NEW HAMPSHIRE DEPARTMENT OF TRANSPORTATION

REQUEST FOR PROPOSAL (RFP)

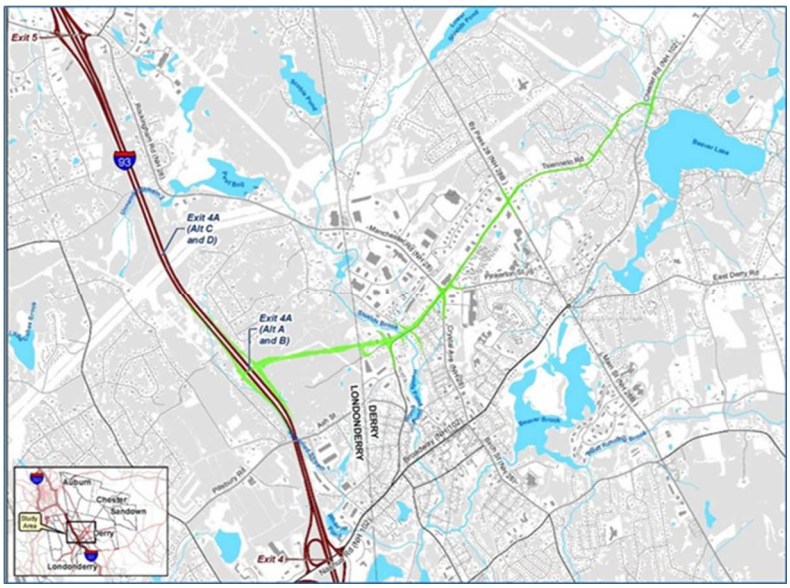
DESIGN-BUILD SERVICES FOR
Interstate 93 Exit 4A Project

DERRY-LONDONDERRY, NH –

NHDOT Project Number: 13065
Federal Project Number IM-0931(201)

