordance with this Section 4.6. Change Orders may be issued for the following purposes (or combination thereof):

(a) to modify the scope of the Work;

(b) to modify the Design-Build Specifications;

(c) to revise a Completion Deadline;

(d) to revise the Price; and

(e) to revise other terms and conditions of the Contract Documents.

The matters set forth in clause (e) above may be made pursuant to an amendment in accordance with the Design-Build Agreement unless TxDOT issues a Directive Letter, in which event the process set forth in Section 4.6.1.2 shall be followed.

Upon TxDOT's approval of the matters set forth in the Request for Change Order submitted by DB Contractor (whether it is initiated by TxDOT or requested by DB Contractor), TxDOT shall prepare a Change Order for execution by the Parties. A Request for Change Order is not required for Unilateral Change Orders. A Change Order may, at the sole discretion of TxDOT, direct DB Contractor to proceed with the Work with the amount of any adjustment of any Completion Deadline or Price to be determined in the future. All additions, deductions or changes to the Work as directed by Change Orders shall be performed under the requirements and conditions of the Contract Documents, except to the extent they are expressly modified by the Change Order. A Change Order shall not be effective for any purpose unless executed by TxDOT.

**4.6.1.2** Issuance of Directive Letter

**4.6.1.2.1** TxDOT may at any time issue a Directive Letter to DB Contractor regarding any matter for which a Change Order can be issued or in the event of any Claim or Dispute regarding the scope of the Work or whether DB Contractor has performed in accordance with the requirements of the Contract Documents. The first Directive Letter shall be labeled "Directive Letter No. 1" and subsequent letters shall be numbered sequentially. The Directive Letter will describe the Work in question and may state the basis for determining compensation, if any. If the Directive Letter does not state the basis for determining compensation, compensation will be determined pursuant to Section 4.6.8. DB Contractor shall proceed immediately as directed in the Directive Letter. If the Directive Letter states that the Work is within DB Contractor's original scope of Work, DB Contractor shall proceed with the Work as directed but shall have the right pursuant to Section 4.6.3 to submit a PCO Notice requesting that TxDOT issue a Change Order except as set forth in the next sentence. If the Directive Letter states that the Work is within DB Contractor's original scope of Work and the

directed work involves less than $10,000 in additional Direct Costs incurred by DB Contractor, DB Contractor shall not be entitled to a Change Order or an increase in the Price.

**4.6.1.2.2** Receipt of a Directive Letter is a condition precedent to a Claim that a TxDOT-Directed Change has occurred; however the fact that a Directive Letter was issued by TxDOT shall not be considered evidence that a TxDOT-Directed Change occurred. The determination whether a TxDOT-Directed Change occurred or whether DB Contractor is otherwise entitled to a Change Order shall be based on an analysis of the requirements under the Contract Documents and a determination whether the Directive Letter in fact constituted a change in those requirements.

**4.6.1.2.3** DB Contractor shall not be entitled to additional compensation or time extension for any changed work or other work not included in the Price that is performed by DB Contractor as a TxDOT-Directed Change prior to receipt of a Directive Letter or Change Order.

**4.6.1.3** TxDOT Right to Issue Change Orders

TxDOT may, at any time and from time to time, without notice to any Surety, authorize or require, pursuant to a Change Order, changes in the Work or in terms and conditions of the Design-Build Specifications (including changes in the standards applicable to the Work); except TxDOT has no right to require any change that:

(a) Is not in compliance with applicable Laws;

(b) Would contravene an existing Governmental Approval and such contravention could not be corrected by the issuance of a further or revised Governmental Approval;

(c) Constitutes a fundamental change in the nature or scope of the Project;

(d) Would cause an insured risk to become uninsurable;

(e) Would materially adversely affect the health or safety of workers or users of the Project;

(f) Is fundamentally incompatible with the Project design; or

(g) Is not technically feasible to construct.

**4.6.2 TxDOT-Initiated Change Orders**

**4.6.2.1** Request for Change Proposal

**4.6.2.1.1** If TxDOT desires to issue a TxDOT-Directed Change or to evaluate whether to initiate such a change, then TxDOT may, in its discretion, issue a Request for Change Proposal. The Request for Change Proposal shall set forth the nature, extent and details of the proposed TxDOT-Directed Change.

**4.6.2.1.2** Within five Business Days after DB Contractor receives a Request for Change Proposal, or such longer period to which the Parties mutually agree in writing, TxDOT and DB Contractor shall consult to define the proposed scope of the change. Within five Business Days after the initial consultation, or such longer period to which the Parties may mutually agree in writing, DB Contractor shall prepare and TxDOT and DB Contractor shall consult concerning the estimated cost and time impacts.

**4.6.2.1.3** After the second consultation and provision of any data described in Section 4.6.2.1.2, TxDOT shall notify DB Contractor of TxDOT's determination to: (a) issue a Change Order, (b) require DB Contractor to provide a Request for Change Order as discussed at the meeting, (c) require DB Contractor to prepare a modified work plan for the change and a Request for Change Order based on the modified plan, or (d) not issue a Change Order. TxDOT may at any time, in its sole discretion, require DB Contractor to provide two alternative Requests for Change Order, one of which shall provide for a time extension and any additional costs permitted hereunder, and the other of which shall show all Acceleration Costs associated with meeting the non-extended Completion Deadlines, as well as any additional costs permitted hereunder.

**4.6.2.1.4** If so requested, DB Contractor shall, within ten Business Days after receipt of the notification described in Section 4.6.2.1.3, prepare and submit to TxDOT for review and approval by TxDOT a Request for Change Order for the requested change, in a format provided by TxDOT, complying with all applicable requirements of Section 4.6.4 and 4.6.5, and incorporating and fully addressing all requests made by TxDOT.

**4.6.2.1.5** DB Contractor shall bear the cost of developing the Request for Change Order in response to a Request for Change Proposal, including any modifications thereto requested by TxDOT, except that DB Contractor shall be entitled to costs (without markup for overhead and profit) in excess of $10,000 incurred for design, estimating and scheduling work required to prepare the Request for Change Order. Such costs must be pre-authorized by TxDOT, to be reimbursable. If the Change Order is approved, such design, estimating and scheduling costs will be included within the Change Order, otherwise, they shall be separately reimbursed through a separate Change Order.

**4.6.2.1.6** If DB Contractor and TxDOT are unable to reach agreement on a Change Order, TxDOT may, in its sole discretion, order DB Contractor to proceed with the performance of the Work in question notwithstanding such disagreement. Such order may, at TxDOT's option, be in the form of a Unilateral Change Order or a Directive Letter. Upon receipt of a Unilateral Change Order or Directive Letter, as the case may be, pending final resolution of the relevant Change Order by the Parties or according to the procedures for resolving Disputes in this Design-Build Contract, (a) DB Contractor shall implement and perform the Work in question as directed by TxDOT and (b) TxDOT will make interim payment(s) to DB Contractor on a monthly basis for the reasonable documented costs of the Work in question, subject to meeting the record requirements in Section 4.6.10 and any subsequent adjustment through the procedures for resolving Disputes in this Design-Build Contract.

**4.6.2.2** Unilateral Change Orders

**4.6.2.2.1** TxDOT may issue a Unilateral Change Order at any time, regardless of whether it has issued a Request for Change Proposal or received a Request for Change Order. If the Unilateral Change Order is not issued as a lump sum, DB Contractor shall be entitled to compensation in accordance with Section 4.6.8 for additional Work that is required to be performed as the result of the Unilateral Change Order. If TxDOT and DB Contractor are unable to agree upon the amount of any adjustment to the Price, then DB Contractor shall have the right to submit the issue of the Price adjustment to dispute resolution in accordance with Section 4.9, Section 4.10 and DBA Exhibit 20.

**4.6.2.2.2** If the Unilateral Change Order is not issued with the direction to accelerate the Work and DB Contractor believes that it is entitled to an adjustment of the Completion Deadlines, DB Contractor shall prepare and submit a Time Impact Analysis in accordance with Section 4.6.5.2.3. If TxDOT and DB Contractor cannot agree as to entitlement to compensation for Acceleration Costs or to any

adjustment of the Completion Deadlines, then DB Contractor shall have the right to submit such matters to dispute resolution in accordance with Section 4.9, Section 4.10 and DBA Exhibit 20.

**4.6.3 DB Contractor-Requested Change Orders**

DB Contractor's entitlement to a Change Order for eligible changes is subject to the restrictions and limitations contained in this Section 4.6 and elsewhere in the Contract Documents, and furthermore is subject to DB Contractor's compliance with all notification and other requirements identified herein. DB Contractor shall initiate the Change Order process by delivery of a PCO Notice as described in Section 4.6.3.2, followed by submittal of a Request for Change Order and supporting documentation to TxDOT. Change Orders may be requested by DB Contractor only pursuant to this Section 4.6.3.

**4.6.3.1** Eligible Changes

**4.6.3.1.1** DB Contractor may request a Change Order to extend a Completion Deadline only for delays directly attributable to one or more of the following events or circumstances that change the duration of a Critical Path:

(a) Relief Events to the extent permitted by Section 4.6.9.3;

(b) TxDOT-Caused Delays;

(c) delays relating to Utilities, to the extent permitted by Sections 4.5.1, 4.5.5 and 4.6.9.2;

(d) delays relating to discovery of Hazardous Materials, to the extent permitted by Section 4.6.9.4.2; or

(e) delays relating to access to ROW, to the extent permitted by Section 4.6.9.5;

(f) delays relating to Differing Site Conditions to the extent provided in Section 4.6.9.1,or

(g) delays relating to supply chain disruptions to the extent permitted in Section 4.6.9.7.

**4.6.3.1.2** DB Contractor may request a Change Order to increase the Price only for increased costs of performance of the Work as follows:

(a) additional costs directly attributable to additional Work resulting from TxDOT-Directed Changes and TxDOT-Caused Delays for which TxDOT has not submitted a Change Order or a Request for Change Proposal;

(b) certain additional costs relating to Differing Site Conditions, Hazardous Materials, and Relief Events, to the extent provided in Section 4.6.9;

(c) certain additional costs relating to Utility Adjustment Work, as described in Section 4.5 and Section 4.6.9.2, to the extent provided therein;

(d) additional costs directly attributable to uncovering, removing and restoring Work, to the extent provided in Section 5.10.1.1.3; or

(e) additional costs for Utility Adjustment Work directly attributable to Necessary Basic Configuration Changes, to the extent provided in Section 4.6.9.

**4.6.3.2** Procedures

The requirements set forth in this Section 4.6.3.2 and Section 4.6.4 constitute conditions precedent to DB Contractor's entitlement to request and receive a Change Order except those involving a Price increase under the Design-Build Agreement for delays to NTP1. DB Contractor understands that it shall be forever barred from recovering against TxDOT if it fails to give notice of any act, or omission, by TxDOT or any of its representatives or the happening of any event, thing or occurrence pursuant to a proper PCO Notice, or fails to comply with the remaining requirements of this Section 4.6.3 and Section 4.6.4.

**4.6.3.2.1** Delivery of PCO Notices

DB Contractor acknowledges the importance of providing prompt notification to TxDOT upon occurrence of any event or thing entitling DB Contractor to a Change Order under Section 4.6.3.1. Among other things, such notification serves the purpose of allowing TxDOT to take action to mitigate adverse impacts. Such notification must be delivered as promptly as possible after the occurrence of such event or situation, through a PCO Notice as described in Section 4.6.3.2.2.

**4.6.3.2.2** PCO Notices

The term "PCO Notice" means a notice delivered by DB Contractor, meeting the requirements set forth below, stating that an event or situation has occurred within the scope of Section 4.6.3.1 and stating which subsection is applicable. The first notice shall be labeled "PCO Notice No. 1" and subsequent notices shall be numbered sequentially.

The PCO Notice shall: (a) state in detail the facts underlying the anticipated Request for Change Order, the reasons why DB Contractor believes additional compensation or time will or may be due and the date of occurrence, (b) state the name, title, and activity of each TxDOT representative knowledgeable of the facts underlying the anticipated Request for Change Order, (c) identify any documents and the substance of any oral communication involved in the facts underlying the anticipated Request for Change Order, (d) cite any and all provisions of the Contract Documents supporting the anticipated Request for Change Order, (e) state in detail the basis for necessary accelerated schedule performance, if applicable, (f) state in detail the basis that the work is not required by this Design-Build Contract, if applicable, (g) identify particular elements of performance for which additional compensation may be sought under this Section 4.6.3.2, (h) identify any potential Critical Path impacts as described in Section 8.5.1.4, (i) identify any insurance available to DB Contractor, any deductible or self-insured retention associated with such insurance, and any insurance deemed to be self-insured by DB Contractor under Section 3.5, with respect to the event giving rise to the request for additional compensation, and (j) provide an estimate of the time within which a response to the notice is required to minimize cost, delay or disruption of performance.

If the PCO Notice relates to a decision that this Design-Build Contract leaves to the discretion of a Person or as to which this Design-Build Contract provides that such Person's decision is final, the PCO Notice shall set out in detail all facts supporting DB Contractor's objection to the decision, including all facts supporting any contention that the decision was capricious or arbitrary or is not supported by substantial evidence.

Written notification provided in accordance with Section 4.6.9.1.4 or 4.6.9.4.1 may also serve as a PCO Notice provided it meets the requirements for PCO Notices.

Any adjustments made to this Design-Build Contract shall not include increased costs or time extensions for delay resulting from DB Contractor's failure to timely provide requested additional information under this Section 4.6.3.2.2.

**4.6.3.2.3** Importance of notice; Waiver

Each PCO Notice shall be delivered as promptly as possible after the occurrence of such event or situation. If any PCO Notice is delivered later than ten days after DB Contractor first discovered (or should have discovered in the exercise of reasonable prudence) the occurrence described therein, DB Contractor shall be deemed to have waived: (a) the right to collect any costs incurred prior to the date of delivery of the PCO Notice, and (b) the right to seek an extension of any Completion Deadline with respect to any delay in a Critical Path that accrued prior to the date of delivery of the PCO Notice. Furthermore, if any PCO Notice concerns any condition or material described in Section 4.6.9.4.1, DB Contractor shall be deemed to have waived the right to collect any and all costs incurred in connection therewith to the extent that TxDOT is not afforded the opportunity to inspect such material or condition before it is disturbed.

In addition to the limitations set forth above in this Section 4.6.3.2.3, DB Contractor's failure to provide a PCO Notice within 60 days after DB Contractor first discovered (or should have discovered in the exercise of reasonable prudence) the occurrence of a given event or situation shall preclude DB Contractor from any relief, unless DB Contractor can show, based on a preponderance of the evidence, that: (a) TxDOT was not materially prejudiced by the lack of notice, or (b) TxDOT's Authorized Representative specified in accordance with the Design-Build Agreement had actual knowledge, prior to the expiration of the 60-day period, of the event or situation and that DB Contractor believed it was entitled to a Change Order with respect thereto. In other words, if the requirements of clause (a) or clause (b) above are satisfied, DB Contractor shall retain the right to receive a Change Order, but shall be deemed to have waived the right to collect any and all costs incurred prior to the date of delivery of the PCO Notice and shall be deemed to have waived the right to seek a time extension with respect to any delay in any Critical Path that accrued prior to the date of delivery of the PCO Notice.

After delivery of a PCO Notice, DB Contractor must submit a Request for Change Order in accordance with Section 4.6.4 as a condition precedent to receipt of a Change Order.

**4.6.4 Requests for Change Orders**

**4.6.4.1** Delivery of Request for Change Order

DB Contractor shall deliver a Request for Change Order under this Section 4.6.4.1 to TxDOT within 30 days after delivery of the PCO Notice or within 10 Business Days after receipt of TxDOT's determination to require a Request for Change Order in accordance with Section 4.6.2.1.3, whichever is applicable. TxDOT may require design and construction costs to be covered by separate Requests for Change Order. If DB Contractor requests a time extension, then TxDOT, in its sole discretion, may require DB Contractor to provide two alternative Requests for Change Order, one of which shall provide for a time extension and any additional costs permitted hereunder, and the other of which shall show all Acceleration Costs associated with meeting the non-extended Completion Deadlines, as well as any additional costs permitted hereunder. If it is not feasible to recover to the non-extended Completion Deadline or if DB Contractor believes that the costs associated with such a recovery are prohibitive, then DB Contractor shall recommend a date to be shown in the alternative Change Order form. If DB Contractor fails to deliver a complete Request for Change Order or incomplete Request for Change Order meeting all of the

requirements of Section 4.6.4.2 within the appropriate time period, DB Contractor shall be required to provide a new PCO Notice before it may submit a Request for Change Order.

**4.6.4.2** Incomplete Requests for Change Order

The first Request for Change Order shall be labeled "Request for Change Order No. 1" and subsequent RCOs shall be numbered sequentially. Each Request for Change Order shall meet all requirements set forth in this Section 4.6.4; provided that if any such requirements cannot be met due to the nature and/or timing of the occurrence, DB Contractor shall provide an incomplete Request for Change Order that fills in all information capable of being ascertained. Each incomplete Request for Change Order shall: (a) include a list of those Change Order requirements that are not fulfilled together with an explanation satisfactory to TxDOT stating why such requirements cannot be met, (b) provide such information regarding projected impact on a Critical Path as is requested by TxDOT, and (c) in all events include sufficient detail to ascertain the basis for the proposed Change Order and for any Price increase associated therewith, to the extent such amount is then ascertainable.

**4.6.4.3** Additional Information to TxDOT

DB Contractor shall furnish, when requested by TxDOT or its designee, such further information and details as may be required to determine the facts or contentions involved. DB Contractor agrees that it shall give TxDOT or its designee access to any and all of DB Contractor's books, records and other materials relating to the Work, and shall cause its Subcontractors to do the same, so that TxDOT or its designee can investigate the basis for such proposed Change Order.

**4.6.4.4** Response and Follow-up

DB Contractor shall provide TxDOT with a monthly update to all outstanding Requests for Change Order describing the status of all previously unfulfilled requirements and stating any changes in projections previously delivered to TxDOT, expenditures to date and time anticipated for completion of the activities for which the time extension is claimed. TxDOT may reject the Request for Change Order at any point in the process. TxDOT's failure to respond to a complete Request for Change Order shall not be deemed an acceptance of the Request for Change Order, and DB Contractor shall have the burden of following up with TxDOT on the status of any Request for Change Order submitted.

**4.6.4.5** Importance of Timely Response

DB Contractor acknowledges and agrees that, due to limitations on funding for the Project, timely delivery of PCO Notices and Requests for Change Orders and updates thereto are of vital importance to TxDOT. TxDOT is relying on DB Contractor to evaluate promptly upon the occurrence of any event or situation whether the event or situation will affect the Project Schedule or Price and, if so, whether DB Contractor believes a time extension or Price increase is required hereunder. If an event or situation occurs that may affect the Price or a Completion Deadline, TxDOT will evaluate the situation and determine whether it wishes to make any changes to the definition of the Project so as to bring it within TxDOT's funding and time restraints. The following matters (among others) shall be considered in determining whether TxDOT has been prejudiced by DB Contractor's failure to provide timely notice: (a) the effect of the delay on alternatives available to TxDOT (that is, a comparison of alternatives that are available at the time notice was actually given and alternatives that would have been available had notice been given within ten days after occurrence of the event or when such occurrence should have been discovered in the exercise of

reasonable prudence); and (b) the impact of the delay on TxDOT's ability to obtain and review objective information contemporaneously with the event.

**4.6.4.6** Review of Subcontractor Claims

Prior to submission by DB Contractor of any Request for Change Order which is based in whole or in part on a request by a Subcontractor to DB Contractor for a price increase or time extension under its Subcontract, DB Contractor shall have reviewed all claims by the Subcontractor that constitute the basis for the Request for Change Order and determined in good faith that each such claim is justified hereunder and that DB Contractor is justified in requesting an increase in the Price and change in Completion Deadlines in the amounts specified in the Request for Change Order. Each Request for Change Order involving Subcontractor Work, and each update to an incomplete Change Order request involving such Work shall include a summary of DB Contractor's analysis of all Subcontractor claims components and shall include a certification signed by DB Contractor's Project Manager stating that DB Contractor has investigated the basis for the Subcontractor's claims and has determined that all such claims are justified as to entitlement and amount of money and/or time requested, has reviewed and verified the adequacy of all back-up documentation to be placed in escrow pursuant to Section 5.13.1, and has no reason to believe and does not believe that the factual basis for the Subcontractor's claim is falsely represented. Any Request for Change Order involving Subcontractor Work which is not accompanied by such analysis and certification shall be considered incomplete.

**4.6.4.7** Performance of Disputed Work

If TxDOT refuses to issue a Change Order based on DB Contractor's request, DB Contractor shall nevertheless perform all work as specified by Directive Letter, and shall have the right to submit the issue to dispute resolution pursuant to Section 4.9, Section 4.10 and DBA Exhibit 20. DB Contractor shall maintain and deliver to TxDOT, upon request, contemporaneous records, meeting the requirements of Section 4.6.10, for all work performed that DB Contractor believes constitutes extra work (including non-construction work), until all Claims and Disputes regarding entitlement or cost of such work are resolved.

**4.6.5 Contents of Change Orders**

**4.6.5.1** Form of Change Order

Each Request for Change Order and Change Order shall be prepared using the forms set forth in Exhibit 14 to the DBA, and shall meet all applicable requirements of this Section 4.6.

**4.6.5.2** Scope of Work, Cost Estimate, Time Impact Analysis and Other Supporting Documentation

DB Contractor shall prepare a scope of work, cost estimate, time impact analysis and other information as required by this Section 4.6.5.2 for each Request for Change Order.

**4.6.5.2.1** Scope of Work

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

**4.6.5.2.2** Cost Estimate

The cost estimate shall set out the estimated costs in such a way that a fair evaluation can be made. It shall include a breakdown for labor, materials, equipment and markups for overhead and profit, unless TxDOT agrees otherwise. The estimate shall include costs allowable under Section 4.6.6.2, if any. If the work is to be performed by Subcontractors and if the work is sufficiently defined to obtain Subcontractor quotes, DB Contractor shall obtain quotes (with breakdowns showing cost of labor, materials, equipment and markups for overhead and profit) on the Subcontractor's stationery and shall include such quotes as back-up for DB Contractor's estimate. No markup shall be allowed in excess of the amounts allowed under Sections 4.6.6.2 and 4.6.8. DB Contractor shall identify all conditions with respect to prices or other aspects of the cost estimate, such as pricing contingent on firm orders being made by a certain date or the occurrence or non-occurrence of an event.

**4.6.5.2.3** Time Impact Analysis

If DB Contractor claims that such event, situation or change affects a Critical Path, it shall provide a time impact analysis indicating all activities represented or affected by the change, as required by and in compliance with Section 8.5.1.4, in form satisfactory to TxDOT, which compares the proposed new schedule to the current approved Project Schedule.

**4.6.5.2.4** Other Supporting Documentation

DB Contractor shall provide such other supporting documentation as may be requested by TxDOT.

**4.6.5.3** Justification

All Requests for Change Orders shall include an attachment containing a detailed narrative justification therefor, describing the circumstances underlying the proposed change, identifying the specific provision(s) of Section 4.6 that permit a Change Order to be issued, and describing the data and documents (including all data and reports required under Section 4.6.10) that establish the necessity and amount of such proposed change.

**4.6.5.4** Certification

Each Change Order shall be accompanied by a certification under penalty of perjury, in a form acceptable to TxDOT, executed by DB Contractor and stating that the following is true and correct: (a) the amount of time and compensation requested is justified as to entitlement and amount, (b) the amount of time and compensation requested includes all known and anticipated impacts or amounts that may be incurred as a result of the event or matter giving rise to such proposed change, and (c) the cost and pricing data forming the basis for the Change Order is complete, accurate and current. Each Change Order involving Work by a Subcontractor for which pricing data is required to be provided under Section 5.13.3 shall include a statement that the Subcontractor pricing data has been provided and shall include a copy of the certification required to be provided by the Subcontractor under Section 5.13.3.

**4.6.5.5** Certificate of Interested Parties (Form 1295)

In connection with an amendment to this Agreement, including any Change Order or Deviation, DB Contractor shall either (i) provide a certification to TxDOT certifying that there has been no change to the Interested Parties (as that term is defined in § 2252.908 of the Texas Government Code and

in 1 T.A.C. § 46.3) disclosed in the most recent Form 1295, Certificate of Interested Parties ("Form 1295") filed by DB Contractor with the Texas Ethics Commission in connection with this Design-Build Contract, as required by Section 2252.908 of the Texas Government Code and Chapter 46 of Title 1 of the Texas Administrative Code (collectively, the "Form 1295 Laws"), or (ii) if there has been a change to the disclosure of Interested Parties or if the value of the amendment is $1,000,000 or greater, file a new Form 1295 with the Texas Ethics Commission as required by the Form 1295 Laws. DB Contractor shall indicate the CSJ for this Design-Build Contract and the applicable Change Order, Deviation or amendment number in the fields provided on Form 1295.

If DB Contractor is required to file a Form 1295 pursuant to this Section 4.6.5.5 in connection with any amendment, including a Change Order or Deviation, DB Contractor must submit to TxDOT an executed and notarized Form 1295 complying with the requirements of the Form 1295 Laws at the same time it submits the executed amendment, including any Change Order or Deviation, for TxDOT's execution. TxDOT will not execute any Change Order or other amendment to this Design-Build Contract until it has received either the certification or the Form 1295 as required by this Section 4.6.5.5; provided, that DB Contractor's filing of such certification or Form 1295 does not obligate TxDOT to execute a Change Order or any other amendment to this Design-Build Contract. TxDOT will acknowledge receipt of each Form 1295 submitted by DB Contractor in relation to each amendment to the Contract Documents, including each Change Order and Deviation, executed by TxDOT; however, TxDOT's receipt of a Form 1295 shall not be construed as TxDOT's review, approval, consent or certification as to the contents of such Form 1295, for which DB Contractor is solely responsible.

Additional information regarding Form 1295 may be found at the Texas Ethics Commission website at https://www.ethics.state.tx.us/tec/1295-Info.htm.

**4.6.6 Certain Limitations**

**4.6.6.1** Limitation on Price Increases

Any increase in the Price allowed hereunder shall exclude: (a) costs caused by the acts, omissions, negligence, intentional misconduct, or breach of applicable Law, contract or Governmental Approval by any DB Contractor-Related Entity; (b) costs to the extent that they are unnecessary or could reasonably be avoided by DB Contractor, including by re-sequencing, reallocating or redeploying its forces to other portions of the Work or to other activities unrelated to the Work; and (c) costs for remediation of any Nonconforming Work. Costs incurred for the purpose of mitigating damages as described in clause (b) above, and not otherwise disallowed hereunder, would be reimbursable.

**4.6.6.2** Limitation on Acceleration Costs, Delay and Disruption Damages

**4.6.6.2.1** Acceleration Costs; Delay and Disruption Damages

Acceleration Costs shall be compensable only as an alternative to allowing an extension of a Completion Deadline as contemplated by Sections 4.6.2.1.3 and 4.6.4.1. Other delay and disruption damages shall be compensable only in the case of delays that entitle DB Contractor to an extension of a Completion Deadline for a TxDOT-Caused Delay.

**4.6.6.2.2** Other Limitations

Delay and disruption damages shall be limited to (a) direct costs directly attributable to the delays described in Section 4.6.6.2.1, (b) markups thereon in accordance with Section 4.6.8.7 and (c) any additional field office and jobsite overhead costs directly attributable to such delays. DB Contractor is not entitled to compensation for home office overhead costs. In addition, before DB Contractor may obtain any increase in the Price to compensate for additional or extended field office and jobsite overhead, Acceleration Costs or other damages relating to delay, DB Contractor shall have demonstrated to TxDOT's satisfaction that:

(a) its schedule defining the affected Critical Path in fact sets forth a reasonable method for completion of the Work; and

(b) the change in the Work or other event or situation which is the subject of the requested Change Order has caused or will result in an identifiable and measurable disruption of the Work that impacted the Critical Path activity (i.e., consumed all available Float and extended the time required to achieve Substantial Completion or Final Acceptance beyond the applicable Completion Deadline); and

(c) the delay or damage was not due to an act, omission, negligence, intentional misconduct, or breach of applicable Law, contract or Governmental Approval of any DB Contractor-Related Entity, and could not reasonably have been avoided by DB Contractor, including by re-sequencing, reallocating or redeploying its forces to other portions of the Work or other activities unrelated to the Work (provided that TxDOT has agreed to reimburse DB Contractor for additional costs reasonably incurred in connection with such re-sequencing, reallocation or redeployment); and

(d) the delay for which compensation is sought is not concurrent with any delay for which any DB Contractor-Related Entity is responsible hereunder; and

(e) DB Contractor has suffered or will suffer actual costs due to such delay, each of which costs shall be documented in a manner satisfactory to TxDOT.

**4.6.6.3** Limitation on Time Extensions

Any extension of a Completion Deadline allowed hereunder shall exclude any delay to the extent that it: (a) did not impact a Critical Path, (b) was due to the fault or negligence, or act or failure to act of any DB Contractor-Related Entity, or (c) could reasonably have been avoided by DB Contractor, including by re-sequencing, reallocating or redeploying its forces to other portions of the Work (provided that if the request for extension involves a TxDOT-Caused Delay, DB Contractor shall be entitled to a time extension unless TxDOT shall have agreed, if requested to do so, to reimburse DB Contractor for its costs incurred, if any, in re-sequencing, reallocating or redeploying its forces). In addition, any extension of a Completion Deadline allowed under this Design-Build Contract other than for a TxDOT-Caused Delay, shall exclude any delay to the extent it is concurrent with any other unrelated delay to a Critical Path for which DB Contractor is responsible hereunder. In the event a delay for which the DB Contractor is responsible is concurrent with a TxDOT-Caused Delay, DB Contractor shall be entitled to a time extension for the TxDOT-Caused Delay but not to any increase in the Price due to the delay, including any delay or disruption damages. DB Contractor shall be required to demonstrate to TxDOT's satisfaction that the change in the Work or other event or situation that is the subject of the Request for Change Order seeking a change in a Completion Deadline has caused or will result in an identifiable and

measurable disruption of the Work that has impacted the Critical Path activity (i.e., consumed all available Float and extended the time required to achieve Substantial Completion or Final Acceptance beyond the applicable Completion Deadline).

**4.6.6.4** Work Performed Without Direction

To the extent that DB Contractor undertakes any efforts outside of the scope of the Work, unless DB Contractor has received a Directive Letter or Change Order signed by TxDOT to undertake such efforts, DB Contractor shall be deemed to have undertaken the extra work voluntarily and shall not be entitled to a Change Order in connection therewith. In addition, TxDOT may require DB Contractor to remove or otherwise undo any such work, at DB Contractor's sole cost.

**4.6.7 Change Order Pricing For Lump Sum Or Unit Price Change Orders**

The price of a Change Order under this Section 4.6.7 shall be a negotiated lump sum price or unit prices as provided below. If requested by TxDOT, in its discretion, negotiation for lump sum or unit price Change Orders may be based on information contained in the EPDs or on an Open Book Basis.

**4.6.7.1** Detailed Cost Proposal

DB Contractor may be required to submit a detailed cost proposal identifying all categories of costs in accordance with the requirements of Section 4.6.8: (a) showing all impacts on the Contract Documents from Work additions, deletions and modifications shown in the Change Order being priced; and (b) setting out the proposed costs in such a way that a fair evaluation can be made. When the Change Order adds or deletes Work to DB Contractor's scope, the detailed cost proposal shall be based on estimates or actual costs of labor, material and equipment in accordance with Section 4.6.7.4 or an estimate including a bill of any material and a breakdown of labor and equipment costs in accordance with Section 4.6.7.5, as applicable. Markup for profit and overhead consistent with Section 4.6.8 shall apply to Work added or deleted by Change Orders.

**4.6.7.2** Identification of Conditions

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

**4.6.7.3** Contents

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

**4.6.7.4** Added Work

When the Change Order adds Work to DB Contractor's scope, the increase in the Price shall be negotiated based on estimated costs of labor, material and equipment in accordance with Section

4.6.8. For negotiated Change Orders, markups for profit and overhead shall be consistent with Sections 4.6.6.2 and 4.6.8.

**4.6.7.5** Deleted Work

When the Change Order deletes Work from DB Contractor's scope, the amount of the reduction in the Price shall be based upon a current estimate including a bill of material, a breakdown of labor, material and equipment costs. Credits for mark-up for profit and overhead shall be as provided in Section 4.6.8. The current estimated amount of risk associated with such Work shall be an additional factor in determining the amount of the Price reduction for deleted Work Change Orders. When a deletion of Work is involved, documented cancellation and Supplier restocking charges may be included in costs and subtracted from the Price reduction.

**4.6.7.6** Change Order Both Adding and Deleting Work

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

(a) Net increase in cost, the change shall be treated as Work added and the provisions of Section 4.6.7.4 shall be used to determine markups for overhead and profit. Markups for overhead and profit will be allowed only for the net increase in cost in order to establish the amount to be added to the Price.

(b) Net decrease in cost, the change shall be treated as Work deleted and the provisions of Section 4.6.7.5 shall be used on the net decrease in cost in order to establish the amount deducted from the Price.

**4.6.7.7** Unit Priced Change Orders

Unit prices shall be deemed to include all costs for labor, material, overhead and profit, and shall not be subject to change regardless of any change in the estimated quantities. Unit-priced Change Orders shall initially include an estimated increase in the Price based on estimated quantities and a not-to-exceed (NTE) amount. If DB Contractor determines that the costs of the Work authorized pursuant to a Unit-priced Change Order will exceed the stated NTE amount, DB Contractor shall notify TxDOT of the additional costs required to complete such Work and TxDOT may approve an increase to the stated NTE amount. DB Contractor is not obligated to perform Work authorized pursuant to a Unit-priced Change Order once the approved NTE amount (as it may be adjusted) has been reached. Upon final determination of the quantities, TxDOT will issue a modified Change Order setting forth the final adjustment to the Price, which shall not exceed the stated not-to-exceed amount (as such amount may be adjusted as described herein).

**4.6.7.8** All-Inclusive Change Orders

All Change Orders executed by DB Contractor shall be all-inclusive, comprehensive and complete and shall not include any conditions with respect to pricing or schedule, except as permitted for Force Account Change Orders.

**4.6.7.9** Insurance

Any increase to the Price under any Change Order shall not include: (i) the amount of any insurance available to DB Contractor, (ii) any deductible or self-insured retention associated with such insurance, or (iii) the amount of any insurance coverage required under this Design-Build Contract that is deemed to be self-insured by DB Contractor under Section 3.5. All of the foregoing shall be solely the responsibility of DB Contractor.

**4.6.8 Force Account Change Orders**

TxDOT may at its discretion issue a Force Account Change Order whenever TxDOT determines that it is advisable. The Force Account Change Order shall instruct DB Contractor to perform the Work, indicate expressly the intention to treat the items as changes in the Work, set forth the kind, character, and limits of the Work as far as they can be ascertained, state the terms under which changes to the Price will be determined and state a not-to-exceed (NTE) total change in the Price. DB Contractor will maintain its records as required by Section 4.6.10 and submit daily records in accordance with Section 4.6.10.2.1. If DB Contractor determines that the costs of the Work authorized pursuant to a Force Account Change Order will exceed the stated NTE, DB Contractor shall notify TxDOT of the additional costs required to complete such Work and TxDOT may approve an increase to the stated NTE. DB Contractor is not obligated to perform Work authorized pursuant to a Force Account Change Order once the approved NTE (as it may be adjusted) has been reached. Upon final determination of the allowable costs and subject to Section 4.6.10.2, TxDOT shall issue a modified Change Order setting forth the final adjustment to the Price, which shall not exceed the stated NTE amount (as such amount may be adjusted as described herein).

**4.6.8.1** Labor Costs

The cost of labor for workers used in the actual and direct performance of the Change Order work, whether provided by DB Contractor or a Subcontractor, will equal the sum of the following:

(a) For construction-related labor, the actual wages (i.e., the base wage paid to the employee exclusive of any fringe benefits) for each hour that the labor and foremen or others approved by TxDOT are actually engaged in the Work. An additional 25% of the actual wages will be paid as compensation for overhead, superintendence, profit, and small tools. An additional 35% of the actual wages (excluding the 25% compensation for overhead) will be paid as compensation for all insurance and taxes including the cost of premiums on public liability and workers' compensation insurance, Social Security, and unemployment insurance taxes. These markups shall constitute full compensation for all profit, overhead and all State and federal payroll, unemployment and other taxes, insurance, fringe benefits and all other payments made to, or on behalf of, the workers, in excess of actual wages.

(b) For non-construction-related work (professional services), (1) the actual wages (i.e., the base wage paid to the employee exclusive of any fringe benefits); plus (2) a labor surcharge in the amount of 145% or the approved FAR rates, whichever is greater, which shall constitute full compensation for all profit, overhead and all State and federal payroll, unemployment and other taxes, insurance, fringe benefits and all other payments made to, or on behalf of, the workers, in excess of actual wages.

**4.6.8.2** Material Costs

Material costs for Change Order work shall be the actual cost of all materials to be used in the performance of the Construction Work plus a 15% markup for profit and overhead. The 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.

**4.6.8.3** Equipment

**4.6.8.3.1** Costs for DB Contractor-owned machinery, trucks, power tools or other similar equipment that are required for Change Order work will be allowed based on the following methodology:

(a) The equipment rental rates shall be those tabulated in the most recent version of the Rental Rate Blue Book. The rental rates to be used shall be the published monthly rate divided by 176 times the age and regional adjustment factors plus the hourly operating costs; plus

(b) 15% of the equipment rental rates for overhead and profit.

DB Contractor shall be considered to own such items if an ownership interest therein is held by: (i) DB Contractor, (ii) any equity participant in DB Contractor, (iii) any Subcontractor performing the Construction Work, or (iv) any Affiliate of DB Contractor or any affiliate of a Subcontractor. If the publication of the Rental Rate Blue Book should be discontinued for any reason, TxDOT may select a different publication from which to make the described calculations.

**4.6.8.3.2** Costs for machinery, trucks, power tools or other similar equipment that are required for Change Order work rented from any commercial enterprises routinely offering equipment and tools for rent or lease to the public will be allowed in an amount equal to the direct rental rate for the equipment, plus a 15% markup for overhead and profit.

**4.6.8.3.3** 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. Payment for loading and transporting will be made only if the equipment is used for Change Order work and cannot be used to perform other 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.

**4.6.8.4** Subcontracted Work

To the extent that any Change Order is intended to compensate DB Contractor for the cost of work performed by Subcontractors, the Change Order shall provide for compensation equal to: (a) the actual cost to DB Contractor of such work (which shall be charged by the Subcontractor on a Force Account basis in accordance with this Section 4.6.8, unless otherwise approved in writing by TxDOT), plus (b) 5% of such cost. The 5% markup for subcontracted work shall not apply to: (i) Subcontracts with Affiliates; or (ii) Subcontracts with Suppliers.

**4.6.8.5** Work Performed by Utility Owners

To the extent that any Change Order is intended to compensate DB Contractor for the cost of work performed by Utility Owners entitled to receive reimbursement for their costs from DB Contractor, the Change Order shall provide for compensation to DB Contractor equal to: (a) the actual and reasonable amount paid by DB Contractor to the Utility Owner for such work (but not greater than the amount allowed pursuant to the applicable Utility Agreements), plus (b) 5% of such allowed actual amount, less any amounts that may be deducted pursuant to Section 4.5. Back-up documentation supporting each cost item for this category shall be provided by DB Contractor and approved by TxDOT in writing prior to any payment authorization being granted.

**4.6.8.6** Other Direct Costs

For any justified Direct Cost incurred for Change Order work not covered by the categories of costs contained in Sections 4.6.8.1 through 4.6.8.5, DB Contractor shall accept as full payment therefor an amount equal to the actual cost to DB Contractor for such Direct Cost item without additional markup. Back-up documentation supporting each cost item for this category shall be provided by DB Contractor and approved by TxDOT in writing prior to any payment authorization being granted.

**4.6.8.7** Overhead Items

The markups specified herein constitute full and complete compensation for all overhead, tools or equipment having an individual replacement value of $1,000 or less, consumables (items that are consumed in the performance of the Work and are not a part of the finished product) and other indirect costs of the added or changed Work, as well as for profit thereon, including any and all costs and expenses incurred due to any delay in connection with the added or changed Work. DB Contractor's markup percentages for construction Work and labor surcharge for non-construction Work shall be considered to include:

(a) Supervisory expenses of all types, including salary and expenses of executive officers, supervising officers or supervising employees, excluding only direct supervision of force account work;

(b) Any and all administrative, clerical or stenographic employees;

(c) Any and all field, jobsite and general home office overhead and operating expenses whatsoever;

(d) Subsistence and travel expenses for all personnel, other incidental job burdens, and bonuses not otherwise covered;

(e) Quality assurance and quality control;

(f) Bond and insurance premiums; and

(g) accessories such as computer assisted drafting and design (CADD) systems, software and computers, facsimile machines, scanners, plotters, etc.

**4.6.8.8** Change Order Data

**4.6.8.8.1** DB Contractor shall maintain its records in such a manner as to provide a clear distinction between: (a) the Direct Cost of Work for which it is entitled (or for which it believes it is entitled) to

an increase in the Price and (b) the costs of other operations. DB Contractor shall furnish daily, on forms approved by TxDOT, reports of all costs described in the foregoing clause (a). The reports shall itemize all costs for labor, materials, and equipment rental and provide the total of costs through the date of the report. For workers, the reports shall include hours worked, rates of pay, names and classifications. For equipment, the reports shall include size, type, identification number, rental rate and actual working hours of operation. All such records and reports shall be made immediately available to TxDOT upon its request. The cost of furnishing such reports are deemed to be included in DB Contractor's overhead and fee percentages.

**4.6.8.8.2** All reports shall be signed by DB Contractor. TxDOT will compare its records with DB Contractor's reports, make the necessary adjustments and compile the costs of Work completed under a Force Account Change Order. When such reports are agreed upon and signed by both Parties, they will become the basis of payment.

**4.6.9 Change Orders for Differing Site Conditions, Utilities, Relief Events, Hazardous Materials, Access to ROW, Necessary Basic Configuration Changes, and Supply Chain Disruption Delays**

**4.6.9.1** Differing Site Conditions

Subject to the restrictions and limitations set forth in this Section 4.6, DB Contractor shall be entitled to a Change Order for certain additional Direct Costs resulting from the existence of any Differing Site Conditions to the extent permitted in this Section 4.6.9.1. No time extension shall be available with respect to Differing Site Conditions unless allowable in accordance with Section 6.1 of the DBA. In no event shall delay or disruption damages be recovered. To the extent that additional Direct Costs are incurred due to changes in DB Contractor's obligations relating to the Work resulting from the existence of Differing Site Conditions, TxDOT and DB Contractor shall share the risk as follows:

**4.6.9.1.1** DB Contractor shall be fully responsible for, and thus shall not receive a Change Order with respect to, the Differing Site Conditions Deductible incurred for changes in the Work resulting from each separate occurrence of Differing Site Conditions, subject to the Differing Site Conditions Aggregate Deductible Cap.

**4.6.9.1.2** TxDOT shall be fully responsible for any additional Direct Costs incurred in excess of (1) the Differing Site Condition Deductible incurred for changes in DB Contractor's obligations hereunder resulting from each separate occurrence of Differing Site Conditions, and (2) the Differing Site Conditions Aggregate Deductible Cap, and a Change Order shall be issued to compensate DB Contractor for such additional Direct Costs.

**4.6.9.1.3** DB Contractor hereby acknowledges and agrees that it has assumed all risks with respect to the need to work around locations impacted by Differing Site Conditions. DB Contractor shall bear the burden of proving that a Differing Site Condition exists and that it could not reasonably have worked around the Differing Site Condition so as to avoid additional cost. DB Contractor shall track the Differing Site Condition Deductible in accordance with the requirements and limitations in this Section 4.6.9 and shall track the Direct Costs incurred in excess of the Differing Site Condition Deductible in accordance with the requirements and limitations in Section 4.6.8.

**4.6.9.1.4** During progress of the Work, if Differing Site Conditions are encountered, DB Contractor shall immediately notify TxDOT thereof telephonically or in person, to be followed immediately by written notification. DB Contractor shall be responsible for determining the appropriate action to be

undertaken, subject to concurrence by TxDOT. In the event that any Governmental Approvals specify a procedure to be followed, DB Contractor shall follow the procedure set forth in the Governmental Approvals.

**4.6.9.1.5** Each request for a Change Order relating to a Differing Site Condition shall be accompanied by a statement signed by a qualified professional setting forth all relevant assumptions made by DB Contractor with respect to the condition of the Site, justifying the basis for such assumptions, explaining exactly how the existing conditions differ from those assumptions, and stating the efforts undertaken by DB Contractor to find alternative design or construction solutions to eliminate or minimize the problem and the associated costs. No time extension or costs will be allowed in connection with any work stoppage in affected areas during the investigation period described above.

**4.6.9.2** Utilities

DB Contractor shall be entitled to a Change Order with respect to certain additional Direct Costs and delays relating to Utility Adjustments, as specified in Section 4.5.1 and subject to the restrictions and limitations set forth in Section 4.5.1 and in this Section 4.6.9.2. In all other respects, DB Contractor is fully responsible for, and thus shall not receive a Change Order with respect to, any additional or unanticipated costs and delays due to changes in DB Contractor's obligations relating to the Work resulting from the existence of any Utilities on the Site.

**4.6.9.2.1** New Utilities

DB Contractor shall be entitled to a Change Order (a) increasing the Price to compensate DB Contractor for any increase in DB Contractor's costs incurred in performing the Utility Adjustment Work that is directly attributable to a New Utility (including reimbursements owed to Utility Owners but excluding delay and disruption damages) and (b) extending the applicable Completion Deadline as a result of any delay in the Critical Path directly attributable to performing the Utility Adjustment Work directly attributable to a New Utility. Subject to the foregoing, the amount of such Change Order shall be determined in accordance with the limitations set forth in this Section 4.6.

**4.6.9.2.2** Unidentified Utilities

(a) DB Contractor shall be entitled to an increase in the Price in connection with certain increases in the cost of the Work due to Unidentified Utilities within the Schematic ROW. Such increase shall be determined on a facility-by-facility basis, and shall apply for a particular Unidentified Utility facility only if the Basic Costs for the Utility Adjustment for that facility are greater than the Unidentified Utilities Deductible. The amount of the Price increase in any Change Order issued under Section 4.6.9.2 for each such Unidentified Utility facility shall be equal to the Basic Costs for that facility, less the Unidentified Utilities Deductible (which deductible amount shall be DB Contractor's sole responsibility). Notwithstanding the foregoing, DB Contractor shall not be responsible for a total amount of Unidentified Utilities Deductibles in excess of the Unidentified Utilities Deductible Cap. In determining whether the Unidentified Utilities Deductible Cap has been reached, Utility Adjustments of Unidentified Utilities with Basic Costs of less than the Unidentified Utilities Deductible shall not be counted towards the Unidentified Utilities Deductible Cap and such amounts shall be DB Contractor's sole responsibility. If the Unidentified Utilities Deductible Cap is reached, the amount of the Price increase in any Change Order thereafter issued under Section 4.6.9.2 for a Utility Adjustment of any Unidentified Utility for which the Basic Costs are in excess of the Unidentified Utilities Deductible shall be

equal to the Basic Costs for that facility. In no event shall DB Contractor be entitled to a Change Order for increased costs due to Utility Adjustments for Unidentified Utilities for which the Basic Costs are equal to or less than the Unidentified Utilities Deductible, regardless of whether the Unidentified Utilities Deductible Cap is reached. DB Contractor's rights to recover additional costs as specified in this Section 4.6.9.2.2 shall not include delay and disruption damages.

(b) All Basic Costs calculations submitted by DB Contractor shall be supported by detailed cost proposals and supporting documentation (for all estimates used in such calculations) meeting the requirements of Section 4.6.6. TxDOT shall have the right, in its discretion, to require that any or all of the information submitted by DB Contractor in the EPDs be used in evaluating the cost proposals.

**4.6.9.2.3** No Time Extension

Except as otherwise provided in Section 4.6.9.2.1 with regard to New Utilities and to the extent allowable in accordance with Section 6.4 of the DBA for Unidentified Utilities, no time extension will be allowed on account of (a) any delays attributable to any inaccuracy in the Utility Strip Map or (b) the performance of Utility Adjustments for Unidentified Utilities.

**4.6.9.3** Relief Events

**4.6.9.3.1** Force Majeure Events

Force Majeure Events means any of the events listed in clauses (a) through (c) below (and no other events, including those listed in clauses (i) through (iii) below), that materially and adversely affects DB Contractor's obligations, provided such events are beyond the control of the DB Contractor-Related Entities and are not due to (1) an act, omission, negligence, recklessness or intentional misconduct of or (2) breach of contract or Law or violation of any Governmental Approval by, any of the DB Contractor-Related Entities, and further provided that such events (or the effects of such events) could not have been avoided by the exercise of caution, due diligence, or reasonable efforts by any DB Contractor-Related Entity:

(a) Any earthquake, tornado, hurricane or other natural disaster that (i) causes direct physical damage to the Project and (ii) has been proclaimed a disaster or state of emergency by the President of the United States, the Governor of the State of Texas, or the Federal Highway Administrator, unless and to the extent such damage is caused by the DB Contractor's action or inaction or the DB Contractor's means and methods of construction;

(b) Any epidemic in the region around the Project; and

(c) Any blockade, rebellion, war, riot, act of sabotage, act of terrorism or civil commotion, in each case that causes direct physical damage to the Project.

For the avoidance of doubt, Force Majeure Events shall be limited to the matters listed above and specifically excludes from its definition the following matters, which might otherwise be considered force majeure:

(i) any fire or other physical destruction or damage, or delays to the Project which occur by action of the elements, including lightning, explosion, drought, rain, flood, snow, or storm, except as specified in clause (a) above;

(ii) except as provided in clause (c) above, malicious or other acts intended to cause loss or damage or other similar occurrence, including vandalism or theft; and

(iii) any strike, labor dispute, work slowdown, work stoppage, secondary boycott, walkout or other similar occurrence.

Subject to the limitations contained in, and upon DB Contractor's fulfillment of all applicable requirements of, this Section 4.6, TxDOT shall issue a Change Order (a) to compensate DB Contractor for additional Direct Costs incurred as a result of the Force Majeure Event under the terms, conditions and limitations set forth in this Section 4.6, and (b) (i) to extend the applicable Completion Deadlines as the result of any delay in a Critical Path directly caused by the Force Majeure Event, to the extent that it is not possible to work around such event or (ii) to compensate DB Contractor for applicable Acceleration Costs associated with meeting the non-extended Completion Deadlines, as determined by TxDOT pursuant to this Section 4.6. DB Contractor's rights to recover additional Direct Costs incurred resulting from Force Majeure Events shall not include compensation for delay and disruption damages.

**4.6.9.3.2** Other Relief Events

Other Relief Events means any of the events listed in clauses (a) through (h) below (and no other events, including those listed in clauses (i) through (vii) below) that materially and adversely affects DB Contractor's obligations, provided such events are beyond the control of the DB Contractor-Related Entities and are not due to (1) an act, omission, negligence, recklessness, intentional misconduct of or (2) breach of contract or Law or violation of any Governmental Approvals by any of the DB Contractor-Related Entities, and further provided that such events (or the effects of such events) could not have been avoided by the exercise of caution, due diligence, or reasonable efforts by any DB Contractor-Related Entity:

(a) The discovery at, near or on the Project ROW (excluding DB Contractor-Designated ROW) of any archaeological, paleontological or cultural resources provided that the existence of such resources or substances was not disclosed in, or ascertainable from, the RFP Documents, was not otherwise known to DB Contractor prior to the Proposal Due Date and would not have become known to DB Contractor by undertaking reasonable investigation prior to the Proposal Due Date;

(b) The discovery at, near or on the Project ROW (excluding DB Contractor-Designated ROW) of any species listed as a Threatened or Endangered Species (regardless of whether the species is listed as threatened or endangered as of the Proposal Due Date), provided that the presence of such species was not disclosed in, or ascertainable from, the RFP Documents, was not otherwise known to DB Contractor prior to the Proposal Due Date and would not have become known to DB Contractor by undertaking reasonable investigation prior to the Proposal Due Date;

(c) Any Change in Law, that (1) requires a material modification of the Project design, (2) requires DB Contractor to obtain a new major State or federal environmental approval not previously required for the Project, (3) results in an increase in DB Contractor's costs directly attributable to the Change in Law of at least $500,000, or (4) specifically targets the Project or DB Contractor;

(d) Any Third Party Release of Hazardous Materials or TxDOT Release of Hazardous Materials which: (1) occurs after the Proposal Due Date (and for Third Party Releases,

also after the date TxDOT makes the parcel available to DB Contractor for the Work) and before the end of the Term, (2) is required to be reported to a Governmental Entity, (3) renders use of the roadway or construction area unsafe or potentially unsafe absent assessment, containment or remediation, and (4) with respect to Third Party Releases of Hazardous Materials, does not result from DB Contractor's failure to exercise reasonable efforts to protect the Site from third parties;

(e) Issuance of a temporary restraining order or other form of injunction by a court that prohibits prosecution of a material portion of the Work;

(f) The suspension, termination, interruption, modification, denial or failure to obtain or non-renewal of any TxDOT-Provided Approval, except to the extent that such suspension, termination, interruption, modification, denial or failure to obtain or non-renewal arises from failure by any DB Contractor-Related Entity to locate or design the Project or carry out the work in accordance with the TxDOT-Provided Approvals or other Governmental Approval;

(g) Modifications to a Governmental Approval that is DB Contractor's responsibility to obtain made by a Governmental Entity after formal issuance of the Governmental Approval, provided that the required modification is not due to changes to the Project initiated by DB Contractor; and

(h) Execution of new Third Party Agreements or modifications made after the Proposal Due Date to existing Third Party Agreements included in Section 3.2 of the DBA.

For the avoidance of doubt, Other Relief Events shall be limited to the matters listed above and specifically excludes from its definition the following matters which might otherwise be considered relief events:

(i) the suspension, termination, interruption, denial, failure to obtain, non-renewal of or change in any requirements of any Governmental Approval, except for any such matter falling within the scope of clause (c), (d), (e), (f) or (g) above;

(ii) any increased costs or delays related to any Utility Adjustment Work or failure to obtain any approval, work or other action from a Utility Owner, except to the extent directly due to any of the matters listed in clauses (a) through (f) above;

(iii) the presence at, near or on the Site, as of the Effective Date, of any Hazardous Materials, including substances disclosed in the Reference Information Documents, as well as any substances contained in any structure required to be demolished in whole or in part or relocated as part of the Work;

(iv) any Change in Law which has the effect of modifying a Utility Owner's required specifications, standards of practice and/or construction methods for the Utility Adjustment Work to be furnished or performed by DB Contractor (or reimbursed by DB Contractor), which occurs after the Proposal Due Date but prior to the date on which the applicable Utility Agreement is signed by the Utility Owner; and

(v) any matters not caused by TxDOT or beyond the control of TxDOT and not listed in clauses (a) through (h) above.

Subject to the limitations contained in, and upon DB Contractor's fulfillment of all applicable requirements of, this Section 4.6, TxDOT shall issue Change Orders: (a) to compensate DB Contractor for additional Direct Costs incurred as a result of the Other Relief Event under the terms, conditions and limitations set forth in this Section 4.6.9, and (b) to extend the applicable Completion Deadlines as the result of any delay in a Critical Path directly caused by the Other Relief Event, to the extent that it is not possible to work around such event. DB Contractor's rights to recover additional Direct Costs incurred resulting from Other Relief Events shall not include compensation for delay and disruption damages. For the avoidance of doubt, the exclusions set forth above apply solely to Other Relief Events as defined in this Section 4.6.9.3.2, and do not limit DB Contractor's ability to seek a Change Order for eligible events that do not fall within the definition of Other Relief Event but are otherwise set forth in this Section 4.6.9.

**4.6.9.4** Hazardous Materials Management

If compensation is payable to DB Contractor pursuant to this Section 4.6.9 with respect to Hazardous Materials Management, the amount of the Change Order shall either be a negotiated amount acceptable to the Parties, or the Reimbursable Hazardous Materials Costs for the work in question, subject to the limitations set forth in this Section 4.6.9.4, including the cost sharing provisions set forth in Section 4.6.9.4.1.

**4.6.9.4.1** Determination of Reimbursable Amount

DB Contractor shall be deemed to have waived the right to collect any and all costs incurred in connection with any Hazardous Materials Management and any right to obtain an extension of a Completion Deadline if TxDOT is not provided written notice of the discovery of Hazardous Materials and afforded the opportunity to inspect sites containing Hazardous Materials before any action is taken that would inhibit TxDOT's ability to ascertain, based on a site inspection, the nature and extent of the materials. In the event of an emergency involving Hazardous Materials, DB Contractor may take such limited actions as are required by Law without advance notice to TxDOT, but shall provide such notice immediately thereafter (which in no event shall be more than 2 hours after the incident by phone and 24 hours after the incident by written notice).

In cases involving reimbursement for Hazardous Materials Management under this Section 4.6.9.4, allowable costs shall be limited to the incremental reasonable, out-of-pocket Direct Costs incurred for the handling, transport, removal and disposal of Hazardous Materials after completion of the testing process to determine whether Hazardous Materials are present (deducting any avoided costs such as the cost of disposal that would have been incurred had Hazardous Materials not been present) ("Reimbursable Hazardous Materials Management Costs"). The costs of investigating and characterizing, including Phase 1 and Phase 2 investigations, are included in the Price and DB Contractor shall not be entitled to additional compensation therefor.

Except as otherwise provided and subject to the limitations in this Section 4.6.9, TxDOT shall compensate DB Contractor for DB Contractor's Reimbursable Hazardous Materials Management Costs for Pre-existing Hazardous Materials encountered by DB Contractor to the extent relief is available in accordance with the cost sharing provisions set forth in Section 6.3 of the Design-Build Agreement.

Except as otherwise provided and subject to the limitations in this Section 4.6, DB Contractor shall be entitled to a Change Order in accordance with Section 4.6.9.3.2 to compensate DB Contractor for DB Contractor's reasonable, out-of-pocket costs and expenses directly attributable to the

handling, transport, removal and disposal of Hazardous Materials falling within the definition for Other Relief Event. Such costs shall be handled in accordance with Section 4.6.9.3.2.

DB Contractor shall take all reasonable steps to minimize any such costs. Compensation shall be allowed only to the extent that DB Contractor demonstrates to TxDOT's satisfaction that: (a) the Hazardous Materials Management could not have been avoided by reasonable design modifications or construction techniques and (b) DB Contractor's plan for the Hazardous Materials Management represents the approach that is most beneficial to the Project and the public. DB Contractor shall provide TxDOT with such information, analyses and certificates as may be requested by TxDOT in order to enable a determination regarding eligibility for payment.