Volume II – Book 1

Design-Build Contract



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July 8, 2020

ADDENDUM #2

Table of Contents

DESIGN-BUILD CONTRACT 1

SECTION 1. CONTRACT COMPONENTS, INTERPRETATION OF CONTRACT DOCUMENTS 3

1.1 Certain Definitions 3

1.2 Contract Documents 3

1.3 Order of Precedence 3

1.4 Integration of NHDOT Standard Specifications into Contract 4

1.5 Interpretation of Contract Documents 5

1.6 Referenced Standards and Specifications 5

1.7 Explanations; Omissions and Misdescriptions 6

1.8 Computation of Periods 6

1.9 Standard for Approvals 6

1.10 Reference Materials 6

1.11 Federal Requirements 7

SECTION 2. OBLIGATIONS OF DESIGN-BUILDER 8

2.1 Performance Requirements 8

2.1.2 Performance of Work; Quality Management Plan 9

2.1.3 Performance Standards 9

2.1.4 Performance as Directed 11

2.2 General Obligations of Design-Builder 11

2.3 Representations, Warranties and Covenants 13

2.4 Survival of Representations and Warranties 16

SECTION 3. INFORMATION SUPPLIED TO DESIGN-BUILDER 17

3.1 Information Supplied 17

3.2 Submittals 17

3.2.2 Time Periods 17

3.3 Responsibility for Design 18

3.3.2 Project Schematics 18

3.3.3 Design Review Process and Compliance with Final Design Documents 19

3.3.4 Basic Configuration Changes 20

3.4 Disclaimer 20

3.5 Design Professional Licensing Requirements 21

3.6 Role of NHDOT Consultants 21

3.7 Role of FHWA 21

3.8 Role of Derry, New Hampshire, and Londonderry, New Hampshire 21

3.9 Governmental Approvals and Third Party Agreements 21

SECTION 4. PROJECT SCHEDULE AND PROGRESS 24

4.1 Time of Essence; Notices to Proceed 24

4.2 Completion Deadlines 25

4.2.1 Project Completion Deadlines 25

4.2.2 Final Acceptance Deadline 25

4.2.3 No Time Extensions 25

4.2.4 Interim Completion Deadlines 25

4.2.5 Interim Milestone Completion Deadlines 25

4.3 Scheduling of Design, Construction, and Payment 26

4.3.2 Float 26

4.3.3 Payment Schedule 26

4.4 Conditions to Commencement of Construction 26

4.5 Recovery Schedule 28

SECTION 5. QUALITY CONTROL AND ACCEPTANCE/VERIFICATION OF WORK . 31

5.1 Control and Coordination of Work 31

5.2 Safety 31

5.3 Process to Be Followed Upon Discovery of Certain Site Conditions 31

5.3.2 Further Investigation 32

5.3.3 Recommencement of Work 32

5.4 Obligation to Minimize Impacts 32

5.5 Oversight, Inspection and Testing 32

5.5.2 Oversight and Acceptance Inspection and Testing by NHDOT and Others 32

5.5.3 Obligation to Uncover Finished Work 34

5.5.4 Progress Meetings 34

5.6 Effect of Oversight and Acceptance/Verification Activities 35

5.6.2 No Estoppel 35

5.7 Nonconforming Work 35

5.7.2 Agreement to Accept Nonconforming Work 36

SECTION 6. ACCESS TO SITE; UTILITY RELOCATIONS; ENVIRONMENTAL MITIGATION; COOPERATION WITH LOCAL AGENCIES 37

6.1 Access to Site 37

6.1.2 Access to NHDOT, Town of Derry and Town of Londonderry Provided Property 37

6.1.3 Additional Properties 37

6.1.4 Acquisition of Temporary Interests by Design-Builder 39

6.1.5 Avoidance of Additional Permanent Acquisitions 39

6.1.6 Conveyance Documents 39

6.2 Utility Work 40

6.3 Contaminated Materials Management 40

6.3.2 Contaminated Materials Generator 42

6.3.3 Materials Brought to Site by Design-Builder 42

6.3.4 Environmental Approvals Relating to Contaminated Materials 42

6.4 Environmental Compliance, Mitigation, and Approval Requirements 43

6.4.2 Performance of Mitigation Measures 43

6.4.3 Technical Provisions Section 6.5 – Summary of Environmental Commitments 43

6.4.4 New Approvals 44

6.4.4.2 New Approvals to Be Obtained at Design-Builder's Expense 45

6.4.5 Environmental Compliance by Design-Builder for Off-Site Activities 45

6.4.5.1 Cultural and Archaeological Resources 45

6.4.5.2 Natural Resources 46

6.4.5.3 Wetlands 46

6.4.5.4 Water Quality 46

6.4.5.5 Floodplains 46

6.4.5.6 Streams and Rivers 46

6.4.5.7 Stormwater Management System 46

6.5 Cooperation with Local Agencies 47

6.5.2 Encroachment Permits 47

6.5.3 ACCESS RESTRAINTS 47

6.5.3.1 Access Restraint #1: Relocation of Eversource Overhead Transmission System 47

SECTION 7. SUBCONTRACTORS AND LABOR 49

7.1 Disadvantaged Business Enterprise (DBE) Program 49

7.1.1 Compliance 49

7.1.2 DBE Participation Goal 49

7.2 Subcontracts 49

7.2.2 Procurement of New Subcontractors 49

7.2.3 Substitution of Subcontractors 50

7.2.4 Subcontract Requirements 50

7.2.5 Subcontract Work 50

7.2.6 Form of Subcontract 50

7.3 Labor Code Requirements 52

7.4 Key Personnel; Character of Employees 52

7.5 Lobbying 55

SECTION 8. PERFORMANCE AND PAYMENT BONDS 56

8.1 Provisions of Bonds 56

8.2 No Relief of Liability 57

SECTION 9. INSURANCE 58

9.1 Design-Builder Provided Insurance 58

9.1.1 Commercial General Liability Insurance 58

9.1.2 Workers' Compensation and Employer's Liability Insurance Workers' Compensation Insurance 59

9.1.3 Automobile Liability Insurance 59

9.1.4 Commercial Umbrella Liability Insurance 60

9.1.5 Professional Liability Insurance 60

9.1.6 Builder's Risk 60

9.1.6.1 Minimum Scope 60

9.1.6.2 Minimum Coverage 61

9.2 General Insurance Requirements 61

9.2.2 Verification of Coverage 61

9.2.2.2 Renewal Policies 62

9.2.3 Endorsements and Waivers 62

9.2.4 Waivers of Subrogation 63

9.2.5 Changes in Insurance Requirements 63

9.2.6 No Recourse 63

9.2.7 Support of Indemnifications 63

9.2.8 Commercial Unavailability of Required Coverages 64

9.3 Prosecution of Claims 64

9.4 Commencement of Work 64

9.5 Design-Builder's Failure to Comply 64

9.6 Disclaimer 65

SECTION 10. TITLE; SITE SECURITY; MAINTENANCE AND REPAIR; OPERATION 66

10.1 Title 66

10.2 Site Security 66

10.3 Obligation to Maintain and Repair 66

10.3.2 Design-Builder Maintenance and Repair Liability; Use of Insurance Proceeds 66

10.3.3 Relief from Maintenance Liability 67

10.3.4 Extension of Maintenance and Repair Obligation 68

SECTION 11. WARRANTIES 69

11.1 Warranties 69

11.1.2 Warranty Period 69

11.1.3 Remedy 69

11.2 Applicability of Warranties to Re-Done Work 70

11.3 Blank 70

11.4 No Limitation of Liability 70

11.5 Damages for Breach of Warranty 71

11.6 Third Party Rights 71

11.7 Warranty Disputes 71

11.8 Warranty Period Letter of Credit 71

SECTION 12. PAYMENT FOR SERVICES 72

12.1 Contract Price 72

12.1.2 Payment for Extra Work 72

12.1.3 Items Included in Contract Price 72

12.1.4 NTP1 Work; Delay in Issuance of NTP2 72

12.1.5 Additional Provisions Relating to Delays in NTP2 74

12.1.6 Estimated Cost Items 74

12.2 Invoicing and Payment 78

12.2.1 Draft Invoice and Progress Meeting 78

12.2.2 Delivery of Invoice 79

12.2.3 Form of Invoice 79

12.2.4 Payment by NHDOT 80

12.3 Deductions, Exclusions and Limitations on Payment 80

12.3.2 Deductions 80

12.3.3 Unincorporated Materials 81

12.3.4 Mobilization Payments; 81

12.3.5 Equipment 82

12.4 Final Payment 82

12.5 Prompt Payment to Subcontractors 83

12.5.1 Satisfactory Work Performed 84

12.5.2 Non-Payment Claims 84

12.5.3 Payment Certifications 84

12.6 Disputes 85

12.7 Interest on Late Payments 85

SECTION 13. CHANGES IN THE WORK 86

13.1 Circumstances Under Which Change Orders May Be Issued 86

13.1.1.2 Issuance of Directive Letter 87

13.1.1.3 Directive Letter as Condition Precedent to Claim that NHDOT- Directed Change Has Occurred 87

13.1.2 Right of NHDOT to Issue Change Orders 87

13.2 NHDOT-Initiated Change Orders 87

13.2.1 Change Notice 88

13.2.2 Unilateral Change Orders 89

13.2.3 NHDOT-Directed Changes Under $10,000 89

13.2.4 Blank 89

13.3 Design-Builder-Initiated Change Orders 90

13.3.2 Procedures 91

13.3.2.1 Request for Change Notice (RFC Notice) 91

13.3.2.2 Delivery of Request for Change Order 92

13.3.2.3 Incomplete Requests for Change Order 93

13.3.2.4 Importance of Timely Response 93

13.3.2.5 Compliance With Section 5.3.1 Requirements 94

13.3.2.6 Review of Subcontractor Claims 94

13.3.3 Performance of Disputed Work 94

13.4 Contents of Change Orders 95

13.4.2 Scope of Work, Cost Estimate, Delay Analysis and Other Supporting

Documentation 95

13.4.2.1 Scope of Work 95

13.4.2.2 Cost Estimate 95

13.4.2.3 Delay Analysis 95

13.4.2.4 Other Supporting Documentation 96

13.4.3 Justification 96

13.4.4 Design-Builder Representation 96

13.5 Certain Limitations 96

13.5.2 Limitation on Delay and Disruption Damages 97

13.5.2.2 Other Limitations 97

13.5.3 Limitation on Time Extensions 98

13.5.4 Work Performed Without Direction 98

13.6 Change Order Pricing 98

13.6.1 Detailed Cost Proposal 98

13.6.2 Identification of Conditions 99

13.6.3 Contents 99

13.6.4 Added Work 99

13.6.5 Deleted Work 99

13.6.6 Change Order Both Adding and Deleting Work 100

13.6.7 Unit Priced Change Orders 100

13.7 Time and Materials Change Orders 100

13.7.2 Pricing and Payment 101

13.7.3 Overhead Items 101

13.7.4 Change Order Data 102

13.8 Necessary Basic Configuration Changes 102

13.9 Change Orders for Differing Site Conditions, Force Majeure Events, Contaminated Materials, and Changes in Law 103

13.9.2 Force Majeure Events 104

13.9.3 Contaminated Materials Management 104

13.9.3.1 Determination of Reimbursable Amount 104

13.9.3.2 Time Extensions 105

13.9.3.3 Limitations on Change Orders 105

13.9.3.4 Insurance Proceeds 106

13.9.3.5 Specified Site Contaminated Materials Allowance 106

13.9.4 Change in Law; New Approvals 106

13.10 Change Order Records 106

13.10.1 Daily Work Reports and Data Collection 107

13.10.3 Supplier's Invoices 107

13.10.4 Execution of Reports 107

13.10.5 Adjustment 107

13.11 Matters Not Eligible for Change Orders and Waiver 108

13.12 Disputes 110

13.13 Changes Not Requiring Change Order 110

13.14 No Release or Waiver 110

SECTION 14. SUSPENSION 112

14.1 Suspensions for Convenience 112

14.2 Suspensions for Cause 112

14.3 Responsibilities of Design-Builder During Suspension Periods 113

SECTION 15. TERMINATION FOR CONVENIENCE 116

15.1 Termination 116

15.2 Design-Builder's Responsibilities After Receipt of Notice of Termination 116

15.3 Acceptance 112

15.4 Settlement Proposal 113

15.5 Amount of Negotiated Termination Settlement 113

15.6 No Agreement as to Amount of Termination Settlement 114

15.7 Reduction in Amount of Claim 115

15.8 Payment 115

15.9 Subcontracts 116

15.10 Termination Based on Delay in NTP2 116

15.11 No Consequential Damages 116

15.12 No Waiver; Release 117

15.13 Dispute Resolution 117

15.14 Allowability of Costs 117

SECTION 16. DEFAULT 118

16.1 Default of Design-Builder 118

16.2 Remedies 120

16.3 Right to Stop Work for Failure by NHDOT to Make Undisputed Payment 123

16.4 Event of Default Due Solely to Design-Builder's Failure to Achieve Completion Deadlines 123

SECTION 17. LIQUIDATED DAMAGES; INTERIM MILESTONES; AND LIMITATION OF LIABILITY 125

17.1 Amount of Liquidated Damages 125

17.2 Reasonableness of Liquidated Damages 126

17.3 Payment; Offset; Reduction; Waiver 126

17.4 Non-Exclusive Remedy 127

17.5 Limitation of Design-Builder's Liability 127

17.6 INTERIM MILESTONES, INTERMEDIATE COMPLETION AND LIQUIDATED DAMAGES 127

17.6.1 Interim Milestone #1: 128

17.6.2 Interim Milestone #2: 129

17.6.3 Intermediate Completion: 130

17.6.4 Notice requirements for completion of INTERIM Milestones 132

17.6.5 Milestone Liquidated Damages Terms and Conditions 132

SECTION 18. INDEMNIFICATION 133

18.1 Indemnifications by Design-Builder 133

18.2 Defense and Indemnification Procedures 131

18.3 No Effect on Other Rights 134

18.4 CERCLA Agreement 134

SECTION 19. DISPUTES AND DISPUTE RESOLUTION 135

19.1 Administrative Process 135

19.1.2 Documentation 135

19.1.3 Agreement to Alternate Dispute Resolution 135

19.1.4 Claims 135

19.1.5 Applicability 135

19.1.6 Rights of Review 135

19.2 Disputes Review Board 135

19.3 Function and Scope of DRB 136

19.3.2 Technical Issues 136

19.3.3 Good Faith Efforts 136

19.4 Continuance of Work During Dispute 136

19.5 Membership 136

19.5.2 Experience of Members 137

19.5.3 Avoidance of Appearance of Conflict 137

19.5.4 Submission of Disclosure Statements 138

19.5.5 Selection Process 138

19.5.6 Execution of Agreement 138

19.5.7 Reconstitution of the DRB 138

19.6 Operation of DRB 139

19.6.2 Consultants to the DRB 139

19.7 Procedures of DRB 139

19.7.2 Hearings 139

19.7.3 Recommendations of DRB 140

19.7.4 Response by Parties 140

19.7.5 Options Upon Rejection 141

19.7.6 Arbitration 141

19.7.7 DRB Recommendations Admissible 141

19.8 Compensation 141

19.9 Cooperation 141

19.10 Provisional Remedies 142

19.11 Continuing Performance 142

19.12 Participation in Other Proceedings 142

19.13 Standard of Review 142

19.14 Claim/Dispute Categories Excluded From the DRB 142

19.15 Emergency Dispute Resolution 143

19.16 Time Limitation 143

SECTION 20. ACCEPTANCE 144

20.1 Project Completion 144

20.1.1.2 Certificate of Project Completion 144

20.2 Final Acceptance 145

20.2.2 Checklist of Final Acceptance 146

20.2.3 Final Inspection and Issuance of Certificate of Final Acceptance 146

20.2.4 No Relief from Liability 146

20.3 Opening Sections of Project to Traffic 147

20.3.2 Direction to Open Following Design-Builder Failure to Perform 147

20.3.3 No Waiver 147

20.4 Clayton Act Assignment 147

SECTION 21. DOCUMENTS AND RECORDS 151

21.1 Escrowed Proposal Documents 151

21.1.1 Availability for Review 151

21.1.2 Proprietary Information 151

21.1.3 Representation 152

21.1.4 Contents of EPDs 152

21.1.5 Form of EPDs 152

21.1.6 Review by NHDOT 152

21.2 Subcontractor Pricing Documents 153

21.3 Financial Reporting Requirements 153

21.4 Maintenance of, Access to and Audit of Records 154

21.5 Retention of Records 158

21.6 Public Records Act 158

21.7 Ownership of Documents 159

21.8 Intellectual Property 160

SECTION 22. VALUE ENGINEERING 161

22.1 General **161**

22.2 Value Engineering Recommendation **161**

22.3 Information to be Provided **161**

22.4 Review by NHDOT **162**

22.5 Approval of VECPs **163**

22.6 Contract Price Adjustment **164**

22.7 Use of VECPs by NHDOT **165**

22.8 Public Records Act Exclusion **165**

SECTION 23. COOPERATION AND COORDINATION WITH OTHER CONTRACTORS AND ADJACENT PROPERTY OWNERS **166**

23.1 Cooperation with Other Contractors **166**

23.2 Interference by Other Contractors **166**

23.3 Coordination with Adjacent Property Owners **166**

SECTION 24. MISCELLANEOUS PROVISIONS **167**

24.1 Amendments **167**

24.2 Waiver **167**

24.3 Independent Contractor **167**

24.4 Successors and Assigns **168**

24.5 Designation of Representatives; Cooperation with Representatives **169**

24.6 Gratuities and Conflicts of Interest **169**

24.7 Survival **170**

24.8 Limitation on Third Party Beneficiaries **170**

24.9 Personal Liability of NHDOT, Town of Londonderry, and Town of Derry Employees **171**

24.10 Governing Law **171**

24.11 Notices and Communications **171**

24.12 Taxes 172

24.13 Further Assurances 173

24.14 Severability 173

24.15 Headings 173

24.16 Entire Agreement 173

24.17 Counterparts 173

LIST OF APPENDICES

Appendix 1 Abbreviations And Acronyms, Defined Terms

Appendix 2 Modified NHDOT Standard Specifications (replacement Sections 1 through 9)

Appendix 3 Not Used

Appendix 4 On-the-Job Training Specifications

Appendix 5 Listed Subcontractors

Appendix 6 Subcontractor Identification Form

Appendix 7 Key Personnel

Appendix 8 Bonds

Appendix 8-A Form of NTP1 Performance Bond

Appendix 8-B Form of NTP2 Performance Bond

Appendix 8-C Form of NTP1 Payment Bond

Appendix 8-D Form of NTP2 Payment Bond

Appendix 9 Invoice and Construction Certificate

Appendix 10 Disputes Review Board Agreement

Appendix 11 VECP Sample Calculation

Appendix 12 Designation of Initial Authorized Representatives

Appendix 13 Design-Builder's Proposal Schematic, Commitments and Clarifications

Appendix 14 Federal Requirements

DESIGN-BUILD CONTRACT

Interstate 93 Exit 4A Project

This Design-Build Contract ("Contract") is entered into by and between the New Hampshire Department of Transportation ("NHDOT"), and ***[insert name of Design-Builder]***, a ***[insert type of entity]*** ("Design-Builder"), effective on approval by Governor & Executive Council, as of the date of execution hereof, with reference to the definitions contained in Appendix 1 and 2 hereto and the following facts:

A. NHDOT wishes to construct a new interchange on Interstate 93, construct approximately 1 mile of new roadway, and reconstruct approximately 1.5 miles of existing roadway in Derry and Londonderry, New Hampshire, including several intersecting streets (the "Project").

B. The Project involves improvements to facilities that will ultimately be jointly owned by the New Hampshire Department of Transportation and the Towns of Derry and Londonderry, Construction of the Project will also impact the Towns of Derry and Londonderry facilities.

D. NHDOT issued a Request for Qualifications on **January 16, 2019**.

E. NHDOT received qualification statements on **March 27, 2019**, and shortlisted 3 proposers.

F. On **May 19, 2020**, NHDOT issued to the shortlisted proposers a Request for Proposals as subsequently amended by addenda, (the "RFP") to develop, design, and construct the Project.

G. On **August 27, 2020**, NHDOT received responses to the RFP, including the response of the Design-Builder (the "Proposal") and on **September 17, 2020** the bid opening and Best-Value Proposer was determined.

H. An RFP evaluation committee determined that the Design-Builder was the proposer which best met the selection criteria contained in the RFP and that the Proposal was the one which provided the best value to the NHDOT.

I. On **November 4, 2020**, Governor and Executive Council accepted the recommendation of the Commissioner and authorized NHDOT to enter into a Contract.

J. This Contract and the other Contract Documents collectively constitute a part of the design-build contract and are entered into in accordance with the provisions of the RFP.

K. The Parties intend for the Contract to be a lump sum design-build contract obligating the Design-Builder to perform all Work necessary to obtain completion of the Project by the deadlines specified herein for the Contract Price, subject only to certain specified limited exceptions. To allow NHDOT to budget for the Project and to reduce the risk of cost overruns, the Contract includes restrictions affecting the Design-Builder's ability to make claims for increases to the Contract Price or extensions of the Completion Deadlines. The Design-Builder has agreed in the Contract to assume such responsibilities and risks and has reflected the assumption of such responsibilities and risks in the Contract Price.

L. If the Design-Builder fails to complete the Project in accordance with the time limitations set forth in the Contract Documents, then the NHDOT and the members of the public represented by the NHDOT will suffer substantial losses and damages. The Contract Documents provide that Design-Builder will pay the NHDOT substantial Liquidated Damages if such completion is delayed. See Section 17 for additional information on Liquidated Damages.

M. The NHDOT has provided certain documents to Design-Builder for the purpose of defining certain aspects of the Project, including the Project Schematics. NHDOT and Design-Builder both intend for Design-Builder to assume full responsibility and liability with respect to design of the Project, including correction of any Errors in the Project Schematics, and for Design-Builder to indemnify, defend, and hold harmless NHDOT and others with respect to any defects in the Project which may relate to Errors in the Project Schematics.

N. Following completion and Final Acceptance of the Project facilities by NHDOT such facilities will become part of the Highway System and NHDOT, and Towns of Derry and Londonderry will own all property located within their right of way.

NOW, THEREFORE, in consideration of the sums to be paid to Design-Builder by NHDOT, the foregoing premises and the covenants and agreements set forth herein, the Parties hereby agree as follows:

SECTION 1. CONTRACT COMPONENTS, INTERPRETATION OF CONTRACT DOCUMENTS

1.1 Certain Definitions

Appendix 1 hereto contains the meaning of various terms used in the Contract Documents.

1.2 Contract Documents

The term "Contract Documents" shall mean the documents listed in Section 1.3.

1.3 Order of Precedence

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

For design and other non-construction Work:

1. Change Orders and Contract amendments;
2. Book 1 (this Design-Build Contract, including all appendices, except that Appendix 2 has a lower order of precedence as noted below);
3. Appendix 2 to the Design-Build Contract; and
4. Book 2 (Technical Provisions);
5. Book 3 (Special Provisions);
6. Design-Builder's Proposal Commitments (as set forth in Appendix 13).
7. NHDOT Standard Specifications for Road and Bridge Construction (March 2016) and Supplemental Specifications thereto.

For construction-related standards, specifications and requirements, the same order of precedence shall apply, except that the Final Design Documents shall also be considered Contract Documents and shall be added following the Proposal Commitments in the order of precedence, provided that: (i) specifications contained therein shall have precedence over plans, and (ii) no conflict shall be deemed to exist between the Final Design Documents and the other Contract Documents with respect to requirements of the Final Design

Documents that NHDOT determines are more beneficial than the requirements of the other Contract Documents.

1.3.2 Notwithstanding the order or precedence among Contract Documents set forth in Section 1.3.1, in the event and to the extent that Appendix 13 expressly specifies that it is intended to supersede specific provisions of the Contract Documents, Appendix 13 shall control over the specified provisions. Moreover, if the Proposal includes statements, offers, terms, concepts, and designs that can reasonably be interpreted as offers to provide higher quality items than otherwise required by the Contract Documents, or to perform services in addition to those otherwise required, or otherwise contains statements, offers, terms, concepts or designs which NHDOT considers to be more advantageous than the requirements of the other Contract Documents, Design-Builder's obligations hereunder shall include compliance with all such statements, offers, terms, concepts, or designs which shall have the priority of Contract amendments and Technical Provision amendments, as applicable. The commitments set forth in Appendix 13 hereto shall be considered part of this Contract.

1.3.3 Portions of the Project Schematics and Reference Materials are referenced in the Contract Documents for the purpose of defining requirements of the Contract Documents. The Reference Materials shall be deemed incorporated in the Contract Documents to the extent that they are so referenced, with the same order of priority as the Contract Document in which the reference occurs.

1.3.4 Additional details and more stringent requirements contained in a lower priority Contract Document will control except to the extent they irreconcilably conflict with the requirements of the higher level Contract Document.

1.3.5 If either Party becomes aware of any conflict with Contract documents, it shall notify the other Party of the conflict. NHDOT shall issue a written determination within five Days respecting which of the conflicting items is to apply, after it becomes aware of any such conflict.