**4.6.9.4.2** Time Extensions

DB Contractor shall not be entitled to an extension of any Completion Deadline with regard to any need to investigate or characterize any Hazardous Materials, regardless of the total quantities, or for any delays resulting from the discovery of Hazardous Materials prior to submission of a PCO Notice (or of notice to TxDOT under Section 4.6.9.4.1 meeting the requirements for a PCO Notice) to TxDOT. If DB Contractor encounters Hazardous Materials for which DB Contractor is entitled to compensation, and Hazardous Materials Management of such Hazardous Materials results in delays to the Critical Path ("Hazardous Materials Delay") DB Contractor shall bear 100% of the risk of such Hazardous Materials Delay up to an amount of 30 days per location and up to an aggregate amount of 120 days for all locations on the Project. If the Hazardous Materials Delay exceeds 30 days in any location, then the risk of such Hazardous Materials Delay in excess of 30 days for that location shall be borne by TxDOT. If aggregate Hazardous Materials Delays exceed 120 days, then the risk of Hazardous Materials Delay in excess of 120 days shall be borne by TxDOT. If a Hazardous Materials Delay is concurrent with another delay that is DB Contractor's responsibility under the Design-Build Contract, then such Hazardous Materials Delay shall be borne 100% by DB Contractor. If a Hazardous Materials Delay at one location is concurrent with another Hazardous Materials Delay in another location, the 30-day period of DB Contractor's responsibility for the delays at the two locations shall run concurrently. The foregoing shall not preclude DB Contractor from obtaining a time extension with respect to any Hazardous Material that qualifies as an Other Relief Event. Notwithstanding anything to the contrary contained in this Section 4.6.9.4, if DB Contractor is prohibited from working at a particular location due to the discovery of Hazardous Materials for which DB Contractor is entitled to a Change Order during the last 12 months prior to the Completion Deadline, then DB Contractor shall be entitled to an extension of the applicable Completion Deadline for any Critical Path delays resulting from such discovery of Hazardous Materials.

**4.6.9.4.3** Limitations on Change Orders for Hazardous Materials

Entitlement to compensation or a time extension shall be limited to work performed pursuant to DB Contractor's Hazardous Materials Management Plan, Investigative Work Plan and Site Investigative Report for such Hazardous Materials as approved by TxDOT, in writing. No compensation or time extension shall be allowed with respect to: (a) immaterial quantities of Hazardous Materials, (b) any Hazardous Materials that could have been avoided by reasonable design modifications or construction techniques, (c) any costs that could have been avoided, (d) Hazardous Materials on any Additional Properties not expressly described in Section 4.8.1.3, (e) any Hazardous Materials encountered during or in connection with the demolition of buildings, structures, fixtures or other improvements on any parcels within the Site, (f) any Hazardous Materials that do not fall within the definition for Pre-existing Hazardous Materials or clause (d) of the definition for Other Relief Event, or (g) any Hazardous Materials that fall within the definition for

DB Contractor Release(s) of Hazardous Materials. Utilities (other than Service Lines) shall not be considered "buildings, structures, fixtures or other improvements" for purposes of this Section 4.6.9.4.

**4.6.9.5** Access to ROW

Subject to the restrictions and limitations set forth in this Section 4.6, DB Contractor shall be entitled to a Change Order to extend the applicable Completion Deadlines as the result of any delay in a Critical Path directly caused by failure or inability of TxDOT to (a) deliver the petition for the parcel to the DB Contractor within 105 days from the date of the approved Condemnation Package, or (b) provide the payment for the parcel within 45 days from the date that the Special Commissioners' award is filed with the Court, in either case in accordance with Section 4.4.5.2. In addition, subject to the limitations and risk sharing provisions in the Contract Documents, DB Contractor shall be entitled to a Change Order to extend the applicable Completion Deadlines as a result of any delay in a Critical Path directly caused by failure or inability of TxDOT to make available the portion of the Preliminary ROW or any Additional Properties that must be acquired due to a TxDOT-Directed Change, Relief Event, or a Necessary Basic Configuration Change, described in a condemnation packet within 365 days after approval of the Condemnation Package. DB Contractor shall be entitled to a Change Order only to the extent the delay (i) materially adversely affects a Critical Path, (ii) is not mitigated by or susceptible to handling by a work around or consumption of Project Float, and (iii) is not due to an act, omission, negligence, recklessness, intentional misconduct, breach of contract or violation of Law or a Governmental Approval of or by any of the DB Contractor-Related Entities. DB Contractor shall not be entitled to an increase in the Price or reimbursement of any costs incurred as a result of such delays, including any delay or disruption damages.

**4.6.9.6** Necessary Basic Configuration Changes

**4.6.9.6.1** Notwithstanding the fact that this Design-Build Contract generally obligates DB Contractor to undertake all work necessary to complete the Project without an increase in the Price, this Section 4.6.9.6 provides for an increase in the Price to be made in the amount of the increased Direct Costs for additional Utility Adjustment Work required on Additional Properties acquired as a result of a Necessary Basic Configuration Change.

**4.6.9.6.2** If DB Contractor commenced any Utility Adjustment Work affected by such modification prior to delivery of an appropriate PCO Notice, the Change Order shall allow TxDOT a credit for the cost of any unnecessary work performed and/or shall exclude any additional costs associated with redoing the work already performed.

**4.6.9.6.3** DB Contractor shall be responsible for any delays (including those that affect the duration of a Critical Path) and, except as set forth in this Section 4.6.9.6 and Section 4.6.9.5, any cost increases resulting from changes in requirements and obligations of DB Contractor relating to the Project due to Errors in the TxDOT Schematic Design.

**4.6.9.7** Supply Chain Disruption Delays

**4.6.9.7.1** DB Contractor shall be entitled to a time extension extending the Completion Deadlines for delays to the Critical Path due to the unavailability of materials that are required for incorporation into the Project resulting from the following events, provided such events and the effects of such events are beyond the control of the DB Contractor-Related Entities and are not due to (1) an act, omission, negligence, recklessness or intentional misconduct of or (2) breach of contract or Law or violation

of any Governmental Approval by, any of the DB Contractor-Related Entities, and further provided that such events (or the effects of such events) could not have been avoided by the exercise of caution, due diligence, or reasonable efforts by any DB Contractor-Related Entity ("Supply Chain Disruption Delay"):

(a) Any earthquake, tornado, hurricane or other natural disaster that (i) occurs in any of the states bordering the Gulf of Mexico and (ii) has been proclaimed a disaster or state of emergency by the President of the United States, the Governor of the state in which the disaster occurs, or the Federal Highway Administrator;

(b) Any epidemic in the State of Texas; and

(c) Any blockade, rebellion, war, riot, act of sabotage, act of terrorism or civil commotion, in each case that occurs on the soil of the continental United States.

**4.6.9.7.2** DB Contractor will be entitled to one day of extension of the Completion Deadlines for every two days of delay to the Critical Path due to a Supply Chain Disruption Delay. If a Supply Chain Disruption Delay is concurrent with another delay that is DB Contractor's responsibility under the Design-Build Contract, then such Supply Chain Disruption Delay shall be borne 100% by DB Contractor.

**4.6.9.7.3** DB Contractor is fully responsible for, and thus shall not receive a Change Order with respect to, any additional or unanticipated costs due to Supply Chain Disruption Delays.

**4.6.10 Change Order Records**

DB Contractor shall maintain its records in such a manner as to provide a clear distinction between the Direct Costs for which it is entitled (or for which it believes it is entitled) to an increase in the Price and the costs of other operations. DB Contractor shall contemporaneously collect, record in writing, segregate and preserve: (a) all data necessary to determine the costs of all Work that is the subject of a Change Order or a requested Change Order, specifically including costs associated with design Work as well as Utility Adjustments, and (b) all data necessary to show the actual impact (if any) of the change on each Critical Path with respect to all Work that is the subject of a Change Order or a proposed Change Order, if the impact on the Project Schedule is in dispute. Such data shall be provided to any dispute resolvers, TxDOT and its authorized representatives as directed by TxDOT, on forms approved by TxDOT. The cost of furnishing such reports is included in DB Contractor's predetermined overhead and profit markups.

**4.6.10.1** Waiver

DB Contractor hereby waives the right to obtain compensation for any Work for which cost data is required to be provided hereunder, if DB Contractor fails to maintain or timely provide to TxDOT cost data meeting the requirements of this Design-Build Contract.

**4.6.10.2** Additional Force Account Record Requirements

In addition to the requirements of this Section 4.6.10, for Force Account Change Orders, DB Contractor shall provide the following:

**4.6.10.2.1** Work Reports and Data Collection

DB Contractor shall furnish TxDOT completed daily work reports for each day's Work that is to be paid for on a Force Account basis. The daily Force Account Work reports shall be detailed as follows:

(a) Name, classification, date, daily hours, total hours, rate, and extension for each worker (including both construction and non-construction personnel) for whom reimbursement is requested.

(b) Designation, dates, daily hours, total hours, rental rate, and extension for each unit of machinery and equipment.

(c) Quantities of materials, prices, and extensions.

(d) Transportation of materials.

The reports shall also state the total costs to date for the Force Account Change Order Work.

**4.6.10.2.2** Supplier's Invoices

Materials charges shall be substantiated by valid copies of Supplier's invoices. Such invoices shall be submitted with the daily Force Account Work reports, or if not available, they shall be submitted with subsequent daily Force Account Work reports. Should said Supplier's invoices not be submitted within 60 days after the date of delivery of the materials, TxDOT shall have the right to establish the cost of such materials at the lowest current wholesale prices at which such materials are available, in the quantities concerned, delivered to the location of Work, less any discounts available.

**4.6.10.2.3** Execution of Reports

All Force Account Change Order reports shall be signed by DB Contractor's Project Manager.

**4.6.10.2.4** Adjustment

TxDOT will compare its records with the completed daily Force Account Work reports furnished by DB Contractor and make any necessary adjustments. When these daily Force Account Work reports are agreed upon and signed by both Parties, said reports shall become the basis of payment for the Work performed, but shall not preclude subsequent adjustment based on a later audit. DB Contractor's cost records pertaining to Work paid for on a Force Account basis shall be open, during all regular business hours, to inspection or audit by representatives of TxDOT during the life of this Design-Build Contract and for a period of not less than five years after the date of Final Acceptance, and DB Contractor shall retain such records for that period. Where payment for materials or labor is based on the cost thereof to any Person other than DB Contractor, DB Contractor shall make every reasonable effort to ensure that the cost records of each such other Person will be open to inspection and audit by representatives of TxDOT on the same terms and conditions as the cost records of DB Contractor. Payment for such costs may be deleted if the records of such third parties are not made available to TxDOT's representatives. If an audit is to be commenced more than 60 days after the date of Final Acceptance, DB Contractor will be given a reasonable notice of the time when such audit is to begin.

**4.6.11** Matters Not Eligible for Change Orders and Waiver

DB Contractor acknowledges and agrees that no increase in the Price or extension of a Completion Deadline is available except in circumstances expressly provided for herein, that such Price increase and time extension shall be available only as provided in this Section 4.6 and that DB Contractor shall bear full responsibility for the consequences of all other events and circumstances. Matters that are exclusively DB Contractor's responsibility include the following:

(a) Errors in the Design Documents and Construction Documents (including Errors therein traceable to Errors in the TxDOT Schematic Design, subject only to the right to a Change Order to the extent permitted by Section 4.6.9);

(b) any changes requested by TxDOT as part of the process of reviewing or approving Submittals for consistency with the requirements of the Contract Documents, the Governmental Approvals or applicable Laws;

(c) defective or incorrect schedules of Work or changes in the planned sequence of performance of the Work (unless arising from causes that otherwise give rise to a right to a Change Order);

(d) action or inaction of any DB Contractor-Related Entity (unless arising from causes that otherwise give rise to a right to a Change Order);

(e) action or inaction of adjoining property owners or TxDOT's other contractors (unless arising from causes that otherwise give rise to a right to a Change Order);

(f) groundwater levels or subsurface moisture content;

(g) untimely delivery of equipment or material, or unavailability or defectiveness or increases in costs of material, equipment or products specified by the Contract Documents;

(h) any costs covered by insurance available to DB Contractor, any deductible or self-insured retention associated with such insurance, or any costs that would have been covered by any insurance that is deemed to be self-insured by DB Contractor under Section 3.5;

(i) correction of Nonconforming Work and review and acceptance thereof by TxDOT (including rejected Submittals);

(j) failure by any DB Contractor-Related Entity to comply with the requirements of the Contract Documents, Governmental Approvals or Laws;

(k) delays not on a Critical Path;

(l) any suspensions, terminations, interruptions, denials, non-renewals of, or delays in issuance of a Governmental Approval that is required to be obtained by DB Contractor, any failure to obtain such Governmental Approval, and compliance with the terms and conditions of all Governmental Approvals;

(m) delays caused by untimely provision of access to Project ROW, except to the extent TxDOT has agreed in this Section 4.6 to be responsible for any such delays;

(n) any increased costs or delays related to any Utility Adjustment Work or failure to timely obtain any approval, work or other action from a Utility Owner, except as allowed by Section 4.6.9.2;

(o) any situations (other than Relief Events) which, while not within one of the categories delineated above, were or should have been anticipated because such situations are referred to elsewhere in the Contract Documents or arise out of the nature of the Work; and

(p) all other events beyond the control of TxDOT for which TxDOT has not expressly agreed to assume liability hereunder.

(q) DB Contractor hereby assumes responsibility for all such matters, and acknowledges and agrees that assumption by DB Contractor of responsibility for such risks, and the consequences and costs and delays resulting therefrom, is reasonable under the circumstances of this Design-Build Contract and that contingencies included in the Price in DB Contractor's sole judgment, constitute sufficient consideration for its acceptance and assumption of said risks and responsibilities.

DB CONTRACTOR HEREBY EXPRESSLY WAIVES ALL RIGHTS TO ASSERT ANY AND ALL CLAIMS BASED ON ANY CHANGE IN THE WORK, DELAY, DISRUPTION, SUSPENSION OR ACCELERATION (INCLUDING ANY CONSTRUCTIVE CHANGE, DELAY, DISRUPTION, SUSPENSION OR ACCELERATION) FOR WHICH DB CONTRACTOR FAILED TO PROVIDE PROPER AND TIMELY NOTICE OR FAILED TO PROVIDE A TIMELY REQUEST FOR CHANGE ORDER, AND AGREES THAT IT SHALL BE ENTITLED TO NO COMPENSATION, DAMAGES OR TIME EXTENSION WHATSOEVER IN CONNECTION WITH THE WORK EXCEPT TO THE EXTENT THAT THE CONTRACT DOCUMENTS EXPRESSLY SPECIFY THAT DB CONTRACTOR IS ENTITLED TO A CHANGE ORDER OR OTHER COMPENSATION, DAMAGES OR TIME EXTENSION.

### 4.6.12 Disputes

If TxDOT and DB Contractor agree that a request to increase the Price or extend any Completion Deadline by DB Contractor has merit, but are unable to agree as to the amount of such Price increase or time extension, as applicable, TxDOT agrees to mark up the Request for Change Order provided by DB Contractor to reduce the amount of the Price increase or time extension as deemed appropriate by TxDOT. In such event, TxDOT will execute and deliver the Unilateral Change Order based on the marked-up Request for Change Order to DB Contractor within a reasonable period after receipt of a request by DB Contractor to do so, and thereafter will make payment or grant a time extension based on such Unilateral Change Order. The failure of TxDOT and DB Contractor to agree to any Change Order under this Section 4.6 (including agreement as to the amount of compensation allowed under a Force Account Change Order and the disputed amount of the increase in the Price or extension of a Completion Deadline in connection with a Change Order as described above) shall be a Dispute to be resolved pursuant to Section 4.9, Section 4.10 and DBA Exhibit 20. DB Contractor's Claim and any award by the dispute resolver shall be limited to the incremental costs incurred by DB Contractor with respect to the Dispute (crediting TxDOT for any corresponding reduction in DB Contractor's other costs) and shall in no event exceed the amounts allowed by Section 4.6.10 with respect thereto.

**4.6.13 Accord and Satisfaction**

Except as otherwise specified in the Change Order, execution of a Change Order by both Parties shall be deemed accord and satisfaction of all claims by DB Contractor of any nature arising from or relating to the Work covered by the Change Order.

**4.6.14 Changes Not Requiring Change Order**

Changes in the Work or requirements in the Contract Documents that have no net cost effect on the Price or impact to the Completion Deadlines may be approved in writing by TxDOT as a Deviation, and in such event shall not require a Change Order. Any other change in the requirements of the Contract Documents shall require either a Directive Letter, Design-Build Contract amendment or a Change Order.

**4.6.15 No Release or Waiver**

**4.6.15.1** No extension of time granted hereunder shall release DB Contractor's Surety from its obligations. Work shall continue and be carried out in accordance with all the provisions of the Contract Documents and this Design-Build Contract shall be and shall remain in full force and effect, unless formally suspended or terminated by TxDOT in accordance with the terms hereof. Permitting DB Contractor to finish the Work or any part thereof after a Completion Deadline, or the making of payments to DB Contractor after such date, shall not constitute a waiver on the part of TxDOT of any rights under this Design-Build Contract.

**4.6.15.2** Neither the grant of an extension of time beyond the date fixed for the completion of any part of the Work, nor the performance and acceptance of any part of the Work or materials specified by this Design-Build Contract after a Completion Deadline, shall be deemed to be a waiver by TxDOT of its right to terminate this Design-Build Contract for abandonment or failure to complete within the time specified (as it may have been extended) or to impose and deduct damages as may be provided.

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

**4.7 Environmental Compliance**

DB Contractor shall be responsible for performance of all environmental mitigation measures and compliance with all other conditions and requirements of the Contract Documents and Environmental Approvals, including TxDOT-Provided Approvals and similar Governmental Approvals for the Project, other than the mitigation requirements which TxDOT has expressly agreed to perform pursuant to Section 4.7.1. The Price includes compensation for DB Contractor's performance of all environmental requirements and conditions, including mitigation measures, except as otherwise described in this Section 4.7.

### 4.7.1 TxDOT's Responsibility for Approvals and Certain Mitigation

All conditions and requirements of the TxDOT-Provided Approvals, including any TxDOT-Provided Approvals that are obtained after the Effective Date, shall automatically be deemed included in the scope of the Work. TxDOT will be responsible for additional mitigation requirements resulting from TxDOT-Directed Changes.

DB Contractor acknowledges that TxDOT makes no commitment to any alternative being evaluated in the NEPA process, and the comparative merits of all alternatives presented in the NEPA document, including the no-build alternative, will be evaluated and fairly considered. In the event the no-build alternative is selected, TxDOT will terminate the Design-Build Contract for convenience pursuant to Section 8.8.1.

### 4.7.2 New Environmental Approvals To Be Obtained by DB Contractor

**4.7.2.1** If it is necessary to obtain a New Environmental Approval for any reason (including any New Environmental Approval associated with drainage easements or any New Environmental Approval associated with Additional Properties) other than a Relief Event or a TxDOT-Directed Change, DB Contractor shall be fully responsible, at its sole cost and expense, for obtaining the New Environmental Approval and any other environmental clearances that may be necessary, and for all requirements resulting therefrom, as well as for any litigation arising in connection therewith.

**4.7.2.2** If any New Environmental Approval is necessitated by a TxDOT-Directed Change or Relief Event, DB Contractor shall be responsible for obtaining such New Environmental Approval and performing any additional mitigation requirements of such New Environmental Approval only if directed to do so by a Directive Letter or a Change Order. TxDOT shall cooperate with DB Contractor and support its efforts to obtain any such New Environmental Approval. Any Change Order covering a TxDOT-Directed Change or Relief Event shall include compensation to DB Contractor for additional costs incurred by DB Contractor to obtain the New Environmental Approval and to implement any changes in the Work (including performance of additional mitigation measures which are DB Contractor's responsibility) resulting from such New Environmental Approvals, as well as any time extension necessitated by the TxDOT-Directed Change or Relief Event, subject to the conditions and limitations contained in Section 4.6.

## 4.8 Hazardous Material Management

### 4.8.1 Procedures and Compensation for Hazardous Materials Management

**4.8.1.1** Subject to Section 4.8.1.3, DB Contractor shall manage, treat, handle, store, remediate, remove, transport (where applicable) and dispose of all Hazardous Materials and Recognized Environmental Conditions, including contaminated groundwater, in accordance with applicable Law, Governmental Approvals, the Hazardous Materials Management Plan, and all applicable provisions of the Contract Documents. If during the course of the Work, DB Contractor encounters Hazardous Materials or a Recognized Environmental Condition in connection with the Project, Project ROW or Work, in an amount, type, quality or location that would require reporting or notification to any Governmental Entity or other Person or taking any preventive or remedial action, in each case under applicable Law, Governmental Approvals, the Hazardous Materials Management Plan or any applicable provision of the Contract Documents, DB Contractor shall (a) promptly notify TxDOT in writing and advise TxDOT of any obligation to notify Governmental Entities under applicable Law and notify such Governmental Entities as required under applicable Law and (b) take reasonable steps, including design modifications or construction techniques, to

avoid excavation or dewatering in areas with Hazardous Materials or Recognized Environmental Conditions. If during the performance of the Work TxDOT discovers Hazardous Materials or a Recognized Environmental Condition in connection with the Project, Project ROW or Work, TxDOT shall promptly notify DB Contractor in writing of such fact. Where excavation or dewatering of Hazardous Materials or Recognized Environmental Conditions is unavoidable, DB Contractor shall utilize appropriately trained personnel and shall select the most cost-effective approach to Hazardous Materials Management, unless otherwise directed by TxDOT. Wherever feasible and consistent with the Contract Documents, applicable Law and Good Industry Practice, contaminated soil and groundwater shall not be disposed off-site.

**4.8.1.2** Except where DB Contractor is required to take immediate action under the Contract Documents or applicable Law, DB Contractor shall afford TxDOT the opportunity to inspect sites containing Hazardous Materials or Recognized Environmental Conditions before any action is taken that would inhibit TxDOT's ability to ascertain the nature and extent of the contamination.

**4.8.1.3** Subject to the limitations and exceptions set forth in this Section 4.8 and Section 4.6, DB Contractor shall be entitled to a Change Order as set forth in Section 4.6.8.4 with respect to additional costs and delays directly attributable to the discovery of (a) Pre-existing Hazardous Materials within the Schematic ROW, (b) Hazardous Materials other than DB Contractor Releases of Hazardous Materials on any parcels added to the Site by a TxDOT-Directed Change or required due to a Relief Event or Necessary Basic Configuration Change, and (c) Hazardous Materials falling within the definition of Other Relief Event.

**4.8.2 Off-Site Disposal and Hazardous Material Generator**

**4.8.2.1** Off-site disposal of Hazardous Materials other than DB Contractor Releases of Hazardous Materials is subject to the following provisions:

(a) As between DB Contractor and TxDOT, TxDOT shall be considered the generator and assume generator responsibility for Hazardous Materials other than DB Contractor Releases of Hazardous Materials.

(b) TxDOT has exclusive decision-making authority regarding selection of the destination facility to which Hazardous Materials other than DB Contractor Releases of Hazardous Materials will be transported. With regard to Hazardous Materials other than DB Contractor Releases of Hazardous Materials, TxDOT shall comply with the applicable standards for generators including those found at 40 CFR Part 262, including the responsibility to sign manifests for the transport of hazardous wastes. The foregoing shall not preclude or limit any rights, remedies or defenses that TxDOT or DB Contractor may have against any Governmental Entity or other third parties, including prior owners, lessees, licensees and occupants of any parcel of land that is or becomes part of the Project ROW.

(c) To the extent permitted by applicable Law, TxDOT shall indemnify, save, protect and defend DB Contractor from Third Party Claims and Losses arising out of or related to generator liability for Hazardous Material for which DB Contractor is not considered the generator pursuant to this Section 4.8.2.1, specifically excluding generator liability for actual and threatened DB Contractor Releases of Hazardous Materials.

**4.8.2.2** As between DB Contractor and TxDOT, DB Contractor shall be considered the generator and assume generator responsibility only for DB Contractor Releases of Hazardous Materials. For such Hazardous Materials, the following provisions shall apply:

(a) Hazardous Materials Management costs, including assessment, containment, and remediation expenses, on, arising from or related to such shall not be compensable to DB Contractor or entitle DB Contractor to an extension of the Completion Deadlines.

(b) To the extent permitted by applicable Law, DB Contractor shall indemnify, save, protect and defend TxDOT from claims, causes of action and Losses arising out of or related to generator liability for such DB Contractor Releases of Hazardous Materials.

## 4.9 Disputes Escalation and Disputes Review Panel

### 4.9.1 Disputes Review Panel

**4.9.1.1** **Purpose.** A disputes review panel (the "Panel") will be established to assist in the avoidance and informal resolution of Disputes arising out of the Work. This Section 4.9 describes the purpose, procedure, function, and key features of the Panel. The execution of a Disputes Review Panel Agreement will formalize the creation of the Panel.

**4.9.1.2** **Duties.** The Panel will assist in and facilitate the timely resolution of Disputes between TxDOT and DB Contractor, in an effort to avoid construction delay and litigation. It is not the intent of the Panel to serve as a means for TxDOT or DB Contractor to circumvent their responsibility to carefully review claims before submission or rejection and to determine responsibility under the Contract Documents for issues that arise concerning the Project by indiscriminately forwarding or assigning such matters to the Panel for resolution. It is intended that the Panel encourage TxDOT and DB Contractor to resolve potential Disputes without resorting to the Panel.

**4.9.1.3** **Relationship to Dispute Resolution Procedures.** Compliance with the procedures in this Section 4.9 are a prerequisite and condition to resolution of Disputes under the Dispute Resolution Procedures set forth in Section 11.1 and Exhibit 20 of the DBA. If the DBA contemplates a Disputes Review Board and associated procedures pursuant to 43 TAC § 9.6, Disputes Review Board members, are not eligible to serve as members of the Panel. Furthermore, Panel members are prohibited from having any communications with any Disputes Review Board members regarding any aspect of the Project.

**4.9.1.4** **Ineligible Matters.** The Panel is not authorized to hear or provide recommendations regarding Ineligible Matters. For the avoidance of doubt, in no event may DB Contractor submit to the Panel a decision with respect to the testing and adequacy of construction materials.

### 4.9.2 Panel Membership

**4.9.2.1** **General.** A Panel shall be established by TxDOT and DB Contractor and begin operation upon the Effective Date, and the Panel's authority and obligations shall terminate upon the later of (a) completion of all work required to be performed by DB Contractor under the DB Contract (including, unless the DB Contract is terminated earlier, work required pursuant to the Warranties) or (b) conclusion of any proceedings before the Panel.

**4.9.2.2** **Panel Members.** The Panel shall initially consist of two members, one selected by TxDOT and approved by DB Contractor and the other selected by DB Contractor and approved by TxDOT. The

first duty of the Panel shall be to select its third member ("Panel Chairperson") who shall be approved by both TxDOT and DB Contractor and will serve as the chairperson for all Panel activities. The goal in selecting the Panel Chairperson is to complement the dispute resolution experience of the first two and to provide leadership for the Panel's activities.

**4.9.2.3** **Experience.** The Panel members shall (a) be experienced with highway design and construction under a design-build contract, (b) have taken and completed the Dispute Resolution Board Foundation training course for TxDOT alternative delivery projects, and (c) be experienced in the resolution of disputes involving design-build contracts as a neutral third party mediator or dispute resolver. The Parties may agree, on a case-by-case basis, to allow completion of another disputes review board practice course in lieu of the Dispute Resolution Board Foundation training course for TxDOT alternative delivery projects.

**4.9.2.4** Selection Process

**4.9.2.4.1** To the extent not previously selected and approved, each Party shall within 14 days after the Effective Date select its Panel member and provide a disclosure statement meeting the requirements of Section 4.9.2.6 regarding the selected individual to the other Party for approval. Each Party shall have 14 days after receipt of such information to approve or object to the other Party's selection. A Party may only object to the other Party's nomination on the grounds that there exists a conflict of interest in accordance with Section 4.9.2.5 or for failure of the candidate to meet minimum qualifications requirements. In such event, the selecting Party shall within 7 days promptly select another candidate for Panel member and provide information regarding the replacement to the other Party for approval. This process shall be followed until two members are approved and also in the event a Party's Panel member is no longer able or eligible to serve on the Panel. Should a Dispute arise regarding whether a Party's Panel member candidate is eligible to serve on the Panel, the Panel member candidate in question, along with the other Party's approved Panel member, shall select the Panel Chairperson, and such matter shall be determined by the Panel Chairperson.

**4.9.2.4.2** Immediately upon approval of the first two members, the two members shall select the Panel Chairperson. The first two members shall ensure that the Panel Chairperson meets all of the criteria in Sections 4.9.2.3 and 4.9.2.5. The Panel Chairperson shall be selected within four weeks after the first two members are approved. In the event of an impasse in the selection of the Panel Chairperson, the matter shall be referred to JAMS for selection of the Panel Chairperson. In so doing, they may, but are not required to, consider the nominees offered by the first two members.

**4.9.2.5** Conflict of Interest

It is imperative that Panel members show no partiality to either the DB Contractor or TxDOT, or have any conflict of interest. Accordingly, the following rules are applicable:

**4.9.2.5.1** Members must not have an ownership interest in the DB Contractor, or a financial interest in this Design-Build Contract or the Project, or in the outcome of any Dispute decided on the Project, except for payment for serving on the Panel.

**4.9.2.5.2** No member shall have been employed (or have his/her employer or partner employed) within three years prior to the Effective Date by TxDOT, DB Contractor, DB Contractor's shareholders, partners, joint venturers or members, or any Subcontractor with a Subcontract price in excess of $1 million or have had financial ties to any of the foregoing. The foregoing prohibition does not apply to a Panel member's (other than the Chairperson's) previous selection and retention by a Party on

a disputes review board, disputes review panel or similar neutral alternative dispute resolution body which is disclosed to both Parties. The Chairperson shall not have been selected by a Party to serve on a disputes review board, disputes review panel or similar neutral alternative dispute resolution body in the past three years.

**4.9.2.5.3** No member shall have had substantial prior involvement in the Project or relationship with any party or affiliate of a nature that would be grounds for disqualification of a judge pursuant to Texas Rule of Civil Procedure 18b or that could otherwise compromise his or her ability to impartially resolve Disputes.

**4.9.2.5.4** No member shall discuss or accept employment with TxDOT, DB Contractor or any DB Contractor-Related Entity during the term of the Project and for so long thereafter as any obligations remain outstanding under the Contract Documents, except that a Panel Member other than the Chairperson may be selected by a Party as a member of a disputes review board or similar neutral alternative disputes resolution body on other projects.

**4.9.2.5.5** Each Panel Member, in the performance of his or her duties on the Panel, is acting as an independent contractor and not as an employee of either TxDOT or DB Contractor.

**4.9.2.6** Submission of Disclosure Statements

Before a Panel member appointment is final, the Party-appointed prospective members shall submit complete disclosure statements for the approval of both TxDOT and DB Contractor. Each statement shall include a resume of experience, together with a declaration describing any potential conflicts of interest as described in Section 4.9.2.5 and all past and present relationships to the Project, the entities described in Section 4.9.2.5.2 and any employees of any such entity. The Panel Chairperson shall supply such a disclosure statement to the Party-appointed Panel members and to TxDOT and the DB Contractor before his or her appointment is final. Each Panel member shall provide an updated disclosure statement to the Parties and the other Panel members no less frequently than annually and any time the Panel member becomes aware of a potential conflict of interest as described in Section 4.9.2.5.

**4.9.2.7** Execution of Disputes Review Panel Agreement

Promptly upon approval of the Panel members, TxDOT, the DB Contractor and the individual Panel members shall enter into a five-party Disputes Review Panel Agreement which sets forth the terms and conditions which apply to the services to be provided by the members. TxDOT, DB Contractor, and all three members of the Panel shall execute the Panel Agreement within 14 days after the selection of the Panel Chairperson.

**4.9.2.8** Withdrawal; Termination; Replacements

Panel Members may withdraw from the Panel upon delivery of written notice of withdrawal to TxDOT, DB Contractor, and the other Panel members. The notice shall specify the effective date of the withdrawal, which shall be no earlier than 28 days following the date of delivery of the notice. In addition, any Panel member may be terminated by TxDOT or DB Contractor if at any time there exists a conflict of interest in accordance with Section 4.9.2.5 or the member otherwise fails to meet the qualifications set forth in this Section 4.9. Should the need arise to appoint a replacement Panel member, the replacement member shall be appointed in the same manner as provided in this Section 4.9 for appointment of the original member. The selection of a replacement Panel member shall begin promptly upon notification of the necessity for a replacement, and shall be

completed within 28 days thereafter. The change in Panel membership shall be evidenced by a fully executed amendment to the Disputes Review Panel Agreement.

**4.9.3 Panel Operations**

The Panel shall formulate its own rules of operation in accordance with the Disputes Review Panel Agreement and consistent with the Operating Procedures and this Design-Build Contract.

**4.9.3.1** Project Schedule Update

In order to keep abreast of design and construction development and progress, DB Contractor shall provide the members with the monthly Project Schedule Update narrative and any other relevant data necessary to resolve Disputes mutually agreed upon by TxDOT and DB Contractor or requested by the Panel.

**4.9.3.2** Regular Meetings

The Panel shall visit the Project and meet with representatives of TxDOT and DB Contractor on a quarterly basis and at such other times as may be requested by the Parties. The regular meetings shall be held at the Project site. Each meeting shall consist of an informal round table discussion followed by a field inspection of the Project. The round table discussion shall be attended by selected personnel from TxDOT and DB Contractor. The agenda shall generally include the following or other matters requested by the Panel:

(a) Meeting convened by the chairman of the Panel;

(b) Opening remarks by TxDOT's representative;

(c) A description by DB Contractor of the Work accomplished since the last meeting, current status of the Project Schedule, schedule for future Work, potential Disputes and proposed solutions for any problems;

(d) Discussion by TxDOT's representative of the Project Schedule as TxDOT views it, potential Disputes, and status of past Disputes; and

(e) Set tentative date for next meeting.

The Parties may request the Panel Chairperson to prepare a summary of regular meetings, and if no request is made, the Panel Chairperson at his or her discretion may prepare a summary of regular meetings and circulate them for comments, revisions, and/or approval of all concerned.

The field inspection shall cover all active segments of the Work. Representatives of both TxDOT and DB Contractor shall accompany the Panel on field inspections.

**4.9.3.3** Ex Parte Communications

The Parties are prohibited from discussing any substantive aspect of an existing or potential Dispute with any member of the Panel except during a regular Panel meeting or hearing which is attended by both Parties. A Panel member who has ex parte contact with a Party or Party representative shall be subject to disqualification from the Panel. The party having the ex parte communications will bear the cost of replacing the Panel member.

**4.9.4 Schedule for Dispute Resolution**

**4.9.4.1** Time Periods Generally

Disputes shall be considered as quickly as possible, taking into consideration the particular circumstances and the time required to prepare detailed documentation. Steps may be omitted as agreed in writing by both Parties or in the discretion of the Panel and the time periods stated herein may be shortened in order to hasten resolution.

**4.9.4.2** Importance of Timeliness; Waiver

DB Contractor waives the right to collect any and all costs incurred and to seek any extension of the Completion Deadlines for delays to the Critical Path due to any decision, action or order of TxDOT in the event DB Contractor fails to file a protest with TxDOT or appeal a TxDOT Decision regarding such matter within the time periods set forth in this Section 4.9. This waiver shall occur whether or not there is any showing of prejudice to TxDOT resulting from the delay in filing the protest.

**4.9.5 Panel Submittals**

Before DB Contractor shall have the right to submit a Dispute to the Panel, it must first comply with the following procedures.

**4.9.5.1** Written Protest Procedure and Dispute Escalation Tiers: In addition to any other notice requirements under this Design-Build Contract, if DB Contractor objects to any written decision, action or order of TxDOT (including any rejection or modification of a proposed Change Order by TxDOT), DB Contractor may file a written protest with TxDOT, stating clearly, and in detail with supporting documentation, the basis for the objection, within seven days after the date of the decision, action or order. Within seven days of DB Contractor's submission of a written protest to TxDOT, or written notice of a potential Dispute to DB Contractor, or the date of an advisory opinion provided by the Panel in accordance with Section 4.9.6, as applicable, the Parties shall begin discussions between the personnel of each organization at the tier levels and for the time periods described in the table below. TxDOT shall within 30 days after the Effective Date provide DB Contractor with the personnel titles corresponding to each tier level and Party in the table below.

**Dispute Escalation Tiers**
Level of Authority and Responsibility

| Tier | DB Contractor | TxDOT | Time Limit* |
|---|---|---|---|
| 1 | TBD | TBD | 2 Business Days |
| 2 | TBD | TBD | 5 Business Days |
| 3 | TBD | TBD | 10 Business Days |

** Time in which Dispute must be resolved or passed on to the next tier.*

In the event the Parties are unable to resolve the issue within 10 Business Days after referral of the protest to the tier 3 personnel, either Party may seek resolution of the issue with Panel.

**4.9.5.2** **Issuance of TxDOT Decision.** TxDOT will consider the written protest and make its decision (the "TxDOT Decision") on the basis of the pertinent Contract Document requirements, together with the facts and circumstances involved in the Dispute. The decision will be furnished in writing to DB Contractor within 14 days after expiration of the tier 3 discussion period, provided that if no written decision is issued, TxDOT shall be deemed to have denied DB Contractor's written protest and a

TxDOT Decision to that effect shall be deemed received by DB Contractor at the end of such 14-day period. The TxDOT Decision shall be final and conclusive on the subject, unless a written appeal to the Panel is filed within 21 days after receipt of the TxDOT Decision.

**4.9.5.3** **Submission of Dispute to Panel.** If the TxDOT Decision does not resolve the Dispute, then either Party may submit the Dispute to the Panel. The Dispute shall be submitted to the Panel by DB Contractor's written notice of appeal of the TxDOT Decision or TxDOT's written notice of Dispute, delivered to the Panel and simultaneously served upon the other party. The written notice shall be filed by the submitting Party and served within 21 days following the date on which the TxDOT Decision is issued or is deemed to have been issued in accordance with Section 4.9.5.2, and shall state clearly and in full detail, with supporting documentation, the specific issues of the Dispute to be considered, including the pertinent facts and the relevant provisions of the Contract Documents. If no notice of appeal or written notice of Dispute is filed within 21 days following the date upon which the TxDOT Decision is final, the TxDOT Decision shall be final, conclusive and binding upon the Parties. Within 21 days of receipt of a written notice of appeal or written notice of Dispute, the Party receiving the written notice shall submit a response with supporting documentation to the other Party and the Panel setting forth in full detail the Party's response to the facts and relevant Contract Document terms asserted in the written notice.

**4.9.5.4** **Continuance of Work during Dispute.** At all times during the course of the dispute resolution process, DB Contractor shall continue with the Work, in a diligent manner and without delay, and in accordance with the Contract Documents, including any Directive Letters.

### 4.9.6 Advisory Opinions

At any time after a written protest is filed by the DB Contractor in accordance with Section 4.9.5.1, the Parties may agree to seek an advisory opinion from the Panel in accordance with this Section 4.9.6. At request of the Parties, the Panel shall issue an advisory opinion after concurrent submission by each Party of a brief written summary of the issue(s) in Dispute, pertinent facts and circumstances, and relevant provisions of the Contract Documents. Each Party's written summary shall not exceed three pages and shall be submitted to the other Party and the Panel on the date agreed upon by the Parties, which shall be no less than three days prior to a scheduled meeting of the Panel. Each Party shall have the opportunity to present its position to the Panel at the next regular meeting, or at such other time set by the Panel at the request of the Parties, prior to the deliberations of the Panel. The Panel shall verbally provide its advisory opinion to the Parties at the meeting. In the event the Parties are unable to resolve the Dispute after the advisory opinion is given, either Party may submit the Dispute to the Panel in accordance with Section 4.9.5. The deadline for commencing discussions between the Parties in accordance with the dispute escalation tiers in Section 4.9.5.1 shall be tolled until 7 days after receipt of the advisory opinion.

### 4.9.7 Date of Hearing

When a Dispute is submitted to the Panel, the Panel, with input from DB Contractor and TxDOT, shall first decide when to conduct the hearing. If the matter is not urgent, it may be heard at the next regular Panel meeting. For an urgent matter, the Panel shall meet at its earliest convenience.

### 4.9.8 Evidence

Evidence, including any written statements, shall be exchanged by the Parties seven days prior to the hearing and any rebuttal evidence shall be exchanged three days prior to the hearing. During the hearing, DB Contractor and TxDOT shall each have ample opportunity to be heard and to offer

documentary evidence. Testimony of witnesses shall be in the form of written statements unless otherwise requested by the Panel, and shall not be offered to change the terms of the Contract Documents. Discovery shall only be permitted at the discretion of the Panel.

**4.9.9 Hearing**

**4.9.9.1** Location of Hearings

Normally the hearing will be conducted at the Project site. However, any location that would be more convenient and still provide all required facilities and access to necessary documentation is satisfactory. Private sessions of the Panel may be held by telephone or at any convenient location.

**4.9.9.2** Record of Hearing

Each member shall keep his or her own notes. A formal transcript is not prepared, except in accordance with the Operating Procedures.

**4.9.9.3** Hearing Procedures

TxDOT and DB Contractor shall have representatives at all hearings. Each may be represented by counsel. DB Contractor will first discuss the Dispute, followed by TxDOT. Each party will then be allowed successive rebuttals until all aspects are fully covered. The Panel members may ask questions, request clarification, or ask for additional data. In large or complex cases, the hearing may be continued as necessary in order to consider and fully understand all the evidence presented by both parties.

**4.9.10 Impartiality of Panel**

The Panel shall fairly and impartially consider Disputes referred to it, solely on the basis of the facts and the terms of the Contract Documents, and shall provide written recommendations to TxDOT and DB Contractor to assist in the resolution of Disputes submitted to the Panel.

**4.9.11 Panel Recommendations**

After any hearings are concluded, the Panel shall meet to formulate its recommendations. All Panel deliberations shall be conducted in private, with all individual views kept strictly confidential. The Panel's recommendations, together with an explanation of its reasoning, shall be submitted as a written report to both parties within 21 days of completion of the hearings. In exceptionally difficult cases, this time may be extended by the Panel. The recommendations shall be based on the pertinent requirements of the Contract Documents and the facts and circumstances involved in the Dispute. The Panel shall make every effort to reach a unanimous recommendation. If this proves impossible, the dissenting member may prepare a minority report, but all three members of the Panel will sign the report without identification of the dissenter. Following delivery of the recommendations, if requested by either Party, the Panel shall either provide additional written clarification or meet (in person or by telephone) with TxDOT and DB Contractor to provide additional clarification of its recommendations.

**4.9.12 Commencement of Informal Resolution Procedures**

Within 7 days of receiving the Panel's recommendations, or such other time specified by the Panel, both TxDOT and DB Contractor shall respond to the other and to the Disputes Panel in writing,

signifying either acceptance or rejection of the Panel's recommendations. If either Party rejects the Panel's recommendations and the Dispute is not otherwise resolved, either Party may commence Informal Resolution Procedures in accordance with Section 4.10 within 14 days after the date of the Panel's recommendations, as such time may be extended upon agreement of the Parties. DB Contractor's failure to timely commence Informal Resolution Procedures shall constitute a waiver of any and all claims that were the subject of the Panel's recommendations.

**4.9.13 Panel Recommendations Not Admissible**

Panel recommendations shall not be admissible for any purpose in any subsequent dispute resolution proceeding. For the avoidance of doubt, the Parties may refer to Panel recommendations when conducting Informal Resolution Procedures.

**4.9.14 Compensation**

Fees and expenses of all three members of the Panel shall be shared equally by TxDOT and DB Contractor. If the Panel desires special services, such as legal consultation, accounting, data research, and the like, both parties must agree, and the costs will be shared by them as mutually agreed. DB Contractor shall pay the invoices of all Panel members after approval by both parties. DB Contractor will then bill TxDOT for 50% of such invoices.

No Panel Member will be entitled to any employee benefits.

**4.9.15 Expenses**

**4.9.15.1** **Payment.** Payment for services rendered by each Panel member and for their direct expenses shall be calculated in accordance with the payment schedule for the Panel member as agreed upon by TxDOT, DB Contractor, and the Panel member.

**4.9.15.2** **Invoices.** Invoices for payment for work performed and expenses incurred shall be submitted no more often than once per month. Such invoices shall be in a format approved by TxDOT and accompanied by a general description of activities performed during this period. The value of work accomplished for payment shall be established from the billing rate and hours expended by the Panel member together with direct expenses. Billings for expenses shall include an itemized listing supported by copies of the original bills, invoices, expense accounts, and miscellaneous supporting data.

**4.9.15.3** **Records.** Each Panel member shall keep available for inspection, for a period of four years after final payment, the cost records and accounts pertaining to the Disputes Review Panel Agreement.

**4.9.16 Cooperation.**

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

**4.10 Informal Resolution Procedures**

As a condition precedent to the right to have any Dispute resolved pursuant to the formal Disputes resolution process set forth in Exhibit 20 to the DBA or by a district court, the claiming Party must first attempt to resolve the Dispute directly with the responding Party through the informal resolution procedures described in this Section 4.10 (collectively, the "Informal Resolution

Procedures"). Time limitations set forth for the Informal Resolution Procedures may be changed by mutual written agreement of the Parties. Changes to the time limitations for the Informal Resolution Procedures agreed upon by the Parties shall pertain to the particular Dispute only and shall not affect the time limitations for the Informal Resolution Procedures applicable to any subsequently arising Disputes.

**4.10.1 Notice of Dispute to Designated Agent**

(a) A Party desiring to pursue a Dispute against the other Party shall initiate the Informal Resolution Procedures by serving a written notice on the responding Party's designated agent. Unless otherwise indicated by written notice from one Party to the other Party, each Party's designated agent shall be its Authorized Representative. The notice shall contain a concise statement describing:

(i) If the Parties have mutually agreed that the Dispute is a Fast-Track Dispute;

(ii) The date of the act, inaction or omission giving rise to the Dispute;

(iii) An explanation of the Dispute, including a description of its nature, circumstances and cause;

(iv) A reference to any pertinent provision(s) from the Contract Documents;

(v) If applicable and then known, the estimated dollar amount of the Dispute, and how that estimate was determined (including any cost and revenue element that has been or may be affected);

(vi) If applicable, an analysis of the Project Schedule and Completion Deadlines showing any changes or disruptions (including an impacted delay analysis reflecting the disruption in the manner and sequence of performance that has been or will be caused, delivery schedules, staging, and adjusted Completion Deadlines);

(vii) If applicable, the claiming Party's plan for mitigating the amount claimed and the delay claimed;

(viii) The claiming Party's desired resolution of the Dispute; and

(ix) Any other information the claiming Party considers relevant.

(b) The notice shall be signed by the designated representative of the Party asserting the Dispute, and shall constitute a certification by the Party asserting the Dispute that:

(i) The notice of Dispute is served in good faith; and

(ii) To the then current knowledge of such Party, except as to matters stated in the notice of Dispute as being unknown or subject to discovery, (A) all supporting information is reasonably believed by the Party asserting the Dispute to be accurate and complete and (B) the Dispute accurately reflects the amount of money or other right, remedy or relief to which the Party asserting the Dispute reasonably believes it is entitled; and

(iii) The designated representative is duly authorized to execute and deliver the notice and such certification on behalf of the claiming Party.

(c) If the responding Party agrees with the claiming Party's position and desired resolution of the Dispute, it shall so state in a written response. The notice of the Dispute and such response shall suffice to evidence the Parties' resolution of the subject Dispute unless either Party requests further documentation. Upon either Party's request, within five Business Days after the claiming Party's receipt of the responding Party's response in agreement, the Parties' designated representatives shall state the resolution of the Dispute in writing as appropriate, including execution of Change Orders or other documentation as needed, and thereafter each Party shall then promptly perform its respective obligations in accordance with the agreed resolution of the Dispute.

(d) The Party asserting the Dispute shall not be prejudiced by its initial statement of the Dispute and shall have the ability at any time during the Informal Resolution Procedures and formal Dispute resolution process to modify its statement of the Dispute and/or the amount of money or other right, remedy or relief sought.

### 4.10.2 Fast-Track Disputes

With respect to any Dispute that the Parties mutually designate as a Fast-Track Dispute, the Informal Resolution Procedures shall be abbreviated in that the procedure contemplated in Section 4.10.3 shall not be required.

### 4.10.3 CEO / Executive Director Meetings

Commencing within 10 Business Days after the notice of Dispute is served and concluding 10 Business Days thereafter, the Chief Executive Officer of DB Contractor and the Executive Director or the assistant Executive Director, shall meet and confer, in good faith, to seek to resolve the Dispute raised in the claiming Party's notice of Dispute. If they succeed in resolving the Dispute, DB Contractor and TxDOT shall memorialize the resolution in writing, including execution of Change Orders or other documentation as appropriate, and thereafter each Party shall then promptly perform its respective obligations in accordance with the agreed resolution of the Dispute.

### 4.10.4 Failure to Resolve Dispute With Informal Resolution Procedures

If a Dispute is not timely resolved under the Informal Resolution Procedures, then within 15 days (seven days for Fast-Track Disputes) after the conclusion of the time periods for Informal Resolution Procedures, if such Dispute was not resolved to the Parties' satisfaction: (a) the Parties may mutually agree to initiate mediation; or (b) either Party may commence the formal Disputes resolution process pursuant to Exhibit 20 to the DBA.

## 4.11 Partnering

Partnering will be encouraged in preference to formal dispute resolution mechanisms. Partnering in this context is intended to be a voluntary, non-binding procedure available for use by the Parties to resolve any issues that may arise during performance of the Work.

### 4.11.1 Schedule; Participation

As soon as possible after execution of this Design-Build Contract, TxDOT and DB Contractor shall jointly select a third-party facilitator to conduct the partnering meetings. The cost of the facilitator shall be shared equally by TxDOT and DB Contractor. Partnering meetings shall be conducted at the office of TxDOT or at such location as otherwise agreed upon by the Parties. Persons who should attend the partnering meetings include Key Personnel and executives of the Parties.

### 4.11.2 Confidentiality

Subject to the requirements of the Public Information Act, any statements made or materials prepared during or relating to partnering meetings, including any statements made or documents prepared by the facilitator, shall not be admissible or discoverable in any judicial or other dispute resolution proceeding, unless such statements or materials are admissible or discoverable under applicable Law.

# ATTACHMENT 4-1

# PROFESSIONAL SERVICES QUALITY MANAGEMENT PLAN

DB Contractor shall prepare a PSQMP that describes the policies, procedures and staffing to manage and ensure the quality of the Professional Services Work (including that of Subcontractors).

The PSQMP shall include all necessary forms, schedules, and requirements checklists, which may be documented in appendices.

The Professional Services Quality Control Manager (PSQCM) shall oversee the implementation of the PSQMP, and the Professional Services Quality Assurance Firm (PSQAF) shall perform independent quality reviews and certify that the Professional Services work products are prepared in accordance with the PSQMP.

DB Contractor's obligations for quality control (QC) and independent quality (IQ) assurance activities including audits by the PSQAF shall comply with the PSQMP requirements in this Attachment 4-1.

The PSQMP shall include, at a minimum, a procedure for each of the quality processes required to deliver the Professional Services. The procedures shall describe DB Contractor's quality management approach for performing both quality control and IQ assurance activities in Section 2 and Section 3, respectively, as described below.

The PSQMP shall consist of the following sections in the order listed below, unless otherwise directed by TxDOT:

- Section 1: Introduction
- Section 2: Quality Control (QC) Program
- Section 3: Independent Quality (IQ) Program
- Appendices including all necessary forms, schedules, and checklists.

DB Contractor shall use the templates in Exhibit 1 of this Attachment 4-1 for preparing the Title Page, Approvals Page and Record of Revisions in that order at the beginning of the plan, unless otherwise directed by TxDOT.

DB Contractor shall ensure that the PSQMP is consistent with the initial PSQMP submitted prior to the Effective Date for TxDOT review and comment. Incorporation of TxDOT's comments on the initial PSQMP shall be a condition precedent for submittal of the PSQMP for TxDOT's approval in its discretion.

TxDOT approval, in its discretion, of the PSQMP shall be a condition of the commencement of Design Work.

If changes to the PSQMP are required after commencement of Design Work, DB Contractor shall update the Record of Revisions table at the front of the PSQMP with the revision number, date of the revision and a description of the revision if changes to the PSQMP are required. Only the revised portions of the PSQMP are required to be submitted for review and approval in TxDOT's discretion.

## 1.0 Introduction

The introduction to the PSQMP shall include the following components in the order listed below in Table 1. The contents and associated requirements are the minimum requirements for Section 1 of the PSQMP. DB Contractor shall include any additional information for the introduction at the end of Section 1.

TxDOT shall not approve the PSQMP if the DB Contractor does not satisfactorily address the requirements for preparing Section 1 of the PSQMP described below in Table 1.

**Table 1 – Introduction Components and Requirements**

| Subsection | Requirements |
|---|---|
| **General** | Provide an overview of the quality management system for the Project and the |

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| | applicable quality policies. |
| | Include a description of the quality objectives for the Project. |
| | State how the PSQMP establishes procedures and policies for implementing IQ/QC during the design of the Project. |
| | Describe the disciplines covered within the PSQMP, which shall include but not be limited to Roadway Design, Drainage, Structures, Geotechnical, Surveying and Mapping, ROW, Utility, ITS/Illumination, etc. |
| **Organization – Personnel and Staffing** | Include an organizational chart and staffing plan for both quality control and IQ staff including the period of time that the staff members will be engaged in Project activities and the experience / knowledge / skill levels of staff. |
| | Describe the role and responsibilities of the Project Manager to ensure quality of the Professional Services Work. Include minimum experience and certifications. The Project Manager shall meet the requirements as more fully described in the Contract Documents. |
| | Describe the role and responsibilities of the Design Manager to oversee the design production of the Professional Services Work and ensure quality of the design work products. Include minimum experience and certifications. The Design Manager shall meet the requirements as more fully described in the Contract Documents. |
| | Describe the role and responsibilities of the Professional Services Quality Control Manager (PSQCM) managing the DB Contractor's QC program for the Professional Services.<br><br>The PSQCM shall meet the following requirements in the performance of the Professional Services Work:<br><br>The PSQCM shall:<br>• not be involved with direct scheduling or delivery production activities and report directly to the PM;<br>• ensure that the methods and procedures contained in the approved PSQMP are implemented and followed in the performance of the Work; and<br>• certify that the design Submittal packages meet the requirements of the PSQMP and Contract Documents.<br><br>The PSQCM shall be:<br>• a Registered PE and shall have relevant Professional Services QC management experience on projects of similar type and scope; and<br>• employed by either: (a) an Equity Member, Lead Engineering Firm or Lead Contractor; (b) a controlled subsidiary of such Equity Member, Lead Engineering Firm or Lead Contractor; or (c) a parent company of an Equity Member.<br><br>The PSQCM shall have authority to stop Work. |

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| | Describe the role and responsibilities of the Engineer of Record (EOR) directly supervising the production of the Professional Services Work.<br><br>The EOR will meet the following requirements:<br><br>The engineers in responsible charge of each item, element, or phase of the Work shall possess the necessary licenses and registrations in the State of Texas and shall be personally responsible for directly supervising the Work.<br><br>The EOR shall sign and seal the Professional Services product for a given item, element, or phase of the Work as applicable. |
| | Describe the role and responsibilities of the Professional Services Quality Assurance Manager (PSQAM) managing and overseeing the independent IQ program of the project.<br><br>The PSQAM will meet the following requirements:<br><br>DB Contractor shall assign a PSQAM who shall be responsible for performing independent quality assurance reviews of the DB Contractor's Professional Services work products, and audits of the DB Contractor's PSQMP and professional services IQ/QC program.<br><br>The PSQAM shall:<br><br>• oversee implementation of the PSQMP;<br>• irrespective of his or her other responsibilities, have defined authority for ensuring the establishment and maintenance of the Professional Services elements of the PSQMP; and<br>• report jointly to TxDOT's and to DB Contractor's executive management teams on the performance of the PSQMP with respect to those elements.<br><br>The PSQAM shall be:<br>• a Professional Engineer with relevant Professional Services quality assurance management experience on projects of similar type and scope; and<br>• employed by an independent Professional Services Quality Assurance Firm.<br><br>The PSQAM shall have authority to stop Work.<br><br>Provide a description of the credentials of the PSQAM and the name of the independent firm of the PSQAM.<br><br>The PSQAM shall remain an independent third party throughout the development of the Professional Services production Work.<br><br>The PSQAM shall oversee of the Professional Services Quality Assurance Staff (PSQAF) |
| | The PSQAF staff shall be provided under the direction of the PSQAM to perform oversight and review of all Professional Services Work. |

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| | The PSQAF staff shall meet the following requirements:<br><br>• The PSQAF staff shall be experienced in the respective aspects of Professional Services undertaken by DB Contractor.<br><br>• The training and experience of the PSQAF staff shall be commensurate with the scope, complexity, and nature of the Work to be reviewed.<br><br>• Qualifications of the PSQAF staff shall include appropriate experience, certifications, training, and licensure.<br><br>• PSQAF staff shall report to the PSQAM.<br><br>• The size of the PSQAF staff shall reflect the volume of PSQAF activities necessary for the Work in progress and shall be maintained in accordance with the Design Submittal Packaging Plan and Submittal Schedule as described below in QCP-02 of the approved PSQMP.<br><br>• PSQAF staff is available and that the audit functions described in the PSQMP are undertaken in a manner consistent with the Project Schedule and in a manner that will enable DB Contractor to achieve the Completion Deadlines.<br><br>Include that PSQAF staffing requirements will be updated as necessary throughout the Term to reflect changes in the actual design schedule. |
| **Communication** | Describe the internal and external communication and coordination roles and responsibilities of the project quality team staff as they relate to technical working group meetings, intradisciplinary and interdisciplinary communication, design-construction interfaces, DB Contractor and TxDOT communication, DB Contractor and third party communication, Designer-Design IQ/QC interfaces. |
| **Proposal Commitments** | Include a list of the proposal commitments with respect to the Professional Services QC program and the IA program, as described in Appendix 1 of Exhibit 2 of the DBA. |
| | Identify relevant Proposal commitments and specify where they are addressed in the PSQMP. |
| | Describe how they will be incorporated into the Professional Services Work and the verification process to ensure the Proposal commitment has been fulfilled. |

## 2.0 Quality Control Program

The professional services quality control (QC) program includes reviewing, checking, and documenting all design and other Professional Services Work to ensure the quality of the work products complies with the Contract Requirements.

The PSQMP shall include QC procedures in Section 2 describing the management approach, stages of design, responsibilities, QC/QA procedures (described separately), reviews, timing, procedure or reference standard, and resulting records for all Professional Services Submittals.

The QC program is intended to ensure that TxDOT is in agreement with the quality of the Work performed by DB Contractor.

Prepare, at a minimum, the QC procedures listed in Table 2. Include any additional QC procedures at the end of Section 2.

TxDOT approval of the PSQMP shall be conditioned upon the DB Contractor satisfactorily addressing the requirements for preparing the QC procedures described below in Table 2. The QC procedures shall include at a minimum a description of the responsible parties performing the actions, detailed description of the procedural steps, and a list of documents referenced in the procedure in accordance with the template for preparing the QC procedures in Exhibit 2 to this Attachment 4-1. The procedures should be clear, detailed and follow the general template outline contained in Exhibit 2.

**Table 2 – Quality Control Procedures**

| Number | Name | Description | Requirements |
|---|---|---|---|
| **QCP-01** | **QC Work Documents** | Prepare QC Work documents, including procedures and forms to ensure the Professional Services Work is performed in accordance with the Contract Documents. | **QC Work Documents Requirements** |
| | | | **Preparation and Use** |
| | | | DB Contractor shall prepare and use documented instructions to control the receipt and issuance of the control of Work documents |
| | | | Use qualitative and quantitative criteria with such instructions to determine compliance. |
| | | | Define the method, format and layout requirements. |
| | | | QC staff should use and follow the Work documents. |
| | | | **Review, Approval and Release** |
| | | | Perform quality reviews of the Work documents for adequacy. |
| | | | Define the approval process for release of the documents. |
| | | | Authorized personnel of the DB Contractor shall approve the release of the Work documents. |
| | | | Distribute and use the Work documents at the location where the prescribed activity is performed. |
| | | | |
| **QCP-02** | **Design Submittal Packaging Plan and Submittal Schedule** | Develop a procedure describing the preparation of the Design Submittal Packaging Plan and Submittal Schedule | **Design Submittal Packaging Plan and Submittal Schedule Requirements** |
| | | | **Packaging Plan and Schedule Preparation** |
| | | | DB Contractor shall prepare a Design Submittal Packaging Plan and Submittal Schedule for all items, elements or portions of the Work. |
| | | | **Packaging Plan and Schedule Workshop** |
| | | | DB Contractor shall host a workshop with TxDOT in order to present its Design Submittal Packaging Plan containing: (i) a list of proposed sections (i.e., Station x+xx to Station y+yy) for the Work; (ii) Professional Services packaging and content (i.e. drainage, individual structures, roadway, traffic sequencing, and others); (iii) a list of mandatory Submittals; and (iv) a proposed Submittal schedule. |
| | | | **Packaging Plan Contents** |
| | | | DB Contractor shall ensure that all permanent Work items, elements, or portions of the permanent Work, including any temporary structural items, elements, or portions of the Work, for each buildable unit, pass through all stages of design development, in the order specified below.<br><br>• Preliminary Design<br>• Final Design<br>• Released for Construction<br>• Record Documents |
| | | | The following additional Submittal packages, which may consist of both permanent and non-permanent work items, elements, or portions of the Work, may be included in the Design Submittal Packaging Plan and Submittal Schedule as agreed upon by TxDOT and DB Contractor: |

| Number | Name | Description | Requirements |
|---|---|---|---|
| | | | • Early Start of Construction (ESOC)<br>• Temporary Work<br>• Third Party Submittal Packages |
| | | | All design Submittal packages shall be included in the Design Submittal Packaging Plan and Submittal Schedule. |
| | | | The Professional Services reviews shall be evenly scheduled in a logical manner over the duration of the design phase of the Work. |
| | | | Sections and packages shall be logically organized into buildable units and shall contain sufficient information and details to confirm DB Contractor intent and to validate conditions. |
| | | | **Packaging Plan and Schedule Approval** |
| | | | DB Contractor shall obtain TxDOT's written approval of the sections, packages and contents, the Submittal Schedule, and the methodology prior to making the first Submittal. |
| | | | **Design Submittal Preparation Manual** |
| | | | DB Contractor shall prepare as part of the PSQMP a project specific Design Submittal Preparation Manual to document the formatting and CADD requirements of all Plans, specifications, reports, calculations, and Record Documents. The manual shall follow the TxDOT *PS&E Preparation Manual*, modified as necessary to suit the needs of DB Contractor and the Project. |
| | | | |
| **QCP-03** | **Professional Services Review Plan** | Prepare procedures for establishing Professional Services review workflow processes, scheduling and performing QC review activities | **<u>Professional Services Review Plan Requirements</u>** |
| | | | **QC Review Process** |
| | | | *[Include a detailed description of the design review process including but not limited to the actions of reviewing, checking, correcting, and verifying, and the identification of responsible parties for performing the actions.]* |
| | | | *[Include a process flow chart with the steps and timeframes for the QC process from receipt of design Submittal package to completion of QC review.]* |
| | | | *[Develop a comment resolution matrix to compile comments and responses during the review of the Submittals. Obtain reviews to ensure prevention of errors, conflicts, or omissions.]* |
| | | | *[Describe the process for transmitting the QC documents to the PSQAM and TxDOT for quality assurance check and audit.]* |
| | | | **QC Reviewers** |
| | | | DB Contractor personnel performing the QC check of the Professional Services shall not be directly involved with the original development of the item, element, or phase being checked. |
| | | | *[Ensure that qualified discipline-specific staff are available to perform the reviews.]* |
| | | | *[Describe the qualifications of the personnel who will be involved in the QC review of the Professional Services.]* |
| | | | *[Describe the process for distributing the PSQMP and other applicable documents to the QC reviewers.]* |

| Number | Name | Description | Requirements |
|---|---|---|---|
| | | | **Project Meetings** |
| | | | The Design Manager shall conduct a series of working meetings with its Professional Services staff, the internal DB Contractor QC staff, the PSQAM, and TxDOT to establish workflow processes and procedures to be utilized during the design review process that are consistent with the Contract Documents. |
| | | | DB Contractor shall conduct weekly technical working group meetings with its design staff, its QC staff, its IQ staff, and TxDOT to discuss general design concepts, approaches, and application of design standards. DB Contractor shall develop, distribute, and maintain records of these meetings. |
| | | | *[Describe the number and schedule of coordination and working group meetings and proposed attendees for the design review process consistent with the Contract Documents.]* |
| | | | **Conformance Reviews** |
| | | | DB Contractor shall perform conformance checks to ensure the correct requirements are being utilized |
| | | | *[Include a process for ensuring the Professional Services Work conforms to requirements of the Contract Documents.]* |
| | | | *[Describe the process for ensuring the work products utilize the correct requirements.]* |
| | | | *[Identify conformance criteria set forth in the Contract Documents for each aspect of work in the Professional Services phase of the Work to ensure compliance with requirements of the Contract Documents.]* |
| | | | **Scope Checking** |
| | | | DB Contractor shall perform scope of Work checks to verify the completeness of Submittals. |
| | | | *[Include a process for verifying the Submittal is complete and conforms to the Project scope of Work requirements detailed in the Contract Documents.]* |
| | | | **Contract Deviations** |
| | | | DB Contractor shall ensure that contract deviations and variances from Contract Documents occur only with TxDOT's approval as Deviations or through the Change Order process; |
| | | | *[Describe the process for obtaining TxDOT approval of Deviations.]* |
| | | | *[Describe the process for preparing and submitting a request for Deviation (RFD) and incorporating an approved Deviation into the Work.]* |
| | | | **Accuracy Checks** |
| | | | DB Contractor shall perform accuracy checks to ensure Professional Services output is correct. |
| | | | *[Describe how accuracy checks of each document will be performed to ensure Professional Services output is correct.]* |
| | | | *[Include a description of how the output information is consistent with the input information such as criteria or calculations.]* |
| | | | **Format Checking** |

| Number | Name | Description | Requirements |
|---|---|---|---|
| | | | DB Contractor shall perform format checks to ensure conformance with appearance requirements, such as CADD, calculations, and specification language. |
| | | | *[Describe how each submittal will be formatted (i.e., reports, plan drawings, comments resolution matrices, etc.) and the process for ensuring verification with formatting requirements.]* |
| | | | **Computer Program and 3-D Computer Modeling Review** |
| | | | DB Contractor shall validate the applicable use of computer programs and checking of inputs. |
| | | | *[Describe the process for checking and verifying that the use of computer programs, CADD requirements and 3-D modeling software used in Submittal production are in accordance with the Contract Documents.]* |
| | | | *[Explain how calculations performed within a computer program will be checked for correct inputs and outputs.]* |
| | | | *[Include steps for reviewing 3-D designs and ensuring that they are prepared in accordance with required 3-D modeling software and design requirements in the Contract Documents.]* |
| | | | *[Ensure 3-D models of the Project submitted as part of the Record Documents accurately depict the Work constructed in accordance with the RFC Documents.]* |
| | | | **Design Calculations Check** |
| | | | DB Contractor shall perform independent calculations, without reference to the designer's calculations, to establish the structural adequacy and integrity of critical items, elements or portions of the Work mutually agreed upon by DB Contractor and TxDOT. The PSQMP shall identify items, elements, or portions of the Work to receive an independent calculation check and the resulting records, as well as an outline of the process for resolving differences between the independent calculations and the designer's calculations. |
| | | | *[Describe the methodology for checking the designer's calculations, detailing how calculation checks will be made to ensure accuracy of the output.]* |
| | | | *[Describe how any formulas used for calculations will be independently verified. If a computer is used to perform calculations and/or formulas, include steps for verifying all inputs and outputs to ensure formulas properly work.]* |
| | | | *[Describe how the resulting records of the checks will be used.]* |
| | | | *[Identify items, elements, or portions of the Work to receive an independent calculation check.]* |
| | | | **Constructability Reviews** |
| | | | DB Contractor shall perform constructability reviews to ensure the safety, feasibility and accessibility of all items, elements or portions of the Work. |
| | | | *[Describe the process for the checking and commenting on Submittals by construction personnel.]* |
| | | | *[Identify the professional services and construction personnel responsible for coordinating the constructability reviews.]* |
| | | | *[Describe when the review will take place within the* |

| Number | Name | Description | Requirements |
|---|---|---|---|
| | | | *Professional Services Submittal review process.]* |
| | | | *[Describe the scope of a discipline-specific constructability review.]* |
| | | | *[Describe the process for ensuring that constructability review comments are incorporated into the Submittal.]* |
| | | | **Interface and Interdisciplinary Reviews** |
| | | | DB Contractor shall perform interface and interdisciplinary reviews to ensure consistency and prevention of coordination errors, conflicts, omissions, or misalignments between individuals, agencies, Utility Owners, disciplines, firms, other projects, existing facilities, project stages, segments, systems, etc. This shall include or reference the coordination of the review, approval, release, distribution, and revision of documents affecting such parties. |
| | | | *[Describe the process for performing interface and interdisciplinary reviews of a Submittal across engineering disciplines.]* |
| | | | *[Identify the individual(s) responsible for coordinating the interdisciplinary reviews. Interdisciplinary reviews should include, but not be limited to, maintenance of traffic, Utilities, environmental compliance, and safety.]* |
| | | | *[Describe the scope of interface and interdisciplinary reviews and resolving identified conflicts.]* |
| | | | *[Identify the disciplines that will perform reviews of the Submittal.]* |
| | | | **External Reviews** |
| | | | DB Contractor shall coordinate external (TxDOT and third party) reviews to obtain input and expedite close-out of comments. |
| | | | *[Describe the process for performing external reviews and addressing any potential scope conflicts with the design plans, reports, or other portions of Work identified during the review.]* |
| | | | *[Describe the steps for coordinating the review, approval, release, distribution, and revision of documents affecting such third parties. Third parties may include local governments, utility owners and any other project stakeholders.]* |
| | | | **Shop Drawing Reviews** |
| | | | DB Contractor shall review shop drawings |
| | | | *[Describe the process for performing QC reviews of shop drawings provided by vendors verifying manufacturing of materials in in accordance with Engineer's designs and specifications.]* |
| | | | |
| **QCP-04** | **Pre-Submittal Workshop and Q&A** | Prepare a procedure for conducting pre-Submittal workshops with TxDOT | **Pre-Submittal Workshop and Q&A Requirements** |
| | | | **Pre-Submittal Workshop** |
| | | | At TxDOT's direction, DB Contractor shall conduct a pre-Submittal workshop, at a location and for a duration acceptable to TxDOT, no later than five days before the scheduled date for each Final Design Submittal. |
| | | | Workshops may be conducted during standard weekly |

| Number | Name | Description | Requirements |
|---|---|---|---|
| | | | meetings. |
| | | | **Workshop Materials** |
| | | | In the event a pre-Submittal workshop is requested, DB Contractor shall prepare supporting materials which shall include, at a minimum, a description of the content and scope of the Submittal and the technical disciplines and items that are the subject of the Submittal. |
| | | | *[Deliver the materials for the meeting at least 3 days prior to the meeting.]* |
| | | | Supporting information shall also include a list of items that will need to be integrated into the design but are not yet advanced to the same stage as the subject Submittal, an explanation of the design status, and a plan detailing how integration will be assured. |
| | | | **Additional Workshops** |
| | | | DB Contractor shall conduct an additional pre-Submittal workshop repeating the process with respect to all or part of a previous Submittal if, in TxDOT's opinion, the original presentation did not provide sufficient detail to conduct a review of the Submittal. |
| | | | TxDOT shall have the right to conduct a pre-Submittal workshop for any Submittal. |
| | | | |
| **QCP-05** | **Preliminary Design Submittal** | Prepare a procedure that describes the processes and methods used to prepare the preliminary Submittal packages | **Preliminary Design Submittal Requirements** |
| | | | **Package Submittal** |
| | | | DB Contractor shall provide its Preliminary Design Submittal package to TxDOT for review and comment prior to beginning development of the Final Design Submittal Package. |
| | | | **PSQCM Certification and Submittal of Quality Record** |
| | | | The PSQCM shall certify that the Preliminary Design package meets the requirements of the PSQMP. |
| | | | The PSQCM shall provide TxDOT and the PSQAM with all the applicable quality records in order to perform their IQ reviews, including redlined and clean copies of the Preliminary Design package working documents, checklists, and the comments and responses log. |
| | | | **Package Contents** |
| | | | DB Contractor, as part of its Preliminary Design package, shall include all plans, specifications, and reports which capture all major items, elements or portions of the Work such that DB Contractor can demonstrate a comprehensive understanding of the Project, including:<br>• Verification of Project ROW requirements<br>• Substantiation of design concepts including thorough site investigation and analysis of Site conditions<br>• Identification of applicable standards and validation of design concept constructability<br>• Identification of design and construction interfaces including materials and equipment used. |
| | | | |

| Number | Name | Description | Requirements |
|---|---|---|---|
| **QCP-06** | **Final Design Submittal** | Prepare a procedure that describes the processes and methods used to prepare the Final Design Submittal package and deliver the package to TxDOT. | **Final Design Submittal Requirements** |
| | | | **Package Submittal** |
| | | | After DB Contractor has incorporated all Preliminary Design Submittal review comments into its design and all concerns and questions have been resolved to the satisfaction of TxDOT, DB Contractor shall provide its Final Design package to TxDOT. |
| | | | **PSQCM Certification and Submittal of Quality Records** |
| | | | The PSQCM shall certify that the Final Design package meets the requirements of the PSQMP. |
| | | | The PSQCM shall provide TxDOT and the PSQAM with all the applicable quality records in order to perform their IQ reviews, including redlined and clean copies of the Final Design package working documents, checklists, and the comments and responses log. |
| | | | **Package Contents** |
| | | | DB Contractor, as part of its Final Design package, shall include all:<br>• Design drawings;<br>• Design calculations;<br>• Design reports;<br>• Standards and Specifications including General Notes;<br>• Copies of TxDOT's approval of deviations for design standards and/or Design Exceptions;<br>• Design Manager certification that the Final Design package meets all applicable requirements of the Contract Documents, applicable Law and Governmental Approvals and that all required Governmental Approvals, Utility Owner approvals and ROW has been acquired that are required for design have been obtained; and<br>• PSQAM certification that the Final Design package has been checked in accordance with the approved PSQMP and that all Final Design Submittal review comments have been addressed. |
| | | | **Design Manager/PSQAM Certifications and TxDOT Concurrence** |
| | | | DB Contractor shall obtain TxDOT review and written concurrence with the Design Manager's and PSQAM's certifications prior to issuing the Released for Construction Documents |
| | | | TxDOT's concurrence with the Design Manager's and PSQAM's certifications of compliance shall not constitute approval of the design or subsequent construction, nor will it relieve DB Contractor of its responsibility to meet the requirements hereof. |
| | | | **DB Contractor Responsibilities** |
| | | | Irrespective of whether TxDOT provides DB Contractor with the authority to begin construction on items, elements, or phases of the Work prior to completion of the design for the entire Project, DB Contractor shall bear the responsibility of |

| Number | Name | Description | Requirements |
|---|---|---|---|
| | | | assuring that construction meets the requirements of the Contract Documents, applicable Law, and Governmental Approvals. |
| | | | |
| **QCP-07** | **Design Resubmittal Process** | Prepare a procedure for the resubmittal of design Submittals | **Design Resubmittal Process Requirements** |
| | | | **Notification** |
| | | | Resubmittals of any design Submittal may be required if deemed necessary by TxDOT or any Governmental Entities with jurisdiction over the Project. |
| | | | TxDOT will notify the DB Contractor of the requirement to resubmit, in accordance with Section 5.2 of these General Conditions |
| | | | **Responses to Comments** |
| | | | Each resubmittal must address all comments received from a prior Submittal in a manner satisfactory to the commenting party. |
| | | | Submittals shall be resubmitted as many times as necessary to address comments from TxDOT or any Governmental Entity with jurisdiction over the Project. |
| | | | **Correspondence** |
| | | | A copy of all correspondence relating to each Submittal made to any Governmental Entity with jurisdiction over the Project shall be concurrently provided to TxDOT. |
| **QCP-08** | **Released for Construction Documents** | Prepare a procedure describing the steps for preparing and issuing Release for Construction (RFC) Documents packages and delivering RFC Documents packages to TxDOT | **Released for Construction Requirements** |
| | | | **Package Submittal** |
| | | | After DB Contractor has completed design of any particular Released for Construction Document, and received TxDOT written concurrence with the Design Manager's and PSQAM's certifications of compliance for the Final Design Submittal, DB Contractor's PM, or designee approved by TxDOT, may release the RFC plans to field staff and shall submit to TxDOT Released for Construction Documents in accordance with the Submittal requirements of the PSQMP. |
| | | | **Package Contents** |
| | | | Released for Construction Documents shall include the required certifications and approvals for the Final Design, and shall be signed and sealed by an Engineer of Record. |
| | | | The RFC Documents package delivered to TxDOT shall include documentation that all review comments have been addressed to TxDOT's satisfaction. |
| | | | **Content Requirements** |
| | | | DB Contractor's Released for Construction Documents shall comply with the requirements of the Contract Documents, shall be detailed, complete, constructible, and shall allow verification of the design criteria and compliance with the Contract Documents. |
| | | | Released for Construction Documents are required for all Construction Work that will be permanently incorporated into the Project and shall also be required for temporary structural items, elements, or portions of Work to be identified by DB Contractor in the Design Submittal Packaging Plan. |

| Number | Name | Description | Requirements |
|---|---|---|---|
| | | | RFC Documents are not required for non-permanent Work items, elements of portions of the Work in Early Start of Construction (ESOC) and Temporary Work packages. Non-permanent Work items, elements of portions of the Work, with the exception of temporary structural items, elements or portions of the Work, are not required to pass through each of the stages of design development described in QCP-02. |
| | | | **Changes to RFC Documents** |
| | | | If TxDOT or the PSQAM determines that the Released for Construction Documents do not meet the requirements of the Contract Documents, applicable Law and/or the Governmental Approvals, TxDOT or the PSQAM will notify DB Contractor in writing of any specific deficiencies in the Released for Construction Documents. DB Contractor shall correct all identified deficiencies; modify the Released for Construction Documents; and, if necessary, modify construction such that the Work is in compliance with the Contract Documents. |
| | | | Any changes to items, elements, or phases of design, after issuance of the Released for Construction Documents shall be checked and certified by the Design Manager and by the PSQAM in the same manner indicated above |
| | | | *[Check and provide compliance certifications for any changes to the RFC Documents prior to submitting for TxDOT and PSQAM review.]* |
| | | | |
| **QCP-09** | **Request for Clarification Process** | Prepare a procedure describing the process for requesting clarifications from TxDOT | **Request for Clarification Process Requirements** |
| | | | DB Contractor shall develop a defined process for requesting clarifications of language and requirements in the Contract Documents from TxDOT. |
| | | | *[Describe the process for incorporating the responses to the requests for clarification into the Work.]* |
| | | | **Document Management Workflow** |
| | | | *[Describe the document management workflow associated with the process.]* |
| | | | |
| **QCP-10** | **Design Changes during Construction** | Prepare a procedure describing how design changes to previously submitted Released for Construction Documents will be processed | **Design Changes during Construction Requirements** |
| | | | Design changes to previously submitted Released for Construction Documents are allowed in accordance with the requirements for this procedure. |
| | | | **Requests for Information** |
| | | | In every instance in which DB Contractor intends to construct the Work or has constructed the Work that deviates from the Released for Construction Documents, DB Contractor shall submit to the Engineer of Record a Request for Information (RFI) and include, at a minimum, the plan set and sheet number containing the proposed design change, a brief description of the requested or required design change, and the reason why the item of concern cannot be or was not constructed in accordance with the Released for Construction Documents. |

| Number | Name | Description | Requirements |
|---|---|---|---|
| | | | *[Describe the RFI process describing how an RFI will be used to initiate a notice of design change (NDC)]* |
| | | | DB Contractor cannot resolve Nonconforming Work solely through the use of an RFI. |
| | | | DB Contractor shall provide TxDOT a copy of the Engineer of Record's responses to all RFIs prior to implementation. |
| | | | The PSQAM shall review RFIs to ensure that they comply with the QMP. |
| | | | **Field Design Change** |
| | | | RFIs that constitute minor changes to the Work and need not initiate a design change or modified calculations shall be used to transfer that information to the as-built drawings. Minor design changes shall be those not needing specialized expertise, not in nonconformance with the Project requirements and not materially affecting design intent. |
| | | | *[Describe how the RFI will be used to process a minor design change as a field design change (FDC) and update the Record Drawings.]* |
| | | | **Notice of Design Change** |
| | | | Those design changes that require redesign or modified calculations shall be progressed by issuing a notice of design change (NDC). |
| | | | *[Enter the design change in either an NDC or an FDC log, as appropriate.]* |
| | | | The Engineer of Record, in accordance with the PSQMP, shall determine if an NDC is necessary. |
| | | | *[If a design change is to be progressed by issuing an NDC, then submit the NDC to TxDOT and the PSQAM.]* |
| | | | *[Include the same information in the NDC as provided with the RFI that DB Contractor submitted to the Engineer of Record.]* |
| | | | DB Contractor shall also include updated calculations, specifications and reports for all changes, as applicable in the NDC. |
| | | | *[Identify the entity or party initiating and impacted by the design change.]* |
| | | | *[Describe process for ensuring that the design change package is prepared in compliance with the Contract Documents.]* |
| | | | The PSQCM shall certify that the design change has been checked in accordance with the Contract Documents and the PSQMP, and is consistent with all other elements of the design, prior to review and IQ review by TxDOT and the PSQAF. |
| | | | TxDOT and the PSQAM shall have the opportunity to hold a formal review meeting of the design change package to review responses to comments. When all comments are closed to TxDOT and the PSQAM's satisfaction, TxDOT and PSQAM provide their written certification. |
| | | | All drawings and documents shall be uniquely identified from the original design. |
| | | | **Design-initiated Design Changes** |

| Number | Name | Description | Requirements |
|---|---|---|---|
| | | | DB Contractor may, in an effort to add clarity or address concerns with previously submitted Released for Construction Documents, issue an NDC. A design change initiated by an NDC shall undergo the same PSQMP processes as the original design including submittal to TxDOT for review and concurrence. |
| | | | **Responsibilities of Engineer of Record** |
| | | | All plans, specifications, calculations, and reports for design changes shall be signed, and sealed by a Registered Professional Engineer in accordance with applicable Law. |
| | | | Every design change shall be:<br>• Designed in accordance with the requirements of the Contract Documents, applicable Law and the Governmental Approvals;<br>• Checked in accordance with the approved PSQMP; and<br>• Prepared consistently with other elements of the original design. |
| | | | **Design Change Processes** |
| | | | DB Contractor shall define in its CQMP and PSQMP its design change process for:<br>• Communication between its construction and design teams regarding inquiries and design changes consistent with the provisions in this item.<br>• Notifications and submittal to TxDOT of RFIs and NDCs;<br>• Determination by the Engineer of Record of whether a design change shall follow the NDC process or shall only be captured in as-built drawings; and<br>• Identification of third parties impacted by a design change. |
| | | | The design changes during construction process workflow is shown in Figure 1. |
| | | | |
| **QCP-11** | **Temporary Work** | Prepare procedures for processing of Temporary Work submittal packages | **Temporary Work Package Requirements** |
| | | | Temporary Work packages include non-permanent Work items, elements or non-permanent portions of the Work that are signed and sealed by Registered a PE and issued for construction at the DB Contractor's sole risk. |
| | | | DB Contractor shall include Temporary Work Submittals in the Design Submittal Packaging Plan and proposed Submittal Schedule, which shall be submitted for TxDOT approval, as described in QCP-02. |
| | | | **Procedures** |
| | | | TxDOT and DB Contractor shall agree on the procedures for preparing and issuing Temporary Work packages for construction and shall include them in this Temporary Work procedure in the PSQMP for approval by TxDOT. |
| | | | DB Contractor shall coordinate with TxDOT in advance of preparing Temporary Work Submittals and confirm the Temporary Work procedures are consistent with the |

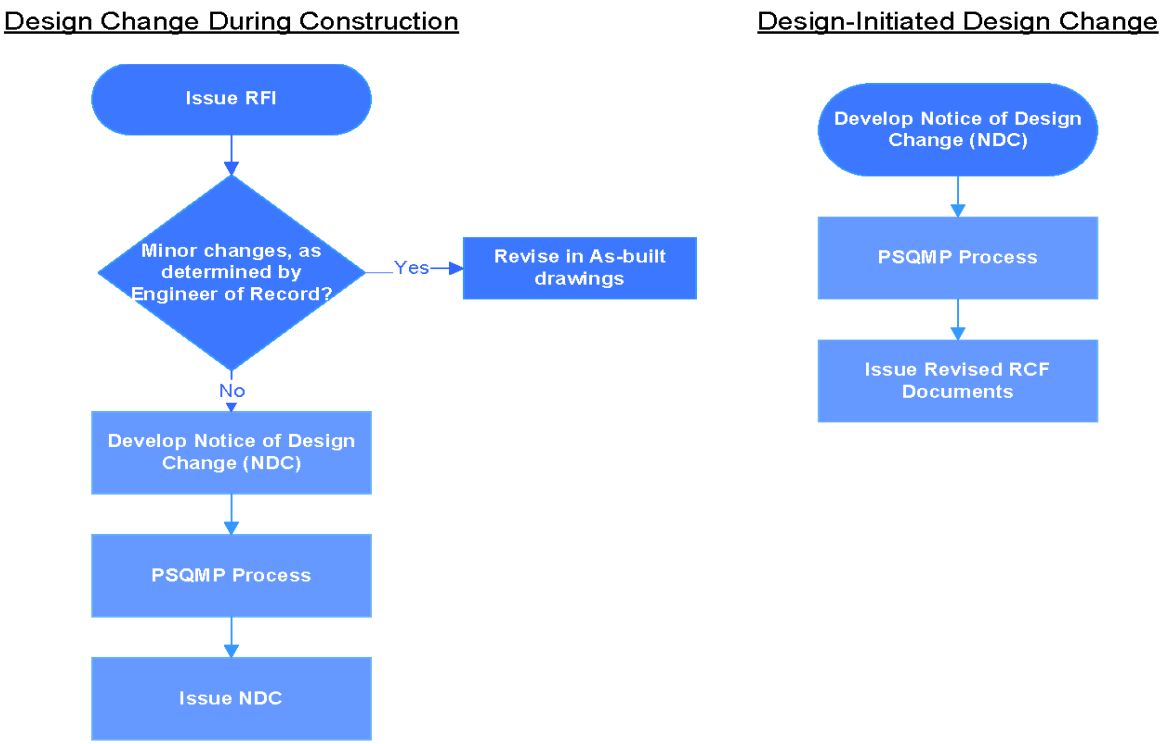
| Number | Name | Description | Requirements |
|---|---|---|---|
| | | | procedures described in the PSQMP. DB Contractor shall update the PSQMP with any amendments to the procedures. |
| | | | *[Describe the quality review process for Temporary Work packages including QC and IQ submittal review timeframes and the process for issuing the packages to DB Contractor field staff.]* |
| | | | **Design Changes** |
| | | | DB Contractor shall describe the process for expediting implementation of design changes to Temporary Work packages for non-permanent Work items, elements or non-permanent portions of the Work. |
| | | | **Package Contents** |
| | | | DB Contractor shall identify items that may be included in a Temporary Work package. |
| | | | Temporary Work plan sheets shall be clearly identifiable as Temporary Work throughout the submittal process. |
| | | | |
| **QCP-12** | **Early Start of Construction** | Prepare procedures for processing of Early Start of Construction (ESOC) submittal packages | **Early Start of Construction Requirements** |
| | | | The requirements below set forth the circumstances under which certain items, elements, or phases of the Work may be packaged by DB Contractor to initiate an Early Start of Construction prior to obtaining TxDOT's concurrence of the Final Design for the item, element or phase. |
| | | | The Early Start of Construction requirements shall apply to any Work consisting of either permanent or non-permanent items, elements or portions of the Work that is performed by DB Contractor prior to receiving TxDOT's written concurrence with the Design Manager's certification of compliance of the Final Design Submittal for such items, elements or portions of the Work. All permanent and non-permanent items, elements or portions of the Work must pass through the four stages of design development if that Work is intended to be permanently incorporated into the Project as described in QCP-02. |
| | | | TxDOT does not consider any items, elements or portions of the Work as satisfying the PSQMP requirements until the Design Manager and PSQAM have issued a certification of compliance and TxDOT has issued a written concurrence therewith. |
| | | | DB Contractor shall provide TxDOT a list and description of the proposed ESOC Submittal packages for TxDOT approval. |
| | | | DB Contractor shall include the approved ESOC Submittal packages in the Design Submittal Packaging Plan and proposed Submittal schedule, which shall be submitted for TxDOT approval, as described in QCP-02. |
| | | | **Procedures** |
| | | | TxDOT and DB Contractor shall agree on procedures for Early Start of Construction procedures which shall, among other things, include a process for distributing Construction Documents, signed and sealed by a Registered PE, to TxDOT and DB Contractor's field staff. |

| Number | Name | Description | Requirements |
|---|---|---|---|
| | | | *[Prepare and include procedures in the PSQMP for approval by TxDOT in its discretion.]* |
| | | | *[Coordinate with TxDOT in advance of the ESOC Submittal and confirm the ESOC procedures are consistent with the procedures described in the PSQMP. Update the PSQMP with any amendments to the procedures.]* |
| | | | *[Prepare preliminary and final ESOC packages for TxDOT review and comment.]* |
| | | | DB Contractor shall include a description of the process for addressing review comments from TxDOT. Comments shall be identified as Priority 1, 2 and 3. Priority 1 shall be defined as an item of Work that is not in conformance with the Contract Documents and is a hazard to public health and safety. |
| | | | DB Contractor shall address all Priority 1 comments prior to release of the ESOC Submittal for construction. |
| | | | TxDOT, at its sole discretion, may defer Early Start of Construction for any portions of the Work as requested by DB Contractor. |
| | | | **Design Changes** |
| | | | DB Contractor shall describe the process for implementing design changes to ESOC packages. |
| | | | **Package Contents** |
| | | | Early Start of Construction may be rough grading of a specific portion of the Project, for which specific pertinent items of the design may include:<br>• Standards and Specifications including General Notes,<br>• Horizontal and vertical drainage system;<br>• Typical sections;<br>• Related elements of the drainage system;<br>• Related elements of the traffic control plan (TCP) specifically applicable during the term of the Early Start of Construction scope;<br>• Subsurface geotechnical investigations and recommendations;<br>• Slope stability analysis and recommendations;<br>• Preliminary structure general plans (if a structure is within the element or portion of the nonstructural Work);<br>• Settlement monitoring program; and<br>• Construction specifications. |
| | | | *[Include all items in an ESOC package required to construct the work (i.e., SW3P, traffic control, etc.)]* |
| | | | ESOC plan sheets shall be clearly identifiable as ESOC throughout the submittal process |
| | | | **Sole Risk of the DB Contractor** |
| | | | An Early Start of Construction package issued for construction shall be at the sole and complete risk of DB Contractor, and does not relieve DB Contractor from any of the PSQMP requirements. |
| | | | Any Work constructed by DB Contractor prior to receiving |

| Number | Name | Description | Requirements |
|---|---|---|---|
| | | | TxDOT's concurrence of the Design Manager's certification of the Final Design Submittal for the Work, and later determined to be unacceptable by TxDOT as described in Section 5.2.1.8 of these General Conditions, shall be revised, removed, or otherwise reconfigured to the satisfaction of TxDOT at DB Contractor's sole cost and expense and without any consideration given to an extension of the Completion Deadline. |
| | | | If, as a result of the review process, construction modification or changes to already completed Work elements performed under the Early Start of Construction are required, DB Contractor shall make any and all construction modifications to already completed construction activities at its sole cost and expense without any entitlement to time extensions or adjustments in the Price. |
| | | | |
| **QCP-13** | **Record Documents** | Prepare procedures for maintaining Record Drawings and submittal of the final Record Documents package to TxDOT | **Record Documents Requirements** |
| | | | DB Contractor shall submit to TxDOT a complete set of Record Documents in hard copy and native electronic format for the portion of the Project actually opened to traffic. |
| | | | TxDOT will not issue a Certificate of Final Acceptance until TxDOT is in receipt of a complete set of Record Documents. |
| | | | DB Contractor shall ensure that the Record Documents reflect the actual condition of the constructed Work prepared from the Released for Construction Documents including any modifications resulting from approved design changes. |
| | | | Include a PE signature on the final plans statement that the Record Drawings accurately depicts the Work constructed in accordance with the RFC Documents |
| | | | *[Update Record Drawings with as-built conditions upon completion of construction of the applicable portion of the Work as defined in the Design Submittal Packaging Plan.]* |
| | | | **Contents** |
| | | | The Record Documents shall be an organized, complete record of Plans and supporting calculations and details that accurately represent what DB Contractor constructed. |
| | | | *[Describe the contents of the Record Documents and how they will be organized, including Record Drawings, supporting calculations, and details.]* |
| | | | Record Drawings shall show the location of all abandoned Utilities and shall show and label all other Utilities including Utility Adjustments that are located within the Project ROW or impacted by the Project in accordance with Section 14.4.9 of the Design-Build Specifications. |
| | | | DB Contractor shall produce reports documenting the location of the as-built alignments, profiles, structure locations, utilities, and survey control monuments as described in Section 17.4.5 of the Design-Build Specifications. |
| | | | |
| **QCP-14** | **Document** | Prepare procedures | **Document Management Requirements** |

| Number | Name | Description | Requirements |
|---|---|---|---|
| | **Management** | that clearly address how Design Documents will be maintained, organized and indexed. | DB Contractor shall maintain accurate, timely and current documentation of design and design changes from initial release through to Record Documents. A current set of plans and specifications, inclusive of all changes shall be available at all points of use. |
| | | | DB Contractor shall use systems for meeting the documentation requirements for design criteria, reports and notes, calculations, Plans, specifications, TxDOT Schematic Design, and all supporting materials needed during the Final Design. |
| | | | DB Contractor shall maintain, organize, and index all Design Documents. Copies shall be made available to TxDOT upon request. |
| | | | *[Describe the systems that will be implemented for meeting the documentation requirements.]* |
| | | | **Staffing Responsibilities** |
| | | | Include the specific responsibilities of personnel to satisfy these document management requirements. |
| | | | |
| **QCP-15** | **Updates to Quality Control Work Documents** | Prepare procedures for updating the QC work documents including changes to QC procedures and forms. | **Updates to QC Work Documents Requirements** |
| | | | **Preparation and Use** |
| | | | DB Contractor shall prepare and use documented instructions to control the receipt and issuance of updates to the control of work documents |
| | | | Define the method, format, and layout requirements related to the revision of the documents. |
| | | | Include measures to control the receipt and issuance of the revised documents. |
| | | | **Review, Approval and Release** |
| | | | Perform quality reviews of the revised work documents for adequacy. |
| | | | Define the approval process for implementing changes to the revised work documents. |
| | | | Authorized personnel of the DB Contractor shall approve the release of the revised work documents. |
| | | | Distribute and use the revised work documents at the location where the prescribed activity is performed. |
| | | | The same organizations shall review and approve changes to the documents that performed the original review and approval, unless TxDOT approves another responsible organization in its discretion. |

**Figure 1: Design Changes During Construction Process Workflow**



## 3.0 Independent Quality Program

The professional services independent quality (IQ) program includes verification and certification that the Professional Services Submittals have been reviewed and checked for conformance in accordance with the quality control procedures and all documents incorporate review comments.

The PSQMP shall include IQ procedures in Section 3 describing the IQ assurance reviews and audits performed by the PSQAF and staff for the Professional Services Work.

The objective of the program is to ensure that TxDOT is in agreement with the quality of the Professional Services Work performed by DB Contractor by verifying/validating the quality assurance activities performed the PSQAF. The PSQAF shall remain an independent and impartial third party throughout the quality assurance process.

Prepare, at a minimum, the IQ procedures listed in Table 3, in the order listed in Table 3, in Section 3 of the PSQMP. Include any additional IQ procedures at the end of Section 3.

TxDOT approval of the PSQMP is in TxDOT's discretion. TxDOT shall not approve the PSQMP if DB Contractor does not satisfactorily address the requirements for preparing the IQ procedures described below in Table 3. The IQ procedures shall include, at a minimum, a description of the responsible parties performing the actions, detailed description of the procedural steps, and a list of documents referenced in the procedure in accordance with the template for preparing the IQ procedures in Exhibit 2 to this Attachment 4-1. The procedures shall be clear, detailed and follow the general template outline contained in Exhibit 2.

.

**Table 3 – Independent Quality Assurance Procedures**

| Number | Name | Description | Requirements |
|---|---|---|---|
| **IQP-01** | **IQ Work Documents** | Prepare the IQ work documents including procedures and forms to ensure the Professional Services Work is performed in accordance with the Contract Documents. | **IQ Work Document Requirements** |
| | | | **Preparation and Use** |
| | | | DB Contractor shall prepare and use documented instructions to control the receipt and issuance of the IQ work documents. |
| | | | Use documented instructions to control the receipt and issuance of documents pertaining to the independent quality reviews and audits undertaken by the PSQAM. |
| | | | Include qualitative and quantitative criteria with such instructions to determine compliance. |
| | | | PSQAF staff shall use and follow the IQ work document instructions. |
| | | | Define the method, format and layout of the work documents. |
| | | | Describe the requirements, responsibilities and processes to assess the ongoing effectiveness of the IQ program including subcontractor programs to ensure the Professional Services Work meets project quality standards. |
| | | | **Review, Approval and Release** |
| | | | Perform independent quality reviews of the work documents. |
| | | | Define the approval process for release of the documents. |
| | | | Authorized personnel of the DB Contractor and PSQAF shall approve the release of the work documents. |
| | | | Distribute and use the work documents at the location where the prescribed activity is performed. |
| | | | |
| **IQP-02** | **Independent Quality Reviews** | Prepare a procedure for IQ reviews of the DB Contractor's Professional Services Work products. | **Independent Quality Review Requirements** |
| | | | DB Contractor shall assign a PSQAM who shall be responsible for the management of the IQ program for the Professional Services, and for carrying out independent quality assurance reviews as described in this procedure. |
| | | | **IQ Review Process** |
| | | | *[Include a defined approach to performing the IQ review of Submittals including spot checking Submittals using prepared contract compliance checklists.]* |
| | | | *[Prior to beginning any independent review of Professional Services Work products, verify that the PSQCM has provided all the applicable quality records to perform the IQ review.]* |
| | | | **Staffing** |
| | | | *[Ensure that responsible and qualified staff are available to perform IQ reviews of all Professional Services Submittals]* |
| | | | *[Include a description of the qualifications of the staff performing the reviews.]* |
| | | | **Hold Points** |
| | | | The PSQAM shall establish IQ hold points for release of the Submittals, including verification of conformance with QC procedures for every Submittal, and defined approach to spot |

| Number | Name | Description | Requirements |
|---|---|---|---|
| | | | checking Submittals. |
| | | | Identification of any instance of Nonconforming Work during the review process shall be an IQ hold point. List all nonconformance items in a nonconformance report for each submittal. The nonresolution of review comments and absence of any initials and dates will be justification for a nonconformance report. |
| | | | **PSQAM Certification** |
| | | | The PSQAM shall certify that:<br>• the Final Design package has been checked in accordance with the approved PSQMP including contract compliance checklists;<br>• the Submittal has been checked and certified by the PSQCM that the Work has been performed in accordance with the approved PSQMP;<br>• and that responses to all Final Design Submittal review comments have been addressed and incorporated into the Submittal package. |
| | | | The PSQAM shall be responsible for ensuring DB Contractor complies with and performs all Professional Services Work in accordance with the PSQMP. |
| | | | *[Include a process for resolution of IQ review comments and PSQAM certification.]* |
| | | | *[Include a process for verification by the PSQAM that prior comments have been resolved and incorporated.]* |
| | | | *[Upon resolution of all review comments and prior to PSQAM certification, make available to the PSQCM and TxDOT the compliance documentation confirming that all comments have been addressed to TxDOT's satisfaction and that the Submittal has been prepared in accordance with the Contract Documents.]* |
| | | | The PSQAM shall provide a monthly written certification that the Professional Services Work is in compliance with the PSQMP. |
| | | | |
| **IQP-03** | **Independent Quality Audits** | Prepare a procedure detailing the process for performing independent audits of PSQMP and the DB Contractor's QC process | **Independent Quality Audits Requirements** |
| | | | The PSQAM shall be responsible for performing independent quality audits. |
| | | | PSQAM shall audit, including audit scheduling, of the Design Firm's QA/QC processes and procedures under the PSQMP. |
| | | | The PSQAM shall ensure that the PSQMP contains quality processes incorporating a comprehensive system of planned and periodic verifications and audits of DB Contractor's PSQMP to determine adherence to and the effectiveness of PSQMP requirements. |
| | | | The procedure for conducting audits shall describe the use of checklists of requirements, objective evidence, competent auditors independent of the scope of work being audited, and the audit result workflow through to re-audit and close-out of findings. |
| | | | **Staffing Responsibilities** |

| Number | Name | Description | Requirements |
|---|---|---|---|
| | | | The PSQMP shall define the responsibilities and requirements for planning audits, conducting audits, establishing records, and reporting results for the Professional Services Work. |
| | | | *[Describe the process and individuals involved in planning audits, conducting audits, establishing records, and reporting results.]* |
| | | | *[Audit records, documentation, procedures, and processes to verify compliance with the Contract Documents and approved PSQMP.]* |
| | | | *[Ensure that personnel perform the audits in accordance with the written procedures or checklists.]* |
| | | | **Audit Planning** |
| | | | Audit planning shall take into consideration the risk to quality of the processes and areas to be audited, as well as the results of previous audits. |
| | | | Audit planning shall define the audit scope, frequency, and status, and be documented in a rolling 12 month schedule. |
| | | | Planned and periodic audits shall be undertaken to determine adherence to and the effectiveness of the QMP and other management plans (e.g. Safety and Health Plan, Traffic Management Plan, etc.). |
| | | | **Audit Results and Actions** |
| | | | Audit results shall be documented, reviewed, and acted upon by DB Contractor. |
| | | | *[Describe the process for implementing changes to the quality system to address nonconformance items as a result of an audit.]* |
| | | | *[Transmit and verify that audit results are received and addressed by DB Contractor.]* |
| | | | *[Re-audit deficient areas following corrective action to verify whether deficiencies are addressed.]* |
| | | | DB Contractor shall submit to TxDOT the results of all Project quality audits within seven days of their completion. |
| | | | |
| **IQP-04** | **Document Management** | Prepare a procedure describing the requirements and methods for controlling IQ documents. | **Document Management Requirements** |
| | | | DB Contractor shall maintain accurate, timely and current documentation of the IQ review documents. |
| | | | DB Contractor shall maintain, organize, and index all IQ documents. Copies shall be made available to TxDOT upon request. |
| | | | *[Describe the systems that will be implemented for meeting the documentation requirements.]* |
| | | | **Staffing Responsibilities** |
| | | | Include the specific responsibilities of personnel to satisfy these document management requirements. |
| | | | |
| **IQP-05** | **Updates to the IQ Work Documents** | Prepare a procedure with guidelines for updating the IQ Work documents including changes to quality assurance | **Updates to IQ Work Documents** |
| | | | **Preparation and Use** |
| | | | DB Contractor shall prepare and use documented instructions to control the receipt and issuance of updates to the IQ Work documents |
| | | | Define the method, format and layout requirements related to |

| Number | Name | Description | Requirements |
|---|---|---|---|
| | | procedures and forms. | the revision of the documents. |
| | | | Include measures to control the receipt and issuance of the revised documents. |
| | | | **Review, Approval and Release** |
| | | | Perform quality reviews of the revised work documents for adequacy. |
| | | | Define the approval process for implementing changes to the revised IQ work documents. |
| | | | Authorized personnel of the DB Contractor shall approve the release of the revised work documents. |
| | | | Distribute and use the revised work documents at the location where the prescribed activity is performed. |
| | | | The same organizations shall review and approve changes to the revised documents that performed the original review and approval, unless TxDOT approves another responsible organization in its discretion. |
| | | | Describe the requirements, responsibilities and processes for reviewing and updating the IQ program and subcontractors' work documents as necessary to continue meeting project quality standards. |

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## EXHIBIT 1 TO ATTACHMENT 4-1

I. Title Page
II. Approvals Page
III. Record of Revisions

# Professional Services Quality Management Plan

[NAME OF PROJECT
Contract #XXXXX]

[Day Month Year]

**Prepared By:** **[DB Contractor's Name**
**Street Address**
**Suite XXX**
**City Name, Texas XXXX]**

# PROFESSIONAL SERVICES QUALITY MANAGEMENT PLAN

# For the

# [NAME OF PROJECT]

**Approved By:**

| | |
|---|---|
| _____ | _____ |
| **Design Manager (DM)** | **Date** |
| _____ | _____ |
| **Professional Services Quality Control Manager (PSQCM)** | **Date** |
| _____ | _____ |
| **Professional Services Quality Assurance Manager (PSQAM)** | **Date** |
| _____ | _____ |
| **TxDOT's Authorized Representative** | **Date** |

# Record of Revisions

| Rev. | Date Issued | Pages Affected | Description of Revision / Comments |
|---|---|---|---|
| | | | |
| | | | |
| | | | |
| | | | |
| | | | |
| | | | |
| | | | |
| | | | |

**EXHIBIT 2 TO ATTACHMENT 4-1**

**IQ/QC PROCEDURES TEMPLATE**

| IQ/QC Procedure Number | IQ/QC Procedure Name | Revision | Date |
|---|---|---|---|
| *[Insert the IQ/QC Procedure Number]* | *[Insert IQ/QC Procedure Name]* | *[#]* | *XX/XX/XX* |

## 1.0 Purpose

*[Define the purpose of the procedure. Include all aspects that are encompassed with this procedure.]*

## 2.0 Scope

*[Detail when the procedure is applicable and will be used. Define the limits of the procedure.]*

## 3.0 Definitions

*[Definitions of terms used within the description of the process of executing the procedure. Each procedure should stand alone and therefore if a term was defined in a previous procedure shall still be defined.]*

## 4.0 Responsibilities

*[Define individuals and/or workgroups to whom the procedure applies. Detail their role and responsibility within the procedure.]*

## 5.0 Process

*[Describe the procedure, in detail. List all steps involved. Include tables, flowcharts, and figures as applicable.]*

## 6.0 Records

*[List the documents developed by which the procedure will be tracked and archived. Define the locations at which the procedure's records will be filed.]*

## 7.0 Attachments

*[List any attachments to be included with the procedure, if applicable.]*

•

**EXHIBIT 3 TO ATTACHMENT 4-1**

**FORM TEMPLATES**

| Form Number | Form Name | Revision | Date |
|---|---|---|---|
| *[Insert Form* | Certification of Compliance | *[#]* | *XX/XX/XX* |
| | PSQCM Verification Form | | |
| | QC Sign-Off Stamp | | |
| | *[Add additional forms as required, including but not limited to the following:*<br>• *RFI Form*<br>• *NDC Form*<br>• *Early Start of Construction Form*<br>• *Comment Resolution Log]* | | |

# ATTACHMENT 4-2

# CONSTRUCTION QUALITY MANAGEMENT PLAN

DB Contractor shall prepare a CQMP that describes the policies and procedures to manage and ensure the quality of the Construction Work (including that of subcontractors) consisting of construction QC and IQF activities and materials acceptance procedures in accordance with TxDOT's QAP for DB Projects.

The Independent Quality Firm (IQF) shall oversee the implementation of the CQMP.

DB Contractor's obligations for construction quality control (QC) and independent quality (IQ) activities shall comply with the CQMP requirements in this Attachment 4-2, supplemented by Sections 2.2.2 and 3.4.5 of TxDOT's Quality Assurance Program for CDA / Design-Build Projects with a Capital Maintenance Agreement with Three Optional 5-Year Terms (QAP) for DB Projects.

The CQMP shall consist of the following sections in the order listed below:

- Section 1: Introduction
- Section 2: Quality Control (QC) Program
- Section 3: Independent Quality (IQ) Program
- Appendices including all necessary forms, schedules, and checklists.

DB Contractor shall use the templates in Exhibit 1 for this Attachment 4-2 for preparing the Title Page, Approvals Page and Record of Revisions in that order at the beginning of the plan.

DB Contractor shall ensure that the CQMP is consistent with the initial CQMP submitted prior to contract execution for TxDOT review and acceptance. Acceptance of the initial CQMP shall be a condition precedent for submittal of the CQMP.

TxDOT approval of the CQMP shall be a condition of the commencement of Construction Work (prior to NTP 2).

If changes to the CQMP are required after commencement of Construction Work, update the Record of Revisions at the front of the CQMP with the revision number, date of the revision and a description of the revision if changes to the CQMP are required. Only the revised section(s) of the CQMP and applicable procedure(s) are required to be submitted for review and approval.

## 1.0 Introduction

The introduction to the CQMP shall include the following components in the order listed below in Table 1. The contents and associated requirements are the minimum requirements for Section 1 of the CQMP. Include any additional information for the introduction at the end of Section 1.

TxDOT approval of the CQMP shall be conditioned upon the DB Contractor satisfactorily addressing the requirements for preparing Section 1 of the CQMP described below in Table 1.

**Table 1 – Introduction Components and Requirements**

| Subsection | Requirements |
|---|---|
| **General** | DB Contractor shall prepare a CQMP that describes its policies and procedures to manage Construction Work quality (including that of subcontractors) consisting of construction QC and Independent Quality Firm (IQF) activities and materials acceptance procedures in accordance with TxDOT's QAP for DB Projects. |
| | DB Contractor's obligations for construction QC and IQF activities, and the requirements for the CQMP, shall comply with this Attachment 4-2. |
| | Include a description of the project's quality goals and objectives |
| | Include measures for ensuring that all Construction Work will be constructed in |

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| | accordance with the Released for Construction Documents, or as modified by approved design changes. |
| | Provide an overview of the proposed quality control program for the DB Contractor's performance of its QC responsibilities with respect to the Construction Work. |
| | Provide an overview of the proposed quality assurance program for the independent quality firm's (IQF) performance of its independent quality assurance reviews and audits and material acceptance responsibilities with respect to the Construction Work. |
| | The IQF shall oversee the implementation of the CQMP. |
| | DB Contractor shall cause the IQF to prepare and deliver to TxDOT a written monthly certification with each payment request in compliance with Section 3.5.3.5 of the QAP for DB Projects. |
| | Provide a description of the quality management system for the project and the applicable quality policies. Describe the quality planning goals for the project to ensure the work is performed in accordance with the contract documents and is ISO 9001:2015 compliant for quality systems, quality plans and quality audits in accordance with Section 3.4.5 of the QAP. |
| | The CQMP shall be consistent with the applicable procedures contained in the current TxDOT Contract Administration Handbook for Construction and establish a clear distinction between QC and IQF activities and persons performing them. |
| | Describe the measures for ensuring that all Construction Work will be constructed in accordance with the Released for Construction Documents, or as modified by approved design changes. |
| **Staffing and Organization** | Provide a description of the quality management team organizational structure and the key quality management staff roles and responsibilities in accordance with TxDOT QAP, Section 2.2.1, 2.2.2 (A), 3.4, 3.4.1, and 3.4.2 |
| | Include an organizational chart and staffing plan for both quality control and independent quality (IQ) assurance staff including the period of time that the staff members will be present on the site and the experience / knowledge / skill levels of staff in accordance with QAP, Section 2.2.2 (A), 3.4.2, 3.4.3 |
| | Establish clear distinction between DB Contractor's QC and IQF activities. The persons performing each function will not be the same as described in QAP, Section 1.4 and 2.2.1. |
| | Describe the roles and responsibilities of the Construction Quality Control Manager (CQCM). The CQCM shall be responsible for management of the QC program for the Construction Work.<br><br>The CQCM shall:<br>• not be involved with scheduling or production delivery activities, and shall report directly to DB Contractor's Project Manager;<br>• ensure the methods and procedures contained in the approved CQMP are implemented and followed in the performance of the Work;<br>• have relevant construction quality control management experience on projects of similar type and scope; and<br>• be co-located and on-Site during periods of construction unless TxDOT approves of a field representative to fulfill CQCM's day-to-day functions.<br><br>The CQCM or field representative as described above shall have authority to stop Work. |

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| | The CQCM shall be employed by either: (a) an Equity Member, Lead Engineering Firm or Lead Contractor; (b) a controlled subsidiary of such Equity Member, Lead Engineering Firm or Lead Contractor; or (c) a parent company of an Equity Member. |
| | Describe the roles and responsibilities of the DB Contractor's and Subcontractors' construction quality control work force.<br><br>All members of the workforce shall be considered members of DB Contractor's QC staff as each and every one is responsible for the quality of the Work.<br><br>Personnel performing QC inspections shall ensure quality of workmanship and QC sampling/testing shall ensure that materials meet the required specifications prior to IQF testing.<br><br>Personnel responsible for performing QC inspection shall be knowledgeable and receive training to perform their QC duties.<br><br>Personnel performing QC sampling/testing shall be knowledgeable in the testing methods and procedures and do not need to be certified or direct employees of DB Contractor, but cannot be employees of the IQF. |
| | Describe the roles and responsibilities of the IQFM. The IQFM shall be responsible for management of the IQF program for the Construction Work.<br><br>The IQFM shall<br>• be employed by an independent firm and report jointly to the TxDOT Project Manager and DB Contractor's senior management team;<br>• carry out assurance and audit functions as described in the CQMP;<br>• perform the duties of the Engineer as outlined in Section 2.2.9.2 of these General Conditions;<br>• be a Registered PE. and shall have relevant construction quality experience on projects of similar type and scope;<br>• be co-located and on-site beginning at NTP2 until Final Acceptance.<br><br>The IQFM shall have the authority to stop Work.<br><br>The IQFM shall, irrespective of his or her other responsibilities, have defined authority for ensuring the establishment and maintenance of the Construction Work elements of the Quality Management Plan and reporting to TxDOT on the performance of the Quality Management Plan with respect to those elements. |
| | Describe the roles and responsibilities of the IQF inspection and material sampling/testing staff, who shall, under the direction of the IQFM, perform inspection and material sampling/testing of all aspects of the Work performed and materials incorporated into the Project by any member of DB Contractor's staff.<br><br>The IQF inspection and testing staff shall:<br>• be employees of the IQF;<br>• have been trained in the applicable inspection and material sampling and testing procedures; and<br>• be qualified and experienced relevant to the inspection or test they perform. |

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| | The training and experience of the IQF staff shall be commensurate with the scope, complexity, and nature of the activity to be controlled and tested.<br><br>Qualifications shall include appropriate TxDOT or State Highway Agency certification for testing and inspection as well as nationally recognized certifications such as American Concrete Institute certification in applicable inspection or testing activities.<br><br>Construction IQF staff shall report to the IQFM.<br><br>The IQF inspection staff shall check compliance of all material, equipment, construction, installations, and operations.<br><br>Construction activities requiring continuous field inspection or sampling and testing, in the sole discretion of TxDOT, shall proceed only in the presence of assigned IQF personnel. |
| | The size of the IQF staff shall reflect the volume of IQF activities necessary for the Work in progress and shall be maintained in accordance with the approved CQMP.<br><br>Ensure that IQF staffing requirements are updated as necessary throughout the Term to reflect changes in the actual construction schedule.<br><br>DB Contractor shall ensure that adequate construction IQF staff is available and that CQMP activities are undertaken in a manner consistent with the Project Schedule and in a manner that will enable DB Contractor to achieve the Completion Deadlines. |
| | Describe the responsibility and authority of IQF staff.<br><br>IQF personnel assigned to perform inspection, testing, or monitoring of characteristics for assurance shall not be those personnel performing or directly supervising the Work being accepted.<br><br>DB Contractor's IQFM and IQF staff shall remain independent of the production Work and of the QC staff.<br><br>The IQFM shall prepare a monthly report of the quality inspections and tests performed, results of such inspections and tests, and occurrences and resolution of non-conformance discoveries. IQFM shall submit the monthly reports jointly to TxDOT and DB Contractor for review. |
| **TxDOT Construction Look-Aheads** | On a weekly basis, DB Contractor shall update and provide the IQF and TxDOT with a rolling three-week look-ahead schedule consistent with the current PBS and showing the anticipated start and finish of Work activities.<br><br>The look-ahead schedule shall include fabrication activities and planned construction activities.<br><br>Anticipated inspection activities, review by third parties, and all associated hold points will be shown in the look-ahead schedules for each of the Work activities. |

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| | DB Contractor shall also, on a daily basis, communicate changes to the scheduled work, for each current day to the IQF and TxDOT, and shall notify the IQF and TxDOT when materials are ready for sampling and testing. |
| **Facilities and Equipment** | Include a description of the offices and office equipment required during construction including DB Contractor, IQF and TxDOT Facilities in accordance with Section 3.4.4 of the TxDOT QAP for DB Projects. IQF's laboratory will be located on site or within 10 miles of the project unless otherwise approved by TxDOT. |
| | IQF laboratory equipment in all laboratories shall be certified according to the requirements of Section 4.4 of the TxDOT QAP for DB Projects prior to commencing any construction activities and shall retain the certification for the duration of the Work. |
| **Internal and External Communication** | Describe the internal and external communication and coordination responsibilities of the project quality team staff. |
| **Proposal Commitments** | Include a list of the proposal commitments with respect to the DB Contractor's quality control program and the IQF's quality assurance program, as described in Appendix 1 of Exhibit 2 of the DB Agreement. |
| | Specify where the relevant proposal commitments are addressed in the CQMP. Describe how they will be incorporated into the Construction Work and the independent quality process to ensure the proposal commitment has been fulfilled. |

## 2.0 Quality Control Program

The construction quality control (QC) program involves inspecting, checking, and documenting the construction work to ensure a resulting quality product that complies with the contract requirements. The CQMP shall include the DB Contractor's QC procedures in Section 2 describing the various inspections, examinations, measurements for quality control of the Construction Work performed by the DB Contractor's QC staff.

The program is intended to ensure that TxDOT is in agreement with the quality of the work performed by the DB Contractor.

Prepare the QC procedures listed in Table 2. Include the procedures in Section 2 of the CQMP in the order listed in Table 2. The list of procedures and associated requirements are the minimum quality control requirements for Section 2 of the CQMP. Include any additional quality control procedures at the end of Section 2.