1.4 Integration of NHDOT Standard Specifications into Contract

1.4.1 The NHDOT Standard Specifications for Road and Bridge Construction, dated March 2016, published by NHDOT, is incorporated into the Technical Provisions, with the exception of the sections which are replaced with the Amended NHDOT Standard Specifications set forth in Appendix 2 hereto. The term "NHDOT Standard Specifications" as used herein shall refer to the NHDOT Standard Specifications for Road and Bridge Construction, as so amended, and including the Amended NHDOT Standard Specifications contained in Appendix 2. The Technical Provisions also require compliance with other NHDOT Documents.

1.5 Interpretation of Contract Documents

In the Contract Documents, where appropriate: the singular includes the plural and vice versa; references to statutes or regulations include all statutory or regulatory provisions consolidating, amending, or replacing the statute or regulation referred to; unless otherwise indicated references to Codes are to the codified laws of the State of New Hampshire; the words "including," "includes" and "include" shall be deemed to be followed by the words "without limitation"; unless otherwise indicated references to sections, appendices, or schedules are to the Contract; words such as "herein," "hereof" and "hereunder" shall refer to the entire document in which they are contained and not to any particular provision or section; words not otherwise defined which have well- known technical or construction industry meanings are used in accordance with such recognized meanings; references to Persons include their respective permitted successors and assigns and, in the case of Governmental Entities, Persons succeeding to their respective functions and capacities; and words of any gender used herein shall include each other gender where appropriate. Unless otherwise specified, lists contained in the Contract Documents defining the Project or the Work shall not be deemed all-inclusive. Design-Builder acknowledges and agrees that it had the opportunity and obligation, prior to the Proposal Date, to review the terms and conditions of the Contract Documents and to bring to the attention of NHDOT any conflicts or ambiguities contained therein. Design-Builder 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. NHDOT's final answers to the questions posed during the Proposal process for the Contract shall be deemed part of the Contract Documents and shall be relevant in interpreting the Contract Documents. On plans, working drawings, and standard plans, calculated dimensions shall take precedence over scaled dimensions.

1.6 Referenced Standards and Specifications

1.6.1 Except as otherwise specified in the Contract Documents or otherwise directed by NHDOT, 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 Date.

1.6.2 In interpreting referenced standards, the following apply:

(a) References to the project owner shall mean NHDOT.

(b) References to the "Engineer" in the context of provider of compliance judgment may mean Design-Builder's Design QC Manager or it may mean an NHDOT representative, depending on the context, as determined by NHDOT, in its sole

discretion.

(c) References to "plan(s)" shall mean the Final Design Documents.

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

1.7 Explanations; Omissions and Misdescriptions

Design-Builder 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, Design- Builder shall request in writing such further written explanations from NHDOT as may be necessary and shall comply with the explanation provided.

1.8 Computation of Periods

References to "Days" contained in the Contract Documents shall mean calendar days unless otherwise specified; provided that 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 which 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, requirements contained in Section 5.3.1, and other requirements for which it is clear that performance is intended to occur on a non-Business Day, shall be required to be performed as specified, even though the date in question may fall on a non-Business Day.

1.9 Standard for Approvals

In all cases where approvals or consents are required to be provided by NHDOT or Design-Builder hereunder, such approvals or consents shall not be withheld unreasonably except in cases where a different standard (such as sole discretion) is specified. In cases where sole discretion is specified the decision shall not be subject to dispute resolution hereunder.

1.10 Reference Materials

1.10.1 NHDOT has provided and disclosed the Reference Materials to Design-Builder. Except as expressly provided in Section 1.3.3: (a) the Reference Materials are not mandatory or binding on Design-Builder, (b) Design-Builder is not entitled to rely on the Reference Materials as presenting a feasible, complete, accurate, viable or desirable technical, design, engineering, construction, operations or maintenance solution or other direction, means or methods for complying with the requirements of the Contract Documents, Governmental Approvals or Governmental Rules; (c) use by the Design-Builder of any element, aspect or

portion of the Reference Materials shall be at the sole risk of Design-Builder; and (d) the Reference Materials are provided without any representation or warranty by, or recourse to, NHDOT, all of which representations and warranties are hereby disclaimed in their entirety.

1.10.2 NHDOT shall not be responsible or liable in any respect for any suits, judgments, proceedings, investigations, causes of action, claims, or Losses whatsoever suffered or incurred by any DB-Related Entity by reason of any use of information contained in, or any action or forbearance in reliance on, the Reference Materials, except any schedule or monetary relief available hereunder as set forth in Section 13 of this Contract.

1.11 Federal Requirements

The Work to be performed under this Contract will be financed in part with federal funds and is therefore subject to federal statutes, rules, and regulations applicable to work financed with federal funds, including the requirements set forth in Appendix 14. Design-Builder shall comply and require its Subcontractors to comply with all applicable federal requirements, including those requirements set forth in Appendix 14. 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.

SECTION 2. OBLIGATIONS OF DESIGN-BUILDER

2.1 Performance Requirements

2.1.1 Performance of Work; Project Management Plan

The Work shall include the design and construction of the Project, conforming to the Basic Configuration as set forth in the Technical Provisions and otherwise complying with the requirements of the Contract Documents, except as otherwise approved in writing by NHDOT. All materials, services, and efforts necessary to achieve Project Completion and Final Acceptance on or before the applicable Completion Deadline shall be Design-Builder's sole responsibility, except as otherwise specifically provided in the Contract Documents. Design-Builder shall plan, schedule, and execute all aspects of the Work and shall coordinate its activities with all Persons who are directly or indirectly impacted by the Work. Subject to the terms of Section 13, the costs of all Work, including all such materials, services, and efforts are included in the Contract Price.

Design-Builder shall develop the Project Management Plan and its component parts, plans, and other documentation in accordance with the requirements set forth in the Contract Documents, including Governmental Approvals, Governmental Rules, and Good Industry Practice.

Design-Builder shall submit to NHDOT, for acceptance, in accordance with the procedures described in Section 4 of this Contract and the time line set forth, 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. NHDOT may propose any change required to comply with the Contract Documents, Governmental Approvals, Governmental Rules, and Good Industry Practice or to reflect a change in working practice to be implemented by Design-Builder.

Design-Builder 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 accepted by NHDOT in accordance with the procedures described in Section 4 of this Contract.

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 NHDOT for acceptance 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 NHDOT.

Design-Builder shall carry out internal audits of the Project Management Plan at the times prescribed in the Project Management Plan.

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

The Quality Control Administrator shall, irrespective of his or her other responsibilities, have defined authority for ensuring the establishment and maintenance of the design elements and construction elements of the Project Management Plan and reporting to NHDOT on the performance of the Project Management Plan with respect to those elements.

2.1.2 Performance of Work; Quality Management Plan

Design-Builder is responsible for implementing a comprehensive Quality Control (QC) System and all related activities necessary to ensure the quality of Work. A Quality Management Plan shall be prepared and implemented by the Design-Builder in accordance with Section 3 of the Technical Provisions.

Design-Builder shall undertake all aspects of its Quality Control system for the Project and Work in accordance with the accepted Project Management Plan, the accepted Quality Management Plan, the Contract Documents, Governmental Approvals, Governmental Rules, and Good Industry Practice.

Design-Builder shall not permit or suffer any substitution or replacement of the QC Administrator or member of the QC Audit Team, except with NHDOT's prior written approval, at NHDOT's sole discretion.

2.1.3 Performance Standards

Design-Builder shall furnish all aspects of the Work and shall construct the Project as designed, free from defects (except to the extent that such defects are inherent in prescriptive specifications included in 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 Governmental Rules, (e) the requirements, terms, and conditions set forth in all Governmental Approvals, (f) the accepted Project Management Plan and all component plans prepared or to be prepared thereunder, and (g) the Construction Documents, in each case taking into account the constraints affecting the Project.

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

Design-Builder acknowledges that, prior to the Effective Date, it had the opportunity to identify any provisions of the Contract Documents, including the Technical Provisions that are erroneous or create a potentially unsafe condition, and the opportunity and duty to notify NHDOT in writing of such fact and of the changes to the provision that Design-

Builder believed were the minimum necessary to render it correct and safe. If it is reasonable or necessary to adopt changes to the Contract Documents, including the Technical Provisions, after the Effective Date, to make the provisions correct and safe, such changes shall not be grounds for any adjustment to the Contract Price, Completion Deadline or other Claim, unless: (a) Design-Builder neither knew nor had reason to know prior to the Effective Date that the provision was erroneous or created a potentially unsafe condition or (b) Design-Builder knew of and reported to NHDOT the erroneous or potentially unsafe provision prior to the Effective Date and NHDOT did not adopt reasonable and necessary changes. If Design-Builder commences or continues any Work affected by such a change after the need for the change was discovered or suspected, or should have been discovered or suspected through the exercise of reasonable care, Design-Builder 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 2.1.3, but instead shall be governed by Section 1.3.

Design-Builder may apply for NHDOT approval of Deviations from applicable requirements of the Contract Documents, including the Technical Provisions, regarding the design or construction of the Project. All applications shall be in writing. Where Design-Builder requests a Deviation, as part of the submittal, from a component of the Project Management Plan, Design-Builder shall specifically identify and label the proposed Deviation. NHDOT shall consider requested Deviations in its sole discretion, but has no obligation to approve any such application. Design-Builder shall bear the burden of persuading NHDOT that the Deviation sought constitutes sound and safe engineering consistent with Governmental Approvals, Governmental Rules, and Good Industry Practice and achieves NHDOT's applicable safety standards and criteria. No Deviation shall be deemed approved or be effective unless and until stated in writing signed by NHDOT's Authorized Representative. NHDOT's affirmative written approval of a component of the Project Management Plan shall constitute: (a) approval of the Deviations expressly identified and labeled as Deviations therein, unless NHDOT takes exception to any such Deviation; and (b) disapproval of any Deviations not expressly identified and labeled as Deviations therein. NHDOT's lack of issuance of a written Deviation within 21 Days after Design-Builder applies therefor in writing shall not be deemed an approval of such application. NHDOT will provide written approval or disapproval of all submittals. NHDOT's denial or disapproval of a requested Deviation shall be final and not subject to the dispute resolution procedures of this Contract, except in the case of non-response.

References in the Technical Provisions to manuals or other publications governing the Work shall mean the most recent editions in effect as of the Proposal Date, unless expressly provided otherwise. Any changes to the Technical Provisions related to the Work shall be subject to the Change Order process for an NHDOT-Directed Change in accordance with Section 13.

New or revised statutes or regulations adopted after the Proposal 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 Technical Provisions to conform to such new or revised statutes or regulations, shall be treated as Changes in Law rather than an NHDOT change to Technical Provisions.

2.1.4 Performance as Directed

At all times during the term hereof, including during the course of, and notwithstanding the existence of, any Dispute, Design-Builder shall perform as directed by NHDOT in a diligent manner and without delay, shall abide by NHDOT's decision or order, and shall comply with all applicable provisions of the Contract Documents. If a Dispute arises regarding such performance or direction, the dispute shall be resolved in accordance with Section 19.

2.2 General Obligations of Design-Builder

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

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

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

2.2.3 Use the design firm or firms identified in the Proposal to perform the design services required by the Contract Documents (or other firms approved in writing by NHDOT, which approval shall not be withheld provided that NHDOT shall

first have determined that such firm has the demonstrated competence and professional qualifications necessary for the satisfactory performance of the required design services, and that the designated key personnel at such firm have sufficient experience with NHDOT and other requirements applicable to the Project). Design-Builder shall not shift design Work from one firm to another without the prior written approval of NHDOT.

2.2.4 Obtain and pay the cost of obtaining all Governmental Approvals required in connection with the Project (except to the extent NHDOT has expressly agreed to be responsible therefor under Section 6.4.4); and prior to beginning any construction activities in the field, furnish NHDOT with fully executed copies of all Governmental Approvals (other than the Governmental Approvals obtained by NHDOT) required for such portion of the Project.

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

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

2.2.7 Comply with, and ensure that all Subcontractors comply with, all requirements of all applicable Governmental Rules, including:

(a) The New Hampshire Labor Code and implementing regulations and federal labor requirements, including requirements with respect to prevailing wages, non-discrimination, and employment and training of apprentices, as more specifically described in Section 7 and in Appendix 14;

(b) All Environmental Laws, including environmental mitigation and monitoring measures required for the Project, including those set forth in Technical Provisions Section 6, and requirements regarding the handling, generation, treatment, storage, transportation, and disposal of Contaminated Materials;

(c) The Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. § 12101 et seq., including any amendments, as well as all applicable regulations and guidelines; and

(d) All other applicable Federal Requirements, including those set forth in Appendix 14.

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

2.2.9 Supervise and be responsible to NHDOT for acts, omissions, negligence, intentional misconduct, or breach of applicable Governmental Rules, contract, or Governmental Approvals by any and all DB-Related Entities, as though all such Persons were directly employed by Design-Builder.

2.2.10 Pay all applicable federal, State, and local sales, consumer, use, and similar taxes, property taxes, and any other taxes, fees, charges, or levies imposed by a Governmental Entity, whether direct or indirect, relating to, or incurred in connection with, the performance of the Work.

2.2.11 Mitigate delay to the Project and mitigate damages due to delay in all circumstances, to the extent possible, including by resequencing, reallocating, or redeploying Design-Builder's and its Subcontractors' forces to other Work, as appropriate.

2.2.12 Provide and maintain a Project Office as described in Section 2.10 of the Technical Provisions for the exclusive use of NHDOT and its consultants for the Project, as well as for FHWA, and other third parties as directed by NHDOT.

2.3 Representations, Warranties and Covenants

Design-Builder represents, warrants and covenants that:

2.3.1 During all periods necessary for the performance of the Work, Design-Builder and its design and construction Subcontractor(s) will maintain all required authority, license status, professional ability, skills, and capacity to perform the Work, and shall perform them in accordance with the requirements contained in the Contract Documents.

2.3.2 Design-Builder has evaluated the constraints affecting design and construction of the Project, including the Project Plans, Planned ROW Limits, conditions of the Technical Provisions Section 6.5, and has reasonable grounds for believing and does believe that the Project can be designed and built within such constraints.

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

2.3.4 Design-Builder has, prior to submitting its Proposal, in accordance with Good Industry Practice, reviewed the preliminary geotechnical data report provided by NHDOT, inspected and examined the Site and surrounding locations, performed or had the opportunity to perform appropriate field studies and geotechnical investigations of the Site, investigated and reviewed available public and private records, and undertaken other appropriate activities sufficient to familiarize itself with surface and subsurface conditions, including the presence of Utilities, Contaminated Materials, Contaminated Groundwater, archeological, paleontological and cultural resources, and threatened or endangered species affecting the Site or surrounding locations, to the extent Design-Builder deemed necessary or advisable for submittal of a Proposal. As a result of such review, inspection, examination, and other activities, Design- Builder is familiar with and accepts the physical requirements of the Work, subject to Design-Builder's right to seek relief under Section 13. Design-Builder further acknowledges and agrees that changes in conditions at the Site may occur after the date hereof, and that Design-Builder shall not be entitled to any Change Order in connection therewith except as specifically permitted under Section 13. Before commencing any Work on a particular aspect of the Project, Design-Builder shall verify all governing dimensions at the Site, and shall examine all adjoining work, which may have an impact on such Work. Design- Builder shall ensure that the Design Documents and Construction Documents accurately depict all governing and adjoining dimensions and conditions.

2.3.5 Design-Builder acknowledges and agrees that it has familiarized itself with the requirements of any and all applicable Governmental Rules and the conditions of any required Governmental Approvals prior to entering into the Contract. Except as specifically permitted under Section 13, Design-Builder shall be responsible for complying with the foregoing at its sole cost and without any increase in Contract Price or extension of any Completion Deadline on account of such compliance, regardless of whether such compliance would require additional time for performance or additional labor, equipment, and/or materials not expressly provided for in the Contract Documents. Design-Builder has no reason to believe that any Governmental Approval required to be obtained by Design-Builder will not be granted in due course and thereafter remain in effect so as to enable the Work to proceed in accordance with the Contract Documents.

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

2.3.7 Design-Builder shall at all times schedule and direct its Work to provide an orderly progression of the Work to achieve Project Completion and Final Acceptance by the applicable Completion Deadlines and in accordance with the accepted Project Schedule, including furnishing such employees, materials, facilities, and equipment and working such hours, extra shifts, overtime operations, Sundays, and holidays as may be necessary to achieve such goal, all at Design-Builder's own cost except as otherwise specifically provided in Section 13.

2.3.8 Design-Builder is a_____, ***[to be provided with executed Contract]*** duly organized and validly existing under the laws of the State of_____, with all requisite power to own its properties and assets and carry on its business as now conducted or proposed to be conducted. Design-Builder is a duly qualified business, and is in good standing, in the State, and will remain in good standing throughout the term of the Contract and for as long thereafter as any obligations remain outstanding under the Contract Documents. ***[If Design-Builder is a joint venture, identify its members and provide organizational information, qualification to do business and good standing representations regarding each member.]***

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

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

2.3.11 There is no action, suit, proceeding, investigation, or litigation pending and served on Design-Builder which challenges Design-Builder's authority to execute, deliver, or perform, or the validity or enforceability of, the Contract, or which challenges the authority of Design-Builder's official executing the Contract Documents; and Design-Builder has disclosed to NHDOT any pending and un-served or threatened action, suit, proceeding, investigation, or litigation with respect to such matters of which Design-Builder is aware.

2.3.12 As of the Proposal Date, Design-Builder disclosed to NHDOT in writing all organizational conflicts of interest of Design-Builder and DB-Related Entities of which Design-Builder was actually aware; and between the Proposal Date and execution of this Contract, Design-Builder has not obtained knowledge of any

additional organizational conflict of interest, and there have been no organizational changes to Design-Builder or its Subcontractors identified in its Proposal which have not been approved in writing by NHDOT. For this purpose, organizational conflict of interest has the meaning set forth in the Instructions to Proposers under which Design-Builder submitted its Proposal.

2.3.13 Design-Builder is aware of the requirements which require every employer to be insured against liability for workers' compensation or to undertake self-insurance, and Design-Builder will comply with such requirement before commencing performance of the Work under the Contract Documents and at all times during the term hereof, whether by provision of its own insurance or self-insurance.

2.3.14 Each Subcontractor performing Remediation Work shall have all necessary licenses including a Contaminated Substance Removal Certification from the State of New Hampshire Contractors State License Board.

2.3.15 Design-Builder shall ensure labor harmony on Site during all stages of the Project, including taking appropriate steps to prevent strikes, walkouts, Work stoppages, Work slowdowns, Work curtailments, cessations, or interruptions of production due to labor disputes. If failure to maintain labor harmony results in delay in completion of the Project, Design-Builder shall not be entitled to a time extension or increase in compensation under Section 13.

2.4 Survival of Representations and Warranties

The representations and warranties of Design-Builder contained herein shall survive expiration of this Contract.

SECTION 3. INFORMATION SUPPLIED TO DESIGN-BUILDER

3.1 Information Supplied

NHDOT has made available to Design-Builder information, which is described in the Technical Provisions and has allowed Design-Builder access to the Site for purposes of inspection and testing.

3.2 Submittals

3.2.1 General

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

3.2.2 Time Periods

Whenever NHDOT is entitled to review, comment on, or to accept a Submittal, NHDOT shall have 21 Calendar 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. Submittals uploaded after noon are to be considered as having been received the following working day.

Design-Builder shall develop submission schedule in conjunction with NHDOT that shall be updated regularly by the Design-Builder. NHDOT shall endeavor to reasonably accommodate a written request from Design-Builder for expedited action on a specific Submittal, within the reasonable and practical limitations on availability of NHDOT personnel appropriate for acting on the types of Submittal in question; provided Design-Builder sets forth in its request specific, abnormal circumstances demonstrating the need for expedited action. This provision shall not apply, however, during any time described in Section 3.2.2. All time periods for NHDOT 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 Governmental Rules, contract or Governmental Approvals, by any DB-Related Entity.

3.3 Responsibility for Design

3.3.1 Design-Builder Responsibility

Design-Builder agrees that it has full responsibility for the design of the Project and that Design-Builder will furnish the design of the Project, regardless of the fact that aspects of the Project Schematics have been provided to Design-Builder prior to the date of execution of the Contract as a preliminary basis for Design-Builder's design. Design-Builder specifically acknowledges and agrees that:

(a) Except to the extent specifically permitted in the Contract Documents, Design-Builder is not entitled to rely on (i) the Project Schematics, except to the extent that the Project Schematics define the NHDOT-Provided Property, (ii) the Reference Materials, or (iii) any other documents or information provided by NHDOT.

(b) NHDOT's liability for Errors in the Project Schematics is limited to its obligations relating to Necessary Basic Configuration Changes and provision of access to parcels within the NHDOT-Provided Property, and is subject to the requirements and limitations of Section 13.

(c) Design-Builder's warranties and indemnities hereunder cover Errors in the Project even though they may be related to Errors in the Project Schematics.

(d) Design-Builder is responsible for verifying all calculations and quantity takeoffs contained in the Technical Provisions or otherwise provided by NHDOT.

3.3.2 Project Schematics

Design-Builder acknowledges and agrees that

(a) The Project Schematics, including roadway, bridge structural, mechanical, electrical, and architectural, layout plans, and profiles are for reference only. Design- Builder acknowledges and agrees that constraints set forth in the Contract Documents, as well as Site conditions, will impact Design-Builder's ability to revise the concepts contained in the Project Schematics, in addition to the requirement to obtain approval.

(b) Design-Builder may rely on the ROW Limits identified in the Project Schematics, and shall have the right to obtain a Change Order for Necessary Basic Configuration Changes as provided herein, but acknowledges that the Project Schematics are otherwise conceptual in nature and cannot be relied upon as presenting a design solution that complies with all of the requirements of the Contract Documents. Design-Builder's entitlement to an increase in the Contract Price or extension of Completion Deadlines in connection with any changes in the Project Schematics is limited to Necessary Basic Configuration

Changes.

3.3.3 Design Review Process and Compliance with Final Design Documents

Design-Builder, through the appropriately qualified and licensed design professionals identified in Design-Builder's Project Management Plan shall prepare designs, plans and specifications in accordance with the Contract Documents. Design-Builder shall cause the Engineer of Record for the Project to sign and seal all Final Design Documents.

Design-Builder shall furnish the Design Documents and Construction Documents to NHDOT, shall obtain NHDOT approval of any deviations from Referenced Standards as specified in Technical Provisions, and shall obtain acceptance of the Final Design Documents. NHDOT's acceptance of Construction Documents for construction as described in the Section 3.3.3 shall constitute acceptance of the design by NHDOT for purposes of compliance with the Contract Documents, but shall not be deemed to relieve Design-Builder of liability for an injury caused by the design during construction.

Design-Builder shall notify NHDOT in writing within 14 Days after receipt of any comments if Design-Builder believes incorporation of any comments would render the Design Documents, Construction Documents, or any other Contract Documents erroneous, defective or deficient in any respect or which would otherwise adversely affect in any manner the design or construction of the Project or the Project Schedule. Any failure of Design-Builder to so notify NHDOT shall constitute Design-Builder's full acceptance of all responsibility for changes made to the Design Documents and Construction Documents in response to such comments and shall be treated for all purposes hereunder as if Design-Builder had initiated such changes.

Design-Builder shall respond to the comments and make modifications to the Construction Documents and Design Documents based on the NHDOT comments in accordance with Section 3.3. Design-Builder acknowledges that comments may be provided that reflect concerns regarding operability or preferences of the commenter or that otherwise do not directly relate to specific requirements of the Contract Documents. Design-Builder agrees to undertake reasonable efforts to accommodate or otherwise resolve any such comments through the review process described in Section 3.3. The foregoing shall in no way be deemed to obligate Design-Builder to incorporate any comments that would result in a significant disruption to its schedule or a significant increase in its costs, except pursuant to an NHDOT-Directed Change.

Design-Builder shall be responsible for handling all design reviews required by, and obtaining all design approvals from, Utility Owners in connection with utilities Work.

Design-Builder shall be responsible for processing any design exceptions required for the improvements, and shall address all requirements reasonably imposed by NHDOT as a condition to granting the design exceptions.

Design-Builder shall construct the Project in accordance with the Final Design Documents and the Construction Documents. The Final Design Documents may be changed only with prior written approval of NHDOT.

3.3.4 Basic Configuration Changes

If, as the result of an Error in the Project Schematics, it becomes apparent that the Basic Configuration must be materially modified, such modification shall be considered a Necessary Basic Configuration Change and shall be eligible for a Change Order as provided in Section 13.8.

If a Value Engineering Change Proposal (VECP) results in a change in Basic Configuration, any cost savings from such VECP shall be shared in accordance with Section 22.

Design-Builder shall not make any change in the Basic Configuration, except as approved by NHDOT and authorized by a Change Order in accordance with Section 13, and subject to the limitations contained in Section 6.4. 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 Design-Builder's costs or schedule.

Except for an NHDOT-Directed Change or Necessary Basic Configuration Change involving more than $10,000 in additional direct costs or involving a delay to a Critical Path, Design-Builder shall not be entitled to an adjustment in the Contract Price or a Completion Deadline or any other relief for any changes in the Basic Configuration.

3.4 Disclaimer

3.4.1 Design-Builder understands and agrees that NHDOT shall not be responsible or liable in any respect for any Losses whatsoever suffered by any DB-Related Entity by reason of any use of any information contained in the Project Schematics or Reference Materials, or any action or forbearance in reliance thereon, except to the extent that NHDOT has specifically agreed herein that Design-Builder shall be entitled to an increase in the Contract Price and/or extension of a Completion Deadline with respect to such matter. Design- Builder further acknowledges and agrees that (a) if and to the extent Design- Builder or anyone on Design-Builder's behalf uses any of said information in any way, such use is made on the basis that Design-Builder, not NHDOT, has approved and is responsible for said information, and (b) Design-Builder 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 Design-Builder's own risk and at its own discretion.

3.4.2 NHDOT DOES NOT REPRESENT OR WARRANT THAT THE INFORMATION CONTAINED IN THE PROJECT SCHEMATICS OR REFERENCE MATERIALS IS COMPLETE OR THAT SUCH INFORMATION IS IN CONFORMITY WITH THE REQUIREMENTS OF TECHNICAL PROVISIONS SECTION 6.5, GOVERNMENTAL RULES OR OTHER CONTRACT DOCUMENTS. THE FOREGOING SHALL IN NO WAY AFFECT NHDOT'S AGREEMENT HEREIN

TO ISSUE CHANGE ORDERS IN ACCORDANCE WITH SECTION 13.

3.5 Design Professional Licensing Requirements

NHDOT does not intend to contract for, pay for, or receive any Professional Services which are in violation of any professional licensing or registration laws, and by execution of the Contract, Design-Builder acknowledges that NHDOT has no such intent. It is the intent of the Parties that Design-Builder is fully responsible for furnishing the Professional Services of the Project through Subcontracts with licensed/registered Professional Service firm(s) as provided herein. Any references in the Contract Documents to Design-Builder's responsibilities or obligations to "perform" the Professional Services portions of the Work shall be deemed to mean that Design- Builder shall "furnish" the Professional Services for the Project. The terms and provisions of this Section 3.5 shall control and supersede every other provision of all Contract Documents.