TxDOT approval of the CQMP shall be conditioned upon the DB Contractor satisfactorily addressing the requirements for preparing the QC procedures described below in Table 2. The procedure numbers below in Table 2 shall be modified by an alpha-numeric designation if more than one procedure is required to address the requirements.

The template for preparing the QC procedures is in Exhibit 2 to Attachment 4-2. The procedures should be clear, detailed and follow the general template outline contained in Exhibit 2 to Attachment 4-2.

**Table 2 – Quality Control Procedures**

| Number | Name | Description | Requirements | Reference |
|---|---|---|---|---|
| **QCP-01** | **QC Work Documents** | Prepare QC work documents including procedures and forms to ensure the Construction Work is performed in accordance with the Contract Documents. | **QC Work Documents Requirements** | QAP, Section 2.2.2 Items D and R |
| | | | DB Contractor shall incorporate the following into the preparation of the QC work documents:<br>• documented instructions to control the receipt and issuance of the control of work documents;<br>• use of qualitative and quantitative criteria to determine compliance; and<br>• define the method, format, layout and approval requirements | |
| | | | Quality control staff shall use and follow the work documents. | |
| | | | DB Contractor shall perform quality reviews of the approved work documents. | |
| | | | Authorized personnel of the DB Contractor shall approve the release of the work documents. | |
| | | | The work documents shall be distributed and used at the location where the prescribed activity is performed. | |
| | | | | |
| **QCP-02** | **Training and Certifications** | Prepare procedures for the education, training and achievement of qualifications including appropriate certifications of personnel performing QC. | **Training and Certifications Requirements** | QAP, Section 2.2.2 Item B |
| | | | Provide a list of the required QC qualifications for various staffing levels. | |
| | | | Certifications shall be achieved and maintained | |
| | | | | |
| **QCP-03** | **Material Approval Process** | Prepare procedures requesting and obtaining approval for procurement and use of all permanent materials for the Project | **Material Approval Process Requirements** | |
| | | | All permanent materials shall meet the requirements of the Contract Documents. | |
| | | | | |
| **QCP-04** | **Material Handling,** | Prepare procedures to | **Material Handling, Inspection and Storage Requirements** | QAP, Section |

| Number | Name | Description | Requirements | Reference |
|---|---|---|---|---|
| | **Inspection and Storage** | control the handling, storage, shipping, cleaning, and preservation of materials and equipment to prevent damage or deterioration. | Describe how the packaging, handling, receiving inspection, storage, and preventative maintenance will be controlled for the items that are delivered and stored at the project site. | 2.2.2 Item P |
| | | | | |
| **QCP-05** | **Control of Materials** | Prepare procedures for identification and control of materials, equipment, and elements of the Construction Work. | **Control of Materials Requirements**<br>Items shall be identified, either on the item or on records traceable to the item, as necessary, throughout fabrication, erection, installation, and use of the item | QAP, Section 2.2.2 Item G |
| | | | | |
| **QCP-06** | **Sampling and Testing** | Prepare written test procedures for the sampling and testing of materials during the production or manufacturing processes to ensure that only materials meeting the specifications are supplied for incorporation into the Construction Work | **Sampling and Testing Requirements**<br>Include reviews for adequacy of control testing, and to verify that test results confirm compliance with the contract documents and approved submittals<br>Include measures that ensure quality standards are being met and that all materials, equipment, and elements of the Construction Work will perform satisfactorily for the purpose intended.<br>Include measures that ensure adequate test instrumentation is available and used.<br>Include measures that ensure tools, gauges, instruments, and other measuring and testing devices used in activities affecting quality are properly maintained, controlled, calibrated, certified, and adjusted at specified periods to maintain accuracy within industry standards<br>Use markings such as stamps, tags, labels, routing cards, or other suitable means to indicate the status of inspections and tests performed upon individual items of the construction work.<br>The IQFM shall document and evaluate the test results to ensure that test requirements have been satisfied. | QAP, Section 2.2.2 Items J, L, M and O |
| | | | | |
| **QCP-07** | **Inspections** | Prepare procedures for the performance of DB Contractor QC inspections, examinations, | **Inspections Requirements**<br>Include a process for coordinating QC testing and inspections with the IQF and applicable third parties.<br>The MOT Implementation Manager shall be responsible for the QC inspection of all elements of | QAP, Section 2.2.2, Items F and K |

| Number | Name | Description | Requirements | Reference |
|---|---|---|---|---|
| | | and measurements for each operation of the Construction Work. | a TCP. | |
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| **QCP-08** | **Mix Design Reviews** | Prepare procedures for the review of mix designs. | **Mix Design Reviews Requirements** | QAP, Section 2.2.2 Item N |
| | | | Describe the process for preparing Portland cement concrete, soil-lime treatment (stabilization or modification), soil-cement treatment, and hot mix asphaltic concrete mix designs by personnel who hold the required certifications as specified in the Contract Documents. | |
| | | | The mix designs shall be reviewed and sealed by a licensed professional engineer in the state of Texas attesting that the design meets TxDOT requirements for the specified class or grade for which it was prepared. | |
| | | | | |
| **QCP-09** | **Hold Points and IQF Coordination** | Prepare procedures for the identification and inspection of hold points in the Construction Work to allow the IQF to perform compliance inspections and confirm that the Construction Work is progressing in accordance with contract requirements. | **Hold Points and IQF Coordination Requirements** | QAP, Section 2.2.2 Item E<br><br>QAP, Appendix J |
| | | | DB Contractor shall allow inspection of each hold point in accordance with the TxDOT QAP for DB Projects. | |
| | | | Include, at a minimum, the hold points described in Appendix J of the TxDOT QAP for DB Projects and those identified at the Risk Assessment Workshop conducted by TxDOT/OVF to meet the needs of the project. | |
| | | | Upon identification, communicate hold points to the CQCM, IQFM, and TxDOT. | |
| | | | Include measures that ensure no portions or elements of the Construction Work are begun or continued beyond identified hold points without formal communication with the IQFM. | |
| | | | Provide TxDOT a minimum 24-hour notice in advance of all hold point inspections. | |
| | | | Failure on the part of TxDOT to conduct any tests or inspections at a hold point does not relieve the DB Contractor of its responsibility to meet all the requirements of the Contract Documents. | |
| | | | Develop the procedure to include activities that progress beyond the hold points. | |
| | | | Establish milestones at convenient opportunities to inspect the Construction Work and to prevent significant cost of correction. | |
| | | | Ensure that Construction Work is not covered until it has been subject to a hold point acceptance by IQF personnel. | |
| | | | Allow the IQFM and TxDOT to modify established hold points to meet the needs of the project. | |

| Number | Name | Description | Requirements | Reference |
|---|---|---|---|---|
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| **QCP-10** | **Construction Deficiencies and Nonconforming Work** | Prepare procedures describing the approach to ensure that Nonconforming Work is identified and controlled to prevent its unintended use or delivery. | **Construction Deficiencies and Nonconforming Work Requirements** | QAP, Section 2.2.2 Item H and Q.<br><br>QAP Section 3.5.3.4<br><br>QAP Section 3.1.2.3 |
| | | | Include the process for resolution of all instances of Nonconforming Work in accordance with the Nonconformance Report (NCR) process as described in Section 3.5.3.4 of the QAP for DB Projects. | |
| | | | Any resolutions to Nonconforming Work, other than replacement of the Nonconforming Work, require the approval of TxDOT in its discretion. Resolutions to Nonconforming Work and closeout of NCRs shall be in accordance with the QAP for DB Projects and Section 4.1.2.2.4 of these General Conditions. | |
| | | | The QMP shall describe the process that the DB Contractor will undertake in order to obtain TxDOT approval in its discretion of DB Contractor's proposed resolution to Nonconforming Work, in accordance with Section 5.3.2 of these General Conditions | |
| | | | Describe the process for identifying, tracking, analyzing, and resolving all instances of Nonconforming Work in accordance with the Nonconformance Report (NCR) process as described in Section 3.5.3.4 of the QAP for DB Projects, using Construction Deficiency Reports (CDR) and Nonconformance Reports (NCR) | |
| | | | DB Contractor shall notify TxDOT, and, if appropriate, governmental entities and other affected third parties upon identification of Nonconforming Work. | |
| | | | Regardless of TxDOT or third party involvement in the resolution to Nonconforming Work and the NCR resolution process, DB Contractor shall be solely responsible for the resolution to Nonconforming Work and closing out all NCRs, including obtaining the required approvals. | |
| | | | If DB Contractor proceeds with Work without closing out any NCRs, DB Contractor shall be responsible for all costs and delays associated with uncovering, repairing, replacing, and/or recovering the Work. | |
| | | | | |
| **QCP-11** | **Corrective and Preventative Action** | Prepare procedures describing the approach to eliminating the causes of actual and potential Nonconforming Work in order to | **Corrective and Preventative Action Requirements** | QAP, Section 2.2.2 Item Q. |
| | | | DB Contractor shall include processes to identify and correct the conditions adverse to quality —such as failures, malfunctions, deficiencies, defective material and equipment, deviations, and other Nonconforming Work and Construction Deficiencies. The processes shall include:<br>• Reviewing Nonconforming Work and TxDOT written notices; | |

| Number | Name | Description | Requirements | Reference |
|---|---|---|---|---|
| | | prevent occurrence or recurrence | • Determining the causes of actual and potential Nonconforming Work, and TxDOT written notices;<br>• Evaluating the need for action to ensure Nonconforming Work and written notices do not recur or occur. Actions should be appropriate to the effects of the actual or potential Nonconforming Work;<br>• Determining and implementing action needed;<br>• Recording the results of the action taken; and<br>• Reviewing the effectiveness of the action taken | |
| | | | DB Contractor shall report conditions adverse to quality to TxDOT and to appropriate levels of the DB Contractor's management to ensure corrective action is promptly taken. | |
| | | | | |
| **QCP-12** | **Survey Control** | Prepare procedures for checking and verifying the accuracy of construction stakes, lines, and grades established by the DB Contractor. | **Survey Control Requirements** | QAP, Section 2.2.2 Item T and U |
| | | | Include measures to ensure construction alignments and grades are in accordance with the requirements contained in the current TxDOT Survey Guide. | |
| | | | | |
| **QCP-13** | **RFI Process** | Prepare procedures for processing a request for information (RFI) during construction to resolve discrepancies and/or questions in the RFC plans and specifications so that all changes are documented and approved by the Engineer of Record. | **RFI Process Requirements** | QAP, Section 2.2.2 Item I |
| | | | Include a description of the RFI process and associated document management workflows, | |
| | | | [*If a design change is required, close the RFI and issue an NDC Notice in accordance with PSQMP Procedure QCP-10, Design Changes during Construction to process the design change.*] | |
| | | | [*If the change constitutes a minor design change, close the RFI and process the change as a field design change (FDC) in accordance with PSQMP Procedure QCP-10, Design Changes during Construction*.] | |
| | | | TxDOT and the IQFM shall receive a copy of the RFI. | |
| | | | Describe the process for incorporating RFI responses into the Work. | |
| | | | The PSQCM, or designee, shall be responsible for incorporating all changes made through the RFI process in the Record Drawings. | |
| | | | The PSQAM, or designee, shall ensure all changes made through the RFI process are documented in the Record Drawings. | |
| | | | | |
| **QCP-14** | **Design** | Prepare a | **Design Changes during Construction Requirements** | |

| Number | Name | Description | Requirements | Reference |
|---|---|---|---|---|
| | **Changes during Construction** | procedure for processing design changes as either an NDC or FDC. | Describe the steps for processing a design change during construction as either an NDC or FDC in accordance with PSQMP Procedure QCP-10, Design Changes during Construction. | |
| | | | FDCs shall be used to address minor design changes in the field. Minor design changes shall be those not needing specialized expertise to resolve, that are not in nonconformance with project requirements, and not materially affecting design intent. | |
| | | | [*If the change requires a design change, then describe the process for implementing the change as an NDC in accordance with PSQMP Procedure QCP-10, Notice of Design Change*.] | |
| | | | [*If the change constitutes a minor design change, then describe the process for implementing the change as a FDC in accordance with PSQMP Procedure QCP-10, Notice of Design Change*.] | |
| | | | [*If a design change is progressed as an FDC, then attach a modified plan sheet(s) to the FDC and provide to the PSQCM to transfer the information to the Record Drawings*.] | |
| | | | | |
| **QCP-15** | **Maintenance of Traffic** | Prepare a procedure describing the QC functions of the construction staff to ensure the MOT Plans are implemented in the field and are adhered to during their implementation. | **Maintenance of Traffic Requirements** | |
| | | | DB Contractor shall designate an individual (MOT Implementation Manager) to be responsible for the QC of the MOT plans. | |
| | | | The MOT Implementation Manager (MOT IM) shall work with the Lead MOT Design Engineer and coordinate with TxDOT, Design-Build Contractor, and appropriate Governmental Entities. | |
| | | | The MOT IM shall have relevant experience overseeing the implementation of MOT plans during the construction phase of highway projects similar in size and scope as the Project. | |
| | | | The MOT IM shall perform QC inspections according to a prescribed checklist including but not limited to:<br>• warning and regulatory signs;<br>• tapers;<br>• lane transitions;<br>• barrier type and placement;<br>• clear zone, safe construction zones;<br>• edge drop off protection;<br>• lane width;<br>• site distance;<br>• temporary side slopes;<br>• temporary retaining walls;<br>• trench excavation protection;<br>• temporary signals;<br>• temporary drainage;<br>• horizontal traffic movements; and | |

| Number | Name | Description | Requirements | Reference |
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| | | | • temporary driveways. | |
| | | | The MOT IM shall be responsible for documenting changes to the MOT plans that:<br>• alter the original MOT; or<br>• result in deviations to design traffic control requirements. | |
| | | | For any design change to MOT plans, the MOT IM shall coordinate with the EOR, Design Manager and/or Lead MOT Design Engineer to determine if the design change qualifies as a minor design change. | |
| | | | The MOT IM shall document changes to the MOT plans prior to, or immediately after, implementing the changes, for minor design changes, as field design change (FDC), or the MOT IM shall issue a notice of design change to process the design change to the MOT plans. | |
| | | | | |
| **QCP-16** | **Daily Inspections and Reporting** | Prepare a procedure for preparing the daily QC reports by field inspectors performing daily field inspections to document inspections performed. | **Daily Inspections and Reporting Requirements** | QAP, Section 2.2.2 Item C<br><br>QAP, Section 2.2.3 |
| | | | DB Contractor, suppliers, and subcontractors shall designate individuals on each crew responsible for performing daily field inspections of their own work and for preparing the daily QC reports. | |
| | | | DB Contractor shall maintain construction workmanship and materials quality records of all inspections and tests performed per the approved CQMP. | |
| | | | Include a description of the format and content of the records in accordance with Section 2.2.3 of the QAP. | |
| | | | DB Contractor shall maintain electronically and transmit to TxDOT daily inspection reports within 48 hours after the work shift in a format acceptable to TxDOT. | |
| | | | QC inspection reports, process control material sampling/testing results, and control charts shall be updated within 48 hours following the inspection or test and be readily available for IQF and TxDOT review or audit. | |
| | | | | |
| **QCP-17** | **Document Management** | Prepare a procedure describing the requirements and methods for controlling documents and the process for maintaining quality control | **Document Management Requirements** | QAP, Section 2.2.2 Item S |
| | | | The document control system shall be compatible with TxDOT's. | |
| | | | The DB Contractor shall establish an electronic system for recording all QC testing and inspections. | |

| Number | Name | Description | Requirements | Reference |
|---|---|---|---|---|
| | | records. | | |
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| **QCP-18** | **Warranty Work** | Prepare a procedure that clearly addresses and includes measures to control the identification and resolution of warranty issues. | **Warranty Work Requirements** | |
| | | | Describe the process and individuals assigned to identify and resolve warranty issues. | |
| | | | | |
| **QCP-19** | **Updates to the QC Work Documents** | Prepare procedures for updating the QC work documents including changes to QC procedures and forms. | **QC Work Documents Update Requirements** | QAP, Section 2.2.2 Item R |
| | | | Define the method, format, layout and approval requirements related to the revision of the documents. | |
| | | | Include measures to control the receipt and issuance of the revised documents. | |
| | | | Require that review control measures are followed and that reviews of revised work documents are performed for adequacy. | |
| | | | Define the approval process for implementing changes to the work documents. | |
| | | | The same organizations must review and approve changes to the revised documents that performed the original review and approval, unless TxDOT consents in writing to another responsible organization. | |
| | | | Require authorized personnel of the DB Contractor to approve the release of the revised work documents. | |
| | | | Ensure the revised work documents are distributed and used at the location where the prescribed activity is performed. | |

## 3.0 Independent Quality Program

The construction independent quality (IQ) program involves inspecting, checking, and documenting the Construction Work for compliance with the Contract Documents. The CQMP shall include IQ procedures in Section 3 describing the various inspections, examinations, measurements and acceptance testing of materials to be performed by the IQF for each operation of the Construction Work.

The program is intended to ensure that TxDOT is in agreement with the quality of the work performed by the DB Contractor by verifying/validating the quality assurance activities and acceptance testing results of the IQF. The IQF shall remain an independent and impartial third party throughout the quality acceptance process.

Prepare the IQ procedures listed in Table 3. Include the procedures in Section 3 of the CQMP in the order listed in Table 3. The list of procedures and associated requirements are the minimum quality assurance requirements for Section 3 of the CQMP. Include any additional quality control procedures at the end of Section 3.

TxDOT approval of the CQMP shall be conditioned upon the IQ procedures satisfactorily incorporating the requirements described below in Table 3. The procedure numbers below in Table 3 shall be modified by an alpha-numeric designation if more than one procedure is required to address the requirements.

The template for preparing the IQ procedures is in Exhibit 2 to Attachment 4-2. The procedures should be clear, detailed and follow the general template outline contained in Exhibit 2 to Attachment 4-2.

**Table 3 – Independent Quality Procedures**

| Number | Name | Description | Requirements | References |
|---|---|---|---|---|
| **IQP-01** | **IQ Work Documents** | Prepare work documents pertaining to the independent quality (IQ) activities undertaken by the IQF including procedures and forms to ensure the Construction Work is performed in accordance with the Contract Documents. | **IQ Work Documents Requirements** | QAP, Section 3.1 |
| | | | The IQF shall incorporate the following into the preparation of the IQ work documents:<br>• documented instructions to control the receipt and issuance of the control of work documents;<br>• use of qualitative and quantitative criteria to determine compliance; and<br>• define the method, format, layout and approval requirements. | |
| | | | IQF staff shall use and follow the work documents. | |
| | | | The IQF shall perform quality reviews of the approved work documents. | |
| | | | Authorized personnel of the IQF shall approve the release of the work documents. | |
| | | | The IQ work documents shall be distributed and used at the location where the prescribed activity is performed. | |
| | | | Describe the requirements, responsibilities and processes to assess the ongoing effectiveness by the IQF of the quality control program including subcontractor/suppliers' programs to ensure the Construction Work meets project quality standards. | |
| | | | | |
| **IQP-02** | **Training and Certifications** | Prepare a procedure for the education, training, and achievement of qualifications, including appropriate certifications of personnel performing IQ activities. | **Training and Certifications Requirements** | QAP, Section 3.4.3<br><br>QAP, Section 3.4.5 Item C |
| | | | Provide a list the required IQ qualifications for various staffing levels. | |
| | | | IQF staff shall receive the necessary training and certifications to ensure all construction work is performed in accordance with the approved designs, plans, and specifications. Require that all training is completed and remains current. | |
| | | | IQF inspection and materials sampling/testing staff shall be trained in the applicable inspection and material sampling and testing procedures | |
| | | | The training and experience of the IQF staff shall be commensurate with the scope, complexity, and nature of the activity to be inspected and tested. | |
| | | | IQF staff shall be experienced in highway inspection and materials testing. | |
| | | | IQF personnel qualifications shall include appropriate TxDOT or State Highway Agency certification for testing and inspection as well as appropriate nationally recognized certifications applicable to inspection or testing activities. | |
| | | | All certifications of the IQF staff shall be achieved and maintained | |
| | | | IQF materials sampling/testing personnel shall be | |

| Number | Name | Description | Requirements | References |
|---|---|---|---|---|
| | | | qualified under the IA program as described in Section 4 – Independent Assurance Program of the TxDOT QAP. | |
| | | | The IQF shall maintain documentation of the training, certification, and experience and shall make such documentation available for review and audit. | |
| | | | | |
| **IQP-03** | **Laboratory Requirements** | Prepare procedures describing the qualification requirements of the independent testing laboratories that are responsible for performing the IQ tests. | **Laboratory Requirements** | QAP, Section 3.4.4 |
| | | | The IQF shall use laboratories meeting the requirements described in Section 4 – Independent Assurance Program of the QAP for quality testing. | |
| | | | Unless otherwise approved by TxDOT, the laboratory or field laboratory shall be located on site or within 10 miles of the project. | |
| | | | The IQF shall be responsible for obtaining AAP accreditation of its laboratories that will be used for quality acceptance and maintaining AAP accreditation annually thereafter. | |
| | | | The IQF's laboratories shall comply with the requirements of the AASHTO Accreditation Program (AAP) and other appropriate certifications acceptable to TxDOT. | |
| | | | the IQF's laboratories shall be certified for the test procedures that are applicable to the project. | |
| | | | The quality acceptance tests shall consist of the project tests established for the project based on the Guide Schedule of Sampling and Testing in the QAP. | |
| | | | | |
| **IQP-04** | **Calibration of Tools, Gauges, Instruments and Devices** | Prepare procedures to ensure all tools, gauges, instruments and devices used in the performance of the Construction Work perform as intended. | **Calibration of Tools, Gauges, Instruments and Devices Requirements** | QAP, Section 3.4.5 Item F |
| | | | Include measures to ensure that tools, gauges, instruments, and other measuring and testing devices used in activities affecting quality are properly maintained, controlled, calibrated, certified, and adjusted at specified periods to maintain accuracy within industry standards. | |
| | | | | |
| **IQP-05** | **Inspection of Sources of Supply and Quality of Materials** | Prepare procedures that include measures for material source evaluation and | **Inspection of Sources of Supply and Quality of Materials Requirements** | QAP, Section 3.1 |
| | | | Include processes to ensure that purchased materials, equipment, and services conform to the Contract Documents, the governmental approvals, applicable laws, rules, and the design documents | QAP, Section 3.4.5 Item |

| Number | Name | Description | Requirements | References |
|---|---|---|---|---|
| | | selection. | The IQF shall review and assess objective evidence of quality such as quality reports furnished by suppliers and subcontractors. | E |
| | | | The IQF shall inspect materials at the manufacture or vendor source and examine products upon delivery. | |
| | | | The quality of all materials shall conform to requirements contained in the Contract Documents and to any requirements of affected Utility Owners. | |
| | | | The IQF shall provide plant inspection and aggregate sampling and testing at concrete and asphalt plants. | |
| | | | Manufacturers' test reports may supplement, but not replace, the IQF inspections, sampling, testing and certification provisions. | |
| | | | | |
| **IQP-06** | **Sampling and Testing** | Prepare procedures describing how materials sampling and testing will be performed by the IQF. | **Sampling and Testing Requirements** | QAP, Section 3.4.5 Items J, K, L, O, S and Q<br><br>QAP, Section 3.2<br><br>QAP, Section 3.6 |
| | | | Describe the processes for random sampling, tracking materials samples, processing materials samples, review and approval of test records, and tracking compliance with materials testing frequency. | |
| | | | The IQF shall review the test results for compliance with mutually agreed-upon processes and naming conventions to ensure data integrity for accurate statistical analyses. | |
| | | | Prepare procedures for addressing IQF failing test results. | |
| | | | For a failed random independent test, the IQF shall perform a fixed test at the original failing test location and a new random independent test at a new location in the same lot. | |
| | | | For a failed fixed test, the IQF shall perform a new fixed test at the original failing test location. | |
| | | | The IQF shall perform testing at the frequency stipulated in the DB Guide Schedule for Testing in the TxDOT QAP for DB Projects. | |
| | | | Include measures to address OV failing test results and non-validation of IQF test results. | |
| | | | The IQF shall work with the OVF to resolve the differences in materials test results. | |
| | | | Pre-approved materials used on the project must maintain their approved status on the MPL. | |
| | | | Materials that do not maintain MPL approval must be sampled and tested on a project-level basis, as defined by the DB Guide Schedule for Testing.] | |
| | | | | |
| **IQP-07** | **Inspections** | Prepare | **Inspections Requirements** | QAP, |

| Number | Name | Description | Requirements | References |
|---|---|---|---|---|
| | | procedures for the performance of IQ inspections, examinations, and measurements for each operation of the Construction Work. | The IQF shall perform inspections, examinations, and measurements for each operation of the Construction Work to assure quality by verifying and documenting that the Work has been constructed in conformance with the released for construction documents, specifications, and approved working and shop drawings.. | Section 3.3<br><br>QAP, Section 3.4.5 Items B and I |
| | | | Provide a list of inspections and develop procedures for performing such inspections, including but not limited to:<br>• Earthwork<br>• Subgrade and Base including Flexible Base<br>• Pavement and Surface Courses<br>• Asphalt Concrete Pavement Field Operations<br>• Hot Mix Asphalt Concrete Plant<br>• Concrete Pavement<br>• Portland Cement Concrete Plant<br>• Structures<br>• Drilled Shaft Foundations<br>• Bridge Deck<br>• Retaining Walls<br>• Lighting, Signing, Markings and Signals<br>• Traffic Control Devices | QAP, Appendix J |
| | | | Include a process for coordinating IQ testing and inspections with QC inspections and third parties. | |
| | | | Include the list of inspection hold points at which IQ inspections and / or materials sampling and testing will be necessary. | |
| | | | | |
| **IQP-08** | **Approval of Mix Designs** | Prepare procedures for the IQ review and verification of mix designs. | **Approval of Mix Designs Requirements** | QAP, Section 3.4.5 Item N |
| | | | Prepare procedures for the IQ review and verification of all Portland cement concrete, soil-lime treatment (stabilization or modification), soil-cement treatment, and hot mix asphaltic concrete mix designs. | |
| | | | The mix designs shall be reviewed and verified by a licensed professional engineer in the state of Texas. | |
| | | | | |
| **IQP-09** | **Construction Deficiencies and Nonconforming Work** | Prepare procedures to document and track the disposition of any identified nonconformance with the plans and | **Construction Deficiencies and Nonconforming Work Requirements** | QAP, Section 3.4.5 Item D<br>QAP, Section 3.5.3.4 |
| | | | Include a clearly defined process for communicating identified construction deficiencies and nonconformances to TxDOT and the DB Contractor using nonconformance and construction deficiency logs. | |
| | | | Describe the IQF's role in closing out construction deficiency reports (CDRs) and nonconformance | |

| Number | Name | Description | Requirements | References |
|---|---|---|---|---|
| | | specifications. | reports (NCRs) for resolving all instances of Nonconforming Work | |
| | | | Describe TxDOT's role in the NCR close-out review and approval process. | |
| | | | | |
| **IQP-10** | **Coordination of Inspection and Testing with Third Parties** | Prepare procedures for inspection of on and off-site prefabricated product fabrication plants. | **Coordination of Inspection and Testing with Third Parties Requirements** | QAP, Section 3.4.5 Item R<br><br>QAP Sections 3.1.2.1 and 3.1.2.2 |
| | | | Prepare procedures for when the IQF and not CST/M&P Structural Branch performs the inspection of product fabrication plants. | |
| | | | Follow the procedures as outlined in the material's quality program in the QAP, which include the applicable DMS requirements, product and quality related specifications, and other applicable documents required by the contract. | |
| | | | | |
| **IQP-11** | **Design Changes during Construction** | Prepare a procedure for ensuring compliance with the implementation of the design change process. | **Design Changes during Construction Requirements** | |
| | | | Describe the process for ensuring that design changes during construction are progressed by DB Contractor in accordance with the QMP. | |
| | | | | |
| **IQP-12** | **Maintenance of Traffic** | Prepare a procedure describing the activities of the IQF to ensure that all MOT activities are performed in accordance with these CQMP requirements and the Contract Documents. | **Maintenance of Traffic Requirements** | |
| | | | The IQFM shall designate a qualified individual to be responsible for observation, inspecting, documenting and reporting on the placement, maintenance, and application of traffic control devices. The individual must have relevant experience overseeing IQ inspections or implementation of MOT plans during the construction phase of highway projects similar in size and scope as the Project. | |
| | | | The IQF shall oversee IQ inspections of the DB contractor's MOT activities to confirm the Work has been performed in accordance with the Contract Documents, specifically, that DB Contractor:<br>• follows the CQMP and PSQMP;<br>• provides appropriate QC and staff to perform activities per CQMP;<br>• erects warning signs and regulatory signs called for in the plans;<br>• erects regulatory speed limit signs in the construction zone designating the limits of the roadway section where speed reduction is necessary for the safe operation of traffic and protection of construction personnel. Even though the | |

| Number | Name | Description | Requirements | References |
|---|---|---|---|---|
| | | | entire length of the project may have reduced maximum speed limit authorized by Commission Minute Order or City/County Ordinances, reduced speed limits are in effect only within the limits between the erected speed limit signs. Regulatory speed zone signs must have an applicable Commission Minute Order or City Ordinance;<br>• uses signs only when necessary;<br>• covers signs placed prior to their need and does not leave in place longer than necessary;<br>• removes or covers signs that restrict the speed limit in a construction or maintenance work zone during any period for which restricted speed limit does not apply;<br>• properly maintain all traffic control devices and ensure they are legible at all times and in conformance with the plans, contract, the Texas Manual on Uniform Traffic Control Devices for Streets and Highways (TMUTCD), and the Traffic Signals Manual volume of the Traffic Operations manual collection;<br>• addresses and implements temporary drainage per contract documents;<br>• provides safe ingress and egress provisions for construction and inspection vehicles;<br>• complies with lane closure requirements;<br>• follows all applicable standards called for in the plans;<br>• follows all applicable notes and MOT narrative; and<br>• Implements all SW3P elements applicable to construction zone. | |
| | | | The IQF shall document changes to the MOT plans that:<br>• alter the original MOT; or<br>• result in deviations to design traffic control requirements.<br><br>The IQF shall ensure that DB Contractor documents the changes to the MOT plans prior to, or immediately after, implementing the changes, for minor design changes, as field design changes (FDC), or that the DB Contractor issues a notice of design change for all other design modifications to the MOT plans. | |

| Number | Name | Description | Requirements | References |
|---|---|---|---|---|
| | | | The IQF shall prepare MOT documentation for:<br>• detailed inspections of MOT's in the field immediately after traffic alignment changes. Documentation of these detailed inspections may be made by photograph, video, use of Form 599, memorandum or other media; and<br>• MOT activities in the diaries and on Form 599, Traffic Control Devices Inspection Checklist (as described below)<br><br>The IQF shall notify DB Contractor of discrepancies in the provided documentation at the time of the inspection, by the end of the next business day, or in accordance with the CQMP. | |
| | | | The IQF shall document MOT activities in the diaries and performs at least two inspections per month (1 day time and 1 night time at approximately 2 week intervals) as reported on Form 599. If accidents occur, the IQF shall limit the documentation to the incident, date and time. | |
| | | | The IQF shall perform the Form 599 inspections and send the form to TxDOT to file. | |
| | | | | |
| **IQP-13** | **Daily Inspections and Reporting** | Prepare procedures for performing daily field inspections and for preparing a daily report by IQF staff to document the inspections performed. | **Daily Inspections and Reporting Requirements** | QAP, Section 3.4.5 Item B<br><br>QAP, Section 3.4.6 |
| | | | The IQF shall designate individuals for performing daily field inspections and for preparing the daily IQ reports. | |
| | | | The IQF shall maintain electronically and transmit to TxDOT daily inspection reports within 48 hours after the work shift in a format acceptable to TxDOT. | |
| | | | The DB Contractor will document and maintain documentation showing how the IQF has complied with the CQMP requirements in Section 3.4.5 of the QAP. | |
| | | | | |
| **IQP-14** | **Document Management** | Prepare a procedure describing the documentation requirements and methods for controlling and maintaining IQ documents | **Document Management Requirements** | QAP, Section 3.4.5 Item H |
| | | | The document control system shall be compatible with TxDOT's. | |
| | | | DB Contractor shall establish an electronic system for recording all IQF inspections and materials test results. | |
| | | | | |
| **IQP-15** | **Independent** | Prepare | **Independent Quality Audits Requirements** | QAP, |

| Number | Name | Description | Requirements | References |
|---|---|---|---|---|
| | **Quality Audits** | procedures describing a comprehensive system of planned and periodic audits of DB Contractor's CQMP and QC inspection processes to determine adherence to and the effectiveness of the CQMP. | Include the requirements, responsibilities and processes to assess the ongoing effectiveness of the DB Contractor's quality control inspection and materials sampling/testing operations and subcontractor/suppliers' quality control programs to ensure the Construction Work complies with the Project's quality standards. | Section 3.4.5 Items G, M and P |
| | | | Describe the process for implementing changes to the quality system to address nonconformances as a result of an audit or management review. | |
| | | | IQF personnel shall perform the audits in accordance with the written procedures or checklists. | |
| | | | The IQFM shall ensure that the CQMP defines the responsibilities and requirements for planning audits, conducting audits, establishing records, and reporting results. | |
| | | | Audit planning shall take into consideration the risk to quality of the processes and areas to be audited, as well as the results of previous audits. | |
| | | | Audit planning shall define the audit scope, frequency, and status, and be documented in a rolling 12 month schedule. | |
| | | | The procedure for conducting audits shall describe the use of checklists of requirements, objective evidence, competent auditors independent of the scope of work being audited, and the audit result workflow through to re-audit and close-out of findings. | |
| | | | Include requirements for audits of QC and IQF records, documentation, procedures, and processes to verify compliance with the contract documents and the approved CQMP. | |
| | | | IQF staff shall document, review and transmit audit results to TxDOT. | |
| | | | DB Contractor shall submit to TxDOT the results of all Project quality audits within seven days of their completion. | |
| | | | Include measures to ensure that audit results are received and addressed by DB Contractor. | |
| | | | IQF personnel shall re-audit deficient areas following corrective action to verify deficiencies are addressed. | |
| | | | | |
| **IQP-16** | **Updates to the IQ Work Documents** | Prepare procedures for updating the IQ work documents including changes to quality | **IQ Work Documents Update Requirements** | QAP, Section 2.2.2 Item R |
| | | | Define the review and approval process for implementing changes to the IQ work documents. The same organizations must review and approve changes to the revised documents that performed the original review and approval, unless TxDOT consents in writing to another responsible | |

| Number | Name | Description | Requirements | References |
|---|---|---|---|---|
| | | acceptance procedures and forms. | organization. | |
| | | | Define the method, format, layout and approval requirements related to the revision of the IQ work documents. | |
| | | | Include measures to control the receipt and issuance of the revised documents. | |
| | | | Review control measures shall be followed and reviews of revised work documents shall be performed for adequacy. | |
| | | | Authorized personnel of the IQF shall approve the release of the revised work documents. | |
| | | | The revised work documents shall be distributed and used at the location where the prescribed activity is performed. | |
| | | | Describe the requirements, responsibilities and processes for reviewing and updating subcontractor/suppliers' work documents as necessary to continue meeting project quality standards. | |

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## EXHIBIT 1 TO ATTACHMENT 4-2

I. Title Page
II. Approvals Page
III. Record of Revisions

# Construction Quality Management Plan

[NAME OF PROJECT
Contract #XXXXX]

[Day Month Year]

**Prepared By: [DB Contractor's Name**
**Street Address**
**Suite XXX**
**City Name, Texas XXXX]**

# CONSTRUCTION QUALITY MANAGEMENT PLAN

# For the

# [NAME OF PROJECT]

**Approved By:**

| | |
|---|---|
| _____ | _____ |
| **Construction Manager (CM)** | **Date** |
| _____ | _____ |
| **Construction Quality Control Manager (CQCM)** | **Date** |
| _____ | _____ |
| **Independent Quality Firm Manager (IQFM)** | **Date** |
| _____ | _____ |
| **TxDOT's Authorized Representative** | **Date** |

# Record of Revisions

| Rev. | Date Issued | Pages Affected | Description of Revision / Comments |
|---|---|---|---|
| | | | |
| | | | |
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**EXHIBIT 2 TO ATTACHMENT 4-2**

**IQ/QC PROCEDURES TEMPLATE**

| IQ/QC Procedure Number | IQ/QC Procedure Name | Revision | Date |
|---|---|---|---|
| *[Insert the QC Procedure Number]* | *[Insert QC Procedure Name]* | *[#]* | *XX/XX/XX* |

## 1.0 Purpose

*[Define the purpose of the procedure. Include all aspects that are encompassed with this procedure.]*

## 2.0 Scope

*[Detail when the procedure is applicable and will be used. Define the limits of the procedure.]*

## 3.0 Definitions

*[Definitions of terms used within the description of the process of executing the procedure. Each procedure should stand alone and therefore if a term was defined in a previous procedure shall still be defined.]*

## 4.0 Responsibilities

*[Define individuals and/or workgroups to whom the procedure applies. Detail their role and responsibility within the procedure.]*

## 5.0 Process

*[Describe the procedure, in detail. List all steps involved. Include tables, flowcharts, and figures as applicable.]*

## 6.0 Records

*[List the documents developed by which the procedure will be tracked and archived. Define the locations at which the procedure's records will be filed.]*

## 7.0 Attachments

*[List any attachments to be included with the procedure, if applicable.]*

**EXHIBIT 3 TO ATTACHMENT 4-2**

**FORM TEMPLATES**

| Form Number | Form Name | Revision | Date |
|---|---|---|---|
| *[Insert Form* | Certification of Compliance | *[#]* | *XX/XX/XX* |
| | Daily Inspection Form | | |
| | Request for Information Form | | |
| | *[Add additional forms as required, including but not limited to the following:*<br>• *Material Haul Summary*<br>• *Construction Audit*<br>• *Construction Inspection forms]* | | |

# CERTIFICATION OF COMPLIANCE FORM - SAMPLE

| | |
|---|---|
| Design Manager: | Date: |
| IQFM: | Revision: |
| | Revision Date: |

To: *[DB Contractor]*

Attn: *[Insert DB Contractor / Project Director / Project Manager's Name]*
*[Title]*

Subject: Certificate of Compliance

I hereby certify that the items furnished under your Purchase Order No. _____ and any component part thereof are in all respects new and free from faulty workmanship or material, and meets the requirements of Contract No. _____ released for construction document No. _____ Paragraph _____ as provided by *[DB Contractor]*.

Sincerely,

_____ ___/___/___

*[Supplier's Management Representative]* Date

*[Title]*

*[Company Name]*

# DAILY INSPECTION REPORT FORM - SAMPLE

Report Number: _____ Date:_____

Day of Week: _____

Inspections Conducted:

| ID | Spec Item | Segment | Area | QAP Form | Feature ID | Location | Station | to | Station | Quantity | Results P I F |
|---|---|---|---|---|---|---|---|---|---|---|---|
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P = Ready for Testing; I = In Progress; F = Not Accepted

Discussions with visitors, Contractor, others:

_____
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_____
_____

Delivered Materials:

| Delivered Material Description | Rec'd<br>Yes No | Reference # | Sample ID Number | Samples Taken<br>Yes No N/A |
|---|---|---|---|---|
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| | ☐ ☐ | | | ☐ ☐ ☐ |
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| | ☐ ☐ | | | ☐ ☐ ☐ |

Field Tests Performed:

| Test ID # | Length Location | | | Width Location | | | Results |
|---|---|---|---|---|---|---|---|
| | Random # | Length (ft) | Distance (ft) | Random # | Length (ft) | Distance (ft) | P F N/A |
| | | | | | | | ☐ ☐ ☐ |
| | | | | | | | ☐ ☐ ☐ |
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P = Pass; F = Fail

IQF Inspector Signature: _____ Date: _____

IQF Supervisor Signature: _____ Date: _____

# REQUEST FOR INFORMATION FORM - SAMPLE

| | |
|---|---|
| **PROJECT NAME:** | **RFI No.:** |
| **PROJECT NUMBER:** | **DATE:** |
| **INITIATED BY:** | **DATE:** |
| **SPECIFICATION NO.:** | **RESPONSE DUE DATE:** |
| **DRAWING REF NO.:** | |
| | |
| **AREA OF WORK:** | |
| **QUESTION:** | |
| **RESPONSE:** | |
| **ATTACHMENTS:** | |
| | |
| RESPONDER (Sign & Print) | DATE: |
| DISTRIBUTION: | |

## ITEM 5 CONTROL OF THE WORK

### 5.1 Control of the Work

#### 5.1.1 Control and Coordination of Work

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

#### 5.1.2 Safety

DB Contractor shall take all reasonable precautions and be solely responsible for the safety of, and shall provide protection to prevent damage, injury, or loss to, all persons on the Site or who would reasonably be expected to be affected by the Work, including individuals performing Work, employees of TxDOT and its consultants, visitors to the Site and members of the traveling public who may be affected by the Work. DB Contractor shall at all times comply with all health and safety requirements contained in the Contract Documents and DB Contractor's Safety and Health Plan and all such requirements under applicable Law, including all rules, directives and guidance of the U.S. Department of Homeland Security or comparable State agency. DB Contractor shall coordinate and cooperate with all Governmental Entities providing security, first responder and other public emergency response services.

#### 5.1.3 Obligations to Minimize Impacts

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

### 5.2 Submittals and Approvals

#### 5.2.1 Submittal, Review and Approval Terms and Procedures

**5.2.1.1** General

This Section 5.2.1 sets forth uniform terms and procedures that shall govern all Submittals to TxDOT pursuant to the Contract Documents or the Project Management Plan and component plans thereunder. In the event of any irreconcilable conflict between the provisions of this Section 5.2.1.1 and any other provisions of the Contract Documents or the Project Management Plan and component plans thereunder, concerning submission, review and approval procedures, this Section 5.2.1.1 shall exclusively govern and control, except to the extent that the conflicting provision expressly states that it supersedes this Section 5.2.1.1.

**5.2.1.2** Time Periods

**5.2.1.2.1** Whenever TxDOT is entitled to review and comment on, or to affirmatively approve, a Submittal, TxDOT shall have a period of 10 Business Days to act after the date it receives an accurate and complete Submittal and all necessary information and documentation concerning the subject matter, except as otherwise provided below.

**5.2.1.2.2** If any provision of the Contract Documents expressly provides a longer or shorter period for TxDOT to act, such period shall control over the foregoing time period.

**5.2.1.2.3** If at any given time TxDOT is in receipt of more than (a) 10 concurrent Submittals in the aggregate (other than Submittals governed by provisions in the Contract Documents that expressly specify a different maximum concurrent number) that are subject to TxDOT's review and comment or approval or (b) the maximum number of concurrent Submittals of any particular type set forth in any other provision of the Contract Documents, TxDOT may extend the applicable period for it to act to that period in which TxDOT can reasonably accommodate the Submittals under the circumstances or such other period of extension set forth in any other provision of the Contract Documents, and no such extension shall entitle DB Contractor to an adjustment to the Price or Completion Deadlines or form the basis of any other Claim. However, if at any time TxDOT is in receipt of some Submittals subject to clause (a) above and some Submittals subject to clause (b) above, then the higher number of Submittals shall be used to determine whether TxDOT may extend the applicable period. Submittals are deemed to be concurrent to the extent the review time periods available to TxDOT under this Section 5.2.1.2 regarding such Submittals overlap. Whenever TxDOT is in receipt of excess concurrent Submittals, DB Contractor may establish by written notice to TxDOT an order of priority for processing such Submittals; and TxDOT shall comply with such order of priority. Refer to Sections 14.5.1, 15.2.4 and 15.3.1 of the Design-Build Specifications for maximum concurrent Utility Adjustment Submittals, Submittals of Acquisition Packages and Submittals of Project ROW maps, and extensions of time in the case of Utility Adjustment Submittals, Acquisition Packages and Project ROW maps in excess of the maximum.

**5.2.1.2.4** All time periods for TxDOT to act shall be extended by the period of any delay caused, in whole or in part, by the acts, omissions, negligence, intentional misconduct, or breach of applicable Law, contract, or Governmental Approval by any DB Contractor-Related Entity.

**5.2.1.2.5** TxDOT shall endeavor to reasonably accommodate a written request from DB Contractor for expedited action on a specific Submittal within the practical limitations and based on availability of TxDOT personnel appropriate for acting on the type of Submittal in question; provided, however, that DB Contractor sets forth in its request specific, abnormal circumstances demonstrating the need for expedited action by TxDOT. This provision shall not apply, however, during any time described in Section 5.2.1.2.4.

**5.2.1.3** TxDOT Discretionary Approvals

If the Submittal is one where the Contract Documents indicate approval or consent or acceptance is required from TxDOT in its discretion, absolute discretion, unfettered discretion, or good faith discretion, then TxDOT's lack of approval, determination, decision, or other action within the applicable time period under Section 5.2.1.2 shall be deemed disapproval. If approval is subject to the sole, absolute or unfettered discretion of TxDOT, then its decision shall be final, binding and not subject to dispute resolution and such decision shall not entitle DB Contractor to an adjustment to the Price or Completion Deadlines or form the basis of any other Claim. If the approval is subject to the good faith discretion of TxDOT, then its decision shall be binding unless it is finally determined by clear and convincing evidence under the Dispute Resolution Procedures of this Design-Build Contract that such decision was arbitrary or capricious. For avoidance of doubt, if the approval is subject to the good faith discretion of TxDOT and the decision is determined to be arbitrary and capricious and causes delay, the delay will constitute and be treated as a TxDOT-Caused Delay, and DB Contractor shall be entitled to submit a Claim in accordance with Section 4.6.

**5.2.1.4** Other TxDOT Approvals

**5.2.1.4.1** Whenever the Contract Documents indicate that a Submittal or other matter is subject to TxDOT's approval or consent and no particular standard therefor is stated, then the standard shall be reasonableness.

**5.2.1.4.2** If the reasonableness standard applies to TxDOT's right of approval of or consent to a Submittal, and TxDOT delivers no approval, consent, determination, decision or other action within the applicable time period under Section 5.2.1.2, then DB Contractor may deliver to TxDOT a written notice stating the date within which TxDOT was to have decided or acted and that if TxDOT does not decide or act within five Business Days after receipt of the notice, delay thereafter may constitute a TxDOT-Caused Delay for which DB Contractor may be entitled to submit a Claim in accordance with Section 4.6.3.

**5.2.1.5** TxDOT Review and Comment

Whenever the Contract Documents indicate that a Submittal or other matter is subject to TxDOT's review, comment, review and comment, or similar action not requiring TxDOT's prior approval before DB Contractor may act or proceed and TxDOT delivers no comments, exceptions, objections, rejections, or disapprovals (referred to in this Section 5.2.1 as "comments and objections") within the applicable time period under Section 5.2.1.2, then DB Contractor may proceed thereafter at its election and risk, without prejudice to TxDOT's rights to later object in accordance with Section 5.2.1.7.1. No such failure or delay by TxDOT in delivering comments and objections within the applicable time period under Section 5.2.1.2 shall constitute a TxDOT-Caused Delay, entitle DB Contractor to an adjustment to the Price or Completion Deadlines, or form the basis of any other Claim. When used in the Contract Documents, the phrase "completion of the review and comment process" or similar terminology means either (a) TxDOT has reviewed and provided comments and objections, and all the same have been resolved or (b) the applicable time period has passed without TxDOT providing any comments and objections.

**5.2.1.6** Submittals Not Subject to Prior Review, Comment or Approval

Whenever the Contract Documents indicate that DB Contractor is to deliver a Submittal to TxDOT but express no requirement for TxDOT review, comment, disapproval, prior approval or other TxDOT action, then DB Contractor is under no obligation to provide TxDOT any period of time to review the Submittal or obtain approval of it before proceeding with further Work, and TxDOT shall have the right, but is not obligated, to at any time make comments and objections with respect to the Submittal in accordance with Section 5.2.1.7.1. No failure or delay by TxDOT in delivering comments and objections with respect to the Submittal shall constitute a TxDOT-Caused Delay, entitle DB Contractor to an adjustment to the Price or Completion Deadlines, or form the basis of any other Claim.

**5.2.1.7** Resolution of TxDOT Comments and Objections

**5.2.1.7.1** If the Submittal is one not governed by Section 5.2.1.3, TxDOT's comments and objections shall be deemed reasonable, valid and binding if and only if based on any of the following grounds:

(a) The Submittal or subject provision thereof fails to comply with any applicable covenant, condition, requirement, term, or provision of the Contract Documents or the Project Management Plan and component plans thereunder;

(b) The Submittal or subject provision thereof is not to a standard equal to or better than the requirements of Good Industry Practice;

(c) DB Contractor has not provided all content or information required with respect to the Submittal or subject provisions thereof, provided that TxDOT assumes no duty, obligation, or liability regarding completeness or correctness of any Submittal, including a Submittal that is to be delivered to another Governmental Entity as a proposed Governmental Approval or in order to obtain, modify, amend, supplement, renew, extend, waive, or carry out a Governmental Approval;

(d) Adoption of the Submittal or subject provision thereof, or of any proposed course of action thereunder, would result in a conflict with or violation of any Law or Governmental Approval; or

(e) In the case of a Submittal that is to be delivered to another Governmental Entity as a proposed Governmental Approval or, in order to obtain, modify, amend, supplement, renew, extend, waive, or carry out a Governmental Approval, it proposes commitments, requirements, actions, terms or conditions that are not usual and customary arrangements that TxDOT offers or accepts for addressing similar circumstances affecting its own projects.

**5.2.1.7.2** DB Contractor shall respond to all of TxDOT's comments and objections to a Submittal and make modifications to the Submittal as necessary to fully reflect and resolve all such comments and objections, in accordance with the review processes set forth in this Section 5.2.1. DB Contractor acknowledges that TxDOT may provide comments and objections that reflect concerns regarding interpretation or preferences of the commenter or that otherwise do not directly relate to grounds set forth in Section 5.2.1.7.1. DB Contractor agrees to undertake reasonable efforts to accommodate or otherwise resolve any such comments or objections through the review processes described in this Section 5.2.1. However, if the Submittal is not governed by Section 5.2.1.3, the foregoing shall in no way be deemed to obligate DB Contractor to incorporate any comments or resolve objections that are not based on any of the grounds set forth in Section 5.2.1.7.1 and would result in a delay to a critical path on the Project Schedule or in an increase in DB Contractor's costs, except pursuant to a TxDOT-Directed Change. If, however, DB Contractor does not accommodate or otherwise resolve any comment or objection, DB Contractor shall deliver to TxDOT within a reasonable time period, not to exceed 30 days after receipt of TxDOT's comments or objections, a written explanation of why modifications based on such comment or objection are not required. The explanation shall include the facts, analyses and reasons that support the conclusion.

**5.2.1.7.3** The foregoing shall in no way be deemed to obligate DB Contractor to incorporate any comments or resolve objections that DB Contractor demonstrates would render the Submittal erroneous, defective or less than Good Industry Practice, except pursuant to a TxDOT-Directed Change.

**5.2.1.7.4** If DB Contractor fails to notify TxDOT within such time period, TxDOT may deliver to DB Contractor a written notice stating the date by which DB Contractor was to have addressed TxDOT's comments and objections and that if DB Contractor does not address those comments and objections within five Business Days after receipt of such notice, then that failure shall constitute DB Contractor's agreement to make all changes necessary to accommodate and resolve the comment or objection and full acceptance of all responsibility for such changes without right to an adjustment to the Price or Completion Deadlines or any other Claim, including any Claim that TxDOT assumes design or other liability.

**5.2.1.7.5** After TxDOT receives DB Contractor's explanation as to why the modifications are not required as provided in Sections 5.2.1.7.2, 5.2.1.7.3 and 5.2.1.7.4, the Parties shall attempt in good faith to resolve the dispute. If they are unable to resolve the dispute, it shall be resolved according to the procedures for resolving Disputes in this Design-Build Contract, except (a) as provided otherwise in this Section 5.2.1.7 and (b) if TxDOT elects to issue a Directive Letter pursuant to Section 4.6.1.2 with respect to the disputed matter, DB Contractor shall proceed in accordance with TxDOT's directive while retaining any Claim as to the disputed amount.

**5.2.1.8** Limitations on DB Contractor's Right to Rely

**5.2.1.8.1** No review, comment on, objection, rejection, approval, disapproval, acceptance, certification (including any certificates of Substantial Completion and Final Acceptance), concurrence monitoring, testing, inspection, spot checking, auditing or other oversight by or on behalf of TxDOT, and no lack thereof by TxDOT, shall constitute either (i) acceptance of materials or Work that fails to comply with the Contract Documents, or (ii) waiver of any legal or equitable right under the Contract Documents, at law, or in equity. TxDOT shall be entitled to remedies for unapproved Deviations and Nonconforming Work and to identify additional Work that must be done to bring the Work and Project into compliance with requirements of the Contract Documents, regardless of whether previous review, comment on, objection, rejection, approval, disapproval, acceptance, certification, concurrence, monitoring, testing, inspection, spot checking, auditing or other oversight were conducted or given by TxDOT. In the event TxDOT expressly accepts Nonconforming Work in accordance with Section 5.3.2, the Warranties shall continue to apply to such Work, however, DB Contractor shall not be required to correct the specific defect or nonconformity that is expressly accepted. Regardless of any such activity or failure to conduct any such activity by TxDOT, DB Contractor at all times shall have an independent duty and obligation to fulfill the requirements of the Contract Documents. DB Contractor agrees and acknowledges that any such activity or failure to conduct any such activity by TxDOT:

(a) Is solely for the benefit and protection of TxDOT;

(b) Does not relieve DB Contractor of its responsibility for the selection and the competent performance of all DB Contractor-Related Entities;

(c) Does not create or impose upon TxDOT any duty or obligation toward DB Contractor to cause it to fulfill the requirements of the Contract Documents;

(d) Shall not be deemed or construed as any kind of warranty, express or implied, by TxDOT;

(e) May not be relied upon by DB Contractor or used as evidence in determining whether DB Contractor has fulfilled the requirements of the Contract Documents; and

(f) May not be asserted by DB Contractor against TxDOT as a defense, legal or equitable, to, or as a waiver of or relief from, DB Contractor's obligation to fulfill the requirements of the Contract Documents.

**5.2.1.8.2** Unless expressly permitted under Section 5.3.2, DB Contractor shall not be relieved or entitled to reduction of its obligations to perform the Work in accordance with the Contract Documents, or any of its other liabilities and obligations, including its indemnity obligations, as the result of any activity identified in Section 5.2.1.8.1 or failure to conduct any such activity by TxDOT. Such activity by TxDOT shall not relieve DB Contractor from liability for, and the responsibility to cure and correct,

any unapproved Deviations, Nonconforming Work that is not expressly accepted in accordance with Section 5.3.2 or DB Contractor defaults.

**5.2.1.8.3** To the maximum extent permitted by law, DB Contractor hereby releases and discharges TxDOT from any and all duty and obligation to cause DB Contractor's Work or the Project to satisfy the standards and requirements of the Contract Documents.

**5.2.1.8.4** Notwithstanding the provisions of Sections 5.2.1.8.1, 5.2.1.8.2 and 5.2.1.8.3:

(a) DB Contractor shall be entitled to rely on written approvals and acceptances from TxDOT (i) for the limited purpose of establishing that the approval or acceptance occurred or (ii) that are within its sole, absolute, or unfettered discretion, but only to the extent that DB Contractor is prejudiced by a subsequent decision of TxDOT to rescind such approval or acceptance;

(b) DB Contractor shall be entitled to rely on specific written Deviations TxDOT approves under Section 4.1.2.2.4;

(c) DB Contractor shall be entitled to rely on the certificates of Substantial Completion and Final Acceptance from TxDOT for the limited purpose of establishing that Substantial Completion and Final Acceptance, as applicable, have occurred, and the respective dates thereof;

(d) TxDOT is not relieved from any liability arising out of a knowing and intentional material misrepresentation under any written statement TxDOT delivers to DB Contractor; and

(e) TxDOT is not relieved from performance of its express responsibilities under the Contract Documents in accordance with all standards applicable thereto.

**5.2.2 Responsibility for Design**

**5.2.2.1** DB Contractor Responsibility

DB Contractor agrees that it has full responsibility for the design of the Project and that DB Contractor will furnish the design of the Project, regardless of the fact that aspects of the TxDOT Schematic Design have been provided to DB Contractor as a preliminary basis for DB Contractor's design. DB Contractor specifically acknowledges and agrees that:

(a) DB Contractor is not entitled to rely on (i) the TxDOT Schematic Design except as specified in Section 5.2.2.2.2, (ii) the Reference Information Documents, or (iii) any other documents or information provided by TxDOT, except to the extent specifically permitted in the Contract Documents.

(b) DB Contractor is responsible for causing the Released for Construction Documents to address and correct any Errors in the TxDOT Schematic Design through the design and construction process without any increase in the Price or extension of a Completion Deadline, subject only to the right to a Change Order with respect to Necessary Basic Configuration Changes to the extent permitted by Section 4.6.9.6.

(c) TxDOT's liability for Errors in the TxDOT Schematic Design is limited to its obligations relating to Necessary Basic Configuration Changes as set forth in Section 4.1.2.3.2 and is subject to the requirements and limitations of Section 4.6.

(d) DB Contractor's warranties and indemnities hereunder cover Errors in the Project even though they may arise from or be related to Errors in the TxDOT Schematic Design.

(e) DB Contractor is responsible for verifying all calculations and quantity takeoffs contained in the RFP Documents or otherwise provided by TxDOT.

**5.2.2.2** TxDOT Schematic Design

**5.2.2.2.1** DB Contractor acknowledges and agrees that if DB Contractor wishes to deviate from the Schematic ROW, it must specifically identify such modifications in writing to TxDOT in accordance with Section 4.1.2.2, provide justification for the modification and obtain specific written approval from TxDOT, in its discretion, prior to use of such modifications. Subject to Section 4.1.2.2, DB Contractor must obtain TxDOT's prior written approval to deviate from the TxDOT Schematic Design unless the proposed modification meets all of the following: (a) is within the Schematic ROW and requires no additional right of way; (b) meets the requirements of the Design-Build Specifications; (c) requires no New Environmental Approval; (d) does not constitute a Design Exception or Design Waiver; (e) is consistent with the design concepts included in the Proposal; and (f) does not deviate from TxDOT's design intent as embodied in the TxDOT Schematic Design. DB Contractor acknowledges and agrees that the requirements and constraints set forth in the Contract Documents and in the Governmental Approvals, as well as Site conditions, will impact DB Contractor's ability to revise the concepts contained in the TxDOT Schematic Design, in addition to the requirement to obtain approval.

**5.2.2.2.2** DB Contractor may rely on the Schematic ROW limits as shown on the TxDOT Schematic Design, acknowledges that it is feasible to design and develop the Project within the Schematic ROW limits identified in the TxDOT Schematic Design, and shall have the right to obtain a Change Order for certain increased costs incurred due to Necessary Basic Configuration Changes to the extent provided in Section 4.6.9.6; provided, however, that DB Contractor acknowledges that "feasible to design and develop the Project" is not intended to mean or be limited to DB Contractor's design approach set forth in its Proposal or DB Contractor's preferred design approach.