3.6 Role of NHDOT Consultants

HDR Engineering, Inc, and Fuss & O'Neill (formerly CDL) will assist NHDOT in all efforts associated with the project. NHDOT may retain other consultants to provide services to NHDOT relating to the Project.

Design-Builder shall cooperate with the Consultants listed above and NHDOT's other consultants in the exercise of their respective duties and responsibilities in connection with the Project.

3.7 Role of FHWA

Design-Builder acknowledges and agrees that FHWA will have certain approval rights with respect to the Project (including rights to approve the Project design and any Change Orders), as well as the right to provide certain oversight and technical services with respect to the Project. Design-Builder shall cooperate with FHWA in the reasonable exercise of their respective duties and responsibilities in connection with the Project.

3.8 Role of Derry, New Hampshire, and Londonderry, New Hampshire

Design-Builder shall cooperate with Derry, New Hampshire, and Londonderry, New Hampshire in the reasonable exercise of their respective duties and responsibilities in connection with the Project.

3.9 Governmental Approvals and Third Party Agreements

3.9.1 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), Design-Builder shall submit the same, together with any supporting environmental studies and analyses, to NHDOT for acceptance.

3.9.2 Design-Builder shall provide NHDOT with copies of all Governmental Approvals

and any other permit, license, consent, authorization, or similar document issued to Design-Builder by, or agreement entered into between, Design- Builder and any Governmental Entity, Utility Owner, property owner, or other third party relating to the Work for the Project within seven Days.

3.9.3 If Design-Builder wishes to pursue Additional Properties, or any other Deviation from any Governmental Approvals, including NHDOT-Provided Approvals, Design-Builder shall first comply with, and obtain any consent or waiver required pursuant to, then-existing agreements between NHDOT and other Governmental Entities.

3.9.4 Upon Design-Builder's request, NHDOT will reasonably cooperate with Design-Builder in providing Design-Builder with copies of the applicable agreements between NHDOT and other Governmental Entities.

3.9.5 If any Governmental Approvals required to be obtained by Design-Builder must formally be issued in the name of NHDOT, Design-Builder shall undertake all efforts to obtain such approvals, subject to NHDOT's reasonable cooperation with Design-Builder, at Design-Builder's expense (except in connection with Governmental Approvals required due to an NHDOT-Directed Change), including execution and delivery of appropriate applications and other documentation in form accepted by NHDOT. Design-Builder shall assist NHDOT in obtaining any Government Approvals, which NHDOT may be obligated to obtain, including providing information requested by NHDOT and participating in meetings regarding such approvals.

3.9.6 Design-Builder shall comply with all conditions and constraints imposed by and undertake all actions required by and all actions necessary to obtain, maintain in full force and effect, and renew all Governmental Approvals, including performance of all environmental mitigation measures required by the Contract Documents or Governmental Approvals, except to the extent that responsibility for performance of such measures is expressly assigned to NHDOT in the Contract Documents.

3.9.7 In the event that NHDOT, Town of Derry, Town of Londonderry, or FHWA must act as the lead agency and directly coordinate with a Governmental Entity in connection with obtaining Governmental Approvals which are the responsibility of Design-Builder, Design- Builder shall provide all necessary support to facilitate the approval, mitigation, or compliance process. Such support shall include conducting necessary field investigations, surveys, and preparation of any required reports, documents, and applications.

3.9.8 Design-Builder shall not enter into any agreement with any Governmental Entity, Utility Owner, property owner, or other third party having regulatory jurisdiction over any aspect of the Project or the Work, or having any property interest affected by the Project or the Work, that in any way purports to obligate NHDOT , or states or implies that NHDOT 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 Contract, unless NHDOT otherwise approves in writing, in its sole discretion. Design-Builder has no power or authority to enter into any such agreement with a third party in the name of or on behalf of NHDOT.

SECTION 4. PROJECT SCHEDULE AND PROGRESS

4.1 Time of Essence; Notices to Proceed

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

4.1.2 Authorization allowing Design-Builder to proceed with Work shall be provided by NHDOT's issuance of a Notice to Proceed. NHDOT anticipates issuing NTP1 concurrently with the execution and delivery of this Contract. Issuance of NTP1 authorizes Design-Builder to perform (or continue performance of) the portion of the Work necessary to obtain NHDOT's approval of the component parts, plans, and documentation of the Project Management Plan indicated in Section 2 of the Technical Provisions. Issuance of NTP1 also authorizes Design-Builder to enter the Project ROW that NHDOT has acquired to conduct surveys and site investigations, including geotechnical, Contaminated Materials, and Utilities investigations.

4.1.3 NHDOT anticipates issuing NTP2 concurrently with NHDOT's acceptance of all the foregoing component and documentation of the Project Management Plan. Issuance of NTP2 authorizes Design-Builder to perform all other Work and activities for the Project. No design or construction submittals will be received by NHDOT until the QMP and PMP have been prepared and submitted by the Contractor in accordance with all requirements in the Contract, and have been found acceptable by NHDOT. Design Builder's rights and remedies arising from a delay in issuance of NTP2 are set forth in Sections 12.1.4, 12.1.5, and 15.10.

The Contractor may request partial relief from the requirements stated above relative to the conditions that NHDOT will not receive any design or construction submittals until the QMP has been prepared and submitted by the Contractor:

1. The Contractor may request relief from requirements to submit construction related portions of the QMP prior to NHDOT receiving any design submittals.
2. The Contractor's request shall clearly identify design related portions of the QMP, which will be required to be provided by the Contractor in accordance with all requirements in the Contract prior to NHDOT receiving any design submittals.
3. The Contractor's request shall clearly identify construction related portions

of the QMP, which are to be submitted by the Contractor in accordance with all requirements in the Contract prior to issuance of NTP2.

4. No construction submittals will be received by NHDOT prior to the submittal by the Contractor in accordance with all requirements in the Contract of a complete QMP, including all required design and construction related requirements and provisions.
5. The issuance of NTP2 will remain dependent on the Contractor submitting a complete QMP.
6. NHDOT will not unreasonably withhold acceptance of the Contractors request for relief provided all of the conditions noted here are met by the Contractor.

4.1.4 Design-Builder shall begin performance of the Work as directed in the applicable Notice to Proceed.

4.2 Completion Deadlines

4.2.1 Project Completion Deadlines

Design-Builder shall achieve Project Completion by **June 27, 2024** Said date for achieving Project Completion, as it may be extended hereunder, is referred to herein as the "Project Completion Deadline."

4.2.2 Final Acceptance Deadline

Design-Builder shall achieve Final Acceptance within 120 Days after Project Completion. Said deadline for achieving Final Acceptance, as it may be extended hereunder, is referred to herein as the "Final Acceptance Deadline."

4.2.3 No Time Extensions

Except as otherwise specifically provided in Section 13, NHDOT shall have no obligation to extend a Completion Deadline and Design-Builder shall not be relieved of its obligation to comply with the Project Schedule and to achieve Project Completion and Final Acceptance by the applicable Completion Deadlines for any reason.

4.2.4 Intermediate Completion Deadlines

Design-Builder shall achieve Intermediate Completion by number of days beyond NTP as specified in Section 17. See Section 17.6 for requirements for achievement of Intermediate Completion. Said date for achieving Intermediate Completion, as it may be extended hereunder, is referred to herein as the "Intermediate Completion Deadline."

4.2.5 Interim Milestone Completion Deadlines

Design-Builder shall achieve Interim Milestone #1 Completion by number of days beyond

NTP1 as specified in Section 17. See Section 17.6 for requirements for achievement of Interim Milestone #1. Said date for achieving Interim Milestone #1 Completion, as it may be extended hereunder, is referred to herein as the "Interim Milestone #1 Completion Deadline".

Design-Builder shall achieve Interim Milestone #2 Completion by number of days beyond NTP 1 as specified in Section 17. See Section 17.6 for requirements for achievement of Interim Milestone #2. Said date for achieving Interim Milestone #2 Completion, as it may be extended hereunder, is referred to herein as the "Interim Milestone #2 Completion Deadline".

4.3 Scheduling of Design, Construction, and Payment

4.3.1 Project Schedule

The Work shall be undertaken and completed in accordance with the Project Schedule prepared in conformance with Technical Provision Section 2. 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 Design-Builder. In the event that Design-Builder fails to provide an acceptable Project Schedule within 45 Days after issuance of NTP1, Design-Builder shall have no right to receive progress payments until such time as Design-Builder has prepared and NHDOT has accepted the Project Schedule.

4.3.2 Float

All Float contained in the Baseline Schedule or generated thereafter shall be considered a Project resource available to either Party or both Parties as needed to absorb delays caused by any event and to achieve schedule milestones, interim completion dates, and/or Completion Deadlines. All Float shall be shown as such in the Project Schedule on each affected schedule path. Identification of (or failure to identify) Float on the schedule shall be examined by NHDOT in determining whether to accept the Project Schedule. Once identified, Design-Builder shall monitor, account for, and maintain Float in accordance with critical path methodology.

4.3.3 Payment Schedule

The Project Schedule shall provide for payment to be made solely on the basis of progress by Design-Builder for the Project. The Payment Schedule shall not limit payment for Change Order Work unless otherwise specified in the Change Order. In other words, at no time shall Design-Builder's cumulative total progress payments (including mobilization payments but exclusive of payments for Change Order Work) exceed the cumulative total expenditure permitted by the Payment Schedule.

4.4 Conditions to Commencement of Construction

4.4.1 Construction Work Generally

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

(a) NHDOT shall have delivered to Design-Builder the NTP2.

(b) NHDOT shall have accepted the Project Schedule, the Project Management Plan, the Quality Management Plan, and Construction QC Plan(s) applicable to the construction Work.

(c) All requirements of the Quality Management Plan, which are a condition to construction, shall have been met.

(d) Design-Builder has delivered to NHDOT all Submittals relating to the construction Work required by the Project Management Plan or Contract Documents, in the form and content required by Project Management Plan or Contract Documents.

(e) Except as otherwise provided in Technical Provision Section 3 (Early Start of Construction), NHDOT shall have accepted all applicable Project Design Documents and Construction Documents relating to such portion of the Project.

(f) All Governmental Approvals necessary for construction of the applicable portion of the Project shall have been obtained and Design-Builder has furnished to NHDOT fully executed copies of such Governmental Approvals;

(g) All conditions of Governmental Approvals necessary for construction of the applicable portion of the Project, which are a prerequisite to commencement of such construction, shall have been performed.

(h) Each Performance Bond and Payment Bond, in form and from a surety accepted by NHDOT, required under Section 8 has been obtained and is in full force and effect, and Design-Builder has delivered to NHDOT certified and conformed copies of the originals of each such bond, with the original of each such bond delivered to Design-Builder.

(i) All insurance policies and bonds required to be delivered to NHDOT hereunder prior to commencement of construction shall have been received and accepted by NHDOT and shall remain in full force and effect.

(j) All necessary rights of access acceptable to NHDOT in its sole discretion for such portion of the Project shall have been obtained by NHDOT.

(k) All pre-construction environmental surveys and mitigation have been completed as required by the Governmental Approvals or otherwise under the

Contract Documents for the area(s) proposed for construction, and Design-Builder shall have performed all other survey work and delivered all notices required by the Contract Documents to be delivered prior to commencement of construction on such portion of the Project.

(l) All representations and warranties of Design-Builder set forth in Section 2.3 shall be in effect and shall remain true and correct in all material respects.

(m) There exists no uncured Event of Default for which Design-Builder has received written notice from NHDOT.

(n) Design-Builder has provided to NHDOT at least ten Days advance written notification of the date Design-Builder determines that it will satisfy all of the conditions set forth in this Section 4.4.

As used in this Section 4.4.1, the term "construction" specifically excludes potholing and geotechnical investigations incidental to design Work, mobilization, Site security, and establishment of work yard(s) and storage sites.

4.5 Recovery Schedule

4.5.1 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 Design-Builder may be entitled to a time extension under Section 13), then Design-Builder, within ten days after Design-Builder first becomes aware of such schedule delay or otherwise at the request of NHDOT, shall prepare and submit to NHDOT for review and acceptance a Recovery Schedule demonstrating Design-Builder's proposed plan to regain lost schedule progress and to achieve the original contractual milestones in accordance with this Contract, including Project Completion by the applicable Project Completion Deadline. NHDOT shall notify Design-Builder within ten days after receipt of each such Recovery Schedule whether the schedule is deemed accepted or rejected. Within five Days after NHDOT's rejection of the schedule, Design-Builder will resubmit a revised Recovery Schedule incorporating NHDOT's comments. When NHDOT accepts Design- Builder's Recovery Schedule, Design-Builder shall, within five Days after NHDOT's acceptance, incorporate and fully include such schedule into the Project Schedule and deliver it to NHDOT.

4.5.2 All costs incurred by Design-Builder in preparing, implementing and achieving the Recovery Schedule shall be borne by Design-Builder and shall not result in a change to the Contract Price, except to the extent that a change in the Contract Price is permitted in accordance with Section 13.

4.5.3 In the event that Design-Builder fails to provide an acceptable Recovery Schedule within 30 Days of Design-Builder's receipt of a notice to do so, Design-Builder shall have no right to receive progress payments until such time as

Design-Builder has prepared and NHDOT has accepted such Recovery Schedule. Any failure or delay in the submittal or acceptance of a Recovery Schedule shall not result in any time extension under the Contract Documents.

SECTION 5. QUALITY CONTROL AND ACCEPTANCE/VERIFICATION OF WORK

5.1 Control and Coordination of Work

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

5.2 Safety

Design-Builder 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 NHDOT and its consultants, visitors to the Site, and members of the public who may be affected by the Work. Design-Builder shall at all times comply with all safety requirements of the Contract Documents, Design-Builder's Safety Program, and all such requirements under applicable Governmental Rules.

5.3 Process to Be Followed Upon Discovery of Certain Site Conditions

5.3.1 Notification to NHDOT

If Design-Builder becomes aware of (a) any on-Site material that Design-Builder believes may contain Contaminated Materials required to be removed or treated, or (b) any Differing Site Conditions, as a condition precedent to Design-Builder's right to a Change Order, Design-Builder shall immediately notify NHDOT thereof telephonically or in person, to be followed immediately by written notification. Design-Builder shall immediately stop Work in and secure the area. In such event, NHDOT will view the location within three Business Days of written receipt of notification and shall advise Design-Builder at that time whether Work should be resumed or whether further investigation is required.

Notwithstanding the foregoing, Design-Builder shall not be obligated to stop Work upon discovery of any materials or conditions which the Contract Documents or Technical Provisions indicate are present in the location in question; provided, however, that Design-Builder shall provide prompt notice to NHDOT of any such discovery. Furthermore, if any Governmental Approval specifies a procedure to be followed which differs from the procedure set forth herein, Design-Builder shall follow the procedure set forth in the Governmental Approval. Refer to Section 6.3 for additional requirements relating to Contaminated Materials.

5.3.2 Further Investigation

NHDOT shall conduct such further investigation, as NHDOT deems appropriate. NHDOT shall use reasonable efforts to determine within five Days after written receipt of such notification whether the situation falls within the scope of Section 5.3.1, and shall immediately notify Design-Builder of its determination once it is made. NHDOT shall at that time also advise Design-Builder of any action to be taken regarding the situation. If Contaminated Materials or Contaminated Groundwater is involved, the notice shall describe the type of remediation measures, if any, which Design-Builder is to undertake with respect thereto.

5.3.3 Recommencement of Work

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

5.4 Obligation to Minimize Impacts

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

5.5 Oversight, Inspection and Testing

5.5.1 Design-Builder Quality Control Inspection and Testing

Design-Builder shall perform the Quality Control inspection, sampling, and testing necessary for Design-Builder to comply with its obligations under the Contract Documents.

5.5.2 Oversight and Acceptance Inspection and Testing by NHDOT and Others

NHDOT, Town of Derry, Town of Londonderry, or designee shall provide oversight and perform Acceptance/Verification activities and shall have the right at all times to monitor, inspect, sample, measure, attend, observe, or conduct tests and investigations, and conduct any other oversight or Acceptance/Verification activity for any part or aspect of the Project or the Work, to the extent necessary or advisable to: (a) comply with FHWA or other applicable federal agency requirements, (b) comply with NHDOT requirements, (c) verify Design-Builder's compliance with the Contract Documents and Quality Management Plan as provided in Section 21.4.3. NHDOT shall conduct such activity in

accordance with Design-Builder'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.

NHDOT, Town of Derry, Town of Londonderry, or designee shall have the right to attend and witness any Design-Builder QC inspection or testing to be conducted pursuant to the Technical Provisions and the Quality Management Plan. Design-Builder shall provide to NHDOT all QC inspection and testing results and reports within seven (7) Days after Design-Builder receives them, unless as provided in Technical Provisions Section 3.9.

All materials and each part or detail of the Work shall also be subject to oversight and Acceptance/Verification inspection and testing by NHDOT. At all points in performance of the Work at which specific inspection or testing by NHDOT is required, Design- Builder shall not proceed beyond that point until NHDOT has made such inspection or testing or waived their right to inspect or test, which waiver shall be in writing. 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, and/or testing does not make such Person a party to the Contract nor will it change the rights of the Parties hereto. Design-Builder hereby consents to such oversight, inspection, and testing. Upon request from NHDOT, Design-Builder shall furnish information to such Persons as are designated in such request and shall permit such Persons access to the Site and all parts of the Work.

Design-Builder at all times shall coordinate and cooperate, and require its Subcontractors to coordinate and cooperate, with NHDOT or the NHDOT designee to facilitate the oversight and Acceptance/Verification inspection and testing activities of NHDOT. Design-Builder shall cause its representatives to be available at all reasonable times for consultation with NHDOT.

Without limiting the foregoing, Design-Builder shall afford NHDOT, Town of Derry, Town of Londonderry, and their respective authorized representatives: (a) safe and unrestricted access to the Project at all times, (b) safe access during normal business hours to Design-Builder's Project offices and operations buildings, and (c) unrestricted access to data related to the Work, subject to Section 21.4.3. Without limiting the foregoing, Design-Builder shall deliver to NHDOT upon request accurate and complete books, records, data, and information regarding Work and the Project.

Nothing in the Contract Documents shall preclude, and Design-Builder shall not interfere with, any review or oversight of submittals or of Work that FHWA or any other applicable federal agency may desire to conduct.

5.5.3 Obligation to Uncover Finished Work

Design-Builder shall inform NHDOT of any part of the Work which is about to be covered and offer a full and adequate opportunity to NHDOT to inspect and test such part of the Work before it is covered. At all times before Final Acceptance, Design- Builder shall remove or uncover such portions of the finished construction Work as directed by NHDOT. After examination by the NHDOT and any other Persons designated by NHDOT, Design-Builder shall restore the Work to the standard required by the Contract Documents. If the Work exposed or examined is not in conformance with the requirements of the Contract Documents, then uncovering, removing, and restoring the Work, and recovery of any delay to any Critical Path occasioned thereby, shall be at Design-Builder's cost and Design-Builder shall not be entitled to any adjustment to the Contract Price or any time extension or any other relief. Furthermore, any Work done or materials used without adequate notice to and opportunity for prior inspection by NHDOT (if applicable) or without inspection in accordance with the Technical Provisions may be ordered uncovered, removed, or restored at Design- Builder's cost and without an adjustment to the Contract Price or a time extension, or any other relief, even if the Work proves acceptable after uncovering. Except with respect to Work done or materials used as described in the foregoing sentence, if Work exposed or examined under this Section 5.5.3 is in conformance with the requirements of the Contract Documents, then any delay in any Critical Path from uncovering, removing, and restoring Work shall be considered an NHDOT-Caused Delay, and Design-Builder shall be entitled to a Change Order for the cost of such efforts and recovery of any delay to any Critical Path occasioned thereby. Refer to Section 5.7 for provisions regarding payments owed by Design-Builder to NHDOT if NHDOT agrees (in its sole discretion) to accept certain Nonconforming Work.

5.5.4 Progress Meetings

Design-Builder shall conduct regular progress meetings with NHDOT at least weekly during the course of the Work. In addition, NHDOT and Design-Builder, 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. Design-Builder shall schedule all meetings with NHDOT at a date, time, and place reasonably convenient to both Parties and, except in the case of urgency, shall provide NHDOT with written notice and a meeting agenda at least three Business Days in advance of each meeting. D/B shall prepare and provide meeting minutes to NHDOT within three Working Days of the meeting for comment/acceptance by meeting attendees. Meeting minutes shall not be considered final until reviewed and the content agreed on by all attendees.

5.6 Effect of Oversight and Acceptance/Verification Activities

5.6.1 Oversight and Acceptance

The oversight and Acceptance/Verification activities, including spot checks, audits, tests, acceptances, and approvals conducted by NHDOT, Town of Derry, Town of Londonderry, and others during progress of the Work do not constitute final acceptance of the materials or Work inspected or waiver of any warranty or legal or equitable right with respect thereto. NHDOT may request remedies for Nonconforming Work and/or identify additional Work which must be done to bring the Project into compliance with Contract requirements at any time prior to Final Acceptance, or, in the case of the landscaping Work, prior to expiration of the Plant Establishment Period, whether or not previous oversight, spot checks, inspections, verifications, audits, reviews, tests, acceptances, or approvals were conducted or waived by NHDOT or any such Persons.

5.6.2 No Estoppel

Design-Builder 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, verifications, 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. NHDOT shall not be precluded or estopped by any measurement, estimate, or certificate made either before or after Final Acceptance, or by making any payment, from showing that any such measurement, estimate, or certificate is incorrectly made or untrue, or from showing the true amount and character of the Work performed and materials furnished by Design-Builder, 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, NHDOT shall not be precluded or estopped from recovering from Design-Builder or Surety(ies) such damages as NHDOT may sustain by reason of Design-Builder's failure to comply or to have complied with the terms of the Contract Documents.

5.7 Nonconforming Work

5.7.1 Rejection, Removal, and Replacement of Work

The Design-Builder shall document all non-conforming Work on a Non-Conformance Report (NCR) and provide a proposed resolution in accordance with Section 3.9 of the Technical Provisions. Nonconforming Work rejected by NHDOT shall be removed and replaced so as to conform to the requirements of the Contract Documents, at Design-Builder's cost and without any adjustment to the Contract Price or time extension or any other relief; and Design-Builder shall take all action necessary to prevent similar deficiencies from occurring in the future. The fact that NHDOT may not have discovered the Nonconforming Work shall not constitute an acceptance of such Nonconforming

Work. If Design-Builder fails to correct any Nonconforming Work within ten Days of receipt of notice from NHDOT requesting correction, or if such Nonconforming Work cannot be corrected within ten Days, and Design-Builder fails to:
(a) provide to NHDOT a schedule for correcting any such Nonconforming Work acceptable to NHDOT within such ten-day period, (b) commence such corrective Work within such ten-day period, and (c) thereafter diligently prosecute such correction in accordance with such accepted schedule to completion, then NHDOT may cause the Nonconforming Work to be remedied or removed and replaced and may deduct the cost of doing so (plus an administrative charge equal to 10% of the cost) from any moneys due or to become due Design-Builder and/or obtain reimbursement from Design-Builder for such cost (plus an administrative charge equal to 10% of the cost).

5.7.2 Agreement to Accept Nonconforming Work

If NHDOT agrees (subject to Town of Derry's, Town of Londonderry's and FHWA's prior written consent) to accept any Nonconforming Work without requiring it to be fully corrected, NHDOT shall be entitled to reimbursement of a portion of the Contract Price in an amount equal to the greater of: (a) the amount deemed appropriate by NHDOT to provide compensation for future maintenance and/or other costs relating to the Nonconforming Work, or (b) 100% of Design-Builder's cost savings associated with its failure to perform the Work in accordance with Contract requirements. Such reimbursement (plus an administrative charge equal to 10% of the costs and expenses) shall be payable to NHDOT within ten Days after Design-Builder's receipt of an invoice therefor. Alternatively, NHDOT may deduct the amount of such costs and expenses (plus an administrative charge equal to 10% of the costs and expenses) from any sums owed by NHDOT to Design-Builder pursuant to this Contract. Design-Builder acknowledges and agrees that NHDOT shall each have sole discretion regarding acceptance or rejection of Nonconforming Work and the amount payable in connection therewith. Payment, reimbursement or deduction of the amounts owed to NHDOT under this Section 5.7.2 shall be a condition precedent to the acceptance of the applicable Nonconforming Work.

SECTION 6. ACCESS TO SITE; UTILITY RELOCATIONS; ENVIRONMENTAL MITIGATION; COOPERATION WITH LOCAL AGENCIES

6.1 Access to Site

6.1.1 Planned ROW Limits

The Project Schematics identify the boundaries of the Planned ROW Limits. In the event of any changes in right-of-way requirements in connection with any NHDOT- Directed Change or Necessary Basic Configuration Change, the Planned ROW Limits shall automatically be deemed modified to incorporate the changed requirements and NHDOT will secure the property rights, otherwise the Design-Builder is responsible for any property rights they wish to acquire for specific construction methods.

6.1.2 Access to NHDOT, Town of Derry and Town of Londonderry Provided Property

All current project activities will be contained within State of New Hampshire, Town of Derry, or Town of Londonderry property.

6.1.3 Additional Properties

In addition to provision of access to the NHDOT, Town of Derry and Town of Londonderry Provided Property, NHDOT will obtain access rights to certain other parcels (the "Additional Properties"), as provided herein. As a condition to NHDOT's obligation to provide access to Additional Properties for the purpose of constructing permanent improvements thereon, Design- Builder shall demonstrate, to NHDOT's satisfaction (after consultation with Town of Derry and/or Town of Londonderry), that: (a) such property is required for permanent improvements for the Project, and
(b) acquisition thereof is otherwise consistent with applicable Governmental Rules. Subject to the foregoing, Additional Properties shall include any Utility Easements which are NHDOT's responsibility to acquire not included in the NHDOT-Provided Property. NHDOT shall have no obligation to acquire temporary interests in property (other than those included in the NHDOT-Provided Property), but may, in its sole discretion, agree to do so following receipt of request from Design-Builder.

The process for acquisitions of Additional Properties by NHDOT is set forth in NHDOT ROW Manual. The scheduling provision of access shall apply as set forth: (a) NHDOT shall provide Design-Builder with written notice of the minimum time necessary for provision of access upon its approval of the acquisition, and (b) delay in acquisition shall not be considered an NHDOT-Caused Delay except to the extent that the delay was directly attributable to grossly negligent actions affirmatively taken by NHDOT.