**5.2.2.2.3** DB Contractor acknowledges that the TxDOT Schematic Design is preliminary and subject to refinement through the design development process and that DB Contractor is not entitled to any time extensions in connection with any changes from the TxDOT Schematic Design, and DB Contractor's entitlement to an increase in the Price in connection with any changes from the TxDOT Schematic Design is limited to certain increased costs incurred as a result of Necessary Basic Configuration Changes to the extent allowed under Section 4.6.9.6.

**5.2.3 Disclaimer**

**5.2.3.1** DB Contractor understands and agrees that TxDOT shall not be responsible or liable in any respect for any Losses whatsoever suffered by any DB Contractor-Related Entity by reason of any use of any information contained in the TxDOT Schematic Design or Reference Information Documents, or any action or forbearance in reliance thereon, except to the extent that TxDOT has specifically agreed in Section 4.6 that DB Contractor shall be entitled to an increase in the Price or extension of a Completion Deadline with respect to such matter. DB Contractor further acknowledges and agrees that (a) if and to the extent DB Contractor or anyone on DB Contractor's

behalf uses any of said information in any way, such use is made on the basis that DB Contractor, not TxDOT, is responsible for said information and (b) DB Contractor is capable of conducting and is obligated hereunder to conduct any and all studies, analyses and investigations as it deems advisable to verify or supplement said information, and that any use of said information is entirely at DB Contractor's own risk and at its own discretion.

**5.2.3.2** TxDOT DOES NOT REPRESENT OR WARRANT THAT THE INFORMATION CONTAINED IN THE TxDOT SCHEMATIC DESIGN OR REFERENCE INFORMATION DOCUMENTS IS EITHER COMPLETE OR ACCURATE (INCLUDING WITH RESPECT TO (i) THE EXISTENCE OR NEED FOR BRIDGES; (ii) BRIDGE LENGTHS, LOCATIONS, TYPES AND VERTICAL PROFILES DEPICTED IN THE TXDOT SCHEMATIC DESIGN, (iii) THE EXISTENCE, NEED FOR, OR LOCATIONS OF CULVERTS; (iv) THE EXISTENCE OR NEED FOR RETAINING WALLS, (v) RETAINING WALL HEIGHTS, LENGTHS OR SIZES DEPICTED IN THE TXDOT SCHEMATIC DESIGN OR (vi) ANY FAILURE OR OMISSION TO DEPICT ANY OF THE FOREGOING IN THE TXDOT SCHEMATIC DESIGN) OR THAT SUCH INFORMATION IS IN CONFORMITY WITH THE REQUIREMENTS OF TxDOT-PROVIDED APPROVALS, OTHER CONTRACT DOCUMENTS, GOVERNMENTAL APPROVALS OR LAW. TxDOT DOES NOT REPRESENT OR WARRANT THE ACCURACY OR COMPLETENESS OF ANY ITEMIZED LIST SET FORTH IN THE DESIGN-BUILD SPECIFICATIONS. THE FOREGOING SHALL IN NO WAY AFFECT TxDOT'S LIABILITY FOR NECESSARY BASIC CONFIGURATION CHANGES AS SPECIFIED HEREIN OR TO ISSUE CHANGE ORDERS IN ACCORDANCE WITH SECTION 4.6.

### 5.2.4 Role of TxDOT Consultants

TxDOT's consultants will assist TxDOT in the management and oversight of the Project and the Contract Documents. DB Contractor shall cooperate with TxDOT's consultants in the exercise of their respective duties and responsibilities in connection with the Project.

### 5.2.5 Role of and Cooperation with FHWA

DB Contractor acknowledges and agrees that FHWA will have certain approval rights with respect to the Project (including rights to approve the Project design and certain Change Orders), as well as the right to provide certain oversight and technical services with respect to the Project. In such cases, DB Contractor shall cooperate with FHWA in the reasonable exercise of FHWA's duties and responsibilities in connection with the Project.

### 5.2.6 Governmental Approvals and Third-Party Agreements

**5.2.6.1** TxDOT retains responsibility for processing all TxDOT-Provided Approvals (based on the TxDOT Schematic Design) that TxDOT has not obtained as of the Effective Date. DB Contractor shall obtain all other Governmental Approvals, including any modifications, renewals and extensions of the TxDOT-Provided Approvals, and, except to the extent the Contract Documents expressly provide TxDOT is responsible therefor, all third-party approvals and agreements required in connection with the Project, the Project Right of Way or the Work. Prior to submitting to a Governmental Entity any application for a Governmental Approval (or any proposed modification, renewal, extension or waiver of a Governmental Approval or provision thereof), DB Contractor shall submit the same, together with any supporting environmental studies and analyses, to TxDOT (a) for approval or (b) for review and comment, as specified in the Design-Build Specifications.

**5.2.6.2** Prior to any DB Contractor action to acquire Additional Properties or submittal for TxDOT review or approval of any modification of or deviation from any Governmental Approvals, including TxDOT-

Provided Approvals, DB Contractor shall first comply with, and obtain any consent or waiver required pursuant to, then-existing agreements between TxDOT and other Governmental Entities. These agreements include the following, as such agreement may be modified or revised:

(a) **Memorandum of Understanding** between Office of the Governor, Economic Development and Tourism Division and Texas Department of Transportation, Texas Parks and Wildlife Department, Texas Commission on the Arts, and Texas Historical Commission (April 2004 – current, to promote tourism in Texas);

(b) **Memorandum of Understanding** between TxDOT and Texas Parks and Wildlife Department (September 1, 2013);

(c) **Memorandum of Understanding** between the Texas Department of Transportation and the General Land Office (June 15, 2004);

(d) **Memorandum of Understanding** between the Texas Department of Transportation and the Texas Natural Resource Conservation Commission (applicable to its successor agency the Texas Commission on Environmental Quality) (May 16, 2013);

(e) **First Amended Programmatic Agreement** among the Federal Highway Administration, the Texas Department of Transportation, the Texas State Historic Preservation Officer, and the Advisory Council on Historic Preservation Regarding the Implementation of Transportation Undertakings (December 28, 2005, renewed in September 2010 and on December 7, 2015); and,

(f) **Memorandum of Understanding** between the Federal Highway Administration and the Texas Department of Transportation concerning State of Texas' Participation in the Project Delivery Program Pursuant to 23 U.S.C. 327, (December 16, 2014).

Upon DB Contractor's request, TxDOT will cooperate with DB Contractor in updating the foregoing list and providing DB Contractor with copies of the applicable agreements between TxDOT and other Governmental Entities. DB Contractor shall periodically visit and monitor TxDOT's website for updates to the above documents.

**5.2.6.3** At DB Contractor's request, TxDOT shall reasonably assist and cooperate with DB Contractor in obtaining from Governmental Entities the Governmental Approvals (including any modifications, renewals and extensions of existing Governmental Approvals from Governmental Entities) required to be obtained by DB Contractor under the Contract Documents. TxDOT and DB Contractor shall work jointly to establish a scope of work and budget for TxDOT's Recoverable Costs related to the assistance and cooperation TxDOT will provide. Subject to any agreed scope of work and budget and to any rights of DB Contractor under Section 4.6, DB Contractor shall fully reimburse TxDOT for all costs and expenses, including TxDOT's Recoverable Costs, TxDOT incurs in providing such cooperation and assistance, including those incurred to conduct further or supplemental environmental studies.

**5.2.6.4** DB Contractor shall comply with all conditions imposed by, and undertake all actions required by and all actions necessary to maintain in full force and effect, all Governmental Approvals, including performance of all environmental mitigation measures required by the Contract Documents or Governmental Approvals, except to the extent that responsibility for performance of such measures is expressly assigned to TxDOT in the Contract Documents.

**5.2.6.5** In the event that any Governmental Approvals required to be obtained by DB Contractor must formally be issued in TxDOT's name, DB Contractor shall undertake the necessary efforts to obtain such approvals subject to TxDOT's reasonable cooperation with DB Contractor, at DB Contractor's expense (except in connection with Governmental Approvals required due to a TxDOT-Directed Change), in accordance with this Section 5.2.6, including execution and delivery of appropriate applications and other documentation in form approved by TxDOT.

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

**5.2.6.7** DB Contractor shall be responsible for compliance with all applicable Laws in relation to Project Specific Locations and for obtaining any Environmental Approval or other Governmental Approval required in connection with Project Specific Locations.

**5.2.6.8** DB Contractor shall not enter into any agreement with any Governmental Entity, Utility, railroad, property owner or other third party having regulatory jurisdiction over any aspect of the Project or Work or having any property interest affected by the Project or the Work that in any way purports to obligate TxDOT, or states or implies that TxDOT has an obligation, to the third party to carry out any installation, design, construction, maintenance, repair, operation, control, supervision, regulation or other activity after the expiration or termination of this Design-Build Contract, unless TxDOT otherwise approves in writing in its discretion. DB Contractor has no power or authority to enter into any such agreement with a third party in the name or on behalf of TxDOT.

### 5.2.7 Software Compatibility

**5.2.7.1** Unless otherwise specifically stated in the Contract Documents, DB Contractor is responsible for assuring that all software it uses for any aspect of the Project is compatible with software used by TxDOT. Prior to using any software or version of software not then in use by TxDOT, DB Contractor must obtain written approval from TxDOT. In addition, DB Contractor shall provide to TxDOT staff, at DB Contractor's cost, working electronic copies of the software, any necessary licenses for TxDOT's use of the software and any training reasonably necessary to assure that TxDOT is able to implement compatible usage of all software utilized by DB Contractor.

**5.2.7.2** In addition to all other requirements set forth in the Contract Documents, DB Contractor shall submit all documents, correspondence and Submittals to TxDOT through TxDOT's dedicated SharePoint site for the Project unless otherwise directed by TxDOT. Nothing in this Section 5.2.7.2 overrides or otherwise alters or amends in any way any other provision regarding requirements for notice, correspondences, Submittals or other communications to TxDOT as set forth in the Contract Documents, including the requirements set forth in Section 9.1 of the Design-Build Agreement.

## 5.3 Nonconforming Work

### 5.3.1 Rejection, Removal and Replacement of Nonconforming Work

Nonconforming Work rejected by TxDOT shall be removed and replaced so as to conform to the requirements of the Contract Documents, at DB Contractor's cost and without any adjustment to the Price or any Completion Deadline or any other relief, and DB Contractor shall promptly take all

action necessary to prevent similar Nonconforming Work from occurring in the future. The fact that TxDOT may not have discovered the Nonconforming Work shall not constitute an acceptance of such Nonconforming Work. If DB Contractor fails to correct any Nonconforming Work within 10 days of receipt of notice from TxDOT requesting correction, or if such Nonconforming Work cannot be corrected within 10 days, and DB Contractor fails to (a) provide to TxDOT a schedule acceptable to TxDOT for correcting any such Nonconforming Work within such 10-day period, (b) commence such corrective Work within such 10-day period, and (c) thereafter diligently prosecute such correction in accordance with such approved schedule to completion, then TxDOT may cause the Nonconforming Work to be remedied or removed and replaced and may deduct the cost of doing so from any moneys due or to become due DB Contractor or obtain reimbursement from DB Contractor for such cost.

### 5.3.2 Agreement to Accept Nonconforming Work

If TxDOT agrees to accept Nonconforming Work without requiring it to be fully corrected, TxDOT shall be entitled to reimbursement of a portion of the Price in an amount equal to the greatest of (a) the amount deemed appropriate by TxDOT to provide compensation for known impacts to all affected Persons (including TxDOT) such as future maintenance and other costs relating to the Nonconforming Work, (b) the amount of the Price allocated to such Work, or (c) 100% of DB Contractor's cost savings associated with its failure to perform the Work in accordance with the requirements of the Contract Documents. Such reimbursement shall be payable to TxDOT within 10 days after DB Contractor's receipt of an invoice therefor. Alternatively, TxDOT may deduct the amount of such costs and expenses from any sums owed by TxDOT to DB Contractor pursuant to this Design-Build Contract. DB Contractor acknowledges and agrees that, subject to DB Contractor's right to correct Nonconforming Work in accordance with Section 5.3.1, including the timelines therein, TxDOT shall have discretion regarding acceptance or rejection of Nonconforming Work and shall have discretion with regard to the amount payable in connection therewith. Payment, reimbursement or deduction of the amounts owing to TxDOT under this Section 5.3.2 shall be a condition precedent to the acceptance of the applicable Nonconforming Work.

## 5.4 Cooperation with Representatives

DB Contractor shall cooperate with TxDOT and all representatives of TxDOT designated as described above.

## 5.5 Cooperation with Contractor

DB Contractor acknowledges that TxDOT has awarded or plans to award contracts for construction and other work at or near the Site, and that other projects (including other TxDOT projects and projects of Governmental Entities) at or near the Site may be in various stages of design and construction. DB Contractor and any DB Contractor-Related Entity shall fully cooperate and be solely responsible for coordinating with such other contractors, Governmental Entities and projects, and shall schedule and sequence the Work as reasonably necessary to accommodate the work of such other contractors and projects. Further, DB Contractor shall conduct its Work and perform its obligations under the Contract Documents without interfering with or hindering the progress or completion of the work being performed by other contractors or of the work relating to such other projects.

## 5.6 Coordination with Utility Owners and Adjacent Property Owners

DB Contractor shall coordinate with Utility Owners and owners of property adjoining the Project, and with their respective contractors, as more particularly described in the Contract Documents.

## 5.7 Interference by Other Contractors

If DB Contractor asserts that any of TxDOT's other contractors have caused damage to the Work, or have hindered or interfered with the progress or completion of the Work, then, DB Contractor's sole remedy shall be to seek recourse against such other contractors.

## 5.8 Cooperation with Railroads

Requirements for cooperation with railroads are set forth in Section 22.3.3 of the Design-Build Specifications.

## 5.9 Construction Surveying

Construction surveying requirements are set forth in Section 17.4 of the Design-Build Specifications.

## 5.10 Oversight and Inspection

### 5.10.1 Oversight, Inspection and Testing; Meetings

**5.10.1.1** DB Contractor Inspection and Testing

**5.10.1.1.1** DB Contractor shall perform the inspection, sampling, testing, quality control and quality assurance necessary for DB Contractor to comply with its obligations under the Contract Documents. All such testing and quality assurance activities shall be in accordance with both the approved Quality Management Plan and the QAP for DB Projects. In the event of a conflict between the QAP for DB Projects and the QMP, the QAP for DB Projects shall govern and control. Without in any way diminishing its obligations under the Contract Documents, DB Contractor may utilize information developed by TxDOT related to acceptance testing for off-site fabricated materials, as more particularly described in Attachment 5-1. In the event that DB Contractor elects to utilize such information, TxDOT may recover as TxDOT Recoverable Costs its reasonable expenses related to the performance of such services and the development of such information in accordance with the procedures described in Attachment 5-1.

**5.10.1.1.2** NOTWITHSTANDING ANY OTHER PROVISION OF THIS AGREEMENT, DB CONTRACTOR ACKNOWLEDGES AND AGREES THAT TxDOT, TO THE EXTENT PERMITTED BY LAW, WILL NOT BE RESPONSIBLE OR BEAR ANY LIABILITY FOR, AND HEREBY RELEASES TxDOT FROM, ANY DAMAGES, INCREASED COSTS, REVENUE LOSSES, DELAYS, OR OTHER IMPACTS TO DB CONTRACTOR OR TO ANY DB CONTRACTOR-RELATED ENTITY, ARISING AS A RESULT OF THE SERVICES PERFORMED BY TxDOT PURSUANT TO ATTACHMENT 5-1, INCLUDING THOSE ARISING FROM ANY NEGLIGENT ACT OR OMISSION OF TxDOT IN PERFORMING THE SERVICES PURSUANT TO ATTACHMENT 5-1, OR FAILURE OF OR DEFECT IN ANY MATERIAL OR PRODUCT INSPECTED OR TESTED BY TxDOT IN PERFORMING THE SERVICES PURSUANT TO ATTACHMENT 5-1, REGARDLESS OF WHEN SUCH FAILURE OR DEFECT MAY OCCUR OR BE DISCOVERED.

**5.10.1.2** Oversight by TxDOT and Others

**5.10.1.2.1** TxDOT and its Authorized Representative shall have the right at all times to monitor, inspect, sample, measure, attend, observe or conduct tests and investigations, and conduct any other oversight respecting any part or aspect of the Project or the Work, to the extent necessary or advisable to (a) comply with FHWA, U.S. Army Corps of Engineers or other applicable federal agency requirements and (b) verify DB Contractor's compliance with the Contract Documents and the Project Management Plan as provided in Section 5.13.4. TxDOT shall conduct such activity in accordance with DB Contractor's safety procedures and manuals, and in a manner that does not unreasonably interfere with normal construction activity or normal operation and maintenance of the Project.

**5.10.1.2.2** TxDOT shall have the right to attend and witness any tests and verifications to be conducted pursuant to the Design-Build Specifications and the Project Management Plan. DB Contractor shall provide to TxDOT all test results and reports, which may be provided in electronic format, in accordance with the Design-Build Specifications.

**5.10.1.2.3** At all points in performance of the Work at which specific inspections or approvals by TxDOT are required by the Contract Documents, the CQMP, or the Project Management Plan, DB Contractor shall not proceed beyond that point until TxDOT has made such inspection or approval or waived its right in writing to inspect or approve. In addition, when any Utility Owner is to accept or pay for a portion of the cost of the Work, its respective representatives have the right to oversee, inspect and test the work. Such oversight, inspection or testing does not make such Person a party to this Design-Build Contract nor will it change the rights of the Parties. DB Contractor hereby consents to such oversight, inspection and owner verification testing. Upon request from TxDOT, DB Contractor shall furnish information to such Persons as are designated in such request and shall permit such Persons access to the Site and all parts of the Work.

**5.10.1.2.4** DB Contractor at all times shall coordinate and cooperate, and require its Subcontractors to coordinate and cooperate, with TxDOT and its Authorized Representative to facilitate TxDOT's oversight activities. DB Contractor shall cause its representatives to be available at all reasonable times for consultation with TxDOT.

**5.10.1.2.5** Without limiting the foregoing, DB Contractor shall afford TxDOT and its Authorized Representative (a) safe and unrestricted access to the Project at all times, (b) safe access during normal business hours to DB Contractor's Project offices and operations buildings, and (c) unrestricted access to data related to the Work, subject to Section 5.13.1. Without limiting the foregoing, DB Contractor shall deliver to TxDOT upon request accurate and complete books, records, data and information regarding Work, the Project and the Utility Adjustment Work, in the format required by the Design-Build Specifications.

**5.10.1.2.6** Nothing in the Contract Documents shall preclude, and DB Contractor shall not interfere with, any review or oversight of Submittals or of Work that the FHWA may desire to conduct.

**5.10.1.3** Obligation to Uncover Finished Work

**5.10.1.3.1** DB Contractor shall inform TxDOT in writing of any part of the Work that is about to be covered and offer a full and adequate opportunity to TxDOT to examine by inspection, testing, or other means such part of the Work before it is covered. At all times before Final Acceptance, DB Contractor shall permit examination by TxDOT, including by removing or uncovering any part of the finished

Work as directed by TxDOT. After examination by TxDOT and any other Persons designated by TxDOT, DB Contractor shall restore the Work to the standard required by the Contract Documents.

**5.10.1.3.2** If any Work examined by TxDOT is found not to be in conformance with the requirements of the Contract Documents, then uncovering, removing and restoring all Work at TxDOT's direction and recovery of any delay to any Critical Path occasioned thereby shall be at DB Contractor's cost and DB Contractor shall not be entitled to any adjustment to the Price or any Completion Deadline or any other relief. Furthermore, if DB Contractor performs any Work or uses any materials without adequate notice to and opportunity for prior inspection by TxDOT (if applicable) or without inspection in accordance with the Contract Documents and the Project Management Plan, TxDOT may direct the Work to be uncovered, removed or restored at DB Contractor's cost and without an adjustment to the Price or any Completion Deadline or any other relief, even if TxDOT determines that all of the Work is in conformance with the requirements of the Contract Documents and the Project Management Plan.

**5.10.1.3.3** Except with respect to Work done or materials used as described in the foregoing sentence, if TxDOT determines that all Work examined by TxDOT under this Section 5.10.1.3.3 is in conformance with the requirements of the Contract Documents and the Project Management Plan, then any delay in any Critical Path from uncovering, removing and restoring Work at TxDOT's direction shall be considered a TxDOT-Caused Delay, and DB Contractor shall be entitled to a Change Order for the cost of such efforts and recovery of any delay to any Critical Path occasioned thereby.

**5.10.1.4** Meetings

DB Contractor shall conduct regular progress meetings with TxDOT at least once a month during the course of the Work. In addition, TxDOT and DB Contractor, through their respective Authorized Representatives, shall meet from time to time at the other Party's request to discuss and resolve matters relating to the Work or Project. DB Contractor shall schedule all meetings with TxDOT at a date, time and place reasonably convenient to both Parties and, except in the case of urgency, shall provide TxDOT with written notice and a meeting agenda at least three Business Days in advance of each meeting.

**5.10.1.4.1** Materials on Hand Meeting

DB Contractor shall conduct a meeting with TxDOT in advance of NTP2 to discuss Materials on Hand that the DB Contractor anticipates incorporating into the Work. DB Contractor shall conduct additional meetings with TxDOT to discuss changes to the anticipated Materials on Hand that will be incorporated into the Work as necessary.

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

**5.10.2.1** Oversight and Acceptance

The oversight, spot checks, inspections, verifications, audits, tests, reviews, acceptances and approvals conducted by TxDOT and other Persons do not constitute acceptance of Nonconforming Work (except in limited circumstances as expressly provided in Section 5.3.2) or waiver of any warranty or legal or equitable right with respect thereto. TxDOT may request remedies for Nonconforming Work or identify additional Work that must be done to bring the Work into compliance with the requirements of the Contract Documents at any time prior to Final Acceptance,

whether or not previous oversight, spot checks, inspections, verifications, audits, tests, reviews, acceptances or approvals were conducted or waived by TxDOT or any such Persons.

**5.10.2.2** No Estoppel

DB Contractor shall not be relieved of obligations to perform the Work in accordance with the Contract Documents, or any of its Warranty or indemnity obligations, as the result of oversight, spot checks, audits, reviews, tests or inspections performed by any Persons, approvals or acceptances made by any Persons, or any failure of any Person to take such action. TxDOT shall not be precluded or estopped, by any measurement, estimate or certificate made either before or after Final Acceptance, or by making any payment, from showing that any such measurement, estimate or certificate is incorrectly made or untrue, or from showing the true amount and character of the Work performed and materials furnished by DB Contractor, or from showing that the Work or materials do not conform in fact to the requirements of the Contract Documents. Notwithstanding any such measurement, estimate or certificate, or payment made in accordance therewith, TxDOT shall not be precluded or estopped from recovering from DB Contractor and its Guarantors or Sureties such damages as TxDOT may sustain by reason of DB Contractor's failure to comply or to have complied with the terms of the Contract Documents.

## 5.11 Substantial Completion

### 5.11.1 Requirements

**5.11.1.1** TxDOT will issue a written Certificate of Substantial Completion at such time as Substantial Completion occurs.

**5.11.1.2** In determining whether Substantial Completion has occurred, TxDOT may consider and require satisfaction of the following criteria:

(a) Whether all major safety features are installed and functional, including guard rails, striping and delineations, concrete traffic barriers, bridge railings, cable safety systems, metal beam guard fences, safety end treatments, terminal anchor sections and crash attenuators;

(b) Whether required illumination is installed and functional;

(c) Whether required signs and signals are installed and functional;

(d) Whether the need for temporary traffic controls or for Lane Closures at any time has ceased (except for any then required for maintenance activities, and except for temporary Lane Closures during hours of low traffic volume in accordance with and as permitted by the Traffic Management Plan solely in order to complete Punch List items);

(e) Whether all lanes of traffic (including ramps, interchanges, overpasses, underpasses, other crossings and access roads) set forth in the Released for Construction Documents are in their final configuration and available for public use;

(f) Whether DB Contractor has otherwise completed the Work in accordance with the Contract Documents and Released for Construction Documents, including the construction of noise/sound walls and establishment of vegetative ground cover for erosion control, such that the Project is in a condition that it can be used for normal and

safe vehicular travel in all lanes and at all points of entry and exit, subject only to Punch List items and other items of work that do not affect the ability to safely open for such normal use by the traveling public; and

(g) Any additional conditions set forth in the DBA are fulfilled.

**5.11.1.3** The Parties shall disregard the status of the landscaping (except the establishment of vegetative ground cover for erosion control) and aesthetic features (except noise/sound walls) included in the Released for Construction Documents in determining whether Substantial Completion has occurred, except to the extent that its later completion will affect public safety or satisfaction of the criterion in Section 5.11.1.2(f).

**5.11.2 Notification of Substantial Completion**

**5.11.2.1** DB Contractor shall provide TxDOT with not less than 20 days' prior written notification of the date DB Contractor determines it will achieve Substantial Completion. During any such 20-day period, DB Contractor and TxDOT shall meet and confer and exchange information on a regular cooperative basis with the goal being TxDOT's orderly, timely inspection and review of the Project and the applicable Construction Documents, and TxDOT's issuance of the Certificate of Substantial Completion.

**5.11.2.2** During such 20-day period, TxDOT shall conduct an inspection of the Project and its components, a review of the applicable Construction Documents and such other investigation as may be necessary to evaluate whether Substantial Completion is achieved.

**5.11.2.3** DB Contractor shall provide TxDOT a second written notification when DB Contractor determines it has achieved Substantial Completion. Within five days after expiration of the 20-day period and TxDOT's receipt of the second notification, TxDOT shall either (a) issue the Certificate of Substantial Completion or (b) notify DB Contractor in writing setting forth, as applicable, why the Project has not reached Substantial Completion. If TxDOT and DB Contractor cannot agree as to the date of Substantial Completion, such Dispute shall be resolved according to the procedures for resolving Disputes set forth in this Design-Build Contract.

**5.11.3 Punch List**

**5.11.3.1** The Project Management Plan shall establish procedures and schedules for preparing a Punch List and completing Punch List work. Such procedures and schedules shall conform to the following provisions.

**5.11.3.2** The schedule for preparation of the Punch List either shall be consistent and coordinated with the inspections regarding Substantial Completion, or shall follow such inspections.

**5.11.3.3** DB Contractor shall prepare and maintain the Punch List. DB Contractor shall deliver to TxDOT not less than five days' prior written notice stating the date when DB Contractor will commence Punch List field inspections and Punch List preparation. TxDOT may, but is not obligated to, participate in the development of the Punch List. Each Party shall have the right to add items to the Punch List and none shall remove any item added by any other without such other's express permission. If DB Contractor objects to the addition of an item by TxDOT, the item shall be noted as included under protest, and if the Parties thereafter are unable to reconcile the protest, the Dispute shall be resolved according to the procedures for resolving Disputes set forth in this Design-Build Contract.

DB Contractor shall deliver to TxDOT a true and complete copy of the Punch List, and each modification thereto, as soon as it is prepared.

**5.11.3.4** DB Contractor shall immediately commence work on the Punch List items and diligently prosecute such work to completion, consistent with the Contract Documents, within the time periods to be set forth in the Project Management Plan and in any case by the applicable Final Acceptance Deadline.

## 5.12 Final Acceptance

### 5.12.1 Final Acceptance

**5.12.1.1** Promptly after achieving Substantial Completion, DB Contractor shall perform all remaining Work, including (a) completion of all Punch List items, (b) all landscaping, and (c) aesthetic features. DB Contractor shall prepare and adhere to a timetable for planting and establishing the landscaping, taking into account weather conditions necessary for successful planting and growth, which timetable shall in any event provide for landscaping to be planted prior to Final Acceptance.

**5.12.1.2** TxDOT will issue a Certificate of Final Acceptance at such time as all of the following conditions have been satisfied:

(a) TxDOT has issued the Certificate of Substantial Completion;

(b) All Punch List items shall have been completed and delivered to the reasonable satisfaction of TxDOT;

(c) All aesthetic and landscaping features for the Project have been completed in accordance with Item 23 of the Design-Build Specifications and the plans and designs prepared in accordance therewith;

(d) TxDOT has received the as-built schedule as required by Section 8.5.1.5;

(e) TxDOT has received a complete set of the Record Documents in form and content required by Table 2 in Attachment 4-1;

(f) All Utility Adjustment Work and other work that DB Contractor is obligated to perform for or on behalf of third parties with respect to the Project has been accepted by such third parties, and DB Contractor has paid for all work by third parties that DB Contractor is obligated to pay for, other than disputed amounts;

(g) All component parts, plans and documentation of the Project Management Plan required to be prepared, submitted and approved prior to Final Acceptance have been so prepared, submitted and approved;

(h) All Submittals required by the Project Management Plan or Contract Documents to be submitted to and approved by TxDOT prior to Final Acceptance have been submitted to and approved by TxDOT, in the form and content required by the Project Management Plan or Contract Documents;

(i) All manufacturers' warranties, guarantees, instruction sheets, parts lists, and other product data have been submitted to TxDOT;

(j) All personnel, supplies, equipment, waste materials, rubbish and temporary facilities of each DB Contractor-Related Entity shall have been removed from the Project ROW, DB Contractor shall restore and repair all damage or injury arising from such removal to the satisfaction of TxDOT, and the Site shall be in good working order and condition;

(k) DB Contractor shall have delivered to TxDOT a certification representing that there are no outstanding claims of DB Contractor or claims, Liens or stop notices of any Subcontractor, Supplier, laborer, Utility Owner or other Persons with respect to the applicable Work, other than any previously submitted unresolved claims of DB Contractor and any claims, Liens or stop notices of a Subcontractor, Supplier, laborer, Utility Owner or other Persons being contested by DB Contractor (in which event the certification shall include a list of all such matters with such detail as is requested by TxDOT and, with respect to all claims, Liens or stop notices of a Subcontractor, Supplier, laborer, Utility Owner and other Person, shall include a representation by DB Contractor that it is diligently and in good faith contesting such matters by appropriate legal proceedings that shall operate to prevent the enforcement or collection of the same). For purposes of such certificate, the term "claim" shall include all matters or facts that may give rise to a claim;

(l) DB Contractor has paid in full all liquidated damages or other fees or charges, including Liquidated Damages, Key Personnel Change Fees and Lane Rental Charges that are owing to TxDOT pursuant to this Design-Build Contract and are not in Dispute, and has provided to TxDOT reasonable security for the full amount of all liquidated damages or other fees or charges, including Liquidated Damages, Key Personnel Change Fees and Lane Rental Charges that may then be the subject of an unresolved Dispute.

(m) DB Contractor shall have delivered to TxDOT a certification representing there exists no uncured DB Contractor Default and no uncured DB Contractor Defaults exist; and

(n) All of DB Contractor's other obligations under the Contract Documents (other than obligations that by their nature are required to be performed after Final Acceptance) shall have been satisfied in full or waived.

**5.12.1.3** DB Contractor shall provide TxDOT with written notification when DB Contractor determines it has achieved Final Acceptance. During the 15-day period following receipt of such notification, DB Contractor and TxDOT shall meet and confer and exchange information on a regular cooperative basis with the goal being TxDOT's orderly, timely inspection and review of the Project and the Record Documents, and TxDOT's issuance of a Certificate of Final Acceptance.

**5.12.1.4** During such 15-day period, TxDOT shall conduct an inspection of the Punch List items, a review of the Record Documents and such other investigation as may be necessary to evaluate whether the conditions to Final Acceptance are satisfied.

**5.12.1.5** Within five days after expiration of such 15-day period, TxDOT shall either (a) issue a Certificate of Final Acceptance or (b) notify DB Contractor in writing setting forth why Final Acceptance has not been achieved. If TxDOT and DB Contractor cannot agree as to the date of Final Acceptance, such Dispute shall be resolved according to the procedures for resolving Disputes set forth in this Design-Build Contract.

### 5.12.2 Early Opening

Prior to Substantial Completion, TxDOT shall have the right to open to traffic portions of the Project, to the extent such portions are safe and necessary or advisable, in TxDOT's sole determination, for traffic circulation. No early openings shall constitute Substantial Completion or Final Acceptance of the Project or waive the requirements thereof.

### 5.12.3 Clayton Act Assignment

DB Contractor shall assign to TxDOT all right, title and interest in and to all claims and causes of action it may have under Section 4 of the Clayton Act (15 U.S.C. Sec. 15), arising from purchases of goods, services or materials pursuant to the Contract Documents or any Subcontract. This assignment shall be made and become effective at the time TxDOT tenders Final Payment to DB Contractor, without further acknowledgment by the Parties.

## 5.13 Documents, Records and Audits

### 5.13.1 Escrowed Proposal Documents

Prior to execution of this Design-Build Contract, DB Contractor delivered to TxDOT one copy of all cost, unit pricing, price quote and other documentary information used in preparation of the Price (the "EPDs"). Upon execution of this Design-Build Contract, the EPDs shall be held in locked fireproof cabinets supplied by DB Contractor and located in TxDOT's project office with the key held only by DB Contractor. Concurrently with approval of each Change Order or amendment to any Contract Document, one copy of all documentary information used in preparation of the Change Order or amendment shall be added to the cabinet to be held with the other EPDs. The EPDs will be held in such cabinet or otherwise maintained until all of the following have occurred: (a) 180 days have elapsed from the later of Final Acceptance or termination of this Design-Build Contract, as applicable; (b) all Claims or Disputes regarding the Work have been settled; (c) all Warranty Terms have expired pursuant to this Design-Build Contract; and (d) Final Payment has been made and accepted.

#### 5.13.1.1 Availability for Review

The EPDs shall be available during business hours for joint review by DB Contractor, TxDOT and TxDOT's consultants, and any dispute resolver in accordance with Section 4.9, in connection with approval of the Project Schedule, negotiation of Change Orders and resolution of Claims or Disputes under the Contract Documents, and also as described in Section 5.13.1.6. TxDOT shall be entitled to review all or any part of the EPDs in order to satisfy itself regarding the applicability of the individual documents to the matter at issue.

#### 5.13.1.2 Proprietary Information

The EPDs are, and shall always remain, the property of DB Contractor and shall be considered to be in DB Contractor's possession, subject to TxDOT's and TxDOT consultants' right to review the EPDs as provided in this Section 5.13.1. DB Contractor will have and control the keys to the filing cabinet containing the EPDs. TxDOT acknowledges that DB Contractor may consider that the EPDs constitute trade secrets or proprietary information. TxDOT shall have the right to copy the EPDs for the purposes set forth in this Section 5.13.1, provided that the Parties execute a mutually agreeable confidentiality agreement with respect to EPDs that constitute trade secrets or

proprietary information, which confidentiality agreement shall explicitly acknowledge that it is subject to applicable Law (including the Public Information Act).

**5.13.1.3** Representation

DB Contractor represents and warrants that the EPDs constitute all documentary information used in the preparation of its Price. DB Contractor agrees that no other price proposal preparation information will be considered in resolving Disputes or Claims. DB Contractor further agrees that the EPDs are not part of the Contract Documents and that nothing in the EPDs shall change or modify any Contract Document.

**5.13.1.4** Contents of EPDs

The EPDs shall, inter alia, clearly detail how each cost or price included in the Proposal has been determined and shall show cost or price elements in sufficient detail as is adequate to enable TxDOT to understand how DB Contractor calculated the Price. The EPDs provided in connection with quotations and Change Orders shall, inter alia, clearly detail how the total cost or price and individual components of that cost or price were determined. The EPDs shall itemize the estimated costs or price of performing the required work separated into cost or price categories identified in the Price breakdown form included with the Proposal to present a detailed estimate of costs and price, including at a minimum, direct labor, repair labor, equipment ownership and operation, expendable materials, permanent materials, supplies, Subcontract costs, plant and equipment, indirect costs, contingencies, markup, overhead and profit. The EPDs shall itemize the estimated payment and performance bonds costs and the annual costs of insurance premiums for each coverage required to be provided by DB Contractor under Section 3.5. The EPDs shall include all assumptions, detailed quantity takeoffs, price reductions and discounts, rates of production and progress calculations, and quotes from Subcontractors used by DB Contractor to arrive at the Price, and any adjustments to the Price under this Design-Build Contract.

**5.13.1.5** Form of EPDs

Except as otherwise provided in the RFP, DB Contractor shall submit the EPDs in such format as is used by DB Contractor in connection with its Proposal. DB Contractor represents and warrants that the EPDs provided with the Proposal were personally examined by an authorized officer of DB Contractor prior to delivery, and that the EPDs meet the requirements of Section 5.13.1.4, DB Contractor further represents and warrants that all EPDs provided were or will be personally examined prior to delivery by an authorized officer of DB Contractor, and that they shall meet the requirements of Section 5.13.1.4.

**5.13.1.6** Review by TxDOT to Confirm Completeness

TxDOT may at any time conduct a review of the EPDs to determine whether they are complete. If TxDOT determines that any data is missing from an EPD, DB Contractor shall provide such data within three Business Days after delivery of TxDOT's request for such data. At that time of its submission to TxDOT, such data will be date stamped, labeled to identify it as supplementary EPD information and added to the EPD. DB Contractor shall have no right to add documents to the EPDs except upon TxDOT's request. The EPDs associated with any Change Order or Price adjustment under this Design-Build Contract shall be reviewed, organized and indexed in the same manner described in Section 5.12.3 of the ITP.

**5.13.2 Financial Reporting Requirements**

**5.13.2.1** DB Contractor shall deliver to TxDOT financial and narrative reports, statements, certifications, budgets and information as and when required under the Contract Documents.

**5.13.2.2** DB Contractor shall furnish, or cause to be furnished, to TxDOT such information and statements as TxDOT may reasonably request from time to time for any purpose related to the Project, the Work or the Contract Documents. In addition, DB Contractor shall deliver to TxDOT the following financial statements for each Guarantor, at the times specified below:

**5.13.2.2.1** Within 60 days after the end of each fiscal quarter, duplicate copies of the balance sheet and a consolidated statement of earnings of the Guarantor and its consolidated subsidiaries for such quarter and for the period from the beginning of the then current fiscal year to the end of such quarter, setting forth in comparative form the figures for the corresponding periods during the previous fiscal year, all in reasonable detail and certified as complete and correct, subject to changes resulting from year-end adjustments, by the chief financial officer of the Guarantor;

**5.13.2.2.2** Within 120 days after the end of each fiscal year, duplicate copies of the financial statements (which shall include a balance sheet and a consolidated statement of financial condition of the Guarantor and its consolidated subsidiaries at the end of such year, and statements of earnings, changes in financial position of the Guarantor and its consolidated subsidiaries for such year, and all related notes to the financial statements, setting forth in each case in comparative form the figures for the previous fiscal year), all in reasonable detail and accompanied by an opinion thereon of an independent public accountant of recognized national standing selected by the Guarantor, which opinion shall state that such financial statements have been prepared in accordance with Generally Accepted Accounting Principles consistently applied, and that the examination of such accountants in connection with such financial statements has been made in accordance with generally accepted auditing standards, and accordingly, included such tests of the accounting records and such other auditing procedures as were considered necessary in the circumstances. If financial statements are prepared in accordance with principles other than U.S. GAAP, a letter from the certified public accountant of the applicable entity, discussing the areas of the financial statements that would be affected by a conversion to U.S. GAAP is required; and

**5.13.2.2.3** Upon request of TxDOT for particular fiscal quarters, copies of all other financial statements and information reported by the Guarantor to its shareholders generally and of all reports filed by the Guarantor with the Securities Exchange Commission under Sections 13, 14 or 15(d) of the Exchange Act, to be provided to TxDOT as soon as practicable after furnishing such information to the Guarantor's shareholders or filing such reports with the Securities and Exchange Commission, as the case may be.

**5.13.2.3** DB Contractor shall cooperate and provide, and shall cause the Subcontractors to cooperate and provide, such information as determined necessary or desirable by TxDOT in connection with any Project financing. Without limiting the generality of the foregoing, DB Contractor shall provide such information deemed necessary or desirable by TxDOT for inclusion in TxDOT's securities disclosure documents and in order to comply with Securities and Exchange Commission Rule 15c2-12 regarding certain periodic information and notice of material events. DB Contractor shall provide customary representations and warranties to TxDOT and the capital markets as to the correctness, completeness and accuracy of any information furnished.

**5.13.2.4** DB Contractor shall cooperate and provide, and shall cause the Subcontractors to cooperate and provide, such information as is necessary or requested by TxDOT to assist or facilitate the

submission by TxDOT of any documentation, reports or analysis required by the State, FHWA or any other Governmental Entity with jurisdiction over the Project.

**5.13.2.5** All reports and information delivered by DB Contractor under Sections 5.13.2.3 and 5.13.2.4 shall also be delivered electronically, to the extent electronic files exist, and be suitable for posting on the web.

**5.13.3 Subcontract Pricing Documents**

DB Contractor shall require each Major Subcontractor to submit to DB Contractor a copy of all documentary information used in determining its Subcontract price (including the price for Subcontract work included in any Change Order), immediately prior to executing the Subcontract and each Subcontract change order, to be held in the same manner as the EPDs and which shall be accessible by TxDOT, DB Contractor and Dispute resolvers, on terms substantially similar to those contained herein. Each Major Subcontract shall include a representation and warranty from the Subcontractor, for the benefit of DB Contractor and TxDOT, stating that its submission in the EPDs, constitutes all the documentary information used in establishing its Subcontract price, and agreeing to provide a sworn certification in favor of DB Contractor and TxDOT together with each supplemental set of EPDs, stating that the information contained therein is complete, accurate and current. Each Subcontract that is not subject to the foregoing requirement shall include a provision requiring the Subcontractor to preserve all documentary information used in establishing its Subcontract price and to provide such documentation to DB Contractor and TxDOT in connection with any Claim made by such Subcontractor.

**5.13.4 Maintenance and Inspection of Records**

**5.13.4.1** Except for EPDs (which shall be maintained as set forth in Section 5.13.1), DB Contractor shall keep and maintain in the county in which the Project is located, or in another location TxDOT approves in writing, all of DB Contractor's books, records and documents relating to the Project, Project Right of Way, Utility Adjustments, or Work, including copies of all original documents delivered to TxDOT. DB Contractor shall keep and maintain such books, records, and documents in accordance with the Texas State Records Retention Schedule and TxDOT's file plan, applicable provisions of the Contract Documents, and review of the Project Management Plan, and in accordance with Good Industry Practice. DB Contractor shall notify TxDOT where such records and documents are kept.

**5.13.4.2** DB Contractor shall make all its books, records, and documents available for inspection by TxDOT and its authorized representatives and legal counsel at DB Contractor's principal offices in Texas or at TxDOT's project office for EPDs, at all times during normal business hours, without charge. DB Contractor shall provide copies thereof to TxDOT, or make available for review to TxDOT (a) as and when expressly required by the Contract Documents or (b) for those not expressly required, upon request and at no expense to DB Contractor; provided, however, that any costs associated with such copies shall be reasonable. TxDOT may conduct any such inspection upon 48 hours' prior written notice or unannounced and without prior notice where there is good faith suspicion of fraud. The right of inspection includes the right to make extracts and take notes. The provisions of this Section 5.13.4.2 are subject to the following:

**5.13.4.2.1** DB Contractor reserves the right to assert exemptions from disclosure for information that would be exempt under applicable State Law from discovery or introduction into evidence in legal actions, provided that in no event shall DB Contractor be entitled to assert any such exemption to withhold traffic and revenue data; and

**5.13.4.2.2** DB Contractor shall retain records and documents for the respective time periods set forth in Texas State Records Retention Schedule or, if not addressed therein, for a minimum of five years after the date the record or document is generated; provided that if the Contract Documents specify any different time period for retention of particular records, such time period shall control. Notwithstanding the foregoing, all records which relate to Claims and Disputes being processed or actions brought under the procedures for resolving Disputes shall be retained and made available until any later date that such Claims, Disputes and actions are finally resolved.

**5.13.5 Audits**

**5.13.5.1** In addition to all of TxDOT's other rights set forth herein, including under Section 5.10.1.2, TxDOT shall have such rights to review and audit DB Contractor, its Subcontractors and their respective books and records as and when TxDOT deems necessary in connection with Claims or Disputes or for purposes of verifying compliance with the Contract Documents and applicable Law. Without limiting the foregoing, TxDOT shall have the right to audit the Project Management Plan and compliance therewith, including the right to inspect Work and activities and to verify the accuracy and adequacy of the Project Management Plan and its component parts, plans and other documentation. TxDOT may conduct any such audit of books and records upon 48 hours' prior written notice or unannounced and without prior notice where there is good faith suspicion of fraud.

**5.13.5.2** All Claims or Disputes filed against TxDOT shall be subject to audit at any time following the filing of the Claim or Dispute. The audit may be performed by employees of TxDOT or by an auditor under contract with TxDOT. No notice is required before commencing any audit within (i) 60 days after Final Acceptance or (ii) 60 days after termination of this Design-Build Contract. Thereafter, TxDOT shall provide 20 days' notice to DB Contractor, any Subcontractors or their respective agents before commencing an audit. DB Contractor, Subcontractors or their agents shall provide adequate facilities, acceptable to TxDOT, for the audit during normal business hours. DB Contractor, Subcontractors or their agents shall cooperate with the auditors. Failure of DB Contractor, Subcontractors or their agents to maintain and retain sufficient records to allow the auditors to verify all or a portion of the Claim or Dispute or to permit the auditor access to the books and records of DB Contractor, Subcontractors or their agents shall constitute a waiver of the Claim or Dispute and shall bar any recovery thereunder. At a minimum, DB Contractor shall make the following documents available to the auditors:

(a) Daily time sheets and supervisor's daily reports;

(b) Union agreements;

(c) Insurance, welfare, and benefits records;

(d) Payroll registers;

(e) Earnings records;

(f) Payroll tax forms;

(g) Material invoices and requisitions;

(h) Material cost distribution work sheet;

(i) Equipment records (list of company equipment, rates, etc.);

(j) Subcontractors' (including Suppliers) invoices;

(k) Subcontractors' and agents' payment certificates;

(l) Canceled checks (payroll, Subcontractors and Suppliers);

(m) Job cost report;

(n) Job payroll ledger;

(o) General ledger;

(p) Cash disbursements journal;

(q) Project Schedules;

(r) All documents that relate to each and every Claim or Dispute, together with all documents that support the amount of damages as to each Claim or Dispute; and

(s) Work sheets used to prepare the Claim or Dispute establishing the cost components for items of the Claim or Dispute, including labor, benefits and insurance, materials, equipment, subcontractors, and all documents that establish the time periods, individuals involved, the hours for the individuals, and the rates for the individuals.

**5.13.5.3** Full compliance by DB Contractor with the provisions of this Section 5.13.5 is a contractual condition precedent to DB Contractor's right to seek relief under Section 4.9.

**5.13.5.4** Any rights of the FHWA to review and audit DB Contractor, its Subcontractors and their respective books and records are set forth in Attachment 3-1.

**5.13.5.5** TxDOT's rights of audit include the right to observe the business operations of DB Contractor and its Subcontractors to confirm the accuracy of books and records.

**5.13.5.6** DB Contractor represents and warrants the completeness and accuracy of all information it or its agents provides in connection with TxDOT audits, and shall cause all Subcontractors other than TxDOT and Governmental Entities acting as Subcontractors to warrant the completeness and accuracy of all information such Subcontractors or their agents provide in connection with TxDOT audits.

**5.13.5.7** DB Contractor's internal and third-party quality and compliance auditing responsibilities shall be set forth in the Project Management Plan, consistent with the audit requirements referred to in this Section 5.13.5.

**5.13.5.8** Nothing in the Contract Documents shall in any way limit the constitutional and statutory powers, duties and rights of elected State officials, including the independent rights of the State auditor, in carrying out his or her legal authority. DB Contractor understands and acknowledges that (a) the State auditor may conduct an audit or investigation of any Person receiving funds from the State directly under this Design-Build Contract or indirectly through a Subcontract, (b) acceptance of funds directly under this Design-Build Contract or indirectly through a Subcontract acts as acceptance of the authority of the State auditor, under the direction of the legislative audit committee, to conduct an audit or investigation in connection with those funds, and (c) a Person

that is the subject of an audit or investigation must provide the State auditor with access to any information the State Auditor considers relevant to the investigation or audit.

**5.13.6 Public Information Act**

**5.13.6.1** DB Contractor acknowledges and agrees that all records, documents, drawings, plans, specifications and other materials in TxDOT's possession, including materials submitted by DB Contractor, are subject to the provisions of the Public Information Act. To the extent that this Design-Build Contract involves the exchange or creation of "public information" (as such term is defined by the Texas Public Information Act) that TxDOT collects, assembles or maintains or has the right of access to, and is not otherwise excepted from disclosure under the Public Information Act, DB Contractor is required, at no additional charge to the State, to make any such information available in PDF format, which is accessible by the public. If DB Contractor believes information or materials submitted to TxDOT constitute trade secrets, proprietary information or other information that is excepted from disclosure under the Public Information Act, DB Contractor shall be solely responsible for specifically and conspicuously designating that information by placing "CONFIDENTIAL" in the center header of each such page affected, as it determines to be appropriate. Any specific proprietary information, trade secrets or confidential commercial and financial information shall be clearly identified as such, and shall be accompanied by a concise statement of reasons supporting the claim. Nothing contained in this Section 5.13.6 shall modify or amend requirements and obligations imposed on TxDOT by the Public Information Act or other applicable Law, and the provisions of the Public Information Act or other Laws shall control in the event of a conflict between the procedures described above and the applicable Law. DB Contractor is advised to contact legal counsel concerning such Law and its application to DB Contractor.

**5.13.6.2** If TxDOT receives a request for public disclosure of materials marked "CONFIDENTIAL," TxDOT will use reasonable efforts to notify DB Contractor of the request and give DB Contractor an opportunity to assert, in writing and at its sole expense, a claimed exception under the Public Information Act or other applicable Law within the time period specified in the notice issued by TxDOT and allowed under the Public Information Act. Under no circumstances, however, will TxDOT be responsible or liable to DB Contractor or any other Person for the disclosure of any such labeled materials, whether the disclosure is required by Law, or court order, or occurs through inadvertence, mistake or negligence on the part of TxDOT or its officers, employees, contractors or consultants.

**5.13.6.3** In the event of any proceeding or litigation concerning the disclosure of any material submitted by DB Contractor to TxDOT, TxDOT's sole involvement will be as a stakeholder retaining the material until otherwise ordered by a court or such other authority having jurisdiction with respect thereto, and DB Contractor shall be fully responsible for otherwise prosecuting or defending any action concerning the materials at its sole cost and risk; provided, however, that TxDOT reserves the right, in its discretion, to intervene or participate in the litigation in such manner as it deems necessary or desirable. Except in the case of TxDOT's voluntary intervention or participation in litigation, DB Contractor shall pay and reimburse TxDOT within 30 days after receipt of written demand and reasonable supporting documentation for all costs and fees, including attorneys' fees and costs, TxDOT incurs in connection with any litigation, proceeding or request for disclosure.

**5.13.7 Ownership of Documents**

Subject to this Section 5.13.7, all data, sketches, charts, calculations, plans, specifications, electronic files, correspondence and other documents created or collected under the terms of the Contract Documents shall be considered "works made for hire" for which TxDOT owns the

copyright. Design Documents shall become TxDOT's property upon preparation; Construction Documents shall become TxDOT's property upon delivery to TxDOT; and other documents prepared or obtained by DB Contractor in connection with the performance of its obligations under the Contract Documents, including studies, manuals, Record Documents, technical and other reports and the like, shall become the property of TxDOT upon DB Contractor's preparation or receipt thereof. Copies of all Design Documents and Construction Documents shall be furnished to TxDOT upon preparation or receipt thereof by DB Contractor. DB Contractor shall maintain all other documents described in this Section 5.13.7 in accordance with the requirements of Section 5.13.4 and shall deliver copies to TxDOT as required by the Contract Documents or upon request if not otherwise required to be delivered, with an indexed set delivered to TxDOT as a condition to Final Acceptance.

**5.13.8 Intellectual Property**

**5.13.8.1** All Proprietary Intellectual Property, including with respect to Source Code and Source Code Documentation, shall remain exclusively the property of DB Contractor or its Affiliates or Subcontractors that supply the same, notwithstanding any delivery of copies thereof to TxDOT.

**5.13.8.2** TxDOT shall have and is hereby granted a nonexclusive, transferable, irrevocable, fully paid up right and license to use, reproduce, modify, adapt and disclose, and sublicense others to use, reproduce, modify, adapt and disclose, the Proprietary Intellectual Property of DB Contractor, including with respect to Source Code and Source Code Documentation, solely in connection with the Project and any State Highway, owned and operated by TxDOT or a State or regional Governmental Entity; provided that TxDOT shall have the right to exercise such license only at the following times:

(a) From and after the expiration or earlier termination of this Design-Build Contract for any reason whatsoever; and

(b) During any time that a receiver is appointed for DB Contractor, or during any time that there is pending a voluntarily or involuntary proceeding in bankruptcy in which DB Contractor is the debtor, in which case TxDOT may exercise such license only in connection with the Project.

**5.13.8.3** Subject to the license and rights granted to TxDOT pursuant to Section 5.13.8.2, TxDOT shall not at any time sell any Proprietary Intellectual Property of DB Contractor or use, reproduce, modify, adapt and disclose, or allow any party to use, reproduce, modify, adapt and disclose, any such Proprietary Intellectual Property for any other purpose.

**5.13.8.4** The right to transfer the license is limited to any Governmental Entity that succeeds to the power and authority of TxDOT generally or with respect to the Project.

**5.13.8.5** The right to sublicense is limited to State or regional Governmental Entities that own or operate a State Highway or other road, and to the concessionaires, contractors, subcontractors, employees, attorneys, consultants and agents that are retained by or on behalf of TxDOT or any such State or regional Governmental Entity in connection with the Project or another State Highway or other road. All such sublicenses shall be subject to Section 5.13.8.6.

**5.13.8.6** Subject to Section 5.13.5, TxDOT shall:

(a) Not disclose any Proprietary Intellectual Property of DB Contractor to any Person other than authorized transferees and sublicensees who agree to be bound by any confidentiality obligations of TxDOT relating thereto;

(b) Enter into a commercially reasonable confidentiality agreement if requested by DB Contractor with respect to the licensed Proprietary Intellectual Property; and

(c) Include, or where applicable require such State or regional Governmental Entity to include, in the contract with the sublicensee its covenant to employ sound business practices no less diligent than those used for its own confidential information, and no less diligent than required by commercially reasonable standards of confidentiality, to protect all Proprietary Intellectual Property of DB Contractor and other materials provided under the sublicense against disclosure to third parties not in receipt of a sublicense, and to use the sublicense only for the permitted purposes.

**5.13.8.7** Notwithstanding any contrary provision of this Design-Build Contract, in no event shall TxDOT or any of its directors, officers, employees, consultants or agents be liable to DB Contractor, any Affiliate or any Subcontractor for any damages, including loss of profit, arising out of breach of the duty of confidentiality set forth in Section 5.13.8.6 if such breach is not the result of gross negligence or intentional misconduct. DB Contractor hereby irrevocably waives all claims to any such damages.

**5.13.8.8** DB Contractor shall continue to have a full and complete right to use any and all duplicates or other originals of its Proprietary Intellectual Property in any manner it chooses.

**5.13.8.9** With respect to any Proprietary Intellectual Property, including with respect to Source Code and Source Code Documentation, owned by a Person other than DB Contractor, including any Affiliate, and other than TxDOT or a Governmental Entity acting as a Subcontractor, DB Contractor shall obtain from such owner, concurrently with execution of any contract, subcontract or purchase order with such owner or with the first use or adaptation of the Proprietary Intellectual Property in connection with the Project, both for DB Contractor and TxDOT, nonexclusive, transferable, irrevocable, fully paid up licenses to use, reproduce, modify, adapt and disclose such Proprietary Intellectual Property solely in connection with the Project and any State Highway, owned and operated by TxDOT or a State or regional Governmental Entity, of at least identical scope, purpose, duration and applicability as the license granted under Section 5.13.8.2. The foregoing requirement shall not apply, however, to mass-marketed software products (sometimes referred to as "shrink wrap software") owned by such a Person where such a license cannot be extended to TxDOT using commercially reasonable efforts. The limitations on sale, transfer, sublicensing and disclosure by TxDOT set forth in Sections 5.13.8.3 through 5.13.8.6 shall also apply to TxDOT's licenses in such Proprietary Intellectual Property.

## ATTACHMENT 5-1

## TERMS OF TXDOT MATERIAL INSPECTION AND TESTING SERVICES

TxDOT agrees to perform certain material inspection and testing services as requested by DB Contractor, and subject to the terms set forth below. Material inspection and testing to be performed by TxDOT consists of the following:

- Various inspected materials fabricated off-site (structural steel bridge components, pre-cast concrete stressed/non-stressed products, and miscellaneous fabricated products).
- Selected roadway monitored materials (as described in page 2) from approved/monitored sources (i.e. Quality Monitored Materials and Material Producer List qualified materials)
- Other materials inspection and testing as agreed upon in writing by TxDOT and DB Contractor

Inspections will be performed in reasonable compliance with the specifications and instructions supplied by DB Contractor in its Work Request, utilizing the form attached as Appendix 2 hereto, and subject to the terms and conditions described below. Inspections will be performed only at locations in Texas where TxDOT routinely provides resident inspection services for its own highway materials. Out-of-state inspections for DB Contractor may be performed as requested by DB Contractor. DB Contractor will reimburse TxDOT for all associated travel costs including airfare, per diem, vehicle rentals, and other directly related costs. TxDOT will only perform tests listed in the TxDOT Inspection & Testing Rates Table attached to this Attachment 5-1, as amended from time to time. Out-of-state inspections for DB Contractor will be performed only when TxDOT has employees scheduled to conduct inspections for TxDOT projects at the requested locations.

As inspection and testing services are performed by TxDOT, written inspection/test reports will be provided to DB Contractor in accordance with TxDOT's existing policies for providing such reports. Reports will include the date, time, locations and nature of services performed. Monitored Materials will not be furnished with inspection/test reports.

Prior to the commencement of the Construction Work, the DB Contractor shall provide TxDOT with a single point of contact for this scope of services. TxDOT will direct all invoices, test reports, questions and other issues to this point of contact. DB Contractor shall provide written notification of a change to the point of contact.

INSPECTED MATERIALS:

Unless agreed upon otherwise by TxDOT and DB Contractor, TxDOT will only perform inspection services for DB Contractor at structural steel fabrication plants, commercial precast prestressed and non-stressed concrete products plants, and other miscellaneous fabrication plants where TxDOT routinely provides such inspection and testing services for its own highway materials or for others. TxDOT reserves the right to prioritize or reschedule any inspection and testing services according to the following:

- Inspection and testing services may be cancelled or deferred due to unavailability of TxDOT personnel to perform the necessary inspection
- Inspections for DB Contractor will be given lower priority than inspections performed by TxDOT for TxDOT projects
- Inspections for DB Contractor may be rescheduled to coincide with the inspection of products for TxDOT projects.

TxDOT may perform additional technical materials acceptance services for DB Contractor to be agreed upon by both parties. These services are defined as additional inspection, testing, or technical materials acceptance services

beyond what is performed during the routine in-plant inspection process. DB Contractor will compensate TxDOT for all direct costs or expenses associated with the performance of these additional services, based upon actual costs of salaries and travel expenses incurred.