Design-Builder shall be responsible for and shall pay directly all costs and expenses in connection with acquiring Additional Properties, including: (a) the cost of acquisition services and document preparation; (b) the cost of condemnation proceedings required

by NHDOT, including private attorneys' fees and expert witness fees, and all fees and expenses for exhibits, transcripts, photos, and other documents and materials production; (c) the purchase prices, court awards or judgments relating to or arising out of the acquisition of all Additional Properties (to be paid by Design-Builder at the time of closing or final award, as applicable); (d) the cost of permitting; (e) closing costs associated with parcel purchases; (f) relocation assistance payments and costs;
(g) the cost for separate property survey(s) in addition to the Planned ROW survey(s); (h) the cost of severance damages or inverse condemnation arising out of or otherwise related to the acquisition of the Additional Properties; and (i) an administrative charge equal to 10% of all of the foregoing costs. All of such costs and expenses shall be determined in accordance with the Uniform Act, and NHDOT policies. If NHDOT incurs any such costs and expenses on Design-Builder's behalf, NHDOT may submit any invoices for such costs and expenses to Design-Builder, in which case Design-Builder shall pay the invoices prior to delinquency. If NHDOT pays any such costs and expenses on Design-Builder's behalf, Design-Builder shall reimburse NHDOT within ten Days of NHDOT's submittal to Design-Builder of an invoice for such NHDOT costs and expenses. Alternatively, NHDOT may deduct the amount of such costs and expenses (plus an administrative charge equal to 10% of the costs) from any sums owed by NHDOT to Design-Builder pursuant to this Contract. Notwithstanding the foregoing, (a) for additional real property associated with a VECP, the costs of obtaining the additional real property shall be considered in determining the Contract Price adjustment under Section 22, and (b) Design-Builder shall not be responsible for costs of acquisition for any Utility Easement for which the Utility Owner has Cost Liability. Any cost savings resulting from the acquisition of Additional Properties (including by avoiding use of retaining walls or other engineering modifications) shall be subject to the Value Engineering provisions set forth in Section 22.

Notwithstanding any contrary provision of the Contract Documents, Design-Builder shall not be entitled to any increase in the Contract Price or any extension of a Completion Deadline pursuant to Section 13 or otherwise as a result of: (a) Site conditions associated with any Additional Properties (including those relating to Contaminated Materials, Differing Site Conditions, or Utilities); and (b) any delay, liability, or cost associated with the acquisition of any Additional Properties.

Design-Builder shall support any requests for acquisition of Additional Properties with such information as may be reasonably required by NHDOT. In all cases, NHDOT's obligation to provide such access is subject to the following conditions: (a) if requested by NHDOT, Design-Builder's providing an analysis regarding alternative courses of action; (b) NHDOT's agreement that the property acquisition is in the best interest of the Project; (c) Design-Builder's providing such evidence as NHDOT may require to enable issuance of a determination of necessity; and (d) issuance of a determination of necessity by NHDOT's Commissioner.

6.1.4 Acquisition of Temporary Interests by Design-Builder

Design-Builder, at its sole cost, shall be solely responsible for acquisition of any temporary interests in property which Design-Builder determines are necessary, desirable, or advisable to complete the Project, other than temporary interests included in the NHDOT-Provided Property and any Additional Properties to be acquired by NHDOT under Section 6.1.3. Temporary interests may include obtaining any construction easements and rights to use property required for storage, as well as any property needed for any temporary facilities being constructed by Design-Builder. Design-Builder shall pay the purchase price for all such property interests directly. In the event that the property is within the limits of the NHDOT-Provided Property or is intended to be used for permanent improvements, or Design-Builder intends to request NHDOT to acquire such parcel, Design-Builder shall not negotiate with the owner(s) of such interests except in compliance with the Uniform Act, and 23 CFR Part 710. NHDOT shall have no obligations or responsibilities with respect to the acquisition, maintenance, or disposition of such temporary rights or interests or the condition of such rights or interests, and shall not be obligated to use its powers of eminent domain in connection therewith. Design-Builder shall comply with all applicable Governmental Approvals and Governmental Rules in acquiring and maintaining or disposing of any such property rights or interests. Design-Builder shall cause the documentation of any such property interest to contain the grantor's express acknowledgment that NHDOT shall have no liability with respect thereto.

6.1.5 Avoidance of Additional Permanent Acquisitions

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

6.1.6 Conveyance Documents

NHDOT will prepare easements documents or other real property interests relating to the Project to be granted by NHDOT to Utility Owners. NHDOT will prepare legal descriptions and grant documentation for any transfers of real property and/or interests therein by NHDOT.

6.2 Utility Work

Design-Builder is responsible for performing all utility work necessary to accommodate the Project.

Without limiting the generality of the preceding paragraph, Design-Builder is responsible for performing, and the scope of the DB utility work includes:

(a) All investigative work necessary to confirm the exact location, size, type and any other relevant characteristics of each Utility (including Advance Relocations) located within the Project ROW or otherwise potentially impacted by the Project;

(b) The Incidental Utility Work; and

(c) All tasks, obligations, duties, and costs specified in Technical Provision to provide services required.

(d) Design and Construction of Town of Derry water and sewer services as needed to facilitate construction.

6.3 Contaminated Materials Management

6.3.1 Procedures and Compensation for Contaminated Materials Management

Design-Builder shall manage, treat, handle, store, remediate, remove, transport (where applicable), and dispose of all Contaminated Materials which may include oil, hazardous materials, solid waste, asbestos contaminated materials (ACM), or other contaminated materials as defined by Env-Or 602.07, in accordance with Governmental Rules, Governmental Approvals, and all provisions of the Contract Documents. If, during the course of the Work, Design-Builder encounters unanticipated Contaminated Materials in connection with the Project, Site, or Work, Design-Builder shall: (a) immediately notify NHDOT in writing and advise NHDOT of any obligation to notify any Governmental Entities under applicable Governmental Rules and Governmental Approvals; and (b) take reasonable steps, including design modifications and/or construction techniques, to avoid excavation or dewatering in areas with Contaminated Materials. For purposes of this Section 6.3, the term “contaminated material” means materials that trigger any reporting, investigation or remediation requirements under any Environmental Law. Where excavation or dewatering is unavoidable, Design-Builder shall use appropriately trained personnel and shall select the most cost-effective approach to Contaminated Materials Management, unless otherwise directed by NHDOT. Wherever feasible and consistent with applicable Governmental Rules, contaminated soil and groundwater shall not be disposed off-Site. All Contaminated Materials shall be managed in accordance with applicable Governmental Rules, Governmental Approvals, and the accepted Health & Safety Plan.

Except where Design-Builder is required to take immediate action under the Contract Documents or applicable Governmental Rules, Design-Builder shall afford NHDOT, and any of its representatives, the opportunity to inspect sites containing Contaminated Materials before any action is taken which would inhibit NHDOT's ability to ascertain the nature and extent of the contamination.

Subject to the limitations and exceptions set forth in this Section 6.3.1, Section 12.1.6 and Section 13, Design-Builder shall be entitled to a Change Order providing for additional compensation (but excluding delay and disruption damages and markup for profit) and/or a time extension with respect to costs and delays directly attributable to the discovery of unanticipated Contaminated Materials within the Planned ROW Limits, or any parcels added to the Site by an NHDOT-Directed Change or required due to a Force Majeure Event. The amount of additional compensation or extension of time in any Change Order allowed hereunder shall be determined in accordance with Sections 13.6 and 13.9. Entitlement to compensation or a time extension shall be limited to costs of Work performed pursuant to the accepted plans required to be provided under Technical Provision Section 2.

No compensation or time extension shall be allowed with respect to:

(a) Removal, disposal, and/or remediation of: (i) asbestos or asbestos-containing materials (other than mineral asbestos naturally occurring in the ground) on or in the Site, in accordance with Technical Provision and the approved Asbestos Control and Management Plan, or (ii) any other Contaminated Materials not falling within the definition of Contaminated Waste that are encountered during or in connection with the demolition of buildings, fixtures, or other improvements on any parcels within the Site;

(b) Handling and disposal of aerially deposited lead as provided in Technical Provision;

(c) Treatment and disposal of any Contaminated Groundwater, other than costs of remediating and disposing of any Contaminated Waste;

(d) Release(s) or threatened Release(s) of Contaminated Material attributable to the actions, omissions, negligence, willful misconduct, or breach of Governmental Rules, Governmental Approvals, or contract by any DB-Related Entity;

(e) Immaterial quantities of Contaminated Materials;

(f) Any Contaminated Materials that could have been avoided by reasonable design modifications or construction techniques; or

(g) Any Contaminated Materials on property outside of the NHDOT-Provided Property, except that compensation will be allowed for Remediation Work on such property to the extent that it is integrally intertwined with Remediation Work required within the NHDOT-Provided Property.

To the extent that any proceeds of insurance are available to pay the cost of any Contaminated Materials Management, Design-Builder shall rely on insurance to provide compensation, in lieu of requesting a Change Order.

6.3.2 Contaminated Materials Generator

As between Design-Builder and NHDOT, NHDOT shall be considered the generator and assume generator responsibility (and if necessary) along with providing a hazardous waste coordination per RSA 147-A:2, III and VI for existing Contaminated Materials located within the NHDOT-Provided Property as of the date of issuance of the Notice to Proceed. The foregoing shall not preclude or limit any rights or remedies that NHDOT may have against any Governmental Entity or other third parties, including prior owners, lessees, licensees, and occupants of such properties, and provided that Design-Builder (and not NHDOT) shall be considered the generator with respect to any Release(s) of Contaminated Materials attributable to the actions, omissions, negligence, willful misconduct, or breach of Governmental Rules, Governmental Approvals, or contract by any DB-Related Entity.

6.3.3 Materials Brought to Site by Design-Builder

Design-Builder shall be solely responsible for: (a) compliance with all Governmental Rules and Governmental Approvals applicable to Contaminated Materials brought onto the Site by any DB-Related Entity; (b) use, containment, storage, management, transport, and disposal of all such Contaminated Materials in accordance with the Contract Documents and all Governmental Rules and Governmental Approvals; and (c) payment of all penalties, expenses (including attorneys' fees and costs), costs, suits, judgments, claims, actions, damages (including damages to natural resources, property or Persons), delays, and liability associated with, arising out of, or related to such Contaminated Materials.

6.3.4 Environmental Approvals Relating to Contaminated Materials

It is the responsibility of Design-Builder to obtain all Governmental Approvals relating to Contaminated Materials Management including federal and State surface water and groundwater discharge permits and permits for recycling or reuse of Contaminated Materials. Design-Builder shall be solely responsible for compliance with such Governmental Approvals and applicable Governmental Rules, including those governing the preparation of waste profiles, waste manifests, and bills of lading.
As NHDOT will be considered the generator of contaminated materials under this project, NHDOT or its authorized consultant shall oversee, review and sign the waste profiles, waste manifests and bills of lading associated with such materials (USDOT generator requirements).

6.4 Environmental Compliance, Mitigation, and Approval Requirements

6.4.1 Environmental Compliance

Design-Builder shall comply with all Environmental Laws in performance of the Work, and with all other conditions and requirements of the Contract Documents and Governmental Approvals issued thereunder, whether obtained by NHDOT or Design- Builder, including the requirements set forth in the Technical Provision Section 6.

6.4.2 Performance of Mitigation Measures

Design-Builder shall perform all environmental mitigation measures (which term shall be deemed to include all requirements of Technical Provisions Section 6.5 and similar Governmental Approvals, regardless of whether such requirements would be considered to fall within a strict definition of the term) for the Project, excluding only those which are expressly specified as NHDOT's responsibility in Technical Provision Section 6 and this Section 6.4. The Contract Price includes compensation for Design- Builder's performance of all such environmental requirements and conditions, including such mitigation measures and for performance of all mitigation measures arising from New Approvals, which Section 6.4.4 provides are Design-Builder's responsibility.

Design-Builder shall monitor the progress of performance of environmental mitigation measures and provide periodic reports to NHDOT as required by the Environmental Compliance and Mitigation Plan (ECMP) and Technical Provision Section 6. Design-Builder acknowledges and agrees that the program may be updated from time to time to account for any revisions in mitigation requirements. Whenever a New Approval is obtained which changes the existing environmental mitigation requirements or adds new environmental mitigation requirements, the ECMP will be revised to include such amendments or new requirements, and Design-Builder shall comply with the revised program from and after the date it receives the revised program. No Change Order shall be allowed in connection with any update or revision to the ECMP except that: (a) Change Orders shall be issued for additional Work resulting from New Approvals which are NHDOT's responsibility as specified in Section 6.4.4, and (b) if Design-Builder believes that any revision represents an NHDOT-Directed Change, it shall have the right to seek a Change Order on that basis in accordance with the requirements of and subject to the limitations in, Section 13.

6.4.3 Technical Provisions Section 6.5 – Summary of Environmental Commitments

NHDOT has not yet obtained all NHDOT-responsible Permits and Approvals described under Section 6.2 of the Technical Provisions. Draft mitigation requirements and/or conditions for these approvals are set forth and compliance therewith is included in the scope of Work. NHDOT staff shall take the lead on obtaining these approvals. Design-Builder shall assist NHDOT in obtaining these Section 6.2 of the Technical Provisions Approvals including providing information requested by NHDOT and participating in meetings regarding such approvals. The Design-Builder shall be required to prepare any

permit amendments or modifications to reflect Design-Builder changes for NHDOT review, approval and submittal of permit amendments or modifications to the Governmental Entities for the procurement of these additional permits or permit amendments. Subject to the limitations appearing in Section 13.5, any failure by NHDOT to obtain any Section 6.2 of the Technical Provisions Approval prior to the later of: (i) the date set forth in Technical Provision Section 6; and (ii) the late date for start of Work requiring such approval, shall be considered an NHDOT-Caused Delay, to the extent that it delays an activity on the Critical Path.