DB Contractor and its fabricators will abide by the Nonconformance Report (NCR) process utilized by TxDOT for disposition of products that do not meet the requirements of the DB Contractor's specifications provided in the Work Request. The current TxDOT NCR process for handling various NCR conditions is described in Appendix 1. TxDOT, in its discretion, may revise the TxDOT NCR process.

A minimum of two (2) weeks prior to TxDOT performing any inspections, DB Contractor will submit Work Requests to TxDOT. Each Work Request will be for a single Fabricator, and will include the following:

- Project information (i.e. contract number, CSJ, etc.)
- Work description
- Type and estimated quantity of material(s) to be inspected
- Fabricator information (Name, contact person, physical location)
- Desired date of inspection
- Signature/name and telephone number of DB Contractor's authorized representative.
- TxDOT 2014 Specification Item or Special Specification to be used for inspection
- List of DB Contractor's amendments to TxDOT 2014 Specification Item
- DB Contractors Special Specifications
- Complete set of necessary design drawings, material specifications, and shop drawing files in Adobe .pdf format to perform inspection of the material

MONITORED MATERIALS:

TxDOT maintains certain materials for TxDOT use. Additionally, certain products or Manufacturers/Suppliers are monitored as being TxDOT compliant. These materials are described in one of the following categories:

- **QM** - Quality Monitoring Program. Materials in Program sent directly to projects. Materials supplied with documentation of program compliance.
- **MPL** - Material maintained on approved list (Material Producer List). No additional testing necessary unless directed by Engineer
- **WA** - Warehouse Agreements to stock Pre-Tested materials
- **PJT** - Approve on the basis of project samples

The DB Contractor will not receive a test report for these above listed Monitored Materials.

TEST REPORTS AND INVOICES

TxDOT will send a monthly invoice to the DB Contractor for services performed pursuant to this Attachment 5-1. The test reports will be sent to the DB Contractor's point of contact.

PAYMENTS:

DB Contractor will pay TxDOT's fees for performance of the materials testing and inspection services as shown in the TxDOT Inspection & Testing Rates Table in effect at the time the service is performed. Information regarding TxDOT's Inspection & Testing Rates Table is attached as Appendix 3. Payments must be remitted by DB Contractor, within 30 days after receipt of TxDOT's invoice, to:

Construction Division/ Texas Department of Transportation
Attn: Construction Division/BMS (RA/200-2nd fl.)
125 E. 11th Street
Austin, TX 78701-2483

**Appendix 1 to Attachment 5-1**

**NCR Process**
**Non-Compliance Report (NCR) Process for Structural Steel Bridge Products**

The NCR process for handling various NCR conditions in the Structural Steel Fabrication Branch includes,

**NCRs requiring DB Contractor's Engineer of Record input (structural analysis, clarifications, etc.): CSTM&P will provide non-compliance information to the DB Contractor's point of contact. Upon review of the information regarding the non-compliance, the DB Contractor will provide in writing to TxDOT a corrective action. The corrective action shall be submitted via email to TxDOT in Adobe .pdf format.**

- Misplaced components beyond specification tolerances.
- Extreme cases of additional, missing, elongated, etc. holes due to poor workmanship.
- Material/design substitutions/changes after shop drawings have been approved.

**NCRs handled by CSTM&P, Structural Steel Fabrication Branch, Austin Headquarters**

- Sweep, camber, and twist beyond specification limits.
- Welding procedures, processes, and defects.
- Misdrilled holes (minor deviations).
- Dimensional problems – length, vertical batter, horizontal skew, overall depth, etc.
- Additional splices in flanges and webs (may need to contact Designer if non-traditional member.
- Base metal defects.
- Assembly of members.

**NCRs handled by TxDOT plant inspectors (In-House Repair)**

- Weld pick-ups.
- Minor heat corrections for sweep/camber.
- Weld defects (up to two times per location – generally).
- Painting issues.

**Non-Compliance Report (NCR) Process for Steel**
**Non-Bridge Structures**

The NCR process handling various NCR conditions in the Miscellaneous Products Fabrication Branch for steel non-bridge structures includes,

**NCRs requiring DB Contractor's Engineer of Record input (structural analysis, clarifications, etc.): CSTM&P will provide non-compliance information to the DB Contractor's point of contact. Upon review of the information regarding the non-compliance, the DB Contractor will provide in writing to TxDOT a corrective action. The corrective action shall be submitted via email to TxDOT in Adobe .pdf format.**

- Fabrication discrepancies beyond specification tolerances. (mislocated and/or oversized holes for structural fasteners and/or anchor bolts, etc.)
- Proposed material substitutions for steel components.

**NCRs handled by CSTM&P, Structural Steel Fabrication Branch, Austin Headquarters**

- Welding procedures, welding repair procedures, procedure qualification records.
- Misdrilled holes, bent surfaces (minor deviations).
- Dimensional problems – length, vertical batter, horizontal skew, overall depth, etc.
- Proposed paint system substitutions.
- Base metal defects.

**NCRs handled by TxDOT plant inspectors (In-House Repair)**

- Galvanized weldment tests.
- Minor heat corrections.
- Weld defect repairs permitted by the AWS D1.1 Structural Welding Code.
- Painting and galvanizing issues.

**Non-Compliance Report (NCR) Process for Commercially Produced Precast Concrete Products**

The NCR process for handling various NCR conditions in the Precast Concrete Fabrication Branch includes,

**NCRs requiring DB Contractor's Engineer of Record input (structural analysis, clarifications, etc.): CSTM&P will provide non-compliance information to the DB Contractor's point of contact. Upon review of the information regarding the non-compliance, the DB Contractor will provide in writing to TxDOT a corrective action. The corrective action shall be submitted via email to TxDOT in Adobe .pdf format.**

- Major honeycombed and/or spalled concrete exposing prestressing strand.
- Modification to prestressed concrete bridge beams (cutting 6-12 inches off beam ends).
- Thin top slab on prestressed concrete box beams (internal void floating).
- Thick bottom slabs on prestressed concrete U-beams and box beams (excessive dead load).
- Low strength concrete

**NCRs handled by CSTM&P, Precast Concrete Fabrication Branch, Austin Headquarters**

- Horizontal misalignment – Coordinate with prime contractor and District personnel.
- Minor honeycombed/spalled concrete with exposed reinforcing and prestressing steel.
- Damage over traffic lanes requiring concrete repair material (not allowed).
- Dimensional problems – length, vertical batter, horizontal skew, overall depth, etc.
- Minor beam modification – drilling anchor holes, cutting up to 6 inches off beam ends. (Coordinated with prime contractor and District personnel)
- Concrete damage in the bearing area of beams - shifting bearing pad away from beam end to reduce amount of bearing area affected by damage. (Coordinated with prime contractor and District personnel)
- Concrete temperature and/or curing violations.

**NCRs handled by TxDOT plant inspectors (In-House Repair)**

- Honeycombed/spalled concrete not extending beyond the first plane of reinforcing steel and not over traffic lanes.
- Damage to prestressed bridge deck panels.
- Damage to non-prestressed products.

**Appendix 2 to Attachment 5-1**

**Work Request**

Ms. Miranda Unruh
TxDOT - Construction Division
Materials & Pavements Section
125 East 11th Street
Austin, Texas 78701-2483

Re: Grand Parkway Segments H&I Project
Project Limits:
County:
CSJ No. _____
**WORK REQUEST**

Dear Ms. Unruh,

We are requesting fabrication inspection of the following materials:

DB Contractor provided specification number
Railing PR1 (150 LF)
Bid Item XXX

The fabricator:

Company Name
Company Address

Company Contact Person:

The date of the inspection:

DB Contractor insert requested inspection date

Additional inspection information or request:

If you have any questions concerning this matter, please feel free to call me at (DB Contractor insert office phone number).

Sincerely,

DB Contractor Quality Manager

cc: DB Contractor to provide pdf of necessary design files

**Appendix 3 to Attachment 5-1**

**TxDOT Inspection & Testing Rates**

Charges will be based on rates in effect at the time inspection and testing services are performed. TxDOT's current Inspection and Testing Rates are published at:

http://ftp.dot.state.tx.us/pub/txdot-info/cst/inspection_testing.pdf

## ITEM 6 CONTROL OF MATERIALS

Reserved.

## ITEM 7 LEGAL RELATIONS AND RESPONSIBILITIES

### 7.1 Title

DB Contractor warrants that it owns, or will own, and has, or will have, good and marketable title to all materials, equipment, tools and supplies furnished, or to be furnished, by it and its Subcontractors that become part of the Project or are purchased for TxDOT for the operation, maintenance or repair thereof, free and clear of all Liens. Title to all of such materials, equipment, tools and supplies delivered to the Site shall pass to TxDOT, free and clear of all Liens, upon the sooner of (a) incorporation into the Project or (b) payment by TxDOT to DB Contractor of invoiced amounts pertaining thereto. Notwithstanding any such passage of title, DB Contractor shall retain sole care, custody and control of such materials, equipment, tools and supplies and shall exercise due care with respect thereto until Final Acceptance or until DB Contractor is terminated from the Project pursuant to Section 8.8 or Section 8.7.

### 7.2 Safety

Reserved.

### 7.3 Compliance with Laws

DB Contractor shall comply with all Laws that affect the performance of the Work.

### 7.4 Permits, Licenses and Taxes

#### 7.4.1 Professional Services Licensing Requirements

TxDOT does not intend to contract for, pay for, or receive any Professional Services that are in violation of any professional licensing or registration laws, and by execution of this Design-Build Contract, DB Contractor acknowledges that TxDOT has no such intent. It is the intent of the Parties that DB Contractor is fully responsible for furnishing the Professional Services through itself or subcontracts with licensed/registered Professional Service firms as provided herein. Any references in the Contract Documents to DB Contractor's responsibilities or obligations to "perform" the Professional Services portions of the Work shall be deemed to mean that DB Contractor shall "furnish" the Professional Services for the Project. The terms and provisions of this Section 7.4 shall control and supersede every other provision of all Contract Documents.

### 7.5 Site Security

DB Contractor shall provide appropriate security for the Site, and shall take all reasonable precautions and provide protection to prevent damage, injury, or loss to the Work and materials and equipment to be incorporated therein, as well as all other property at or on the Site, whether owned by DB Contractor, TxDOT, or any other Person.

### 7.6 Risk of Loss or Damage; Maintenance and Repair of Work

#### 7.6.1 Risk of Loss or Damage

**7.6.1.1** DB Contractor shall be responsible for maintenance of the Work and the Site in accordance with Section 27 of the Design-Build Specifications. Upon Final Acceptance, TxDOT shall assume the maintenance obligations for the Project. DB Contractor shall be relieved from responsibility for

maintenance of the Project except that DB Contractor shall be responsible for (a) maintenance of improvements owned by third parties until control of and maintenance responsibility for such improvements has been formally transferred to the third parties; (b) maintenance of mitigation sites in accordance with the Environmental Compliance and Mitigation Plan required by Section 4.2.4.2 and any other extended maintenance responsibilities set forth in the Design-Build Specifications; and (c) maintenance within any work zones that DB Contractor implements during the performance of corrective Work in accordance with the Warranty under Section 3.8.

**7.6.2 Maintenance and Repair of Work**

**7.6.2.1** DB Contractor shall maintain, rebuild, repair, restore or replace all Work, including Design Documents, Construction Documents, materials, equipment, supplies and maintenance equipment which are purchased for permanent installation in, or for use during construction of the Project that is injured or damaged prior to the date that DB Contractor's maintenance responsibility ends as set forth in this Section 7.6, regardless of who has title thereto under the Contract Documents and regardless of the cause of the damage or injury, at no additional cost to TxDOT, except to the extent that TxDOT is responsible for such costs in accordance with the express terms of this Design-Build Contract. DB Contractor, at its cost, shall also have sole responsibility during such periods for rebuilding, repairing and restoring all other property within the Project ROW whether owned by DB Contractor, TxDOT or any other Person; provided, however, that DB Contractor shall not be responsible for rebuilding, repairing and restoring Project-related property that the Contract Documents provide will be maintained by third parties, unless such property is damaged due to negligent or willful acts of a DB Contractor-Related Entity.

**7.6.2.2** If insurance proceeds with respect to any loss or damage for which DB Contractor is responsible for the rebuilding, repair or restoration thereof are paid to TxDOT, then TxDOT shall arrange for such proceeds to reimburse DB Contractor as repair or replacement work is performed by DB Contractor to the extent that TxDOT has not previously paid for such repair or replacement work; provided, however, that release of such proceeds to DB Contractor shall not be a condition precedent to DB Contractor's obligation to perform such replacement or repair work or indicate that such replacement or repair work has been approved and accepted by TxDOT.

**7.7 Independent Contractor**

**7.7.1** DB Contractor is an independent contractor, and nothing contained in the Contract Documents shall be construed as creating any relationship between TxDOT and DB Contractor other than that of Project owner and independent contractor.

**7.7.2** Nothing in the Contract Documents is intended or shall be construed to create any partnership, joint venture or similar relationship between TxDOT and DB Contractor and in no event shall either Party take a position in any tax return or other writing of any kind that a partnership, joint venture, or similar relationship exists. While the term "Design-Build" may be used on occasion to refer to contractual relationships of the type hereby created, the Parties do not thereby express any intention to form or hold themselves out as a de jure or de facto partnership, joint venture, or similar relationship to share net profits or net losses, or to give TxDOT control or joint control over DB Contractor's financial decisions or discretionary actions concerning the Project and the Work.

**7.7.3** In no event shall the relationship between TxDOT and DB Contractor be construed as creating any relationship whatsoever between TxDOT and DB Contractor's employees. None of DB Contractor, any Subcontractor, nor any of their respective employees is or shall be deemed to be an employee of TxDOT. Except as otherwise specified in the Contract Documents, DB Contractor has sole

authority and responsibility to employ, discharge, and otherwise control its employees and has complete and sole responsibility as a principal for its agents, for all Subcontractors, and for all other Persons that DB Contractor or any Subcontractor hires to perform or assist in performing the Work.

## 7.8 Successors and Assigns; Change of Control

### 7.8.1 Successors and Assigns

**7.8.1.1** The Contract Documents shall be binding upon and inure to the benefit of TxDOT and DB Contractor and their permitted successors, assigns and legal representatives.

**7.8.1.2** TxDOT may transfer and assign all or any portion of its rights, title and interests in and to the Contract Documents, including rights with respect to the Payment and Performance Bonds, Guarantees, letters of credit and other security for payment or performance:

(a) without DB Contractor's consent, to any other public agency or public entity as permitted by Law;

(b) without DB Contractor's consent, to any other Person that succeeds to the governmental powers and authority of TxDOT; and

(c) to any other Person with the prior written approval of DB Contractor.

**7.8.1.3** In the event of TxDOT's assignment of all of its rights, title and interests in the Contract Documents as permitted hereunder, DB Contractor shall have no further recourse to TxDOT under the Contract Documents or otherwise except as specifically provided by other contractual agreement or by statute.

### 7.8.2 Change in Control

**7.8.2.1** DB Contractor shall not voluntarily or involuntarily sell, assign, convey, transfer, pledge, mortgage or otherwise encumber DB Contractor's interest in this Design-Build Contract or any portion thereof without TxDOT's prior written approval, except to any entity that is under the same ultimate management control as DB Contractor. DB Contractor shall not sublease or grant any other special occupancy or use of the Project to any other Person that is not in the ordinary course of DB Contractor performing the Work, without TxDOT's prior written approval. Any sale, assignment, conveyance, transfer, pledge, mortgage, encumbrance, sublease or grant of other special occupancy or use in violation of this provision shall be null and void ab initio and TxDOT, at its option, may declare any such attempted action to be a material DB Contractor Default.

**7.8.2.2** DB Contractor shall not voluntarily or involuntarily cause, permit or suffer any Change of Control prior to Final Acceptance without TxDOT's prior written approval. If there occurs any voluntary or involuntary Change of Control without TxDOT's prior written approval, TxDOT, at its option, may declare it to be a material DB Contractor Default.

**7.8.2.3** Where TxDOT's prior approval is required for a proposed sale, assignment, conveyance, transfer, pledge, mortgage, encumbrance, sublease or grant of other special occupancy or use, or for any proposed Change of Control prior to Final Acceptance, TxDOT may withhold or condition its approval in its discretion. Any such decision of TxDOT to withhold consent shall be final, binding and not subject to the procedures for resolving Disputes, including the Disputes Review Panel

Process, Informal Resolution Procedures and Dispute Resolution Procedures, set forth in this Design-Build Contract.

**7.8.2.4** Assignments and transfers of DB Contractor's interest permitted under this Section 7.8.2 or otherwise approved in writing by TxDOT shall be effective only upon TxDOT's receipt of written notice of the assignment or transfer and a written recordable instrument executed by the transferee, in form and substance acceptable to TxDOT, in which the transferee, without condition or reservation, assumes all of DB Contractor's obligations, duties and liabilities under this Design-Build Contract and the other Contract Documents then in effect and agrees to perform and observe all provisions thereof applicable to DB Contractor. Each transferee shall take DB Contractor's interest subject to, and shall be bound by, the Project Management Plan, the Major Subcontracts, the Utility Agreements, all agreements between the transferor and railroads, the Governmental Approvals, and all agreements between the transferor and Governmental Entities with jurisdiction over the Project or the Work, except to the extent otherwise approved by TxDOT in writing in its good faith discretion.

## 7.9 Change of Organization or Name

**7.9.1** DB Contractor shall not change the legal form of its organization in a manner that adversely affects TxDOT's rights, protections and remedies under the Contract Documents without the prior written approval of TxDOT, which consent may be granted or withheld in TxDOT's discretion.

**7.9.2** In the event either Party changes its name, such Party agrees to promptly furnish the other Party with written notice of change of name and appropriate supporting documentation.

## 7.10 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 anyone not a Party hereto to maintain a suit for personal injury or property damage pursuant to the terms or provisions hereof, except to the extent that specific provisions (such as the warranty and indemnity provisions) identify third parties and state that they are entitled to benefits hereunder. Except as otherwise provided in this Section 7.10, the duties, obligations and responsibilities of the Parties to the Contract Documents with respect to third parties shall remain as imposed by Law. The Contract Documents shall not be construed to create a contractual relationship of any kind between TxDOT and a Subcontractor or any Person other than DB Contractor.

## 7.11 No Personal Liability of TxDOT Employees; Limitation on State's Liability

### 7.11.1 No Personal Liability of TxDOT Employees

**7.11.1.1** TxDOT's Authorized Representatives are acting solely as agents and representatives of TxDOT when carrying out the provisions of or exercising the power or authority granted to them under the Contract Documents. They shall not be liable any DB Contractor-Related Entity either personally or as employees of TxDOT for actions in their ordinary course of employment.

**7.11.1.2** The Parties agree to provide to each other's Authorized Representative written notice of any claim which such Party may receive from any third party relating in any way to the matters addressed in the Contract Documents, and shall otherwise provide notice in such form and within such period as is required by Law.

### 7.11.2 Limitation on State's Liability

In no event shall TxDOT be liable for injury, damage, or death sustained by reason of a defect or want of repair on or within the Site during the period DB Contractor has operation and control of the Site, nor shall TxDOT be liable for any injury, damage or death caused by the actions, omissions, negligence, intentional misconduct, or breach of applicable Law or contract by any DB Contractor-Related Entity. DB Contractor expressly acknowledges and agrees that TxDOT's rights in this Design-Build Contract to take any action with respect to the Project, including the right to review, comment on, disapprove or accept designs, plans, specifications, work plans, construction, installation, traffic management details, safety plan and the like, are discretionary in nature and exist solely for the benefit and protection of TxDOT and do not create or impose upon TxDOT any standard or duty of care toward DB Contractor or any other Person, all of which are hereby expressly disclaimed.

## 7.12 INDEMNIFICATION

### 7.12.1 Indemnity by DB Contractor

**7.12.1.1** SUBJECT TO SECTION 7.12.1.2, DB CONTRACTOR SHALL RELEASE, PROTECT, DEFEND, INDEMNIFY, AND HOLD HARMLESS THE INDEMNIFIED PARTIES FROM AND AGAINST ANY AND ALL CLAIMS, CAUSES OF ACTION, SUITS, JUDGMENTS, INVESTIGATIONS, LEGAL OR ADMINISTRATIVE PROCEEDINGS, DEMANDS, AND LOSSES, IN EACH CASE IF ASSERTED OR INCURRED BY OR AWARDED TO ANY THIRD PARTY, ARISING OUT OF, RELATING TO OR RESULTING FROM:

(a) THE BREACH OR ALLEGED BREACH OF ANY OF THE CONTRACT DOCUMENTS BY ANY DB CONTRACTOR-RELATED ENTITY;

(b) THE FAILURE OR ALLEGED FAILURE BY ANY DB CONTRACTOR-RELATED ENTITY TO COMPLY WITH THE GOVERNMENTAL APPROVALS, ANY APPLICABLE ENVIRONMENTAL LAWS OR OTHER LAWS (INCLUDING LAWS REGARDING HAZARDOUS MATERIALS MANAGEMENT);

(c) ANY ALLEGED PATENT OR COPYRIGHT INFRINGEMENT OR OTHER ALLEGEDLY IMPROPER APPROPRIATION OR USE OF TRADE SECRETS, PATENTS, PROPRIETARY INFORMATION, KNOW-HOW, COPYRIGHT RIGHTS OR INVENTIONS IN PERFORMANCE OF THE WORK, OR ARISING OUT OF ANY USE IN CONNECTION WITH THE PROJECT OF METHODS, PROCESSES, DESIGNS, INFORMATION, OR OTHER ITEMS FURNISHED OR COMMUNICATED TO TxDOT OR ANOTHER INDEMNIFIED PARTY PURSUANT TO THIS AGREEMENT; PROVIDED THAT THIS INDEMNITY SHALL NOT APPLY TO ANY INFRINGEMENT TO THE EXTENT RESULTING FROM TxDOT'S FAILURE TO COMPLY WITH SPECIFIC WRITTEN INSTRUCTIONS REGARDING USE PROVIDED TO TxDOT BY DB CONTRACTOR;

(d) THE ACTUAL OR ALLEGED CULPABLE ACT, ERROR, OMISSION, NEGLIGENCE, BREACH, OR MISCONDUCT OF ANY DB CONTRACTOR-RELATED ENTITY IN OR ASSOCIATED WITH PERFORMANCE OF THE WORK;

(e) ANY AND ALL CLAIMS BY ANY GOVERNMENTAL OR TAXING AUTHORITY CLAIMING TAXES BASED ON GROSS RECEIPTS, PURCHASES OR SALES, THE USE OF ANY PROPERTY OR INCOME OF ANY DB CONTRACTOR-RELATED ENTITY

WITH RESPECT TO ANY PAYMENT FOR THE WORK MADE TO OR EARNED BY ANY DB CONTRACTOR-RELATED ENTITY;

(f) ANY AND ALL STOP NOTICES AND LIENS FILED IN CONNECTION WITH THE WORK, INCLUDING ALL EXPENSES AND ATTORNEYS', ACCOUNTANTS', AND EXPERT WITNESS FEES AND COSTS INCURRED IN DISCHARGING ANY STOP NOTICE OR LIEN, AND ANY OTHER LIABILITY TO SUBCONTRACTORS FOR FAILURE TO PAY SUMS DUE FOR THEIR WORK OR SERVICES, PROVIDED THAT TxDOT HAS PAID ALL UNDISPUTED AMOUNTS OWING TO DB CONTRACTOR WITH RESPECT TO SUCH WORK;

(g) ANY ACTUAL OR THREATENED DB CONTRACTOR RELEASE OF HAZARDOUS MATERIALS;

(h) THE CLAIM OR ASSERTION BY ANY OTHER (i) CONTRACTOR THAT ANY DB CONTRACTOR-RELATED ENTITY INTERFERED WITH OR HINDERED THE PROGRESS OR COMPLETION OF WORK BEING PERFORMED BY SUCH OTHER CONTRACTOR, OR FAILED TO COOPERATE REASONABLY WITH SUCH OTHER CONTRACTOR, SO AS TO CAUSE INCONVENIENCE, DISRUPTION, DELAY, OR LOSS, EXCEPT WHERE THE DB CONTRACTOR-RELATED ENTITY WAS NOT IN ANY MANNER ENGAGED IN PERFORMANCE OF THE WORK OR (ii) CONTRACTOR THAT ANY DB CONTRACTOR-RELATED ENTITY INTERFERED WITH OR HINDERED THE PROGRESS OR COMPLETION OF WORK BEING PERFORMED BY SUCH OTHER CONTRACTOR, SO AS TO CAUSE INCONVENIENCE, DISRUPTION, DELAY, OR LOSS, TO THE EXTENT SUCH CLAIM ARISES OUT OF THE ACTUAL OR ALLEGED CULPABLE ACT, ERROR, OMISSION, NEGLIGENCE, BREACH, OR MISCONDUCT OF ANY DB CONTRACTOR-RELATED ENTITY;

(i) DB CONTRACTOR'S PERFORMANCE OF, OR FAILURE TO PERFORM, THE OBLIGATIONS UNDER ANY UTILITY AGREEMENT, OR ANY DISPUTE BETWEEN DB CONTRACTOR AND A UTILITY OWNER AS TO WHETHER WORK RELATING TO A UTILITY ADJUSTMENT CONSTITUTES A BETTERMENT;

(j) ANY DB CONTRACTOR-RELATED ENTITY'S BREACH OF OR FAILURE TO PERFORM AN OBLIGATION THAT TxDOT OWES TO A THIRD PERSON, INCLUDING GOVERNMENTAL ENTITIES, UNDER LAW OR UNDER ANY AGREEMENT BETWEEN TxDOT AND A THIRD PERSON, WHERE TxDOT HAS DELEGATED PERFORMANCE OF THE OBLIGATION TO DB CONTRACTOR UNDER THE CONTRACT DOCUMENTS OR (ii) THE ACTS OR OMISSIONS OF ANY DB CONTRACTOR-RELATED ENTITY THAT RENDER TxDOT UNABLE TO PERFORM OR ABIDE BY AN OBLIGATION THAT TxDOT OWES TO A THIRD PERSON, INCLUDING GOVERNMENTAL ENTITIES, UNDER ANY AGREEMENT BETWEEN TxDOT AND A THIRD PERSON WHERE THE AGREEMENT WAS EXPRESSLY DISCLOSED TO DB CONTRACTOR;

(k) THE FRAUD, BAD FAITH, ARBITRARY OR CAPRICIOUS ACTS, OR VIOLATION OF LAW BY ANY DB CONTRACTOR-RELATED ENTITY IN OR ASSOCIATED WITH THE PERFORMANCE OF THE WORK;

(l) INVERSE CONDEMNATION, TRESPASS, NUISANCE OR SIMILAR TAKING OF OR HARM TO REAL PROPERTY BY REASON OF (i) THE FAILURE OF ANY DB CONTRACTOR-RELATED ENTITY TO COMPLY WITH GOOD INDUSTRY PRACTICES,

REQUIREMENTS OF THE CONTRACT DOCUMENTS, THE PROJECT MANAGEMENT PLAN, OR GOVERNMENTAL APPROVALS RESPECTING CONTROL AND MITIGATION OF CONSTRUCTION ACTIVITIES AND CONSTRUCTION IMPACTS, (ii) THE INTENTIONAL MISCONDUCT OR NEGLIGENCE OF ANY DB CONTRACTOR-RELATED ENTITY, OR (iii) THE ACTUAL PHYSICAL ENTRY ONTO OR ENCROACHMENT UPON ANOTHER'S PROPERTY BY ANY DB CONTRACTOR-RELATED ENTITY;

(m) ERRORS, INCONSISTENCIES, OR OTHER DEFECTS IN THE DESIGN OR CONSTRUCTION OF THE PROJECT OR OF UTILITY ADJUSTMENTS INCLUDED IN THE WORK; AND

(n) ANY CLAIM BY A DB CONTRACTOR-RELATED ENTITY ARISING OUT OF, RELATING TO, OR RESULTING FROM THE PERFORMANCE BY TxDOT OF MATERIAL INSPECTION AND TESTING SERVICES PURSUANT TO SECTION 5.10.1.1 AND ATTACHMENT 5-1.

**7.12.1.2** Subject to the releases and disclaimers herein, including all the provisions set forth in Section 5.2.1.8, DB Contractor's indemnity obligation shall not extend to any third-party Loss to the extent caused by:

(a) the negligence, reckless or intentional misconduct, bad faith or fraud of such Indemnified Party,

(b) TxDOT's material breach of any of its obligations under the Contract Documents;

(c) An Indemnified Party's material violation of any Laws or Governmental Approvals; or

(d) An unsafe requirement inherent in prescriptive design or prescriptive construction specifications of the Design-Build Specifications, but only where prior to occurrence of the third-party Loss (i) DB Contractor complied with such specifications and did not actually know, or would not have known, while exercising reasonable diligence, that the requirement created a potentially unsafe condition or (ii) DB Contractor knew of and reported to TxDOT the potentially unsafe requirement.

**7.12.1.3** In claims by an employee of DB Contractor, a Subcontractor, anyone directly or indirectly employed by them or anyone for whose acts they may be liable, the indemnification obligation under this Section 7.12 shall not be limited by a limitation on the amount or type of damages, compensation or benefits payable by or for DB Contractor or a Subcontractor under workers' compensation, disability benefit or other employee benefits laws.

**7.12.1.4** For purposes of this Section 7.12, "third party" means any person or entity other than an Indemnified Party and DB Contractor, except that a "third party" includes any Indemnified Party's employee, agent or contractor who asserts a claim against an Indemnified Party that is within the scope of the indemnities and that is not covered by the Indemnified Party's worker's compensation program.

**7.12.2 Defense and Indemnification Procedures**

**7.12.2.1** Subject to Section 7.12.2.6, if any of the Indemnified Parties receives notice of a claim or otherwise has actual knowledge of a claim that it believes is within the scope of the indemnities under Section

7.12.1, TxDOT shall by writing as soon as practicable after receipt of the claim (a) inform DB Contractor of the claim, (b) send to DB Contractor a copy of all written materials TxDOT has received asserting such claim, and (c) notify DB Contractor that should no insurer accept defense of the claim, the Indemnified Party will conduct its own defense unless DB Contractor accepts the tender of the claim in accordance with Section 7.12.2.3. As soon as practicable after DB Contractor receives notice of a claim or otherwise has actual knowledge of a claim, it shall tender the claim in writing to the insurers under all potentially applicable insurance policies. TxDOT and other Indemnified Parties also shall have the right to tender such claims to such insurers.

**7.12.2.2** If the insurer under any applicable insurance policy accepts the tender of defense, TxDOT and DB Contractor shall cooperate in the defense as required by the insurance policy. If no insurer under potentially applicable insurance policies provides defense, then Section 7.12.2.3 shall apply.

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

(a) Accepts the tender of defense and confirms that the claim is subject to full indemnification hereunder without any "reservation of rights" to deny or disclaim full indemnification thereafter;

(b) Accepts the tender of defense but with a "reservation of rights" in whole or in part; or

(c) Rejects the tender of defense based on a determination that it is not required to indemnify against the claim under the terms of this Design-Build Contract.

**7.12.2.4** If DB Contractor accepts the tender of defense under Section 7.12.2.3(a), DB Contractor shall have the right to select legal counsel for the Indemnified Party, subject to reasonable approval by the Indemnified Party, and DB Contractor shall otherwise control the defense of such claim, including settlement, and bear the fees and costs of defending and settling such claim. During such defense:

(a) DB Contractor shall fully and regularly inform the Indemnified Party of the progress of the defense and of any settlement discussions; and

(b) The Indemnified Party shall fully cooperate in said defense, provide to DB Contractor all materials and access to personnel it requests as necessary for defense, preparation and trial and which or who are under the control of or reasonably available to the Indemnified Party, and maintain the confidentiality of all communications between it and DB Contractor concerning such defense.

**7.12.2.5** If DB Contractor responds to the tender of defense as specified in Section 7.12.2.3(a) or 7.12.2.3(c), the Indemnified Party shall be entitled to select its own legal counsel and otherwise control the defense of such claim, including settlement.

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

(a) A conflict exists between it and DB Contractor that prevents or potentially prevents DB Contractor from presenting a full and effective defense;

(b) DB Contractor is otherwise not providing an effective defense in connection with the claim; or

(c) DB Contractor lacks the financial capacity to satisfy potential liability or to provide an effective defense.

**7.12.2.7** If the Indemnified Party is entitled and elects to conduct its own defense pursuant hereto of a claim for which it is entitled to indemnification, DB Contractor shall reimburse on a current basis all reasonable costs and expenses the Indemnified Party incurs in investigating and defending, except to the extent the Indemnified Party conducts its own defense as a result of DB Contractor's denial of such defense pursuant to Section 7.12.2.3(c). In the event the Indemnified Party is entitled to and elects to conduct its own defense, then:

(a) In the case of a defense conducted under Section 7.12.2.3(a), it shall have the right to settle or compromise the claim with DB Contractor's prior written consent, which shall not be unreasonably withheld or delayed;

(b) In the case of a defense conducted under Section 7.12.2.3(b), it shall have the right to settle or compromise the claim with DB Contractor's prior written consent, which shall not be unreasonably withheld or delayed, or with approval of the court or arbitrator following reasonable notice to DB Contractor and opportunity to be heard and without prejudice to the Indemnified Party's rights to be indemnified by DB Contractor; and

(c) In the case of a defense conducted under Section 7.12.2.3(c), it shall have the right to settle or compromise the claim without DB Contractor's prior written consent and without prejudice to its rights to be indemnified by DB Contractor. If a dispute resolver determines that DB Contractor wrongfully denied the defense of the Indemnified Party, the Indemnified Party shall be entitled to reimbursement of the costs of defense, including reimbursement of reasonable attorneys' fees and other litigation and defense costs, and indemnification of the amount paid to settle or compromise the claim, in addition to interest at the rate calculated in accordance with Section 7.14 payable on such defense and settlement amounts from the date such costs and expenses are incurred by the Indemnified Party.

**7.12.2.8** The Parties acknowledge that while Section 7.12.1 contemplates that DB Contractor will have responsibility for certain claims and liabilities arising out of its obligations to indemnify, circumstances may arise in which there may be shared liability of the Parties with respect to such claims and liabilities. In such case, where either Party believes a claim or liability may entail shared responsibility and that principles of comparative negligence and indemnity are applicable, it shall confer with the other Party on management of the claim or liability in question. If the Parties cannot agree on an approach to representation in the matter in question, each shall arrange to represent itself and to bear its own costs in connection therewith pending the outcome of such matter. Within 30 days subsequent to the final, non-appealable resolution of the matter in question, whether by arbitration or by judicial proceedings, the Parties shall adjust the costs of defense, including reimbursement of reasonable attorneys' fees and other litigation and defense costs, in accordance with the indemnification arrangements of this Section 7.12.2, and consistent with the outcome of such proceedings concerning the respective liabilities of the Parties on the third-party claim.

**7.12.2.9** In determining responsibilities and obligations for defending suits pursuant to this Section 7.12.2, specific consideration shall be given to the following factors: (a) the party performing the activity in

question; (b) the location of the activity and incident; (c) contractual arrangements then governing the performance of the activity; and (d) allegations of respective fault contained in the claim.

### 7.13 Joint and Several Liability

See the DBA for special joint and several liability provisions applicable to joint ventures and partnerships.

### 7.14 Interest on Amounts Due and Owing

Unless expressly provided otherwise in this Design-Build Contract or in the case of TxDOT's Recoverable Costs, all amounts to which a Party is entitled to assess, collect, demand or recover under this Design-Build Contract shall earn interest from the date on which such amount is due and owing at the lesser of (a) 12% per annum or (b) the maximum rate allowable under applicable Law.

### 7.15 TxDOT Monetary Obligations

All TxDOT monetary obligations under the Contract Documents are subject to appropriation by the Texas Legislature. This Section 7.15 applies to all monetary obligations of TxDOT set forth in the Contract Documents, notwithstanding any contrary provisions of the Contract Documents. The Contract Documents do not create a debt under the Texas Constitution.

### 7.16 Israel Boycott Certification and Prohibition

(a) "Boycott Israel" means refusing to deal with, terminating business activities with, or otherwise taking any action that is intended to penalize, inflict economic harm on, or limit commercial relations specifically with Israel, or with a person or entity doing business in Israel or in an Israeli-controlled territory, but does not include an action made for ordinary business purposes.

(b) DB Contractor hereby certifies that neither DB Contractor nor any wholly owned subsidiaries, majority owned subsidiaries, parent companies, or for-profit affiliates Boycott Israel.

(c) DB Contractor represents and warrants that DB Contractor and its wholly owned subsidiaries, majority owned subsidiaries, parent companies, and for-profit affiliates shall not Boycott Israel during the term of this Design-Build Contract.

## ITEM 8 PROSECUTION AND PROGRESS

### 8.1 Notice to Proceed and Commencement of Construction

### 8.1.1 Notices to Proceed

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

**8.1.1.2** Authorization allowing DB Contractor to proceed with Work hereunder shall be provided through TxDOT's issuance of NTP1 and NTP2. DB Contractor acknowledges and agrees that TxDOT has no obligation to issue any NTP hereunder, and further agrees that unless and until NTP1 is issued, TxDOT shall have no liability to DB Contractor hereunder, and unless and until the NTP for a portion of the Work is issued, TxDOT's liability hereunder shall be limited to payment owing hereunder for Work under NTPs actually issued (if any).

**8.1.1.3** TxDOT anticipates issuing NTP1 concurrently with execution and delivery of this Design-Build Contract. Issuance of NTP1 authorizes DB Contractor to perform only the Work described in this Section 8.1.1.3 or otherwise expressly authorized upon issuance of NTP1 in the Contract Documents. Issuance of NTP1 authorizes DB Contractor to perform the portion of the Work necessary to obtain TxDOT's approval of the component parts, plans and documentation of the Project Management Plan set forth in Section 4.2 and Quality Management Plan set forth in Section 4.3. It also authorizes DB Contractor to enter the Project Right of Way that TxDOT owns in order to conduct surveys and site investigations, including geotechnical, Hazardous Materials and Utilities investigations, and to commence negotiating Utility Agreements with Utility Owners. DB Contractor, however, shall not execute any Project Utility Adjustment Agreement until issuance of NTP2. Refer to the Design-Build Agreement regarding a Price adjustment for delays to NTPs.

**8.1.1.4** TxDOT anticipates issuing NTP2 concurrently with (a) TxDOT's approval, in its discretion, of all the component parts, plans and documentation of the Project Management Plan, Quality Management Plan and the PBS2, (b) availability for occupancy of field office(s) and core office space in accordance with Section 10.1.1 of the Design-Build Specifications, and (c) with respect to any Work to be performed upon issuance of NTP2, DB Contractor's provision to TxDOT of copies of all executed Subcontracts with Key Subcontractors that were not provided to TxDOT prior to issuance of NTP1. Issuance of NTP2 authorizes DB Contractor to perform all other Work (including ROW acquisition services) and activities pertaining to the Project.

**8.1.1.5** DB Contractor may request that TxDOT grant DB Contractor approval to begin design, engineering, architecture, or ROW acquisition services Work prior to issuance of NTP2 if DB Contractor meets all of the conditions described in Section 8.1.1.4 relating to the design, engineering, architecture, or ROW acquisition services Work to be performed, including approval of the PSQMP, submittal of insurance certificates, obtaining the bonds described in Section 8.1.2.1(d), approval of that portion of the Schedule of Values identifying the design, engineering, architecture, or ROW acquisition services Work to be performed and delivery to TxDOT of copies of all executed Subcontracts with Key Subcontractors that will perform any of such design,

engineering, architecture, or ROW acquisition services Work and were not required to be provided to TxDOT prior to issuance of NTP1. Notwithstanding the foregoing, DB Contractor is not entitled to payment for any Work prior to issuance of NTP2 in excess of the NTP1 Maximum Payment Amount.

**8.1.1.6** Notwithstanding Section 8.1.1.4, DB Contractor may request that TxDOT issue NTP2 prior to approval of all of the component parts, plans and documentation of the Project Management Plan and the PBS2. In such event, TxDOT may elect to issue NTP2 prior to satisfaction by DB Contractor of any particular conditions to NTP2. TxDOT may condition such early issuance of NTP2 upon payment by DB Contractor to TxDOT the amount set forth in the DBA for each day during the period that NTP2 has been issued and any condition to NTP2 remains unsatisfied. Notwithstanding any early issuance of NTP2, DB Contractor shall not be permitted to commence Construction Work on any portion of the Project until all the conditions to the commencement of Construction Work described in Section 8.1.2 have been satisfied.

**8.1.2 Conditions to Commencement of Construction**

**8.1.2.1** Construction Work Generally

Except to the extent expressly permitted in writing by TxDOT, in TxDOT's discretion, DB Contractor shall not commence or permit or suffer commencement of Construction Work or any applicable portion thereof until TxDOT issues NTP2 and all of the following conditions have been satisfied:

(a) All Governmental Approvals necessary to begin Construction Work in the applicable portion of the Project have been obtained, and DB Contractor has furnished to TxDOT fully executed copies of such Governmental Approvals.

(b) Fee simple title or other property rights acceptable to TxDOT in its discretion for the Project ROW necessary for commencement of construction of the applicable portion of the Project and Utility Adjustments included in the Construction Work have been identified, conveyed to and recorded in favor of TxDOT, TxDOT has obtained possession thereof through eminent domain, or all necessary parties have validly executed and delivered a possession and use agreement or right of entry therefor on terms acceptable to TxDOT with the exception of Quitclaim Deeds used for Utility Adjustments, which shall comply with the requirements of Section 14.2.4.4 of the Design-Build Specifications.

(c) DB Contractor has satisfied for the applicable portion of the Project all applicable pre-construction requirements contained in the Environmental Approvals and other Governmental Approvals.

(d) Each Performance Bond and Payment Bond (including any dual obligee riders), in form and from a surety approved by TxDOT, required under this Item 8 has been obtained and is in full force and effect, and DB Contractor has delivered to TxDOT certified and conformed copies of the originals of each such bond, with the original of each such bond delivered to DB Contractor.

(e) The Guarantees, if any, required under the Design-Build Agreement have been obtained and delivered to TxDOT.

(f) All insurance policies required under Section 3.5 have been obtained and are in full force and effect, and DB Contractor has delivered to TxDOT written binding verifications of coverage from the relevant issuers of such insurance policies.

(g) DB Contractor has caused to be developed and delivered to TxDOT and TxDOT has approved, in accordance with Sections 4.1.2.2.4 and 4.2, the component parts, plans and documentation of the Project Management Plan.

(h) DB Contractor has delivered to TxDOT all Submittals relating to the Construction Work required by the Project Management Plan or Contract Documents, in the form and content required by the Project Management Plan or Contract Documents, including the Phase II and Phase III Environmental Site Assessments if required pursuant to Section 15.3.5.1 of the Design-Build Specifications.

(i) All representations and warranties of DB Contractor set forth in Section 10.1 of the Design-Build Agreement shall be and remain true and correct in all material respects.

(j) DB Contractor has adopted written policies establishing ethical standards of conduct for all DB Contractor-Related Entities, including DB Contractor's supervisory and management personnel in dealing with (a) TxDOT and TxDOT's consultants and (b) employment relations, in accordance with Section 8.2.5 of the Design-Build Agreement.

(k) There exists no uncured DB Contractor Default for which DB Contractor has received written notice from TxDOT.

(l) DB Contractor has provided to TxDOT at least 10 days advance written notice of the date DB Contractor determines that it will satisfy all of the conditions set forth in this Section 8.1.2.1.

(m) DB Contractor has provided to TxDOT copies of all executed Subcontracts with Key Subcontractors that were not required to be provided to TxDOT prior to issuance of NTP1 or NTP2.

**8.1.2.2** Utility Adjustments

DB Contractor shall not commence or permit or suffer commencement of construction of a Utility Adjustment included in the Construction Work until TxDOT issues NTP2, all of the conditions set forth in Section 8.1.2.1 that are applicable to the Utility Adjustment (reading such provisions as if they referred to the Utility Adjustment) have been satisfied, and the requirements provided in Section 14.4.4 of the Design-Build Specifications have been satisfied.

**8.1.3 Completion Deadlines**

**8.1.3.1** Substantial Completion Deadlines

DB Contractor shall achieve Substantial Completion of the Project on or before the Substantial Completion Deadline.

**8.1.3.2** Final Acceptance Deadline

DB Contractor shall achieve Final Acceptance on or before 120 days after Substantial Completion.

**8.1.3.3** No Time Extensions

Except as otherwise specifically provided in Section 4.6, TxDOT shall have no obligation to extend a Completion Deadline and DB Contractor shall not be relieved of its obligation to comply with the Project Schedule and to achieve Substantial Completion and Final Acceptance by the applicable Completion Deadlines for any reason.

## 8.2 Subcontracting

### 8.2.1 Subcontracts

**8.2.1.1** DB Contractor shall retain or cause to be retained only Subcontractors that are qualified, experienced and capable in the performance of the portion of the Work assigned. DB Contractor shall assure that each Subcontractor has at the time of execution of the Subcontract, and maintains at all times during performance of the assigned Work, all licenses required by applicable Laws.

**8.2.1.2** DB Contractor shall comply with the following Subcontractor requirements.

(a) DB Contractor shall provide TxDOT, as part of each monthly Draw Request, a listing of (a) all Subcontracts in effect to which DB Contractor is a party and (b) where DB Contractor is a party to a Subcontract with an Affiliate, all Subcontracts in effect to which such Affiliate is a party and under which all or a substantial portion of the Affiliate's responsibilities or obligations under its Subcontract with DB Contractor are delegated to the Subcontractor. DB Contractor also shall provide, as part of the monthly Draw Request the Subcontractors under such Subcontracts, guarantees of Subcontracts in effect and the guarantors thereunder. Subject to Section 5.13.1, DB Contractor shall allow TxDOT ready access to all Subcontracts and records regarding Subcontracts, including amendments and supplements to Subcontracts and guarantees thereof.

(b) DB Contractor shall provide TxDOT the information and certifications required pursuant to Article A, Section 6 of the DBE Special Provisions for Non-Traditional Contracts in Attachment 3-2.

**8.2.1.3** The retention of Subcontractors by DB Contractor will not relieve DB Contractor of its responsibility hereunder or for the quality of the Work or materials provided by it. DB Contractor shall supervise and be responsible for acts and omissions of DB Contractor's employees, agents, officers and Subcontractors and other Persons performing portions of the Work, as though all such Persons were directly employed by DB Contractor. No Subcontract entered into by DB Contractor will impose any obligation or liability upon TxDOT to any such Subcontractor or any of its employees. Nothing in this Design-Build Contract will create any contractual relationship between TxDOT and any Subcontractor of DB Contractor.

**8.2.1.4** The following requirements shall apply to Subcontracts:

(a) DB Contractor shall, prior to soliciting any bids for performance of work or labor or rendering of services relating to the design or construction of the Project or for special fabrication and installation of a portion of the Work, submit to TxDOT for its review and approval a procedure for the conduct of the bidding and approval process applicable to Major Subcontracts. DB Contractor may use procedures set forth in the TxDOT Standard Specifications or may submit alternative procedures to TxDOT for approval. DB

Contractor shall not enter into any Major Subcontracts except in accordance with the foregoing procedure; provided, however, that this Section 8.2.1.4(a) shall not apply to Major Subcontracts entered between DB Contractor and a Subcontractor identified in DB Contractor's Proposal.

(b) DB Contractor shall not terminate any Major Subcontract, or permit or suffer any substitution or replacement of a Major Subcontractor, except that (i) for Major Subcontracts that are not with Key Subcontractors, DB Contractor may terminate the Major Subcontract in the case of material default by a Major Subcontractor, termination of this Design-Build Contract for convenience or with TxDOT's prior written approval and (ii) for Major Subcontracts that are with Key Subcontractors, DB Contractor may terminate the Major Subcontract only in accordance with Section 8.2.1.5.

(c) As soon as DB Contractor identifies a potential Subcontractor for a potential Subcontract described in the first sentence of Section 8.2.1.2, but in no event later than five days after Subcontract execution, DB Contractor shall notify TxDOT in writing of the name, address, phone number and authorized representative of such Subcontractor.

**8.2.1.5** The following additional requirements shall apply to Key Subcontractors:

(a) DB Contractor shall not terminate any Subcontract with a Key Subcontractor, or permit or suffer any substitution or replacement of a Key Subcontractor, unless the Key Subcontractor:

(i) is no longer in business, is unable to fulfill its legal, financial, or business obligations, or can no longer meet the terms of the teaming agreement or Subcontract with DB Contractor;

(ii) voluntarily removes itself from DB Contractor's team; or

(iii) fails to provide a sufficient number of qualified personnel to fulfill the duties identified during the Proposal stage.

(b) If DB Contractor makes changes to a Key Subcontractor in violation of Section 8.2.1.5(a), DB Contractor shall pay to TxDOT 100% of any cost savings resulting from the change.

Each Subcontract shall:

(c) Set forth a standard of professional responsibility or a standard for commercial practice equal to the requirements of the Contract Documents and Good Industry Practice for work of similar scope and scale and shall set forth effective procedures for claims and change orders.

(d) Require the Subcontractor to carry out its scope of work in accordance with the Contract Documents, the Governmental Approvals and applicable Law, including the applicable requirements of the DBE Performance Plan.

(e) Without cost to DB Contractor or TxDOT, expressly permit assignment to TxDOT or its successor, assign or designee of all DB Contractor's rights under the Subcontract, contingent only upon delivery of written request from TxDOT following termination of this Design-Build Contract, allowing TxDOT or its successor, assign or designee to assume

the benefit of DB Contractor's rights with liability only for those remaining obligations of DB Contractor accruing after the date of assumption, such assignment to include the benefit of all Subcontractor warranties, indemnities, guarantees and professional responsibility.

(f) Expressly state that any acceptance of assignment of the Subcontract to TxDOT or its successor, assign or designee shall not operate to make the assignee responsible or liable for any breach of the Subcontract by DB Contractor or for any amounts due and owing under the Subcontract for work or services rendered prior to assumption (but without restriction on the Subcontractor's rights to suspend work or demobilize due to DB Contractor's breach).

(g) Expressly include a covenant to recognize and attorn to TxDOT upon receipt of written notice from TxDOT that it has exercised its rights under this Design-Build Contract, without necessity for consent or approval from DB Contractor or to determine whether TxDOT validly exercised its rights, and DB Contractor's covenant to waive and release any claim or cause of action against the Subcontractor arising out of or relating to its recognition and attornment in reliance on any such written notice.

(h) Not be assignable by the Subcontractor to any Person other than TxDOT (or its assignee) without DB Contractor's prior written consent.

(i) Expressly include requirements that the Subcontractor will (i) maintain usual and customary books and records for the type and scope of operations of business in which it is engaged (e.g., constructor, equipment Supplier, designer, service provider); (ii) permit audit thereof with respect to the Project or Work by each of DB Contractor and TxDOT pursuant to Section 5.13.5; and (iii) provide progress reports to DB Contractor appropriate for the type of work it is performing sufficient to enable DB Contractor to provide the reports it is required to furnish TxDOT under this Design-Build Contract.

(j) Include the right of DB Contractor to terminate the Subcontract in whole or in part upon any Termination for Convenience of this Design-Build Contract without liability of DB Contractor or TxDOT for the Subcontractor's lost profits or business opportunity.

(k) Expressly require the Subcontractor to participate in meetings between DB Contractor and TxDOT, upon TxDOT's request, concerning matters pertaining to such Subcontract or its work, provided that all direction to such Subcontractor shall be provided by DB Contractor, and provided further that nothing in this clause (i) shall limit the authority of TxDOT to give such direction or take such action that, in its discretion, is necessary to remove an immediate and present threat to the safety of life or property.

(l) Include an agreement by the Subcontractor to give evidence in any dispute resolution proceeding pursuant to Section 4.9, if such participation is requested by either TxDOT or DB Contractor.

(m) Expressly provide that all Liens, claims and charges of the Subcontractor and its subcontractors at any time shall not attach to any interest of TxDOT in the Project or the Project ROW.

(n) With respect to Major Subcontracts, expressly include a covenant, expressly stated to survive termination of the Major Subcontract, to promptly execute and deliver to TxDOT a

new contract between the Major Subcontractor and TxDOT on the same terms and conditions as the Major Subcontract, in the event (i) the Major Subcontract is rejected by DB Contractor in bankruptcy or otherwise wrongfully terminated by DB Contractor and (ii) TxDOT delivers written request for such new contract following termination or expiration of this Design-Build Contract.

(o) Be consistent in all other respects with the terms and conditions of the Contract Documents to the extent such terms and conditions are applicable to the scope of work of such Subcontractors, and include all provisions required by this Design-Build Contract.

DB Contractor shall not amend any Subcontract with respect to any of the foregoing matters without the prior written consent of TxDOT.

**8.2.1.6** DB Contractor shall not enter into any Subcontracts with any Person then debarred or suspended from submitting bids by any agency of the State.

**8.2.2 Responsibility for DB Contractor-Related Entities**

DB Contractor shall supervise and be responsible for the acts and omissions of DB Contractor's employees, agents, officers and Subcontractors and other Persons performing portions of the Work, as though all such Persons were directly employed by DB Contractor.

**8.2.3 Subcontracts with Affiliates**

**8.2.3.1** DB Contractor shall have the right to have Work and services performed by Affiliates only under the following terms and conditions:

(a) DB Contractor shall execute a written Subcontract with the Affiliate;

(b) The Subcontract shall comply with all applicable provisions of this Section 8, be consistent with Good Industry Practice, and be in form and substance substantially similar to Subcontracts then being used by DB Contractor or Affiliates for similar Work or services with unaffiliated Subcontractors;

(c) The Subcontract shall set forth the scope of Work and services and all the pricing, terms and conditions respecting the scope of Work and services;

(d) The pricing, scheduling and other terms and conditions of the Subcontract shall be no less favorable to DB Contractor than those that DB Contractor could reasonably obtain in an arm's length, competitive transaction with an unaffiliated Subcontractor. DB Contractor shall bear the burden of proving that the same are no less favorable to DB Contractor; and

(e) No Affiliate shall be engaged to perform any Work or services which any Contract Documents or the Project Management Plan or any component part, plan or other documentation thereunder indicates are to be performed by an independent or unaffiliated party. No Affiliate shall be engaged to perform any Work or services which would be inconsistent with Good Industry Practice.

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

TxDOT for review and comment. TxDOT shall have 20 days after receipt to deliver its comments to DB Contractor.

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

**8.2.4 Labor Standards**

**8.2.4.1** In the performance of its obligations under the Contract Documents, DB Contractor at all times shall comply, and require by Subcontract that all Subcontractors (including Suppliers) comply, with all applicable federal and State labor, occupational safety and health standards, rules, regulations and federal and State orders.

**8.2.4.2** All individuals performing Work shall have the skill and experience and any licenses required to perform the Work assigned to them.

**8.2.4.3** If any individual employed by DB Contractor or any Subcontractor is not performing the Work in a proper, safe and skillful manner, then DB Contractor shall, or shall cause such Subcontractor to, remove such individual and such individual shall not be re-employed on the Work. If, after notice and reasonable opportunity to cure, such individual is not removed or if DB Contractor fails to ensure that skilled and experienced personnel are furnished for the proper performance of the Work, then TxDOT may suspend the affected portion of the Work by delivery of written notice of such suspension to DB Contractor. Such suspension shall be considered a suspension for cause and shall in no way relieve DB Contractor of any obligation contained in the Contract Documents or entitle DB Contractor to any additional compensation or time extension hereunder.

**8.2.5 Ethical Standards**

**8.2.5.1** Within 90 days after the Effective Date, DB Contractor shall adopt written policies establishing ethical standards of conduct applicable to all DB Contractor-Related Entities, including DB Contractor's supervisory and management personnel, in dealing with (a) TxDOT and TxDOT's consultants and (b) employment relations. Such policy shall be subject to review and comment by TxDOT prior to adoption. Such policy shall include standards of ethical conduct concerning the following:

(a) Restrictions on gifts and contributions to, and lobbying of, TxDOT, the Texas Transportation Commission, TxDOT consultants and any of their respective commissioners, directors, officers and employees;

(b) Protection of employees from unethical practices in selection, use, hiring, compensation or other terms and conditions of employment, or in firing, promotion and termination of employees;

(c) Protection of employees from retaliatory actions (including discharge, demotion, suspension, threat, harassment, pay reduction or other discrimination in the terms and conditions of employment) in response to reporting of illegal (including the making of a false claim), unethical or unsafe actions or failures to act by any DB Contractor-Related Entity;

(d) Restrictions on directors, members, officers or supervisory or management personnel of any DB Contractor-Related Entity engaging in any transaction or activity, including receiving or offering a financial incentive, benefit, loan or other financial interest, that is, or to a reasonable person appears to be, in conflict with or incompatible with the proper discharge of duties or independence of judgment or action in the performance of duties, or adverse to the interests of the Project or employees;

(e) Restrictions on use of office or job position for a purpose that is, or would to a reasonable person appear to be, primarily for the private benefit of a director, member, officer or supervisory or management person, rather than primarily for the benefit of DB Contractor or the Project, or primarily to achieve a private gain or an exemption from duty or responsibility for a director, member, officer or supervisory or management person; and

(f) Restrictions on directors, members, officers or employees of any DB Contractor-Related Entity performing any of the Work if the performance of such services would be prohibited under TxDOT's published conflict of interest rules and policies applicable to TxDOT's design-build agreement program, or would be prohibited under Section 572.054 of the Texas Government Code.

**8.2.5.2** DB Contractor shall cause its directors, members, officers and supervisory and management personnel, and include contract provisions requiring those of all other DB Contractor-Related Entities, to adhere to and enforce the adopted policy on ethical standards of conduct. DB Contractor shall establish reasonable systems and procedures to promote and monitor compliance with the policy.

**8.2.6 Job Training Plan**

**8.2.6.1** DB Contractor's Job Training Plan applicable to the Project is set forth in Exhibit 5 to the Design-Build Agreement. The purpose of the Job Training Plan is to ensure that inexperienced and untrained workers have a substantial opportunity to participate in the performance of the Work through apprenticeships, training and similar measures to maintain and grow a diverse, skilled work force. DB Contractor shall perform and comply with all requirements set forth in the Job Training Plan.

**8.2.6.2** DB Contractor shall include provisions to effectuate the Job Training Plan in every Subcontract to which it is a party (including purchase orders and task orders for Work), and shall require that they be included in all Subcontracts (including purchase orders and task orders for Work), except for Subcontracts with TxDOT or Governmental Entities, so that such provisions will be binding upon each Subcontractor. The foregoing shall not apply to any Subcontracts with TxDOT or Governmental Entities.

**8.2.7 Prevailing Wages**

**8.2.7.1** DB Contractor shall pay or cause to be paid to all applicable workers employed by it or its Subcontractors to perform the Work not less than the prevailing rates of wages, as provided in the statutes and regulations applicable to public work contracts, including Chapter 2258 of the Texas Government Code and the Davis-Bacon Act, and as provided in Exhibit 7 to the Design-Build Agreement. DB Contractor shall comply and cause its Subcontractors to comply with all Laws pertaining to prevailing wages. For the purpose of applying such Laws, the Project shall be treated as a public work paid for in whole or in part with public funds (regardless of whether public funds

are actually used to pay for the Project). The foregoing shall not apply to any Subcontracts with TxDOT or Governmental Entities.

**8.2.7.2** It is DB Contractor's sole responsibility to determine the wage rates required to be paid. DB Contractor shall bear the cost of labor and shall have no Claim against TxDOT on account of any changes to such costs. Without limiting the foregoing, no Claim will be allowed that is based upon DB Contractor's lack of knowledge or a misunderstanding of requirements pertaining to prevailing wages or DB Contractor's failure to include in the Price adequate wages over the duration of this Design-Build Contract.

**8.2.7.3** Any issue between DB Contractor or a Subcontractor, and any affected worker relating to any alleged violation of Section 2258.023 of the Texas Government Code that is not resolved before the 15th day after the date TxDOT makes its initial determination under Section 2258.052 of the Texas Government Code (as to whether good cause exists to believe that a violation occurred) shall be submitted to binding arbitration in accordance with the Texas General Arbitration Act, Chapter 171 of the Civil Practice and Remedies Code.

**8.2.7.4** DB Contractor shall comply and cause its Subcontractors to comply with all Laws regarding notice and posting of intent to pay prevailing wages, of prevailing wage requirements and of prevailing wage rates.

### 8.2.8 E-Verify

Pursuant to Executive Order PR-80, DB Contractor certifies and ensures that for all contracts for services, DB Contractor shall, to the extent permitted by law, utilize the United States Department of Homeland Security's E-Verify system during the Term and Warranty Term of this Design-Build Contract to determine the eligibility of:

(a) All persons hired by DB Contractor during the Term and Warranty Term of this Design-Build Contract to perform duties within the State of Texas; and

(b) All persons, including subcontractors, hired during the Term and Warranty Term and assigned by DB Contractor during the Term and Warranty Term to perform work pursuant to this Design-Build Contract.

Violation of this provision constitutes a material breach of this Design-Build Contract.

### 8.2.9 Uniforms

Any uniforms, badges, logos and other identification worn by personnel of DB Contractor-Related Entities shall bear colors, lettering, design or other features to assure clear differentiation from those of TxDOT and its employees.

## 8.3 Key Personnel

### 8.3.1 Key Personnel and Qualifications of Employees

**8.3.1.1** The Contract Documents identify certain job categories of Key Personnel for the Project. Key Personnel must be English-speaking and capable of reading and understanding the Contract Documents. Except as permitted in Section 8.3.1.6, DB Contractor shall not change, or permit any change in, any Key Personnel. Any replacement Key Personnel during the Term shall have equal

or better qualifications and experience as the individual being replaced and shall be subject to prior approval by TxDOT.

**8.3.1.2** DB Contractor shall designate an Authorized Representative who shall have onsite field and office authority to represent and act for DB Contractor. An Authorized Representative shall be present at the job site at all times while Work is actually in progress. Other Key Personnel shall be on site as and when required by TxDOT. DB Contractor shall provide phone, e-mail addresses and mobile telephone numbers for all Key Personnel. TxDOT requires the ability to contact the following Key Personnel and other personnel 24 hours per day, seven days per week: (a) Project Manager and (b) Safety Manager.

**8.3.1.3** DB Contractor acknowledges and agrees that the award of this Design-Build Contract by TxDOT to DB Contractor was based, in large part, on the qualifications and experience of the personnel listed in the Proposal and DB Contractor's commitment that such individuals would be available to undertake and perform the Work. DB Contractor represents, warrants and covenants that such individuals are available for and will fulfill the roles identified for them in the Proposal in connection with the Work. Individuals filling Key Personnel roles shall be available for the Work and shall maintain active involvement in the prosecution and performance of the Work. In addition to the foregoing, TxDOT reserves the right to require a 100% time commitment per position from any Key Personnel if TxDOT, in its discretion, determines that such personnel are not devoting sufficient time to the prosecution and performance of the Work.

**8.3.1.4** If an individual filling one or more Key Personnel roles is not available for the Work and does not maintain active involvement in the prosecution and performance of the Work because such individual has been replaced, DB Contractor acknowledges that TxDOT, the Work, and the Project will suffer significant and substantial Losses due to the unavailability of the individual identified in the Proposal and that it is impracticable and extremely difficult to ascertain and determine the actual Losses that would accrue to TxDOT in such event. Therefore, if an individual filling a Key Personnel role is not available or not actively involved in the prosecution and performance of the Work sufficient for satisfactory performance of the Work to be performed by such Key Personnel, as determined by TxDOT in its discretion, regardless of whether such individual has been replaced by an individual approved by TxDOT, DB Contractor agrees to pay TxDOT a Key Personnel Change Fee for each position held by such individual, as deemed compensation to TxDOT for such Losses in the amount set forth in Section 7.4.1 of the Design-Build Agreement.

**8.3.1.5** If an individual filling one or more Key Personnel roles is not available for the Work and does not maintain active involvement in the prosecution and performance of the Work and such individual has not been replaced by an individual approved by TxDOT, DB Contractor acknowledges that TxDOT, the Work and the Project will suffer significant and substantial additional Losses due to the unavailability of an approved individual to fill a Key Personnel role and that it is impracticable and extremely difficult to ascertain and determine the actual Losses which would accrue to TxDOT in such event. Therefore, for each day that a Key Personnel role is not filled by an approved individual, DB Contractor agrees to pay TxDOT Key Personnel Unavailability Liquidated Damages in the amount set forth in Section 7.4.2 of the Design-Build Agreement, for each position not filled, as deemed compensation to TxDOT for such Losses.

**8.3.1.6** DB Contractor understands and agrees that any Key Personnel Change Fees and Key Personnel Unavailability Liquidated Damages payable in accordance with this Section 8.3 are in the nature of liquidated damages and not a penalty and that such sums are reasonable under the circumstances existing as of the Effective Date. TxDOT shall have the right to deduct any amount owed by DB Contractor to TxDOT hereunder from any amounts owed by TxDOT to DB Contractor, or to collect

from any bond or Guaranty furnished under this Design-Build Contract for such Key Personnel Change Fees and Key Personnel Unavailability Liquidated Damages. Notwithstanding the foregoing, DB Contractor shall not be liable for Key Personnel Change Fees under Section 8.3.1.4 or Key Personnel Unavailability Liquidated Damages under Section 8.3.1.5 if (a) DB Contractor removes or replaces such personnel at the direction of TxDOT, except pursuant to Section 8.2.4.3; (b) such individual is unavailable due to death, retirement, injury or no longer being employed by the applicable DB Contractor-Related Entity (provided that moving to an affiliated company shall not be considered grounds for avoiding Key Personnel Change Fees or Key Personnel Unavailability Liquidated Damages); or (c) such individual is unavailable due to TxDOT's failure to issue NTP1 within 180 days of the Proposal Due Date for a reason other than the acts, omissions, negligence, intentional misconduct, or breach of applicable Law, contract or Governmental Approval of any DB Contractor-Related Entity; provided, however, in each such case, DB Contractor shall promptly propose to TxDOT a replacement for such personnel, which individual shall be subject to TxDOT's review and written approval. If NTP1 has not been issued within 180 days after the Proposal Due Date through no act, omission, negligence, intentional misconduct, or breach of applicable Law, contract or Governmental Approval of any DB Contractor-Related Entity, DB Contractor shall have 30 days after issuance of NTP1 to identify any change in Key Personnel without incurring any Key Personnel Change Fees or Key Personnel Unavailability Liquidated Damages. Following any TxDOT-approved substitution or replacement of a Key Personnel pursuant to the terms hereof, the new individual shall be considered a Key Personnel for all purposes under the Contract Documents, including the provisions of this Section 8.3 relative to Key Personnel Unavailability Liquidated Damages.

**8.3.1.7** DB Contractor acknowledges and agrees that the Key Personnel positions are of critical importance to TxDOT and the Project. In addition to the approval rights of TxDOT set forth in Section 8.3.1.1, the Key Personnel Change Fees set forth in Section 8.3.1.4 and the Key Personnel Unavailability Liquidated Damages set forth in Section 8.3.1.5, if an individual in a Key Personnel position leaves that position, TxDOT shall have the right to terminate this Design-Build Contract for default under Section 8.7, unless DB Contractor provides TxDOT a replacement acceptable to TxDOT within 90 days after the earlier of (a) the date on which such individual has left his/her position or (b) DB Contractor or TxDOT becomes aware that such individual intends to leave his/her position.

## 8.4 Suspension

### 8.4.1 Suspensions for Convenience

**8.4.1.1** TxDOT may, at any time and for any reason, by written notice, order DB Contractor to suspend all or any part of the Work required under the Contract Documents for the period of time that TxDOT deems appropriate for the convenience of TxDOT. DB Contractor shall promptly comply with any such written suspension order. DB Contractor shall promptly recommence the Work upon receipt of written notice from TxDOT directing DB Contractor to resume the Work. Any such suspension for convenience shall be considered a TxDOT-Directed Change, provided that TxDOT shall have the right to direct suspensions for convenience not exceeding 48 hours each up to a total of 96 hours, which shall not be considered a TxDOT-Directed Change. Adjustments of the Price and the Completion Deadlines shall be available for any such TxDOT-Directed Change, subject to DB Contractor's compliance with the terms and conditions set forth in Section 4.6.

### 8.4.2 Suspensions for Cause

**8.4.2.1** Upon TxDOT's delivery of notice of a DB Contractor Default for any of the following breaches or failures to perform and DB Contractor's failure to fully cure and correct within the applicable cure period, if any, TxDOT shall have the right and authority to suspend for cause any affected portion of the Work by written order to DB Contractor:

(a) The existence of conditions unsafe for workers, other Project personnel or the general public;

(b) Failure to comply with any Law or Governmental Approval (including failure to handle, preserve and protect archeological, paleontological or historic resources, or failure to handle Hazardous Materials, in accordance with applicable Laws and Governmental Approvals);

(c) Performance of Nonconforming Work;

(d) (Failure to carry out and comply with Directive Letters;

(e) Certain failures to remove and replace personnel as set forth in Section 8.2.4.3;

(f) (Failure to provide proof of required insurance coverage as set forth in Section 3.5;

(g) Failure to deliver or maintain the Payment Bond, Performance Bond, and any other bonds or security required hereunder; or

(h) Failure to comply with any quality control plan or safety plan required under the Contract Documents.

**8.4.2.2** DB Contractor shall promptly comply with any such written suspension order, even if DB Contractor disputes the grounds for suspension. DB Contractor shall promptly recommence the Work upon receipt of written notice from TxDOT directing DB Contractor to resume the Work. TxDOT shall have no liability to DB Contractor, and DB Contractor shall have no right to any adjustment in the Price or Completion Deadlines in connection with any suspension of Work properly founded on any of the grounds set forth in Section 8.4.2. If TxDOT orders suspension of the Work on one of the foregoing grounds but it is finally determined under the Dispute Resolution Procedures of this Design-Build Contract that such grounds did not exist, it shall be treated as a suspension for TxDOT's convenience under Section 8.4.1.

### 8.4.3 Responsibilities of DB Contractor During Suspension Periods

During periods that the Work is suspended, DB Contractor shall continue to be responsible for the Work and shall prevent damage or injury to the Project, provide for drainage, and shall erect necessary temporary structures, signs, or other facilities required to maintain the Project. During any suspension period, DB Contractor shall maintain in a growing condition all newly established plantings, seedings and soddings furnished under the Contract Documents and shall protect new tree growth and other vegetative growth against injury, replacing all dead plants requiring replacement during the suspension period. Additionally, DB Contractor shall continue other Work that has been or can be performed at the Site or offsite during the period that the Work is suspended.

## 8.5 Project Schedule and Progress

### 8.5.1 Project Schedule

#### 8.5.1.1 General Requirements

DB Contractor shall create a complete and logical Project Schedule that represents DB Contractor's plan for managing and executing the Work. The Project Schedule shall be used to: plan the Work; define the timeframe for completion of the Project; provide milestones of major Submittals; monitor progress; form the basis for progress payments; and to measure the impact of changes that occur during design and construction.

The scheduling software employed by DB Contractor shall be compatible with the current scheduling software employed by TxDOT as of the Effective Date (currently Primavera P6). DB Contractor shall provide an electronic file version of the schedule capable of being directly imported by TxDOT using TxDOT's scheduling software.

If separate short-term look-ahead schedules are prepared using a different tool, DB Contractor shall submit these short-term look-ahead schedules to TxDOT and assure they align accurately with the overall Project Schedule.

#### 8.5.1.2 Project Baseline Schedule (PBS)

##### 8.5.1.2.1 Staged Schedule Development

As the design is developed, it is intended that the Project Schedule shall represent the most accurate information known. Accordingly, a three staged schedule development process shall be used as follows:

- Preliminary Project Baseline Schedule - PBS1: Submitted with Proposal.

- **Project Baseline Schedule - PBS2**: DB Contractor shall use PBS1 as a foundation to prepare PBS2. The schedule shall be fully developed to at least the most detailed work breakdown structure (WBS) levels shown in Attachment 8-1 for the entire Project, and shall be cost loaded in accordance with Section 8.5.1.2.2(h). For the Project administration, ROW acquisition, design and Utility coordination WBS levels, the maximum activity durations will be 20 days unless approved by TxDOT. No resource loading will be required for these WBS levels. For the Utility relocation and construction WBS levels, the maximum activity duration will be 40 days unless approved by TxDOT. No resource loading will be required for these WBS levels until PBS3. Upon approval, DB Contractor shall update PBS2 monthly until PBS3 is reviewed and approved.

- **PBS3**: DB Contractor shall use PBS2 as a foundation to prepare PBS3. DB Contractor shall not commence Construction Work until PBS3 is approved by TxDOT. The minimum level of detail to develop the schedule for the construction and Utility relocations WBS levels are shown in Attachment 8-1. For the construction and Utility relocation WBS levels, the maximum activity duration is 20 days unless approved by TxDOT. The construction and Utility relocation activities shall be resource loaded in accordance with Section 8.5.1.2.2(g). PBS3, once approved by TxDOT, will be the Project Baseline Schedule used for tracking progress and monitoring the impact of changes.

**8.5.1.2.2** Schedule Requirements

The schedule shall include all major activities of Work required by the Contract Documents. It shall also include Submittal activities and Submittal review activities for TxDOT's and all third party reviews, such as for Government Approvals and Utility Owner reviews, which require an approval, acceptance, or concurrence.

The Submittal activities and submittal review activities along with the associated timeframes included in the Project Baseline Schedule shall be based on the activities and timeframes defined in the proposed Submittal schedule prepared by the DB Contractor and submitted as part of the Design Submittal Packaging Plan in accordance with Table 2 of Attachment 4-1(Submittal Preparation).

The schedule shall indicate the sequence of performing each major activity and the logical dependencies and inter-relationships among the activities, and shall provide a sufficient number of activities to assure adequate planning to allow monitoring and evaluation of progress and, if applicable, payments.

(a) WBS and Activity Coding

DB Contractor shall organize the schedule in accordance with the WBS presented in Attachment 8-1. Additional WBS elements and/or levels may be added with TxDOT's approval.

DB Contractor shall supplement the WBS organization with Project level activity codes that allow Project activities to be sorted by type of work, phase, location of work, and responsibility or as mutually agreed to by DB Contractor and TxDOT. Only Project level activity codes shall be utilized unless otherwise approved by TxDOT. If required, specific Project level activity codes shall be assigned as presented in Attachment 8-1 along with the required WBS.

(b) Activities

For each activity in the Project Schedule, DB Contractor shall:

- Assign a unique identification number;
- Provide a logical activity description so that the scope of Work is identifiable and progress on each activity can be measured. The scope and location of the Work shall be included in the activity description, and a list of abbreviations used in activity descriptions shall be provided by DB Contractor if requested;
- Assign quantities of Work to construction activities;
- For the Payment Activities identified on Attachment 8-1 assign values as further described in Section 8.5.1.2.2(h);
- Provide a duration based on the quantity divided by a reasonable anticipated production rate and a list of anticipated production rates for major Work elements. Inclement weather days shall not be accounted for in the activity durations;

- Include separate activities for cure time and assign to a cure calendar, unless otherwise approved by TxDOT;

- Use the activity "Percent Complete Type" setting in P6 of "Physical Percent Complete", unless otherwise approved by TxDOT; TxDOT approval time should be set to calendar days and set to "Duration % Complete", as this is a set time of review; and

- Assign a predecessor and successor relationship for each activity, except for NTP1 and Substantial Completion milestone(s).

(c) Calendars

Through the use of calendars, DB Contractor shall incorporate seasonal weather conditions into the schedule, using a 10- to 100-year average from the closest station provided by the National Oceanic and Atmospheric Administration, for Work that may be influenced by adverse weather conditions. A seven day/week cure calendar for curing activities shall be included. DB Contractor shall adequately represent non-work days for activities with limitations such as Utility shutdown, work seasons, and landscape seasons. Non-work periods shall also be incorporated.

DB Contractor shall set up all calendars as Project specific. Global calendars shall not be used unless otherwise approved by TxDOT.

(d) Constraints and Milestones

DB Contractor shall identify each Completion Deadline with a milestone and assign a "Finish On or Before" constraint date. No other constraints are allowed without TxDOT approval.

DB Contractor shall include additional milestones in the schedule to define significant events such as notices to proceed (NTPs), start and finish of major segments/areas/regions of work, major traffic changes, and coordination points with outside entities.

(e) Schedule Calculation Settings

The default schedule calculation settings in Primavera shall be used, except that critical activities shall be defined as the "Longest Path".

(f) Float and Float Suppression

As identified in Section 8.5.3.2, all Float contained in the Project Schedule, as shown in the Preliminary Project Baseline Schedule or as generated thereafter, shall be considered a Project resource available to either Party or both Parties as needed to absorb delays caused by any event, or to achieve schedule milestones, interim completion dates or Completion Deadlines.

DB Contractor shall not sequester Float through the use of excessive lags, extended durations, calendar manipulation, intangible relationships, or any other such methodology.

(g) Resource Loading and Leveling

For all construction activities, resources shall be incorporated at a crew level into the schedule when required. DB Contractor shall provide a list of crews separate from the schedule, and shall identify the composition of and production rate for each crew type. The crews shall be defined as a labor resource type and shall be assigned to appropriate activities.

The schedule option of leveling resources shall only be used with prior notification and concurrence of TxDOT.

(h) Cost Loading, Payment Activities and Schedule of Values

DB Contractor shall submit the Schedule of Values to TxDOT for review and approval with PBS2 as described in Section 8.5.1.2.3(b). Once reviewed and approved by TxDOT, DB Contractor shall not change the Schedule of Values without written approval from TxDOT.

Upon the execution of a Change Order, DB Contractor shall revise the Schedule of Values and submit to TxDOT for approval with the next Project Schedule Update.

The Schedule of Values shall comply with the following requirements:

- No individual value for a Payment Activity in the Schedule of Values shall exceed $1.0 million unless otherwise approved by TxDOT;
- Values shall be allocated only to task-dependent Payment Activities for which completion progress can be measured and tracked;
- Values shall not be allocated to TxDOT activities;
- Price should be capable of reporting by CSJ at WBS Level 2; and
- Values shall not be artificially inflated, imbalanced, or front loaded when allocated to the Payment Activities.
- DB Contractor shall submit procedures for addressing cost loading modifications for TxDOT's review and approval.

**8.5.1.2.3** PBS2 and PBS3 Narrative and Submittal

DB Contractor shall prepare and submit a narrative report for the initial PBS2 and PBS3 submittals in accordance with the following requirements. Updates and revisions to these schedules have separate narrative requirements.

(a) PBS2 Narrative Requirements

DB Contractor shall provide a schedule narrative that addresses the following in the order listed. The narrative shall:

- Describe the plan and approach to each of the major elements of work: ROW acquisition, design, Utilities, additional third party coordination, and construction. A discussion of the schedule uncertainty shall be included in each of the major elements;

- Describe the Critical Path;

- Describe the activity identification naming convention and provide a guide to acronyms and abbreviations used in activity descriptions;

- Provide a list of activities with durations exceeding the limits required in Section 8.5.1.2.1, as well as an explanation for using a longer duration. Activities exceeding the limits must have written approval from TxDOT;

- Describe the approach to setting up the calendars used in the schedule, including adverse weather assumptions, and nighttime and shift work. The source of historical inclement weather data used in defining weather dependent work calendars shall also be provided;

- Describe the milestones and constraints used and the completion dates as they relate to the Completion Deadlines in the Agreement;

- Describe the use of leads and lags in the schedule;

- Describe activity coding methodology;

- Describe how resources were addressed in the schedule, as well as resource limitations. A comprehensive list of planned resources including number of crews, crew composition, and expected crew production rates shall be provided for all construction activities; and

- Describe how the Price was allocated to the Payment Activities. A graph showing three cumulative cash flow curves shall be provided: one based on the early dates; one based on the late dates; and one based on the Maximum Payment Schedule.

As an attachment to the schedule narrative, DB Contractor shall provide the following for verifying the electronic copy of the schedule is the same as the schedule presented in the narrative:

(1) 11 inches x 17 inches longest path plot in a Portable Document Format (PDF); and

(2) Copy of the schedule calculation log in a PDF.

All schedule plots shall include: the Project title, the schedule file name, the data date, a page number, and a legend indicating the various symbols used and their meanings.

(b) PBS2 Submittal Requirements

- DB Contractor shall submit PBS2 within the timeframe stated in Table 8-1. DB Contractor shall submit the following with the PBS2 schedule:

- One copy of the Schedule of Values with the Price allocated to the Payment Activities as described in Section 8.5.1.2.2(h). In order to facilitate the schedule cost loading, this may be submitted prior to the schedule submission;

- One electronic copy of the narrative report in a PDF; and

- One electronic copy of the schedule in the Primavera .xer format.

(c) PBS3 Narrative Requirements

DB Contractor shall provide a schedule narrative that describes, in addition to any update or amendment to the PBS2 narrative, the following in the order listed:

- How resources were addressed in the schedule and any resource limitations, including a list of planned resources with number of crews, crew composition, and expected crew production rates;

- The plan and approach to the construction of the Project and Utility relocations; and

- The longest/Critical Path.

- As an attachment to the schedule narrative, provide the following for verifying the electronic copy of the schedule is the same as the schedule presented in the narrative:

  (1) 11 inches x 17 inches longest path plot in a PDF; and

  (2) Copy of the schedule calculation log in a PDF.

Include on all schedule plots the Project title, the schedule file name, the data date, and a legend indicating the various symbols used and their meanings.

(d) PBS3 Submittal Requirements

Prior to the commencement of Construction Work, DB Contractor shall obtain TxDOT review and approval of PBS3. DB Contractor shall submit the following with the PBS3 schedule:

- The narrative report in PDF;

- The narrative report without attachments in Word format; and

- The schedule in Primavera .xer format.

**8.5.1.2.4** TxDOT Review and Approval

TxDOT will review the schedule submittal and within 21 calendar days of submission, return it to DB Contractor as approved, approved with comments to be addressed in the following Project Schedule Update, or returned for resubmission within ten days from the date of receipt by DB Contractor. DB Contractor shall repeat the Submittal process until receiving TxDOT approval of the Project Schedule.

TxDOT's review and approval of the Project Schedule is for conformance to the requirements of the Contract Documents and does not relieve DB Contractor of any responsibility for meeting any Completion Deadlines. Review and approval does not expressly or by implication warrant, acknowledge, or admit the reasonableness of the logic or durations of the Project Schedule. If DB Contractor fails to define any element of work, activity, or logic and TxDOT's review does not detect this omission or error, DB Contractor is responsible for correcting the error or omission.

DB Contractor is solely responsible for planning and executing the Work and for providing sufficient materials, equipment, and labor to guarantee completion of the Project in accordance with the Contract Documents and Completion Deadlines.

**8.5.1.2.5** Project Schedule Updates

**8.5.1.2.5.1** Update Requirements

DB Contractor shall submit the Project Schedule Update monthly with actual start and finish dates for completed activities, and physical percent complete and remaining durations for activities in progress. The data date for each Project Schedule Update shall be the day after the progress period for payments closes. Logic changes shall be implemented consistent with the retained logic method of scheduling to allow out-of-sequence Work to proceed. DB Contractor shall submit the Project Schedule Update with the monthly Draw Request. A Project Schedule Update (whether or not such update has been approved by TxDOT) does not constitute a revision to the Project Schedule. Refer to Section 8.5.1.3 for the process by which revisions to the Project Schedule shall be submitted and approved by TxDOT.

(a) Acceptable Schedule Changes

Acceptable scheduling changes in a Project Schedule Update include: logic adjustments to address out of sequence Work, splitting of activities to address significant periods of inactivity for payment purposes and changes to cost loading of activities below the WBS level of Payment Activities.

DB Contractor shall not revise descriptions to represent a different scope than originally intended. No changes in activity durations, activity cost loading at the WBS level of Payment Activities or higher, calendar assignments, logic ties, or constraints will be allowed without TxDOT's written concurrence. These are considered revisions to the Project Baseline Schedule. An activity identification number can only be used once. DB Contractor shall not delete an activity and then create a new activity at a later date utilizing the same activity identification number.

(b) Acceptable Cost Loading Changes in an Update

The splitting of Payment Activities for payment purposes will be allowed provided that justification is submitted, reviewed, and approved by TxDOT. DB Contractor shall ensure planned budget values match the Price (as may be modified by a Change Order) at all times.

**8.5.1.2.5.2** Project Schedule Update Narrative and Submittal Requirements

DB Contractor shall provide a narrative with each Project Schedule Update Submittal. The narrative shall:

- Include a comparison between last month's longest/Critical Path and current month's longest/Critical Path, with an explanation for any slippage or gains in Completion Deadlines;

- Describe Work performed during the progress period with explanation of deviations between the Work planned or scheduled and the Work performed for the period, and explain any adjustments made to correct actual dates that were prior to the current update period;

- Include a table of contract milestones and major interim milestones reflecting current completion dates compared to the completion dates shown in the Project Baseline Schedule;

- Describe changes made to the schedule in terms of acceptability for an update and the effect the changes had on the Critical or near Critical Paths;

- Include a look-ahead at Work to be accomplished during the next month, with a focus on Critical Path items; and

- Include a description of potential Project issues that may impact the schedule. A discussion of the following shall be included: how critical each issue is and how much float it has; and DB Contractor's Plans on how to mitigate, avoid or resolve the issue.

A discussion of problems or delay in the Project Schedule Update narrative shall not relieve DB Contractor of complying with contractual requirements regarding notification and documentation of claims.

DB Contractor shall include the following as attachments to the Project Schedule Update narrative:

- Longest path schedule plot organized by WBS and sorted by early start in a PDF;

- Schedule plot comparing DB Contractor's actual monthly progress to the previous month's planned progress, organized by WBS in a PDF;

- A 30-day look-ahead schedule layout in a PDF;

- Monthly expenditure projections in the WBS format;

- Updated actual cumulative cash flow curve plotted along with the three cumulative cash flow curves: one based on the early dates; one based on the late dates; and one based on the Maximum Payment Schedule required in Section 8.5.1.2.3; and

- Other layouts or reports as agreed upon or requested by TxDOT.

DB Contractor shall submit the following with the monthly Project Schedule Update:

- The narrative report with attachments in a PDF;

- The narrative report without attachments in Word format; and

- The schedule in Primavera .xer format.

**8.5.1.2.5.3** TxDOT Review and Approval

TxDOT will review the Project Schedule Update submittal within 10 business days of submission, return it to DB Contractor as approved, approved with comments to be addressed in the following Project Schedule Update, or returned for resubmission within ten days from the date of receipt by DB Contractor. DB Contractor shall repeat the submittal process until receiving TxDOT acceptance of the Project Schedule. Approval of the Project Schedule Update is required prior to payment of the associated Draw Request.

TxDOT's review and approval of the Project Schedule Update is for conformance to the requirements of the Contract Documents only and does not relieve DB Contractor of any responsibility for meeting any Completion Deadlines. Review and approval does not expressly or by implication warrant, acknowledge, or admit the reasonableness of the logic or durations of the Project Schedule. If DB Contractor fails to define any element of work, activity, or logic and TxDOT's review does not detect this omission or error, DB Contractor is responsible for correcting the error or omission.

**8.5.1.3** Schedule Revisions

**8.5.1.3.1** DB Contractor Schedule Revisions

DB Contractor shall submit proposed revisions to the Project Schedule using a copy of the latest approved Project Schedule Update. DB Contractor shall not include updates and proposed revisions to the Project Schedule within the same Submittal. All changes to the schedule, other than allowed in Section 8.5.1.2.5, will be considered proposed revisions.

**8.5.1.3.2** Change Order Revisions

Upon receipt of a Request for Change Proposal, DB Contractor shall incorporate the proposed change into a copy of the latest approved Project Schedule Update using Steps 1 and 2 of the Time Impact Analysis (TIA) process, provided in Section 8.5.1.4. The potential time impact which may result from the change shall be assessed by DB Contractor.

DB Contractor shall allocate agreed Change Order amounts into the Schedule of Values and the Project Schedule Update immediately following the execution date of the Change Order. The amount of each Change Order shall be assigned to unique "Change Modification" activities in the Schedule of Values.

**8.5.1.3.3** Recovery Schedule Revision

In accordance with this Section 8.5.1.3.3, DB Contractor shall prepare and submit a "Recovery Schedule" demonstrating the proposed plan to recover schedule slippage and to achieve the Completion Deadlines. The recovery plan shall be explained in writing and submitted in Primavera .xer format.

**8.5.1.3.3.1** If at any time, the Work on any Critical Path item is delayed for a period which exceeds the greater of either 30 days in the aggregate or that number of days in the aggregate equal to 5% of the days remaining until a Completion Deadline (including delays to which DB Contractor may be entitled to a time extension under Section 4.6), then DB Contractor shall prepare and submit to TxDOT for review and approval with the next Project Schedule Update a Recovery Schedule demonstrating DB Contractor's proposed plan to regain lost schedule progress and to achieve the contractual

milestones in accordance with this Design-Build Contract, including Substantial Completion and Final Acceptance, by the applicable Completion Deadline.

**8.5.1.3.3.2** TxDOT shall notify DB Contractor within 14 days after receipt of each such Recovery Schedule whether the Recovery Schedule is deemed accepted or rejected. Within seven days after any rejection by TxDOT of the Recovery Schedule, DB Contractor will resubmit a revised Recovery Schedule incorporating TxDOT's comments. When TxDOT accepts DB Contractor's Recovery Schedule, DB Contractor shall, within five days after TxDOT's acceptance, incorporate and fully include such schedule into the Project Schedule, deliver the same to TxDOT, and proceed in accordance with the approved Recovery Schedule.

**8.5.1.3.3.3** All costs incurred by DB Contractor in preparing, implementing and achieving the Recovery Schedule shall be borne by DB Contractor and shall not result in a change to the Price, except to the extent that the Recovery Schedule is in lieu of a time extension and a change in the Price is permitted for Acceleration Costs in accordance with Section 4.6.6.2.1.

If a TxDOT-approved Recovery Schedule is not in place within 30 days from DB Contractor's submission of a Recovery Schedule in accordance with this Section 8.5.1.3.3 or if DB Contractor fails to provide an acceptable Recovery Schedule as required herein and in addition to any other rights and remedies in favor of TxDOT arising out of such failure, DB Contractor shall have no right to receive progress payments until such time as DB Contractor has prepared and TxDOT has approved such Recovery Schedule. Any failure or delay in the submittal or approval of a Recovery Schedule shall not result in any time extension under the Contract Documents.

**8.5.1.3.4** Revision Submittal Requirements

The following shall be submitted with the proposed revision to the Project Schedule:

- A written revision analysis report providing the reason for the revisions, the scope and changes made to the schedule, and a description of the resulting effects on the schedule including any changes to the Critical or near Critical Paths;
- Schedule plots and/or comparison analysis to the update prior to the revision showing the changes that were made in a PDF; and
- The revised schedule in Primavera .xer format.

**8.5.1.3.5** TxDOT Review and Approval

TxDOT will review the schedule revision or Change Order revision Submittal within 10 Business Days after Submittal and return it to DB Contractor as: approved, approved with comments to be addressed in the following Project Schedule Update, or returned for resubmission within ten days from the date of receipt by DB Contractor. DB Contractor shall repeat the Submittal process until receiving TxDOT approval of the revision to the Project Schedule.

In the event the time impact of a Change Order revision cannot be agreed upon, DB Contractor shall continue tracking the change in accordance with Steps 3 and 4 of the TIA process and report findings.

**8.5.1.4** Time Impact Analysis

DB Contractor shall submit to TxDOT a TIA as part of a PCO Notice for an impact that may potentially cause Project delay as set forth in the Contract Documents and when requested by TxDOT for evaluating the potential time impact of Change Orders under consideration.

If TxDOT requests a TIA, it shall be submitted by DB Contractor within 15 days of receiving the request from TxDOT. Submission of a TIA does not relieve DB Contractor of complying with all contractual requirements regarding notification and documentation of PCO Notices and actual Change Orders.

Time extensions will only be considered when the total and Project Float are absorbed and the Completion Deadline(s) is delayed.

Each TIA shall consist of the following steps:

Step 1: Establishing the status of the Project before the impact by using the Project Schedule Update with the closest data date prior to the impact, or as adjusted by mutual agreement to the date the impact began;

Step 2: Estimating the duration of the impact, determining appropriate logic, and insertion of the impact activity or activities into the Project Schedule Update used in Step 1, and predicting the effect of the impact on the schedule;

Step 3: Tracking the effects of the impact on the schedule during its occurrence. Identifying and measuring the effect of mitigation efforts taken by either DB Contractor or TxDOT; and

Step 4: DB Contractor shall establish the status of the Project after the impact is complete and identify any ongoing mitigation efforts being taken;

Steps 1 and 2 shall be submitted to TxDOT with a PCO Notice, or as soon as there is constructive notice of a potential time impact. Step 3 shall be incorporated into Project Schedule Updates until the impact is complete. Step 4 shall be submitted to TxDOT no later than 30 days after the completion of an impact. If Step 4 is not submitted within 30 days, the issue will be considered as having no time impact.

A TIA shall consist of a report with accompanying schedules used in the analysis in Primavera .xer format. The report shall:

- Identify the scope and timeline for the impact(s) being analyzed;
- Identify the schedules used in the analysis;
- Identify the schedule approach to modeling the time impact including the addition of activities, relationships, modifications to calendars, or application of constraints, and include a plot of the portion of the schedule showing the model;
- Describe the impact or potential impact by comparing Step 1 to Step 2;
- Describe the results of mitigation efforts taken through Step 3;

- Describe any other potential mitigation efforts that may be taken to avoid impact;
- Describe the status of the Project after the impact is over; and
- Include schedule plots illustrating the analysis and documentation supporting dates, timelines, and entitlement.

**8.5.1.5** As-Built Schedule

Upon completion of the Punch List, DB Contractor shall submit a final update which will be considered the as-built schedule.

**8.5.2 Scheduling of Design, Construction and Payment**

**8.5.2.1** Project Schedule

The Work shall be undertaken and completed in accordance with the Project Schedule prepared in conformance with Section 8.5.1.1. The Project Schedule shall be used by the Parties for planning and monitoring the progress of the Work and as the basis for determining the amount of monthly progress payments to be made to DB Contractor.

**8.5.2.2** Float

All Float contained in the Project Schedule, as shown in the Preliminary Project Baseline Schedule or as generated thereafter, shall be considered a Project resource available to either Party or both Parties as needed to absorb delays caused by any event, or to achieve schedule milestones, interim completion dates or Completion Deadlines. All Float shall be shown as such in the Project Schedule on each affected schedule path. TxDOT shall have the right to examine the identification of (or failure to identify) Float on the schedule in determining whether to approve the Project Schedule. Once identified, DB Contractor shall monitor, account for and maintain Float in accordance with critical path methodology.

**8.5.3 Performance Evaluations**

TxDOT will conduct performance evaluations of DB Contractor's major team members, consultants, and Subcontractors. These evaluations will be conducted annually at twelve-month intervals during the term of this Design-Build Contract, upon termination of this Design-Build Contract, and when TxDOT determines that work is materially behind schedule or not being performed according to the requirements of the Contract Documents. DB Contractor agrees to cooperate in the conducting of these evaluations. DB Contractor shall respond to TxDOT requests regarding performance evaluations within two weeks. DB Contractor shall provide each performance evaluation received to all team members, including Subcontractors, that are identified in the performance evaluation.

**8.6 Liquidated Damages, Charges, Fees and Limitation of Liability**

**8.6.1 Liquidated Damages Respecting Delays**

**8.6.1.1** DB Contractor shall be liable for and pay to TxDOT liquidated damages with respect to any failure to achieve Substantial Completion and Final Acceptance by the applicable Completion Deadline,

as the same may be extended pursuant to this Design-Build Contract. The amounts of such liquidated damages are in the amounts set forth in Section 7.2 of the Design-Build Agreement.

DB Contractor acknowledges that the liquidated damages described in this Section 8.6.1 are reasonable in order to compensate TxDOT for damages it will incur as a result of late completion of portions thereof as set forth in this Section 8.6.1. Such damages include (a) loss of use, enjoyment and benefit, as applicable, and connecting TxDOT transportation facilities by the general public, (b) injury to the credibility and reputation of TxDOT's transportation improvement program with policy makers and with the general public who depend on and expect availability of service by the Substantial Completion Deadline, which injury to credibility and reputation may directly result in loss of ridership on the Project and connecting TxDOT transportation facilities, and (c) additional costs of administering this Design-Build Contract (including engineering, legal, accounting, overhead and other administrative costs). DB Contractor further acknowledges that these damages are incapable of accurate measurement because of, among other things, the unique nature of the Project and the unavailability of a substitute for it.

**8.6.2 Liquidated Damages for Lane Closures and Lane Rental Charges**

**8.6.2.1** DB Contractor shall be liable for and pay to TxDOT liquidated damages for Lane Closures ("Liquidated Damages for Lane Closures") and Lane Rental Charges assessed against DB Contractor for failure to meet Lane Closure requirements as described in Exhibit 15 to the Design-Build Agreement.

**8.6.2.2** DB Contractor acknowledges and agrees that Liquidated Damages for Lane Closures and Lane Rental Charges are reasonable in order to compensate TxDOT for damages it will incur as a result of such Lane Closures. Such damages include (a) loss of use, enjoyment and benefit of the Project and connecting TxDOT transportation facilities by the general public, (b) injury to the credibility and reputation of TxDOT's transportation improvement program with policy makers and with the general public who depend on and expect availability of service, which injury to credibility and reputation may directly result in loss of ridership on the Project and connecting TxDOT transportation facilities, and (c) additional costs of administering this Design-Build Contract (including engineering, legal, accounting, overhead and other administrative costs). DB Contractor further acknowledges that these damages are incapable of accurate measurement because of, among other things, the unique nature of the Project and the unavailability of a substitute for it and such amounts are in the nature of liquidated damages and not a penalty and that such sums are reasonable under the circumstances as of the Effective Date.

**8.6.3 Additional Acknowledgements Regarding Liquidated Damages, Charges and Fees**

DB Contractor further agrees and acknowledges that:

**8.6.3.1** In the event that DB Contractor fails to achieve Substantial Completion or Final Acceptance by the applicable Completion Deadline, or in the event of impermissible Lane Closures or Key Personnel Changes, TxDOT will incur substantial damages.

**8.6.3.2** Such damages are incapable of accurate measurement and difficult to prove for the reasons stated in Section 8.6.1, Section 8.6.2 and Section 8.3.1, as applicable.

**8.6.3.3** As of the Effective Date, the amounts of Liquidated Damages, charges and fees represent good faith estimates and evaluations by the Parties as to the actual potential damages that TxDOT

would incur as a result of late Substantial Completion, late Final Acceptance or impermissible Lane Closures or Key Personnel changes, and do not constitute a penalty.

**8.6.3.4** The Parties have agreed to such Liquidated Damages, charges and fees in order to fix and limit DB Contractor's costs and to avoid later Disputes over what amounts of damages are properly chargeable to DB Contractor.

**8.6.3.5** Such sums are reasonable in light of the anticipated or actual harm caused by delayed Substantial Completion, delayed Final Acceptance or impermissible Lane Closures or Key Personnel changes, the difficulties of the proof of loss, and the inconvenience or infeasibility of otherwise obtaining an adequate remedy.

**8.6.3.6** Such Liquidated Damages, charges and fees are not intended to, and do not, liquidate DB Contractor's liability under the indemnification provisions of Section 7.12, even though Third Party Claims against Indemnified Parties may arise out of the same event, breach or failure that gives rise to the Liquidated Damages, charges or fees.

**8.6.4 Payment; Satisfaction; Waiver; Non-Exclusive Remedy**

**8.6.4.1** DB Contractor shall pay any Liquidated Damages, Key Personnel Change Fees and Lane Rental Charges owing under this Section 8.6 within 20 days after TxDOT delivers to DB Contractor TxDOT's invoice or demand therefor, such invoice or demand to be issued not more often than monthly. For clarification, this provision does not excuse DB Contractor from including all amounts of Liquidated Damages, Key Personnel Change Fees and Lane Rental Charges owed to TxDOT within its Draw Request in accordance with Section 9.3.2, regardless of whether DB Contractor has received TxDOT's invoice.

**8.6.4.2** TxDOT shall have the right to deduct and offset Liquidated Damages, Key Personnel Change Fees and Lane Rental Charges from any amounts owing DB Contractor. TxDOT also shall have the right to draw on any bond, certificate of deposit, letter of credit or other security provided by DB Contractor pursuant to this Design-Build Contract to satisfy Liquidated Damages, Key Personnel Change Fees and Lane Rental Charges not paid when due.

**8.6.4.3** Permitting or requiring DB Contractor to continue and finish the Work or any part thereof after a Completion Deadline as applicable, shall not act as a waiver of TxDOT's right to receive Liquidated Damages, Key Personnel Change Fees or Lane Rental Charges hereunder or any rights or remedies otherwise available to TxDOT.

**8.6.4.4** Subject to Section 8.7.3, TxDOT's right to, and imposition of, Liquidated Damages, Key Personnel Change Fees and Lane Rental Charges are in addition, and without prejudice, to any other rights and remedies available to TxDOT under this Design-Build Contract, at law or in equity respecting the breach, failure to perform or DB Contractor Default that is the basis for the Liquidated Damages, Key Personnel Change Fees and Lane Rental Charges, or any other breach, failure to perform or DB Contractor Default, except for recovery of the monetary damage that the Liquidated Damages, Key Personnel Change Fees and Lane Rental Charges are intended to compensate.

**8.6.5 Limitation of DB Contractor's Liability**

Notwithstanding any other provision of the Contract Documents, to the extent permitted by applicable Law, TxDOT will not seek indemnification and defense under Section 7.12 or to recover damages from DB Contractor resulting from breach of this Design-Build Contract (whether arising

in contract, negligence or other tort, or any other theory of law) in excess of the sum of (a) all those costs reasonably incurred by TxDOT or any Person acting on TxDOT's behalf in completing or correcting the Work or having the Work completed or corrected by another Person, including the cost of the work required or arising under the Warranties; (b) an amount equal to 100% of the Price up to $100,000,000 (which amount shall specifically include any Liquidated Damages, Key Personnel Change Fees or Lane Rental Charges paid pursuant to this Section 8.6); (c) any amounts paid by or on behalf of DB Contractor that are covered by insurance proceeds from insurance policies required under the Contract Documents; and (d) all Losses incurred by any Indemnified Party relating to or arising out of any illegal activities, fraud, criminal conduct, gross negligence or intentional misconduct on the part of any DB Contractor-Related Entity.

**8.6.6 Limitation on Consequential Damages**

**8.6.6.1** Notwithstanding any other provision of the Contract Documents and except as set forth in this Section 8.6.6.1 and in Section 8.6.6.2, to the extent permitted by applicable Law, neither party shall be liable to the other for punitive damages or indirect, incidental or consequential damages, whether arising out of breach of this Design-Build Contract, tort (including negligence) or any other theory of liability, and each party hereby releases the other party from any such liability.

**8.6.6.2** The foregoing limitations on DB Contractor's liability for punitive, indirect, incidental or consequential damages shall not apply to or limit any right of recovery TxDOT may have respecting the following:

(a) Losses (including defense costs) to the extent (i) covered by the proceeds of insurance required to be carried pursuant to Section 3.5, (ii) covered by the proceeds of insurance actually carried by or insuring DB Contractor under policies solely with respect to the Project and the Work, regardless of whether required to be carried pursuant to Section 3.5, or (iii) DB Contractor is deemed to have self-insured the Loss pursuant to Section 3.5.2.3;

(b) Losses arising out of fraud, criminal conduct, intentional misconduct (which does not include any intentional Event of Default), recklessness, bad faith or gross negligence on the part of any DB Contractor-Related Entity;

(c) DB Contractor's indemnities set forth in Section 7.12.1 or elsewhere in the Contract Documents;

(d) DB Contractor's obligation to pay Liquidated Damages, Key Personnel Change Fees and Lane Rental Charges in accordance with the Contract Documents; and

(e) Losses arising out of DB Contractor Releases of Hazardous Materials.

**8.7 Default and Remedies**

**8.7.1 Default of DB Contractor**

**8.7.1.1** Events and Conditions Constituting Default

DB Contractor shall be in breach under this Design-Build Contract upon the occurrence of any one or more of the following events or conditions (each a "DB Contractor Default"):

(a) DB Contractor: (i) fails to begin Work within 30 days following issuance of NTP1 or NTP2, or (ii) fails to satisfy all conditions to commencement of the Construction Work, and commence the Construction Work with diligence and continuity;

(b) DB Contractor fails to complete the required Work by the applicable Completion Deadline, as the same may be extended pursuant to this Design-Build Contract;

(c) DB Contractor fails to perform the Work in accordance with the Contract Documents, including (i) conforming to applicable standards set forth therein with respect to the Work, or (ii) refusing to comply with any of the requirements of Section 5.10.1.3 with respect to the uncovering of Nonconforming Work, or Section 5.3.1 with respect to the correction, removal and replacement of Nonconforming Work;

(d) DB Contractor suspends, ceases, stops or abandons the Work or fails to continuously and diligently prosecute the Work (exclusive of work stoppage: (i) due to termination by TxDOT, or (ii) due to and required as a result of the continuance of a Relief Event or suspension by TxDOT, or (iii) due to and during the continuance of any work stoppage under Section 8.7.4);

(e) DB Contractor fails to obtain, provide and maintain any insurance, bonds, guarantees, letters of credit or other performance security as and when required under this Design-Build Contract for the benefit of relevant parties, or fails to comply with any requirement of this Design-Build Contract pertaining to the amount, terms or coverage of the same;

(f) DB Contractor makes or attempts to make or suffers a voluntary or involuntary assignment or transfer of all or any portion of this Design-Build Contract in violation of Section 7.8;

(g) DB Contractor fails, absent a valid dispute, to make payment when due for labor, equipment or materials in accordance with its agreements with Subcontractors and in accordance with applicable Laws, or fails to make payment to TxDOT when due of any amounts owing to TxDOT under this Design-Build Contract;

(h) DB Contractor materially fails to timely observe or perform or cause to be observed or performed any other material covenant, agreement, obligation, term, or condition required to be observed or performed by DB Contractor under the Contract Documents;

(i) Any representation or warranty in the Contract Documents made by DB Contractor, or any certificate, schedule, report, instrument or other document delivered by or on behalf of DB Contractor to TxDOT pursuant to the Contract Documents is false or materially misleading or inaccurate when made or omits material information when made;

(j) DB Contractor commences a voluntary case seeking liquidation, reorganization or other relief with respect to itself or its debts under any U.S. or foreign bankruptcy, insolvency, or other similar Law now or hereafter in effect, seeks the appointment of a trustee, receiver, liquidator, custodian, or other similar official of it or any substantial part of its assets; becomes insolvent, or generally does not pay its debts as they become due; admits in writing its inability to pay its debts; makes an assignment for the benefit of creditors; or takes any action to authorize any of the foregoing;

(k) An involuntary case is commenced against DB Contractor seeking liquidation, reorganization, dissolution, winding up, a composition or arrangement with creditors, a readjustment of debts or other relief with respect to DB Contractor or DB Contractor's debts under any U.S. or foreign bankruptcy, insolvency or other similar Law now or hereafter in effect; seeking the appointment of a trustee, receiver, liquidator, custodian, or other similar official of DB Contractor or any substantial part of DB Contractor's assets; seeking the issuance of a writ of attachment, execution, or similar process; or seeking like relief, and such involuntary case shall not be contested by DB Contractor in good faith or shall remain undismissed and unstayed for a period of 60 days;

(l) A voluntary or involuntary case or other act or event described in clauses (j) and (k) of this Section 8.7.1.1 shall occur (and in the case of an involuntary case shall not be contested in good faith or shall remain undismissed and unstayed for a period of 60 days) with respect to (i) any member of DB Contractor with a material financial obligation owing to DB Contractor for equity or shareholder loan contributions or (ii) any Guarantor of DB Contractor;

(m) In any voluntary or involuntary case seeking liquidation, reorganization or other relief with respect to DB Contractor or its debts under any U.S. or foreign bankruptcy, insolvency or other similar Law now or hereafter in effect, this Design-Build Contract or any of the other Contract Documents is rejected, including a rejection pursuant to 11 USC § 365 or any successor statute;

(n) (Any Guarantor revokes or attempts to revoke its obligations under its guarantee or otherwise takes the position that such instrument is no longer in full force and effect;

(o) Any final judgment is issued holding DB Contractor or any Guarantor liable for an amount in excess of $100,000 based on a finding of intentional or reckless misconduct or violation of a state or federal False Claims Act; or

(p) DB Contractor fails to resume performance of Work that has been suspended or stopped, within the time specified in the originating notification after receipt of notice from TxDOT to do so or (if applicable) after cessation of the event preventing performance.

**8.7.1.2** Notice and Opportunity to Cure

For the purpose of TxDOT's exercise of other remedies and subject to remedies that this Section 8.7 expressly states may be exercised before lapse of a cure period, DB Contractor shall have the following cure periods with respect to the following DB Contractor Defaults:

(a) Respecting a DB Contractor Default under clauses (a), (c) through (g), (m) and (p) of Section 8.7.1.1, a period of 15 days after TxDOT delivers to DB Contractor written notice of the DB Contractor Default; provided that TxDOT shall have the right, but not the obligation, to effect cure, at DB Contractor's expense, if a DB Contractor Default under clause (e) of Section 8.7.1.1 continues beyond five days after such notice is delivered.

(b) Respecting a DB Contractor Default under clauses (h) and (i) of Section 8.7.1.1, a period of 30 days after TxDOT delivers to DB Contractor written notice of DB Contractor Default; provided that: (i) if the DB Contractor Default is of such a nature that the cure cannot with diligence be completed within such time period and DB Contractor has commenced meaningful steps to cure immediately after receiving the default notice, DB Contractor

shall have such additional period of time, up to a maximum cure period of 60 days, as is reasonably necessary to diligently effect cure, and (ii) as to clause (i), cure will be regarded as complete when the adverse effects of the breach are cured.

(c) Respecting a DB Contractor Default under clauses (b), (j), (k), (l), (n) and (o) of Section 8.7.1.1, no cure period, and there shall be no right to notice of a DB Contractor Default under clauses (b), (j), (k), (l), (n) and (o) of Section 8.7.1.1.

(d) Respecting a DB Contractor Default under clause (l) of Section 8.7.1.1, a period of 10 days from the date of the DB Contractor Default to commence diligent efforts to cure, and 30 days to effect cure of such default by providing a letter of credit or payment to TxDOT for the benefit of the Project, in the amount of, as applicable: (i) the member's financial obligation for equity or shareholder loan contributions to or for the benefit of DB Contractor or (ii) the Guarantor's specified sum or specified maximum liability under its guaranty, or if none is specified, the reasonably estimated maximum liability of the Guarantor.

**8.7.1.3** Declaration of Event of Default

If any event or condition described in Section 8.7.1.1 is not subject to cure or is not cured within the period (if any) specified in Section 8.7.1.2, TxDOT may declare that an "Event of Default" has occurred. The declaration of an Event of Default shall be in writing and given to DB Contractor and the Surety.

**8.7.2 TxDOT Remedies for DB Contractor Default**

**8.7.2.1** Termination for Default

**8.7.2.1.1** In the event of any DB Contractor Default that is or becomes an Event of Default, TxDOT may terminate this Design-Build Contract or a portion thereof for default, including terminating DB Contractor's rights of entry upon, possession, control and operation of the Project, in which case, the procedures set forth in Section 8.8.2 shall apply. If this Design-Build Contract or a portion thereof is terminated for default, TxDOT shall have the following rights without further notice and without waiving or releasing DB Contractor from any obligations and DB Contractor shall have the following obligations (as applicable):

(a) TxDOT may deduct from any amounts (including interest thereon as permitted under this Design-Build Contract) payable by TxDOT to DB Contractor such amounts payable by DB Contractor to TxDOT, including reimbursements owing, Liquidated Damages, Key Personnel Change Fees, Lane Rental Charges, amounts TxDOT deems advisable to cover any existing or threatened claims, Liens and stop notices of Subcontractors, laborers or other Persons, amounts of any Losses that have accrued, the cost to complete or remediate uncompleted Work or Nonconforming Work or other damages or amounts that TxDOT has determined are or may be payable to TxDOT under the Contract Documents.

(b) TxDOT shall have the right, but not the obligation, to pay such amount or perform such act as may then be required from DB Contractor under the Contract Documents or Subcontracts.

(c) TxDOT may appropriate any or all materials, supplies and equipment as may be suitable and acceptable and may direct the Surety to complete this Design-Build Contract or may enter into an agreement for the completion of this Design-Build Contract according to the terms and provisions hereof with another contractor or the Surety, or use such other methods as may be required for the completion of the Work and the requirements of the Contract Documents, including completion of the Work by TxDOT.

(d) If TxDOT exercises any right to perform any obligations of DB Contractor, in the exercise of such right TxDOT may, but is not obligated to, among other things: (i) perform or attempt to perform, or cause to be performed, such Work; (ii) spend such sums as TxDOT deems necessary and reasonable to employ and pay such architects, engineers, consultants and contractors and obtain materials and equipment as may be required for the purpose of completing such Work; (iii) execute all applications, certificates and other documents as may be required for completing the Work; (iv) modify or terminate any contractual arrangements; (v) take any and all other actions that it may in its discretion consider necessary to complete the Work; and (vi) prosecute and defend any action or proceeding incident to the Work.

**8.7.2.1.2** DB Contractor and each Guarantor shall be jointly and severally liable to TxDOT for all costs reasonably incurred by TxDOT or any Person acting on TxDOT'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). TxDOT shall be entitled to withhold all or any portion of further payments to DB Contractor until Final Acceptance or the date on which TxDOT otherwise accepts the Project as complete or determines that it will not proceed with completion, at which time TxDOT will determine whether and to what extent DB Contractor is entitled to further payments. Promptly following Final Acceptance or the date on which TxDOT otherwise accepts the Project as complete or determines that it will not proceed with completion, the total cost of all completed Work shall be determined, and TxDOT shall notify DB Contractor and each Guarantor in writing of the amount, if any, that DB Contractor and each Guarantor shall pay TxDOT or TxDOT shall pay DB Contractor or its Surety with respect thereto. TxDOT's Recoverable Costs will be deducted from any moneys due or that may become due DB Contractor or its Surety. If such expense exceeds the sum that would have been payable to DB Contractor under this Design-Build Contract, then DB Contractor and each Guarantor shall be liable and shall pay to TxDOT the amount of such excess.

**8.7.2.1.3** In lieu of the provisions of this Section 8.7.2.1 for terminating this Design-Build Contract for default and completing the Work, TxDOT may, in its discretion, pay DB Contractor for the parts already done according to the provisions of the Contract Documents and may treat the parts remaining undone as if they had never been included or contemplated by this Design-Build Contract. No Claim under this Section 8.7.2.1.3 will be allowed for prospective profits on, or any other compensation relating to, Work uncompleted by DB Contractor.

**8.7.2.1.4** If this Design-Build 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 8.8.1.

**8.7.2.1.5** DB Contractor Defaults Related to Safety

Notwithstanding anything to the contrary in this Design-Build Contract, if in the good faith judgment of TxDOT a DB Contractor Default results in an emergency or danger to persons or property, and if DB Contractor is not then diligently taking all necessary steps to rectify or deal with such

emergency or danger, TxDOT may, without notice and without awaiting lapse of the period to cure any breach, and in addition and without prejudice to its other remedies, (but is not obligated to) (a) immediately take such action as may be reasonably necessary to rectify the emergency or danger, in which event DB Contractor shall pay to TxDOT on demand the cost of such action, including TxDOT's Recoverable Costs or (b) suspend the Work or close or cause to be closed any and all portions of the Project affected by the emergency or danger. So long as TxDOT undertakes such action in good faith, even if under a mistaken belief in the occurrence of such failure or existence of an emergency or danger as a result thereof, such action shall not be deemed unlawful or a breach of this Design-Build Contract, shall not expose TxDOT to any liability to DB Contractor and shall not entitle DB Contractor to any other remedy, it being acknowledged that TxDOT has a high priority, paramount public interest in protecting public and worker safety at the Project and adjacent and connecting areas. TxDOT's good faith determination of the existence of such a failure, emergency or danger shall be deemed conclusive in the absence of clear and convincing evidence to the contrary. Immediately following rectification of such emergency or danger, as determined by TxDOT, acting reasonably, TxDOT shall allow the Work to continue or such portions of the Project to reopen, as the case may be.

**8.7.2.1.6** Damages

**8.7.2.1.7** Subject to Section 8.6, TxDOT shall be entitled to recover any and all damages available at Law (subject to the duty at Law to mitigate damages) on account of the occurrence of a DB Contractor Default. DB Contractor shall owe any such damages that accrue after the occurrence of the DB Contractor Default and the delivery of notice thereof, if any, required by this Design-Build Contract regardless of whether the DB Contractor Default is subsequently cured.

**8.7.2.1.8** If TxDOT suffers damages as a result of a DB Contractor Default due to a DB Contractor-Related Entity's acts, omissions, negligence, intentional misconduct, or breach of applicable Law, contract or Governmental Approval, then, subject to Section 8.6, TxDOT shall be entitled to recovery of such damages from DB Contractor regardless of whether such acts, omissions, negligence, intentional misconduct, or breach of applicable Law, contract or Governmental Approval ripens into an Event of Default.

**8.7.2.1.9** DB Contractor, the Surety and Guarantor shall not be relieved of liability for any continuing Liquidated Damages, Key Personnel Change Fees or Lane Rental Charges on account of a DB Contractor Default or by TxDOT's declaration of an Event of Default, or by actions taken by TxDOT under this Section 8.7.2.

**8.7.2.1.10** TxDOT's remedies with respect to Nonconforming Work shall include the right to accept such Work and receive payment as provided in Section 5.3.2 in lieu of the remedies specified in this Section 8.7.2.

**8.7.2.2** Performance Security

Upon the occurrence of an Event of Default and without waiving or releasing DB Contractor from any obligations, TxDOT shall be entitled to make demand upon and enforce any bond, and make demand upon, draw on and enforce and collect any letter of credit, guaranty or other performance security available to TxDOT under this Design-Build Contract with respect to the Event of Default in question. Where access to a bond, letter of credit or other performance security is to satisfy damages owing, TxDOT shall be entitled to make demand, draw, enforce and collect, regardless of whether the Event of Default is subsequently cured. TxDOT will apply the proceeds of any such action to the satisfaction of DB Contractor's obligations under this Design-Build Contract, including

payment of amounts due TxDOT. The foregoing does not limit or affect TxDOT's right to give notice to or make demand upon and enforce any bond, and make demand upon, draw on and enforce and collect any letter of credit, guaranty or other performance security, immediately after TxDOT is entitled to do so under the bond, letter of credit, guaranty or other performance security.

**8.7.2.3** Other Rights and Remedies; Cumulative Remedies

Subject to Sections 8.6.4 and 8.6.5, TxDOT shall also be entitled to exercise any other rights and remedies available under this Design-Build Contract, or available at law or in equity, and each right and remedy of TxDOT hereunder shall be cumulative and shall be in addition to every other right or remedy provided herein or now or hereafter existing at law or in equity or by statute or otherwise, and the exercise or beginning of the exercise by TxDOT of any one or more of any of such rights or remedies shall not preclude the simultaneous or later exercise by TxDOT of any or all other such rights or remedies.

**8.7.3 Event of Default Due Solely to DB Contractor's Failure to Achieve Completion Deadlines**

**8.7.3.1** If an Event of Default consists solely of DB Contractor's failure to achieve Substantial Completion or Final Acceptance by the applicable Completion Deadline, TxDOT's sole remedy for such Event of Default shall be the right to assess Liquidated Damages, provided that (a) such Event of Default does not delay Substantial Completion beyond 365 days after the Substantial Completion Deadline or Final Acceptance beyond 180 days after the Final Acceptance Deadline, as applicable, and (b) DB Contractor continues to diligently perform the Work despite such Event of Default.

**8.7.3.2** The fact that TxDOT has agreed to accept Liquidated Damages as compensation for its damages associated with any delay in meeting a Completion Deadline shall not preclude TxDOT from exercising its other rights and remedies respecting the delay set forth in Section 8.7.2 other than the right to collect other damages due to the delay, except that TxDOT agrees not to exercise such other rights and remedies respecting the delay so long as (a) the Project Schedule demonstrates that DB Contractor is capable of achieving (i) Substantial Completion within 365 days after the Substantial Completion Deadline and (ii) Final Acceptance within 180 days after the Final Acceptance Deadline, as applicable, and (b) DB Contractor diligently performs the Work in accordance with said schedule. Nothing in this Section 8.7.3 shall prejudice any other rights or remedies that TxDOT may have due to any other Event of Default during such 365-day period or 180-day period, as applicable.

**8.7.3.3** If Substantial Completion has not occurred within 365 days after the Substantial Completion Deadline or if Final Acceptance has not occurred within 180 days after the Final Acceptance Deadline, TxDOT shall have the right to (a) terminate this Design-Build Contract; (b) continue to assess Liquidated Damages subject only to the limitations set forth in Section 8.6.1; and (c) exercise any other right or remedy under this Design-Build Contract, at law or in equity.

**8.7.4 Right to Stop Work for Failure by TxDOT to Make Undisputed Payment**

DB Contractor shall have the right to stop Work if TxDOT fails to make an undisputed payment due hereunder within 15 Business Days after TxDOT's receipt of written notice of nonpayment from DB Contractor. Any such work stoppage shall be considered a suspension for convenience under Section 8.4.1 and shall be considered a TxDOT-Directed Change. DB Contractor shall not have the right to terminate this Design-Build Contract for default as the result of any failure by TxDOT to make an undisputed payment due hereunder. However, if such nonpayment continues for more than 180 days, upon written notice from DB Contractor to TxDOT, the nonpayment may be

deemed a Termination for Convenience pursuant to Section 8.8. Upon such termination, the Parties' rights and obligations shall be as set forth in Section 8.8.

## 8.8 Termination

### 8.8.1 Termination for Convenience

**8.8.1.1** TxDOT may, at any time, terminate this Design-Build Contract and the performance of the Work by DB Contractor, in whole or in part, if TxDOT determines, in its discretion, that a termination is in TxDOT's best interest ("Termination for Convenience"). TxDOT shall terminate by delivering to DB Contractor a written Notice of Termination for Convenience or Notice of Partial Termination for Convenience specifying the extent of termination and its effective date. Termination (or partial termination) of this Design-Build Contract under this Section 8.8 shall not relieve DB Contractor or any Surety or Guarantor of its obligation for any claims arising prior to termination.

**8.8.1.2** Within three days after receipt of a Notice of Termination for Convenience or Notice of Partial Termination for Convenience, DB Contractor shall meet and confer with TxDOT for the purpose of developing an interim transition plan for the orderly transition of the terminated Work, demobilization and transfer of the Project to TxDOT. The Parties shall use diligent efforts to complete preparation of the interim transition plan within 15 days after the date DB Contractor receives such notice of termination. The Parties shall use diligent efforts to complete a final transition plan within 30 days after such date. The transition plan shall be in form and substance acceptable to TxDOT in its good faith discretion and shall include and be consistent with the other provisions and procedures set forth in Section 8.8.2, all of which provisions and procedures DB Contractor shall immediately follow, regardless of any delay in the preparation or acceptance of the transition plan.

**8.8.1.3** DB Contractor acknowledges and agrees that TxDOT has no obligation to issue NTP1 and further agrees that, unless and until NTP1 is issued, TxDOT shall have no liability to DB Contractor hereunder except as provided under Section 8.8.9.

### 8.8.2 DB Contractor's Responsibilities After Receipt of Notice of Termination

After receipt of a Notice of Termination for Convenience or Notice of Partial Termination for Convenience, and except as otherwise directed by TxDOT, DB Contractor shall timely comply with the following obligations independent of, and without regard to, the timing for determining, adjusting, settling, and paying any amounts due DB Contractor under this Design-Build Contract:

**8.8.2.1** Stop the Work as specified in the notice.

**8.8.2.2** Notify all affected Subcontractors (including Suppliers) that this Design-Build Contract is being terminated and that their Subcontracts (including orders for materials, services, or facilities) are not to be further performed unless otherwise authorized in writing by TxDOT.

**8.8.2.3** Enter into no further Subcontracts (including orders for materials, services or facilities) except as necessary to complete the continued portion of the Work.

**8.8.2.4** Unless instructed otherwise by TxDOT, terminate all Subcontracts and Utility Agreements to the extent they relate to the Work terminated.

**8.8.2.5** To the extent directed by TxDOT, execute and deliver to TxDOT written assignments, in form and substance reasonably acceptable to TxDOT, of all of DB Contractor's right, title, and interest in and to (a) Subcontracts and Utility Agreements that relate to the terminated Work, provided TxDOT assumes in writing all of DB Contractor's obligations thereunder that arise after the effective date of the termination and (b) all assignable warranties, claims and causes of action held by DB Contractor against Subcontractors and other third parties in connection with the terminated Work, to the extent such Work is adversely affected by any Subcontractor or other third-party breach of warranty, contract or other legal obligation.

**8.8.2.6** Subject to the prior written approval of TxDOT, settle all outstanding liabilities and claims arising from termination of Subcontracts and Utility Agreements that are required to be terminated hereunder.

**8.8.2.7** Within 30 days after notice of termination is received, DB Contractor shall provide TxDOT with a true and complete list of all materials, goods, machinery, equipment, parts, supplies and other property in inventory or storage (whether held by DB Contractor or any person or entity on behalf of or for the account of DB Contractor) for use in or respecting the terminated Work or on order or previously completed but not yet delivered from Suppliers for use in or respecting such Work. In addition, if requested by TxDOT, on or about the effective date of termination, DB Contractor shall transfer title and deliver to TxDOT or TxDOT's Authorized Representative, through bills of sale or other documents of title, as directed by TxDOT, all such materials, goods, machinery, equipment, parts, supplies and other property, provided TxDOT assumes in writing all of DB Contractor's obligations under any contracts relating to the foregoing that arise after the effective date of termination.

**8.8.2.8** On or about the effective date of termination, DB Contractor shall execute and deliver to TxDOT the following, together with an executed bill of sale or other written instrument, in form and substance reasonably acceptable to TxDOT, assigning and transferring to TxDOT all of DB Contractor's right, title and interest in and to the following: (a) all completed or partially completed drawings (including plans, elevations, sections, details and diagrams), specifications, designs, Design Documents, Record Documents, Construction Documents, surveys, and other documents and information pertaining to the design or construction of the terminated Work; (b) all samples, borings, boring logs, geotechnical data and similar data and information relating to the terminated Work; (c) all books, records, reports, test reports, studies and other documents of a similar nature relating to the terminated Work; and (d) all other work product used or owned by DB Contractor or any Affiliate relating to the terminated Work.

**8.8.2.9** Complete performance in accordance with the Contract Documents of all Work not terminated, except to the extent performance of the remaining Work is rendered impossible due to the scope of the partial Termination for Convenience.

**8.8.2.10** Take all action that may be necessary or that TxDOT may direct for the safety, protection and preservation of (a) the public, including public and private vehicular movement, (b) the Work and (c) equipment, machinery, materials and property related to the Project that is in the possession of DB Contractor and in which TxDOT has or may acquire an interest.

**8.8.2.11** As authorized by TxDOT in writing, use its best efforts to sell to third parties, at reasonable prices, any property of the types referred to in Section 8.8.2.7; provided, however, that DB Contractor (a) is not required to extend credit to any purchaser and (b) may acquire the property itself under the conditions prescribed and at reasonable prices approved by TxDOT. The proceeds of any transfer

or disposition will be applied to reduce any payments to be made by TxDOT under the Contract Documents or paid in any other manner directed by TxDOT.

**8.8.2.12** Immediately safely demobilize and secure construction, staging, lay down and storage areas for the Project and Utility Adjustments included in the Work in a manner satisfactory to TxDOT and remove all debris and waste materials, except as otherwise approved by TxDOT in writing.

**8.8.2.13** Assist TxDOT in such manner as TxDOT may require prior to and for a reasonable period following the effective date of termination to ensure the orderly transition of the terminated Work and its management to TxDOT and shall, if appropriate and if requested by TxDOT, take all steps as may be necessary to enforce the provisions of Subcontracts pertaining to the surrender of the terminated Work.

**8.8.2.14** Carry out such other directions as TxDOT may give for the termination of the Work.

**8.8.2.15** Take such other actions as are necessary or appropriate to mitigate further cost.

### 8.8.3 Settlement Proposal

After receipt of a Notice of Termination for Convenience or Notice of Partial Termination for Convenience, DB Contractor shall submit a final termination settlement proposal to TxDOT in the form and with the certification prescribed by TxDOT. DB Contractor shall submit the proposal promptly, but no later than 90 days from the effective date of termination, unless DB Contractor has requested a time extension in writing within such 90-day period and TxDOT has agreed in writing to allow such an extension. DB Contractor's termination settlement proposal shall then be reviewed by TxDOT and acted upon, returned with comments, or rejected. If DB Contractor fails to submit the proposal within the time allowed, TxDOT may determine, on the basis of information available, the amount, if any, due DB Contractor because of the termination and shall pay DB Contractor the amount so determined, and DB Contractor shall be bound by TxDOT's determination.

### 8.8.4 Amount of Negotiated Termination Settlement

DB Contractor and TxDOT may agree, as provided in Section 8.8.3, upon the whole or any part of the amount or amounts to be paid to DB Contractor by reason of the total or partial termination of the Work for convenience pursuant to Section 8.8.1. Such agreed amount or amounts, exclusive of settlement costs, shall not exceed the total Price as reduced by the amount of payments made and the Price of Work not terminated. Upon determination of the settlement amount, this Design-Build Contract will be amended accordingly, and DB Contractor will be paid the agreed amount as described in this Section 8.8.4. Nothing in Section 8.8.5 prescribing the amount to be paid to DB Contractor in the event that DB Contractor and TxDOT fail to agree upon the whole amount to be paid to DB Contractor by reason of the termination of Work pursuant to Section 8.8.1 shall be deemed to limit, restrict, or otherwise determine or affect the amount or amounts that may be agreed upon to be paid to DB Contractor pursuant to this Section 8.8.4. TxDOT'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 DB Contractor from its obligations with respect thereto (including Warranties) or affect DB Contractor's obligations under any of the Performance Bond, Payment Bond, Warranty Bond and Guaranty as to such completed or non-terminated Work.

**8.8.5 No Agreement as to Amount of Termination Settlement**

If DB Contractor and TxDOT fail to agree upon either all or some portion of the amount to be paid DB Contractor by reason of a Termination for Convenience pursuant to Section 8.8.1, the amount payable (exclusive of interest charges) shall be determined by TxDOT in accordance with the following, but without duplication of any items or of any amounts agreed upon in accordance with Section 8.8.4:

**8.8.5.1** TxDOT will pay DB Contractor the sum of the following amounts for Work performed prior to the effective date of the Notice of Termination for Convenience or Notice of Partial Termination for Convenience:

(a) DB Contractor's actual reasonable out-of-pocket costs, without profit, and including equipment costs only to the extent permitted by Section 4.6.8.3 for all Work performed, including mobilization, demobilization, Work in progress, and Work done to secure the applicable portion of 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 TxDOT's satisfaction. In determining the reasonable cost, deductions will be made for the cost of materials, supplies, and equipment to be retained by DB Contractor, for amounts realized by the sale of such items, and for other appropriate credits against the cost of the Work, including those deductions that would be permitted in connection with Final Payment. When, in the opinion of TxDOT's Authorized Representative, the cost of a contract item of Work is excessively high due to costs incurred to remedy or replace Nonconforming Work, the reasonable cost to be allowed will be the estimated reasonable cost of performing that Work in compliance with the requirements of the Contract Documents, and the excessive actual cost shall be disallowed.

(b) A sum, as profit on clause (a) above, determined by TxDOT to be fair and reasonable, provided DB Contractor establishes to TxDOT's satisfaction that it is reasonably probable that DB Contractor would have made a profit had the Design-Build Contract been completed, and provided further that the profit allowed shall in no event exceed 4% of the cost owing to DB Contractor under clause (a).

(c) The cost of settling and paying claims arising out of the termination of Work under Subcontracts and Utility Agreements as provided in Section 8.8.2.6, exclusive of the amounts paid or payable on account of supplies or materials delivered or services furnished by the Subcontractor prior to the effective date of the Notice of Termination for Convenience or Notice of Partial Termination for Convenience of Work under this Design-Build Contract, which amounts shall be included in the cost on account of which payment is made under clause (a) above.

(d) The reasonable out-of-pocket costs (including reasonable overhead) of the preservation and protection of property incurred pursuant to Section 8.8.2.10 and any other reasonable out-of-pocket costs (including overhead) incidental to termination of the Work under this Design-Build Contract, including the reasonable cost to DB Contractor of handling material returned to the Supplier, delivered to TxDOT or otherwise disposed of as directed by TxDOT, and including a reasonable allowance for DB Contractor's administrative costs in determining the amount payable due to termination of this Design-Build Contract.

**8.8.5.2** DB Contractor acknowledges and agrees that it shall not be entitled to any compensation in excess of the value of the Work performed (determined as provided in Section 8.8.5.1) plus its settlement costs and that items such as lost or anticipated profits, unabsorbed overhead, and opportunity costs shall not be recoverable by it upon termination of this Design-Build Contract. The total amount to be paid to DB Contractor, exclusive of costs described in Sections 8.8.5.1(c) and (d), may not exceed the total Price less the amount of payments previously made and the Price of Work not terminated. Furthermore, in the event that any refund is payable with respect to insurance or bond premiums, deposits, or other items that were previously passed through to TxDOT by DB Contractor, such refund shall be paid directly to TxDOT or otherwise credited to TxDOT. Except for normal spoilage, and except to the extent that TxDOT will have otherwise expressly assumed the risk of loss, there will be excluded from the amounts payable to DB Contractor under Section 8.8.5.1 the fair value, as determined by TxDOT, of equipment, machinery, materials, supplies, and property that is destroyed, lost, stolen, or damaged so as to become undeliverable to TxDOT or sold pursuant to Section 8.8.2.11. Information contained in the EPDs may be a factor in determining the value of the Work terminated. Upon determination of the amount of the termination payment, this Design-Build Contract shall be amended to reflect the agreed termination payment, DB Contractor shall be paid the agreed amount, and the Price shall be reduced to reflect the reduced scope of the Work.

**8.8.5.3** If a termination hereunder is partial, DB Contractor may file a proposal with TxDOT for an equitable adjustment of the Price for the continued portion of this Design-Build Contract. Any proposal by DB Contractor for an equitable adjustment under this Section 8.8.5.3 shall be requested within 90 days from the effective date of termination unless extended in writing by TxDOT. The amount of any such adjustment as may be agreed upon shall be set forth in an amendment to this Design-Build Contract.

**8.8.6 Reduction in Amount of Claim**

The amount otherwise due DB Contractor under this Section 8.8 shall be reduced by (a) the amount of any claim that TxDOT may have against any DB Contractor-Related Entity in connection with this Design-Build Contract, (b) the agreed price for, or the proceeds of sale, of property, materials, supplies, equipment or other things acquired by DB Contractor or sold, pursuant to the provisions of this Section 8.8, and not otherwise recovered by or credited to TxDOT, (c) all unliquidated advance or other payments made to or on behalf of DB Contractor applicable to the terminated portion of the Work or Design-Build Contract, (d) amounts that TxDOT deems advisable, in its discretion, to retain to cover any existing or threatened claims, Liens and stop notices relating to the Project, including claims by Utility Owners, (e) the cost of repairing any Nonconforming Work (or, in TxDOT's discretion, the amount of the credit to which TxDOT is entitled under Section 5.3.2); and (f) any amounts due or payable by DB Contractor to TxDOT.

**8.8.7 Payment**

TxDOT may from time to time, under such terms and conditions as it may prescribe and in its discretion, make partial payments for costs incurred by DB Contractor in connection with the terminated portion of this Design-Build Contract, whenever in the opinion of TxDOT the aggregate of such payments shall be within the amount to which DB Contractor will be entitled hereunder. If the total of such payments is in excess of the amount finally agreed or determined to be due under this Section 8.8, such excess shall be payable by DB Contractor to TxDOT upon demand.

**8.8.8 Subcontracts**

**8.8.8.1** Provisions shall be included in each Subcontract regarding terminations for convenience, allowing such termination rights and obligations to be passed through to the Subcontractors and establishing terms and conditions relating thereto, including procedures for determining the amount payable to the Subcontractor upon a termination, consistent with this Section 8.8.

**8.8.8.2** Each Subcontract shall provide that, in the event of a termination for convenience by TxDOT, the Subcontractor will not be entitled to any anticipatory or unearned profit on Work terminated or partly terminated, or to any payment that constitutes consequential damages on account of the termination or partial termination.

**8.8.9 Termination Based on Delay to Issuance of NTP1**

If NTP1 has not been issued within 365 days after the Effective Date and this delay is not caused in whole or in part by any act, omission, negligence, intentional misconduct, or breach of applicable Law, contract or Governmental Approval of any DB Contractor-Related Entity, DB Contractor, as its sole remedy, shall have the right to terminate this Design-Build Contract, which right shall be exercised by delivery of notice of termination to TxDOT. In such event, TxDOT's sole liability to DB Contractor is to pay DB Contractor the same payment for work product as provided to unsuccessful Proposers pursuant to the ITP, provided that all other conditions for such payment are met.

**8.8.10 No Consequential Damages**

Under no circumstances shall DB Contractor be entitled to anticipatory or unearned profits or consequential or other damages as a result of any termination under this Section 8.8. The payment to DB Contractor determined in accordance with this Section 8.8 constitutes DB Contractor's exclusive remedy for a termination hereunder.

**8.8.11 No Waiver; Release**

**8.8.11.1** Notwithstanding anything contained in this Design-Build Contract to the contrary, a termination under this Section 8.8 shall not waive any right or claim to damages that TxDOT may have and TxDOT may pursue any cause of action that it may have at Law, in equity or under the Contract Documents.

**8.8.11.2** Subject to Section 8.8.12 below, TxDOT's payment to DB Contractor of the amounts required under this Section 8.8 shall constitute full and final satisfaction of, and upon payment TxDOT shall be forever released and discharged from, any and all Claims, causes of action, suits, demands, and Losses, known or unknown, suspected or unsuspected, that DB Contractor may have against TxDOT arising out of or relating to the terminated Work. Upon such payment, DB Contractor shall execute and deliver to TxDOT all such releases and discharges as TxDOT may reasonably require to confirm the foregoing, but no such written release and discharge shall be necessary to give effect to the foregoing satisfaction and release.

**8.8.12 Dispute Resolution**

The failure of the Parties to agree on amounts due under this Section 8.8 shall be a Dispute to be resolved in accordance with Section 4.9.

### 8.8.13 Allowability of Costs

All costs claimed by DB Contractor under this Section 8.8 must be allowable, allocable and reasonable in accordance with the cost principles and procedures of 48 CFR Part 31.

## 8.9 Submittals

All submittals described in Item 8 shall be in accordance with the schedule and for the purpose (approval, review and comment, for information) set forth in Table 8-1. Acceptable electronic formats include Microsoft Word, Microsoft Excel, or Adobe Acrobat files, unless otherwise indicated.

**Table 8-1: Submittals to TxDOT**

| Submittals | Submittal Schedule | Department Action | Reference Section |
|---|---|---|---|
| Schedule of Values | Submitted with Project Baseline Schedule PBS2 and PBS3 and updated whenever a Change Order is agreed | Approval | 8.5.1.2.2 |
| Project Baseline Schedule (PBS2) | Prior to issuance of NTP2 | Approval | 8.5.1.2.1 |
| Project Baseline Schedule (PBS3) | Prior to Commencement of Construction | Approval | 8.5.1.2.1 |
| Project Schedule Updates | Monthly after initial PBS2 and PBS3 submittals and as part of the Draw Request | Approval | 8.5.1.2.5 |
| Schedule revisions –<br>o DB Contractor revisions<br>o Change Order revisions<br>o Recovery Schedule revisions | As necessary | Approval | 8.5.1.3<br>8.5.1.3.1<br>8.5.1.3.2<br>8.5.1.3.3 |
| Time Impact Analysis | As necessary; within 15 days of receiving the request from TxDOT | Approval | 8.5.1.4 |
| As-Built Schedule | Prior to Final Acceptance | Approval | 8.5.1.5 |

## ATTACHMENT 8-1

### PROJECT BASELINE SCHEDULE – WORK BREAKDOWN STRUCTURE

The Project Baseline Schedule shall be organized consistent with the WBS shown in Table 1. Additional WBS elements and levels may be added with TxDOT's approval

The Schedule of Values shall be the rollup of all Payment Activities to the WBS Level 3, 4, or 5 as appropriate.

WBS Minimum Requirements

1 [Name of Project]

- 1.1. Project Administration
  - 1.1.1. Mobilization
    - 1.1.1.1. (by DB Contractor entity)
  - 1.1.2. Administrative Submittals and Permitting
    - 1.1.2.1. (By Governmental Agency)
      - 1.1.2.1.1. (By Specific Permit/Submittal Requirement)
- 1.2. Right of Way Acquisition
  - 1.2.1. Acquisition By TxDOT
    - 1.2.1.1. (By Parcel No.)
  - 1.2.2. Acquisition by DB Contractor
    - 1.2.2.1. (By Parcel No.)
- 1.3. Utility Adjustments
  - 1.3.1. Utility Coordination
    - 1.3.1.1. Administration and Planning
      - 1.3.1.1.1. Site Utility Engineering
      - 1.3.1.1.2. Conceptual Design
    - 1.3.1.2. (By Owner)
      - 1.3.1.2.1. Master Agreements
      - 1.3.1.2.2. Utility Assemblies
  - 1.3.2. Utility Relocations
    - 1.3.2.1. (By Owner)
      - 1.3.2.1.1. (By Line No.)
- 1.4. Design
  - 1.4.1. General Activities and Field Work
    - 1.4.1.1. Design Mobilization
    - 1.4.1.2. Schematics

1.4.1.3. Survey Work

1.4.1.4. Geotechnical Investigations

1.4.1.5. Additional Field Investigations

1.4.2. Develop Specifications

1.4.2.1. (By Discipline)

1.4.3. Geotechnical Design

1.4.3.1. General

1.4.3.2. Earthwork Geotech

1.4.3.3. Bridge Geotech

1.4.3.4. Culvert Geotech

1.4.3.5. Wall Geotech

1.4.4. Pavement Design

1.4.4.1. Data Analysis and Draft Report

1.4.4.2. Final Design and Report

1.4.5. Drainage Design

1.4.5.1. Hydrologic and Hydraulic Design

1.4.5.2. Preliminary System Design

1.4.5.3. Detailed Drainage Design

1.4.6. Roadway Design

1.4.6.1. Alignments

1.4.6.2. Sections

1.4.6.3. Detailed Design

1.4.7. Bridge Design

1.4.7.1. Establish Criteria and Procedures

1.4.7.2. Bridge layouts

1.4.7.3. Substructure Design

1.4.7.4. Superstructure Design

1.4.8. Retaining Wall Design

1.4.8.1. Establish Criteria and Procedures

1.4.8.2. Fill Wall Design

1.4.8.3. Cut Wall Design

1.4.9. Traffic Management

1.4.9.1. (By Phase)

**1.4. Design (Continued)**

1.4.10. Environmental Design

1.4.10.1. Erosion Control/SWPPP

1.4.10.2. Noise Wall Design

1.4.10.3. Wetland and habitat Mitigation

1.4.10.4. TCEQ Best Management Practices

1.4.11. Landscape and Aesthetic Design

1.4.11.1. Landscape Design

1.4.11.2. Aesthetic Design

1.4.12. Electrical Design

1.4.12.1. Illumination

1.4.12.2. Traffic Signals

1.4.13. ITS & TCS Design

1.4.13.1. Duct Bank System & Power Supply

1.4.13.2. ITS/TCS Equipment & Structures

1.4.14. Signage and Marking Design

1.4.14.1. Overhead

1.4.14.2. Small signs and pavement markings

1.4.15. Design Packages

1.4.15.1. Package Preparation

1.4.15.2. QA/QC Review

1.4.15.3. Submittal

1.4.15.4. TxDOT/IE Reviews

1.4.15.5. Comment Resolution

1.5. Construction

1.5.1. General

1.5.2. Material Submittals

1.5.3. Mobilization

1.5.4. Administration

1.5.5. Quality Control

1.5.6. By Phase or Work Area

**1.5. Construction (Continued)**

1.5.6.1. Removals

1.5.6.1.1. Building Removals

1.5.6.1.2. ROW Preparation

1.5.6.1.3. Roadway Removals

1.5.6.1.4. Bridge Removals

1.5.6.2. Earthwork

1.5.6.2.1. Topsoil Stripping and Placing

1.5.6.2.2. Excavation

1.5.6.2.3. Embankment

1.5.6.2.4. Special Geotechnical Measures

1.5.6.3. Landscaping

1.5.6.3.1. Seeding and Sodding

1.5.6.3.2. Fertilizer and Watering

1.5.6.3.3. Special Aesthetic Landscaping (if applicable)

1.5.6.4. Subgrade Treatment and Base

1.5.6.4.1. Lime Treatment

1.5.6.4.2. Flexible Base

1.5.6.5. Pavement

1.5.6.5.1. Asphalt Pavement

1.5.6.5.2. Concrete Pavement

1.5.6.5.3. Curb & Gutter

1.5.6.5.4. Driveways

1.5.6.5.5. Sidewalks and Median Paving

1.5.6.6. Retaining Walls

1.5.6.6.1. (By Wall No.)

1.5.6.7. Bridges

1.5.6.7.1. (By Bridge No.)

1.5.6.8. Drainage

1.5.6.8.1. Culverts

1.5.6.8.2. Storm Sewer

1.5.6.8.3. Riprap

## 1.5. Construction (Continued)

1.5.6.9. Traffic Control and Temporary Work

- 1.5.6.9.1. Barricades, Signs & Traffic Handling
- 1.5.6.9.2. Erosion Control
- 1.5.6.9.3. Detour Construction/Removal
- 1.5.6.9.4. Portable Traffic Barrier
- 1.5.6.9.5. Workzone Pavement Marking
- 1.5.6.9.6. Temporary Bridges
- 1.5.6.9.7. Temporary Walls/Shoring
- 1.5.6.9.8. Temporary Drainage
- 1.5.6.9.9. Temporary Illumination

1.5.6.10. Permanent Barriers

- 1.5.6.10.1. Permanent Concrete Barriers
- 1.5.6.10.2. Metal Beam Guard Fence
- 1.5.6.10.3. Crash Attenuators

1.5.6.11. Signals and Illumination

- 1.5.6.11.1. Roadway Illumination
- 1.5.6.11.2. High Mast Illumination
- 1.5.6.11.3. Electrical Services
- 1.5.6.11.4. Traffic Signals

1.5.6.12. ITS/TCS

- 1.5.6.12.1. Duct Bank System
- 1.5.6.12.2. Equipment Foundations
- 1.5.6.12.3. Support Structures and Equipment

1.5.6.13. Permanent Signing and Marking

- 1.5.6.13.1. Overhead Sign Structures
- 1.5.6.13.2. Small Signs
- 1.5.6.13.3. Pavement Markings

1.5.6.14. Environmental Mitigation

- 1.5.6.14.1. Noise Walls
- 1.5.6.14.2. Wetland and Habitat Mitigation

1.5.6.15. Hazardous Materials

- 1.5.6.15.1. Site Assessments
- 1.5.6.15.2. Remediation

1.6. Close-out

1.6.1. Inspections

1.6.2. Punch List

1.6.3. Closing Documentation

1.6.3.1. Record Documents

1.6.3.2. Maintenance Records

1.6.3.3. Warranty Documents

1.6.4. Substantial Completion

1.6.5. Final Acceptance

## ITEM 9 PAYMENT

### 9.1 Price

#### 9.1.1 Amount

As full compensation for the Work and all other obligations to be performed by DB Contractor under the Contract Documents, TxDOT shall pay to DB Contractor the lump sum "Price." The term "Price" as used herein means the lump sum amount set forth in Section 4.1 of the Design-Build Agreement, subject to adjustment from time to time to account for Change Orders. The Price shall be increased or decreased only by a Change Order issued in accordance with Section 4.6. The Price shall be paid in accordance with Section 9.3.

#### 9.1.2 Items Included in Price

DB Contractor acknowledges and agrees that, subject only to DB Contractor's rights under Section 4.6, the Price includes (a) all designs, equipment, materials, labor, insurance and bond premiums, home office, job site and other overhead, profit and services relating to DB Contractor's performance of its obligations under the Contract Documents (including all Work, equipment, materials, labor and services provided by Subcontractors and intellectual property rights necessary to perform the Work); (b) performance of each and every portion of the Work; (c) the cost of obtaining all Governmental Approvals (except as specified in Section 4.7); (d) all costs of compliance with and maintenance of the Governmental Approvals and compliance with Laws, except to the extent compliance with or maintenance of Governmental Approvals is the responsibility of Utility Owners pursuant to Section 14 of the Design-Build Specifications; (e) payment of any taxes, duties, permit and other fees and royalties imposed with respect to the Work and any equipment, materials, labor or services included therein; and (f) compensation for all risks and contingencies assigned to DB Contractor under the Contract Documents.

#### 9.1.3 Payment for Work Prior to NTP2

DB Contractor acknowledges and agrees that the amount of funds available to pay for Work prior to issuance of NTP2 is limited to the NTP1 Maximum Payment Amount. TxDOT has no obligation to make any payments to DB Contractor in excess of the NTP1 Maximum Payment Amount until such time (if any) as NTP2 is issued.

### 9.2 Maximum Payment Schedule

The Project Schedule shall provide for payment to be made solely on the basis of progress by DB Contractor, subject to a cap on payments shown on the Maximum Payment Schedule established for the Project. The Maximum Payment Schedule shall not limit payment for Change Order Work unless otherwise specified in the Change Order. In other words, at no time shall DB Contractor's cumulative total progress payments (including mobilization payments but exclusive of payments for Change Order Work) exceed the cumulative total expenditure permitted by the Maximum Payment Schedule. The Maximum Payment Schedule shall be calculated based on the monthly expenditure rate set forth in Exhibit 10 to the Design-Build Agreement. If DB Contractor and TxDOT mutually agree in writing to a different expenditure rate at any time, then such revised rate shall thereafter be the Maximum Payment Schedule for the Project. The Maximum Payment Schedule shall be revised from time to time thereafter upon request by TxDOT or by DB Contractor on its own initiative, as appropriate to account for any changes in the Price as evidenced by Change Orders

or amendments. The aggregate amount of progress payments to DB Contractor hereunder shall not exceed the amount allowed by the Maximum Payment Schedule at any time, exclusive of payments for Change Order Work.

## 9.3 Invoicing and Payment

The following process shall apply to invoicing and payment:

### 9.3.1 Delivery of Draw Request

On or about the fifth Business Day of each month following NTP1 and continuing through the last date of the Maximum Payment Schedule shown on Exhibit 10 to the DBA, DB Contractor shall deliver to TxDOT one hard copy and an electronic copy of a Draw Request in the form of Attachment 9-1 and meeting all requirements specified herein except as otherwise approved in writing by TxDOT. Each Draw Request shall be executed by DB Contractor's Authorized Representative. DB Contractor acknowledges that TxDOT will obtain funding for portions of the Work from the federal government, local agencies and other third parties, and DB Contractor agrees to segregate Draw Requests for all such Work in a format reasonably requested by TxDOT and with detail and information as reasonably requested by TxDOT. Each Draw Request shall be organized to account for applicable reimbursement requirements and to facilitate the reimbursement process.

### 9.3.2 Contents of Draw Request

Each Draw Request must include, at a minimum, all items required by Exhibit 3 to Attachment 9-1.

A Draw Request shall be considered complete and ready for further processing if it includes (i) all of the items required by Exhibit 3 to Attachment 9-1 and (ii) an approved Project Schedule Update Submittal.

### 9.3.3 Draw Request Cover Sheet Contents

The Draw Request cover sheet shall include the following:

(a) Project number and title;

(b) Request number (numbered consecutively starting with "1");

(c) Total amount earned to date for the Project; and

(d) Authorized signature, title of signer, and date of signature.

### 9.3.4 Certification by Professional Services Quality Assurance Firm and Independent Quality Firm

Each Draw Request shall include a certificate signed by the Professional Services Quality Assurance Firm or the Independent Quality Firm, as appropriate, in the form included in Exhibit 2 to Attachment 9-1 or otherwise acceptable to TxDOT certifying that:

(a) Except as specifically noted in the certification, all Work, including that of designers, Subcontractors, and Suppliers, that is the subject of the Draw Request has been checked or inspected in accordance with the respective Quality Management Plan;

(b) Except as specifically noted in the certification, all Work that is both the subject of the Draw Request and for which an audit or inspection has been performed conforms to the requirements of the Contract Documents;

(c) The Professional Services quality program and the Construction quality program and all of the measures and procedures provided therein are functioning properly and are being followed;

(d) The Professional Services percentages and construction percentages indicated are accurate and correct; and

(e) All quantities for which payment is requested on a unit price basis are accurate.

### 9.3.5 Draw Request Data Sheets

Draw Request data sheets shall be subdivided into DB Contractor designated Project segments and shall be attached to a Project wide report and Draw Request data sheet. Payments will be based on the percentage of Work completed, not on measured quantities (except as expressly set forth in this Design-Build Contract), except that cost plus or unit price Change Order work or items to be paid from an allowance may be paid based upon measured quantities. The percentage completion of Payment Activities shown on the Project Schedule Update (subject to TxDOT's review and approval in accordance with Section 8.5.1.2.5) shall be the basis for determining periodic payments. Where progress is measured by percentage completed and days remaining, the percentage completion of each Payment Activity shall be calculated using the latest scheduling software and the methods set forth in Section 8.5.1. DB Contractor shall present the format of the Draw Request data sheets for TxDOT approval at least 20 Business Days prior to the submittal of the first Draw Request. Once the Draw Request format has been approved by TxDOT, the format shall not change without TxDOT's prior written approval.

### 9.3.6 Payment by TxDOT

Within 10 Business Days after TxDOT's receipt of a complete Draw Request, TxDOT shall notify DB Contractor of the amount approved for payment and the reason for disapproval of any remaining invoiced amounts or of any other information set forth in the Draw Request. DB Contractor may include such disapproved amounts in the next month's Draw Request after correction of the deficiencies noted by TxDOT and satisfaction of the requirements of the Contract Documents related thereto. Within five Business Days after TxDOT's approval of a Draw Request, TxDOT will pay DB Contractor the amount of the Draw Request approved for payment less any amounts that TxDOT is entitled to withhold or deduct. In no event shall DB Contractor be entitled to (a) payment for any Payment Activity in excess of the value of the Payment Activity times the completion percentage of such activity (for non-unit-priced Work) or (b) aggregate payments hereunder in excess of (i) the overall completion percentage for the Project times the Price (for non-unit-priced Work) or (ii) the Maximum Payment Schedule for the month to which the Draw Request applies, plus amounts allowed by Change Orders not included in the Maximum Payment Schedule.

## 9.4 Deductions, Withholding, Exclusions and Limitations on Payment

### 9.4.1 Deductions

In addition to the adjustments that TxDOT may make to the payment amount requested in Draw Requests exceeding the amounts to which DB Contractor is entitled pursuant to Section 9.3.6, TxDOT may deduct from each progress payment and the Final Payment the following:

(a) Any TxDOT or third-party Losses for which DB Contractor is responsible hereunder;

(b) Any (i) Liquidated Damages, including any Key Personnel Unavailability Liquidated Damages and Liquidated Damages for Lane Closures, (ii) Key Personnel Change Fees, or (iii) Lane Rental Charges, that have accrued as of the date of the application for payment or that are anticipated to accrue based on the Substantial Completion and Final Acceptance dates shown in the current Project Schedule;

(c) If a notice to stop payment, claim or Lien is filed with TxDOT, due to DB Contractor's failure to pay for labor or materials used in the Work, money due for such labor or materials will be withheld from payment to DB Contractor until such time as DB Contractor provides evidence to TxDOT that the stop payment, claim or Lien is released;

(d) Any sums expended by or owing to TxDOT as a result of DB Contractor's failure to maintain the Record Documents, up to a maximum of 1% of the Price, which shall be released to DB Contractor upon TxDOT's receipt of acceptable Record Documents, as described in Section 9.5.3;

(e) Any sums included in a Draw Request for materials that are impacted by, or Work that is the subject of, an NCR that is not resolved and closed out in accordance with the QAP for DB Projects and Section 4.1.2.2.4, which sums shall be withheld until such time as the NCR is resolved and closed out to TxDOT's satisfaction; and

(f) Any other sums that TxDOT is entitled to recover, deduct or withhold from DB Contractor under the terms of this Design-Build Contract.

DB Contractor shall provide documentation with the Draw Request describing any amounts included in the Draw Request for materials that are described in Section 9.4.1 (e), along with an itemized account of deducted and withheld sums using Appendix 2 to Exhibit 1 to Attachment 9-1. The failure by TxDOT to deduct any of these sums from a progress payment shall not constitute a waiver of TxDOT's right to such sums.

### 9.4.2 Materials on Hand

TxDOT will not pay for materials not yet incorporated in the Work unless such materials qualify as Materials on Hand and all of the following conditions are met:

**9.4.2.1** Materials on Hand shall be (a) delivered to the Site, (b) delivered to DB Contractor and promptly stored by DB Contractor in storage at a location approved by TxDOT, or (c) stored at a Supplier's fabrication site, which shall be a location approved by TxDOT prior to submitting a request for such Materials on Hand. If such materials are stored at any site not approved by TxDOT, DB Contractor shall accept responsibility for and pay all personal and property taxes that may be levied against TxDOT by any state or subdivision thereof on account of the storage of such material.

**9.4.2.2** DB Contractor shall submit a completed Appendix 1 to Exhibit 1 of Attachment 9-1 with each Draw Request showing the amount requested for Materials on Hand and the cumulative amount earned to date for that period to report on line E of Exhibit 1 to Attachment 9-1 (Form of Draw Request and Certificate). DB Contractor shall submit invoices for such Materials on Hand seven days in advance of submittal of the Draw Request to allow TxDOT to verify requested amounts, which shall be a condition to payment for such Materials on Hand. TxDOT shall allow only such portion of the amount represented by these invoices as, in its discretion, is consistent with the reasonable cost of such materials. Such invoices shall not include freight and handling costs. Payment for precast products fabricated or constructed by DB Contractor for which invoices are not available may be made based on statements of actual cost. Payment will not exceed the actual cost of the material as established by invoice, or the total cost of the associated Payment Activity less reasonable placement costs, whichever is less. DB Contractor shall provide a paid invoice within 60 days of receiving payment for Materials on Hand or DB Contractor will not be eligible for any additional payments for Materials on Hand and payment shall be withheld from future Draw Requests in an amount equal to the payments for Materials on Hand that were not supported by a paid invoice. The total amount eligible for payment for Materials on Hand shall not exceed the cumulative maximum payment schedule amount. DB Contractor shall report the total earned value and Materials on Hand amounts for the Payment Activities for that period on Appendix 1 to Exhibit 1 of Attachment 9-1. Prior to payment, the IQF shall certify that Materials on Hand are in conformance with the approved material submittals and specifications in accordance with Section 3.1.1 of the QAP and are authorized for construction, unless approved by TxDOT at their sole discretion. Payment for Materials on Hand does not constitute acceptance of the Material.

**9.4.2.3** All such Materials on Hand are the property of DB Contractor. DB Contractor shall be responsible for taking any actions required to ensure Materials on Hand meet the requirements of the Contract Documents and may be incorporated into the Work. DB Contractor at its own cost shall promptly execute, acknowledge and deliver to TxDOT proper bills of sale or other instruments in writing in a form acceptable to TxDOT assuring to TxDOT that such materials included in any Draw Request are free and clear of all Liens.

**9.4.2.4** The cost and charges for Materials on Hand included in a Draw Request, which material is subsequently lost, damaged, unsatisfactory or impacted by Nonconforming Work may be deducted from succeeding Draw Requests if TxDOT, in its discretion, determines that is appropriate after considering the availability of insurance coverage and DB Contractor's actions to replace the lost, damaged or unsatisfactory material.

**9.4.2.5** Payment for Materials on Hand furnished and delivered as indicated in this Section 9.4.2 will not exceed the amount paid by DB Contractor as evidenced by a bill of sale supported by a paid invoice.

## 9.5 Payments for Mobilization, Bond and Insurance Premiums and Record Documents

### 9.5.1 Payments for Mobilization

Subject to the limitations on payment imposed by the Maximum Payment Schedule, DB Contractor shall be entitled to payment for mobilization in installments in an amount equal to the Mobilization Payment Activity Amount. The first payment for mobilization shall be in an amount not to exceed 5% of the Mobilization Payment Activity Amount, payable as part of the first Draw Request following NTP1. The second payment for mobilization shall be in an amount not to exceed 20% of the Mobilization Payment Activity Amount, payable as part of the first Draw Request following NTP2. The third payment for mobilization shall be in an amount not to exceed 50% of the

Mobilization Payment Activity Amount, payable when at least 10% of the Price (less the Mobilization Payment Activity Amount) is earned. The fourth payment for mobilization shall be in the remaining amount of the Mobilization Payment Activity Amount, payable when at least 25% of the Price (less the Mobilization Payment Activity Amount) is earned. The amounts calculated as due under this Section 9.5.1 shall be taken into account in assessing the amount to be paid under a Draw Request, which shall not be more than the amount in the Maximum Payment Schedule.

**9.5.2 Payments for Bonds and Insurance Premiums**

The portion of the Price allocable to bond and insurance premiums, as set forth in the Proposal, shall be payable to reimburse DB Contractor for bond and insurance premiums actually paid, without markup, not to exceed the line item for such premiums in the Proposal, as part of the first Draw Request following NTP1 for bonds and insurance required at NTP1 and as part of the applicable Draw Request following NTP2 for bonds and insurance required on or after NTP2. Any excess portion of the line item for such premiums set forth in the Proposal shall be payable following Substantial Completion. The amounts paid under this Section 9.5.2 shall be taken into account in assessing the maximum amount payable under a Draw Request through application of the Maximum Payment Schedule.

**9.5.3 Payment for Record Drawings**

The amount payable for Record Documents acceptable to TxDOT shall equal 1% of the Price (including mobilization), which shall be withheld from the Final Payments of the Price. DB Contractor is not entitled to any interest on such withheld amounts. DB Contractor shall not be entitled to payment for the last 1% of the Price until acceptable Record Documents have been delivered to TxDOT.

**9.6 Equipment**

TxDOT shall not pay for direct costs of equipment. Costs of equipment, whether new, used or rented, and to the extent not included in the mobilization payments under Section 9.5, shall be allocated to and paid for as part of the activities with which the equipment is associated, in a manner that is consistent with the requirements of Section 4.6.8.3.

**9.7 Final Payment**

Final Reconciliation of amounts owing for all Work will be made as follows:

**9.7.1** On or about the date of Final Acceptance, DB Contractor shall prepare and submit a proposed Final Reconciliation to TxDOT showing the proposed total amount due DB Contractor as of the date of Final Acceptance, including any amounts owing from Change Orders. In addition to meeting all other requirements for Draw Requests hereunder, the Final Reconciliation shall propose a schedule of monthly payments that do not exceed the amounts set forth on the Maximum Payment Schedule. The Final Reconciliation shall list all outstanding PCO Notices stating the amount at issue associated with each such notice. The Final Reconciliation shall also be accompanied by (a) evidence regarding the status of all existing or threatened claims, Liens and stop notices of Subcontractors, Suppliers, laborers, Utility Owners and other third parties against DB Contractor, TxDOT or the Project, (b) consent of any Guarantors and Surety to the proposed monthly payment schedule, (c) such other documentation as TxDOT may reasonably require, and (d) the release described in Section 9.7.4 executed by DB Contractor. Prior applications and payments shall be subject to correction in the Final Reconciliation. PCO Notices filed concurrently

with the Final Reconciliation must be otherwise timely and meet all requirements under Section 4.6.

**9.7.2** If the Final Reconciliation shows no existing or threatened claims, Liens and stop notices of Subcontractors, Suppliers, laborers, Utility Owners or other third parties against DB Contractor, TxDOT or the Project, and provided TxDOT has approved the Final Reconciliation, TxDOT, in exchange for an executed release meeting the requirements of Section 9.7.4 and otherwise satisfactory in form and content to TxDOT, will pay in accordance with the monthly payment schedule described in Section 9.7.6 the entire sum found due on the approved Final Reconciliation, less the amount of any Losses that have accrued as of the date of Final Acceptance, any other deductions permitted under Section 9.4.1 above.

**9.7.3** If the Final Reconciliation lists any existing or threatened claims, Liens and stop notices of Subcontractors, Suppliers, laborers, Utility Owners or other third parties against DB Contractor, TxDOT or the Project, or if any is thereafter filed, TxDOT may withhold from payment such amount as TxDOT deems advisable to cover any amounts owing or which may become owing to TxDOT by DB Contractor, including costs to complete or remediate uncompleted Work or Nonconforming Work, and the amount of any existing or threatened claims, Liens and stop notices of Subcontractors, Suppliers, laborers, Utility Owners and other third parties against DB Contractor, TxDOT or the Project.

**9.7.4** The executed release from DB Contractor shall be a release from any and all claims arising from the Work, and shall release and waive any claims against the Indemnified Parties, excluding only those matters identified in any PCO Notices listed as outstanding in the Final Reconciliation. The release shall be accompanied by an affidavit from DB Contractor certifying:

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

(b) that DB Contractor has resolved any claims made by Subcontractors, Suppliers, Utility Owners, laborers, or other third parties against DB Contractor, TxDOT or the Project (except those listed by DB Contractor in accordance with Section 9.7.3);

(c) that DB Contractor has no reason to believe that any Person has a valid claim against DB Contractor, TxDOT or the Project that has not been communicated in writing by DB Contractor to TxDOT as of the date of the certificate; and

(d) that all guarantees, Warranties and the Payment Bond, the Performance Bond and Warranty Bond are in full force and effect.

**9.7.5** All prior Draw Requests shall be subject to correction in the Final Reconciliation.

**9.7.6** TxDOT will review DB Contractor's proposed Final Reconciliation, and any changes or corrections, including deductions and withholdings described in Section 9.7.2, will be forwarded to DB Contractor for correction within 20 Business Days. Any changes or corrections made pursuant to this Section 9.7.6 will be reflected in an updated monthly payment schedule showing the net amount owed to DB Contractor by month.

**9.7.7** TxDOT shall fulfill its payment obligations under this Design-Build Contract by paying the amounts identified in Section 9.7.6, in accordance with the schedule described in Section 9.7.6.

## 9.8 Payment to Subcontractors

**9.8.1** DB Contractor shall pay each Subcontractor for Work performed within 10 days after receiving payment from TxDOT for the Work performed by the Subcontractor, and shall pay any retainage on a Subcontractor's Work within 10 days after satisfactory completion of all of the Subcontractor's Work. Completed Subcontractor Work includes vegetative establishment, test, maintenance, performance, and other similar works that are the responsibility of the Subcontractor.

**9.8.2** For the purpose of Section 9.8.1, satisfactory completion shall have been accomplished when:

(a) the Subcontractor has fulfilled the Subcontract requirements and the requirements under the Contract Documents for the subcontracted Work, including the submission of all submittals required by the Subcontract and Contract Documents; and

(b) the Work done by the Subcontractor has been inspected and approved by DB Contractor, and the final quantities of the Subcontractor's Work have been determined and agreed upon.

**9.8.3** The foregoing payment requirements apply to all Subcontractors and shall be incorporated into all Subcontracts.

**9.8.4** The DB Contractor must provide a certification of prompt payment, using either the Prompt Payment Certification Form 2177 or TxDOT's electronic compliance tracking system which may be accessed at the following Internet address: https://txdot.txdotcms.com/, to certify that all Subcontractors, including Suppliers, were paid from the previous month's payments and retainage was released for those whose work is complete. A completed Prompt Payment Certification Form 2177 or a certification from the electronic compliance tracking system must be submitted each month and the month following the month when Final Acceptance occurs.

## 9.9 Payment Disputes

Failure by TxDOT to pay any amount in dispute shall not alleviate, diminish or modify in any respect DB Contractor's obligation to perform under the Contract Documents, including DB Contractor's obligation to achieve the Completion Deadlines and perform all Work in accordance with the Contract Documents, and DB Contractor shall not cease or slow down its performance under the Contract Documents on account of any such amount in dispute. Any Claim or Dispute regarding such payment shall be resolved pursuant to Section 4.9, Section 4.10 and Exhibit 20 to the DBA. DB Contractor shall proceed as directed by TxDOT pending resolution of the Claim or Dispute. Upon resolution of any such Claim or Dispute, each Party shall promptly pay to the other any amount owing.

## ATTACHMENT 9-1

## FORM OF DRAW REQUEST AND CERTIFICATE REQUIREMENTS

| Exhibit Description | No. of Pages |
|---|---|
| Exhibit 1 – Form of Draw Request and Certificate | 2 |
| Appendix 1 to Exhibit 1 – Materials on Hand Summary | 1 |
| Appendix 2 to Exhibit 1 – Deductions Summary | 1 |
| Exhibit 2 – Draw Request Certifications | 2 |
| Exhibit 3 – Draw Request Contents Checklist | 2 |

**EXHIBIT 1**

**FORM OF DRAW REQUEST AND CERTIFICATE**[1]

**Draw Request #** _____ Date: _____
month/day/year

Texas Department of Transportation
[Address]

"Entry Required in Cell"

A. Draw Request for Work performed for the period: _____ to _____
month/day/year month/day/year

| | |
|---|---|
| B. Original Contract Amount | |
| C. Approved Change Order Amounts | |
| D. Revised Contract Amount (B+C) | $0.00 |
| E. Cumulative Amount Earned to Date (Amount "E" from Appendix 1 to this Exhibit 1) | |
| F. Cumulative Maximum Payment Schedule Allowance (this Draw Request from DBA Exhibit 10) | |
| G. Cumulative Amount of Previous Draw Requests | |
| H. Amount Qualified for Payment this Draw Request (Lesser of "E-G" or "F-G") (includes Landscaping Allowance Work described below) | $0.00 |
| I. Total deductions from progress payment per Section 9.4.1 (from Appendix 2 to Exhibit 1) | $ |
| J. Current Amount Due ("H" - "I" ) | $ |

_____
Printed Name Signature month/day/year

DB Contractor's Authorized Representative

_____
Printed Name Signature month/day/year

TxDOT's District Engineer or Designee

_____
Printed Name Signature month/day/year

Texas Department of Transportation

[1] [Revise Form of Draw request as needed for applicable project requirements.]

(Note: See Sheet 5 of 5 for Draw Request Checklist)

## APPENDIX 1 TO EXHIBIT 1

## MATERIALS ON HAND SUMMARY

**Draw Request No. _____**

| | |
|---|---|
| A. Cumulative Amount Earned to Date based on the Schedule of Values | $ |
| B. Previous MOH Invoices | $ |
| C. Installed to-date | $ |
| D. Current MOH Invoices | $ |
| E. Cumulative Amount Earned to Date (A+B-C+D) | $ |

**Materials on Hand Record Log**

[Create smart pdf to sum amounts and (+/-) toggle to ADD and DELETE line items in table]

| Invoice Number | Sub/ Vendor | Payment Activity ID(s) | Item Number and Description | Material Description | Invoice Total | Paid on D.R. # | Installed | Installed on D.R. # |
|---|---|---|---|---|---|---|---|---|
| | | | | | | | | |

**Payment Activity Summary Log**

| Payment Activity ID(s) | Total Value based on SOV | Total Earned Value to Date | Total MOH |
|---|---|---|---|
| | $ | $ | $ |

## APPENDIX 2 TO EXHIBIT 1

## DEDUCTIONS SUMMARY

**Draw Request No. _____**

Provide a summary of deductions as described in Section 9.4.1

| **Deduction / Withholding** | | **This Draw Request** | **Cumulative Total** |
|---|---|---|---|
| A. | TxDOT or third party Losses (see Section 9.4.1(a)) | $ | $ |
| B. | Liquidated Damages, Key Personnel Change Fees and Lane Rental Fees (see Section 9.4.1(b)) | | |
| C. | Failure to pay for labor or materials (see Section 9.4.1(c)) | | |
| D. | Failure to maintain Record Documents (see Section 9.4.1(d)) | | |
| E. | Work or materials that is the subject of an NCR (see Section 9.4.1(e)) | | |
| F. | Any other sums owed to TxDOT (see Section 9.4.1(f)) | | |
| | Total | | |

## EXHIBIT 2

### DRAW REQUEST NO. _____ CERTIFICATION

The undersigned hereby certifies that (choose applicable bracketed language):

- Except as specifically noted in this certification, all Work, including that of designers, Subcontractors and Suppliers, that is the subject of this Draw Request has been checked and/or inspected in accordance with the respective Quality Management Plan;

- Except as specifically noted in this certification, all Work that is both the subject of this Draw Request and for which an audit or inspection has been performed conforms to the requirements of the Contract Documents;

- [The Professional Services quality program] [The Construction quality program] and all of the measures and procedures provided therein are functioning properly and are being followed; and

- [The Professional Services percentages] [The construction percentages] indicated are accurate, correct, and are based on the Schedule of Values. All quantities for which payment is requested on a unit price basis are accurate.

- All quantities for which payment is requested on a unit price basis are accurate.

Exceptions:

_____

_____

_____

_____ _____

Name:_____ Date

[PSQAF] [IQF] Representative

**DRAW REQUEST NO. _____ CERTIFICATION**

The undersigned hereby certifies that all Work that is the subject of this Draw Request fully complies with the requirements of the Contract Documents subject to any exceptions identified in this certification.

Exceptions:

_____

_____

_____

_____ _____

Name:_____ Date

DB Contractor's Authorized Representative

## EXHIBIT 3

## DRAW REQUEST CONTENTS CHECKLIST

The following items shall be included in the Draw Request package in the order listed below:

- ☐ A cover sheet.
- ☐ Documentation showing submittal and approval status of a monthly Project Schedule Update Submittal, as described in Section 8.5.1.2.5.
- ☐ A completed Form of Draw Request and Certificate (Exhibit 1 to Attachment 9-1).
- ☐ Certification by the DB Contractor's authorized representative that all Work that is the subject of the Draw Request fully complies with the requirements of the Contract Documents, subject to any exceptions identified in the certification (Exhibit 2 to Attachment 9-1).
- ☐ Certification by the Professional Services Quality Assurance Firm, if applicable (Exhibit 2 to Attachment 9-1).
- ☐ Certification by the Independent Quality Firm, if applicable (Exhibit 2 to Attachment 9-1).
- ☐ Documentation showing the CSJ cost distribution, if applicable.
- ☐ Documentation describing in detail the related payments due in accordance with the Project Schedule and the Maximum Payment Schedule, as of the end of the prior month.
- ☐ A current Schedule of Values and status of completion of Payment Activities shown on the Project Schedule.
- ☐ Cash flow curves and comparison to the Maximum Payment Schedule.
- ☐ Data sheets and documents that support and substantiate the amount requested in this Draw Request, which may include:
- ☐ Quantities and unit prices for unit priced Work including invoices, receipts or other evidence establishing the number of units delivered.
- ☐ Time and materials documentation for Force Account Change Orders in accordance with Section 4.6.8.
- ☐ Actual costs as evidenced by invoices for items to be paid from an allowance.
- ☐ Invoices or statements of actual cost for Materials on Hand with a completed Appendix 1 to Exhibit 1 of Attachment 9-1.
- ☐ A list of any Change Orders that were identified or executed during the progress period and their status.
- ☐ A description of any deductions, including any Losses for which DB Contractor is responsible, Liquidated Damages, Key Personnel Change Fees, Lane Rental Charges, [and any other amounts subject to deduction pursuant to Section 9.4.1, with a completed Appendix 2 to Exhibit 1 of Attachment 9-1.

- ☐ A Nonconformance Report (NCR) log as described in Section 3.5.3.4 of the QAP for DB Projects.
- ☐ Certification of prompt payment using either Prompt Payment Certification Form 2177 or TxDOT's electronic compliance tracking system as described in Section 9.8.4, if applicable.
- ☐ A monthly report of personnel hours.
- ☐ [DBE utilization reports] in a format reasonably satisfactory to TxDOT.
- ☐ A listing of all Subcontracts in effect to which DB Contractor is a party with a list of the Subcontractors under such Subcontracts, guarantees of such Subcontracts and the guarantors thereunder, in accordance with Section 8.2.1.2(a).
- ☐ Details of amounts paid to Subcontractors, if applicable, including Suppliers, from the payments made by TxDOT to DB Contractor with respect to the Draw Request submitted two months prior.
- ☐ Any affidavits of payment and unconditional waivers of Liens and claims, if applicable, (including applicable waivers in the form required under Section 53.284 of the Texas Property Code) executed by DB Contractor and each Subcontractor with respect to all amounts paid in connection with the Draw Request submitted two months prior.
- ☐ Summary description of DB Contractor maintenance activities in accordance with Section 27.4 of the Design-Build Specifications.
- ☐ Any traffic incident reports.
- ☐ Status of Project ROW acquisition, if applicable, and a description of the survey activity performed and condemnation support services provided as described in Sections 15.2.6, 15.3.2 and 15.4.4 of the Design-Build Specifications.