All mitigation requirements contained in the final Section 6.2 of the Technical Provisions Approvals shall automatically be deemed included in the scope of Work. If Design- Builder believes the final Section 6.2 of the Technical Provisions Approvals result in a material modification of Design-Builder's obligations hereunder, Design-Builder may submit a Request for Change Notice in accordance with Section 13.3.2; provided that Design-Builder shall have 30 Days to deliver the Request for Change Notice in lieu of the five Days allowed in Section 13.3.2.1. Subject to the provisions of Section 13.5, any change in the activities to be performed by Design-Builder as a result of an alteration in mitigation requirements from the original scope of Work that: (a) have a material adverse impact on Design-Builder's obligations hereunder, and (b) were not caused by modifications to the Project Schematics that were initiated by Design-Builder, shall be treated as an NHDOT-Directed Change, provided that Design-Builder complies with the notification and other requirements set forth in this Section 6.4.3 and Section 13. Any Change Order issued for such NHDOT-Directed Change shall be in accordance with Sections 13.6.4 (for increases in price), 13.6.5 (for credits), or 13.6.6 (for both added and deleted Work). Notwithstanding any contrary provision of the Contract Documents, if Design-Builder fails to timely provide such notice, Design-Builder shall be deemed to have waived any right to later claim that an NHDOT-Directed Change has occurred, and shall be precluded from any relief on account of the terms for which such notice should have been given, regardless of actual notice or knowledge on the part of NHDOT and regardless of any alleged lack of prejudice to NHDOT from late notice.

6.4.4 New Approvals

6.4.4.1 Approvals To Be Obtained at NHDOT's Expense

NHDOT shall be responsible for obtaining any New Approvals necessitated by an NHDOT-Directed Change, Force Majeure Event, or Necessary Basic Configuration Change. Design-Builder shall provide support services to NHDOT with respect to obtaining any such New Approval, without additional charge to NHDOT. Any Change Order covering an NHDOT-Directed Change, Force Majeure Event, or Necessary Basic Configuration Change shall include compensation to Design-Builder for any material changes in the Work (including performance of material additional mitigation measures but excluding performance of such support services) resulting from such New Approvals, as well as any time extension necessitated by the NHDOT-Directed Change, Force Majeure Event, or Necessary Basic Configuration Change, subject to the conditions and limitations contained in Section 13.

6.4.4.2 New Approvals to Be Obtained at Design-Builder's Expense

If a New Approval becomes necessary for any reason other than those specified in Section 6.4.4, Design-Builder shall be fully responsible for the cost and delay of obtaining the New Approval and any other environmental approvals that may be necessary, and for all requirements and delays resulting therefrom, as well as for any litigation arising in connection therewith. If Design-Builder wishes to adopt any design or construction approach that would require a revision, modification, or amendment to Section 6.5 of the Technical Provisions Approval, Design-Builder shall consult with NHDOT. Design-Builder shall not implement any such approach unless concurrence of NHDOT has first been obtained and arrangements have been made to reimburse NHDOT for the costs of the proposed change. If any New Approval is associated with a VECP, the costs of obtaining and complying with the terms of the New Approval shall be considered in determining the Contract Price adjustment under Section 22.

6.4.5 Environmental Compliance by Design-Builder for Off-Site Activities

If Design-Builder chooses to add or select any ground or resource disturbing features such as material (gravel, borrow, disposal or re-use) sites, equipment staging sites, office sites, water lines, holding ponds, Contaminated and/or non-Contaminated Materials staging areas, etc., for which a new Governmental Approval is required, Design-Builder shall take the actions below and shall obtain and provide to NHDOT the Governmental Approvals, including the environmental approvals below, before commencing any construction activity within the feature(s). Design-Builder is responsible for all costs of pursuing and obtaining all of the below approvals and any others which may be necessary, and is not entitled to any time extension for delays encountered in obtaining these approvals, except as specified in Section 6.4.4.

6.4.5.1 Cultural and Archaeological Resources

Design-Builder shall initiate consultation with NHDOT's representatives concerning proposed additional feature(s) impacting cultural and/or archaeological resources. Design-Builder's subsequent coordination with the State Historic Preservation Officer of New Hampshire and other applicable Governmental Entities may be required. Construction may commence only after Design-Builder's receipt of approval in writing from NHDOT's representatives.

Feasibility of reconstruction of stonewalls determined by NHDOT as meeting the criteria for reconstruction shall be evaluated, in coordination with NHDOT, by the Design-Builder. The Design-Builder shall coordinate with the owners of stonewalls that have been identified as feasible for reconstruction in accordance with NHDOT's 2017 Stone Wall Policy Guidelines. The Design-Builder shall construct/reconstruct stonewalls in accordance with NHDOT's Standard Specifications for Road and Bridge Construction.

6.4.5.2 Natural Resources

Design-Builder shall obtain all applicable Governmental Approvals from the United States Fish and Wildlife Service (USFWS), the New Hampshire Natural Heritage Bureau, the National Oceanic and Atmospheric Administration (NOAA), the New Hampshire Department of Environmental Services (NHDES) and/or the New Hampshire Department of Fish and Game (NHFG) for any impacts to wetlands, endangered species, shorelands, streambeds and associated habitats due to such additional features, or for any Work in USFWS/NHFG/NHDES's jurisdiction due to such additional features. Design-Builder shall coordinate with NHDOT in obtaining such Governmental Approvals.

6.4.5.3 Wetlands

Design-Builder shall obtain all applicable Governmental Approvals from the U.S. Army Corps of Engineers and NH Department of Environmental Services (NHDES) for impacts to waters of the United States or State, and/or wetlands due to such additional features. Design-Builder shall coordinate with NHDOT in obtaining such Governmental Approvals.

6.4.5.4 Water Quality

Design-Builder shall obtain a Section 401 permit, NHDES authorization and any other applicable Governmental Approvals for impacts to water quality due to such additional feature. Design-Builder shall coordinate with NHDOT in obtaining such Governmental Approvals.

6.4.5.5 Floodplains

Design-Builder shall initiate consultation with NHDOT concerning any proposed additional feature(s) affecting floodplains. Subsequent coordination with the Federal Emergency Management Agency (FEMA), and other applicable Governmental Entities may be required. Verification of non-interference by Design-Builder within a floodplain, or compliance with federal, state, and local guidelines and other applicable Governmental Rules by NHDOT, shall be required before Design-Builder proceeds with affected construction Work.

6.4.5.6 Streams and Rivers

Design-Builder shall be responsible for ensuring that final plans for Work in streams and rivers are acceptable to all applicable Governmental Entities and comply with all required conditions and Governmental Approvals for such Work.

6.4.5.7 Stormwater Management System

Design-Builder shall be responsible for the design and installation of a stormwater management system that meets applicable performance standards during construction. Applicable performance standards include but are not limited to, the National Pollutant Discharge Elimination System and the NHDES' AoT permitting requirements and the 2017 Construction General Permit. Refer to Section 6 of the Technical Provisions for additional information.

6.5 Cooperation with Local Agencies

6.5.1 Compliance with Local Agency Requirements

Design-Builder shall comply with Local Agency requirements applicable to the Work, including payment of all plan review and construction inspection costs charged by Local Agencies relating to the Work. Such payments are part of the Contract Price and no additional compensation shall be payable relating thereto. Design-Builder shall also comply with all applicable terms, requirements and conditions of the Town of Derry and Town of Londonderry, New Hampshire.

6.5.2 Encroachment Permits

Governmental Approvals to be obtained by Design-Builder hereunder include encroachment permits and other access rights or right of entries for Work to be performed in areas under the jurisdiction of Local Agencies. Design-Builder shall pay all permit fees and shall comply with all permit requirements including obtaining necessary approvals of plans and specifications. Such payments are part of the Contract Price and no additional compensation shall be payable relating thereto.

6.5.3 ACCESS RESTRAINTS

The Contract includes Access Restraint(s) to provide an anticipated start date of certain portions of the Work that are restrained by a Utility Party. An Access Restraint is a restriction of physical work, of a specific area or operation in the Contract, to allow all bidders to evaluate anticipated work restrictions, equally, during the pre-bid planning stages. The Contract Time (duration) has considered these portions of the utility work and has been developed with the initial information that has been provided by the Utility Party, and accepted by NHDOT. The Design-Builder shall be required to communicate and coordinate with all affected Utilities, and may be required to perform support aspects of the utility relocation (as noted in the Contract Documents) well in advance of the start of the applicable utility relocation. The Design-Builder must clearly identify all aspects of this work in the preparation of the Construction Schedule and throughout the contract duration. This Contract contains the following utility Access Restraints that are to be included in the Design-Builder's Baseline Schedule submission:

6.5.3.1 Access Restraint #1: Relocation of Eversource Overhead Transmission System

For 120 continuous calendar days, beginning at 5:00 am on the first day following the date Milestone #1 was achieved by the Design-Builder, the Design-Builder will be restricted from any physical work that may affect or restrict work within the area required for Eversource to relocate their overhead transmission line spanning I-93. This access restraint is required to allow Eversource to install a new transmission facility, transfer service to the new facility, de-energize and remove the existing overhead transmission facility as

specified in the BTC plans and contract documents. Eversource will utilize equipment suitable and necessary to perform this work including rough terrine equipment, bucket trucks, aerial lifts, and other equipment as necessary. This equipment will access the work area using a pathway constructed by the Design-Builder as required for the achievement of Interim Milestone #1. The Design-Builder shall not block access to or any portion of the pathway during the time period specified in Access Restraint #1.

SECTION 7. SUBCONTRACTORS AND LABOR

7.1 Disadvantaged Business Enterprise (DBE) Program

NHDOT's Disadvantaged Business Enterprise (DBE) Program applicable to federally assisted projects such as the Project is set forth in Appendix 14. The purpose of the DBE Program is to create a level playing field on which DBEs, as defined in 49 CFR Part 26 (the "DBE Regulations"), can compete fairly for contracts and subcontracts.

7.1.1 Compliance

Design-Builder shall comply with the requirements set forth in Appendix 14 and with the requirements of its DBE Performance Plan approved by NHDOT in accordance with Appendix 14. In the event of any conflicts or inconsistencies between the DBE Regulations and NHDOT'S DBE Program, the DBE Regulations shall prevail.

7.1.2 DBE Participation Goal

Design-Builder has committed to a 3% overall DBE project goal under this Contract. Design-Builder acknowledges and agrees that the NHDOT has the right under Appendix 14 to certain administrative remedies if Design-Builder fails to undertake good faith efforts to meet said goal. Design-Builder shall include provisions to effectuate the requirements of this Section 7.1 in every Subcontract (including purchase orders and in every subcontract of any DB-Related Entity for the Work), and shall require that they be included in all Subcontracts at lower tiers, so that such provisions will be binding upon each Subcontractor. NHDOT will maintain oversight of Design-Builder's activities, including those identified within the DBE Performance Plan, to ensure full compliance with the DBE requirements.

7.2 Subcontracts

7.2.1 Listed Subcontractors

Design-Builder, in its Proposal, identified certain Subcontractors for the Project, as listed in Appendix 5 hereto (the "Listed Subcontractors"). Design-Builder shall obtain NHDOT's written approval of Subcontractors via NHDOT Bureau of Construction and NHDOT Office of Federal Compliance.

7.2.2 Procurement of New Subcontractors

For all Subcontractors subject to this Section 7.2.2, Design-Builder shall receive approval from NHDOT Bureau of Construction and NHDOT Office of Federal Compliance.

Design-Builder shall notify NHDOT in writing of the identity of each Subcontractor selected.

7.2.3 Substitution of Subcontractors

Design-Builder shall notify NHDOT of its intent to substitute any Listed Subcontractor, which must obtain approval from NHDOT Bureau of Construction and NHDOT Office of Federal Compliance.

7.2.4 Subcontract Requirements

Design-Builder shall complete and provide to NHDOT a schedule listing all of its current Subcontractors, using the form attached hereto as Appendix 6. Design-Builder shall provide an updated schedule each month thereafter. Design-Builder shall allow NHDOT access to all Subcontracts and records regarding Subcontracts, within ten Days after execution, true and complete copies of all Major Subcontracts and Subcontracts with DBEs and, within ten Days after receipt of a request from NHDOT, true and complete copies of all other Subcontracts as may be requested. At Design-Builder's option, copies of the pages of the Subcontracts delivered to NHDOT may be redacted to remove pricing information, provided that in such event a full copy of the Subcontract shall be added to the EPDs maintained under Section 21.1.

7.2.5 Subcontract Work

Design-Builder shall coordinate the Work performed by Subcontractors. If NHDOT makes reasonable objection to the use or continued use of a Subcontractor due to their negligence as determined by NHDOT, the Subcontractor shall be replaced at the request of NHDOT and shall not again be employed on the Project. Design-Builder shall not be entitled to any increase in the Contract Price as a result of such removal and/or replacement. No Subcontractor may start any Work until after NHDOT approval via Section 7.2.2.

7.2.6 Form of Subcontract

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

Each Subcontract shall:

a. 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.

b. Require the Subcontractor to carry out its scope of Work in accordance with the Contract Documents, the Governmental Approvals, and Governmental Rules, including the applicable requirements of the DBE Performance Plan, and to participate in any dispute resolution proceeding pursuant to Section 19, if such participation is requested by Design- Builder or NHDOT.

c. Set forth effective procedures for claims and change orders.

d. Set forth warranties, guaranties, or liability provisions of the contracting party in accordance with good commercial practice for work of similar scope and scale.

e. Include the following: (i) requirement to maintain usual and customary books and records for the type and scope of operations of business in which the Subcontractor is engaged (e.g., constructor, equipment supplier, designer, service provider); (ii) provision permitting audits to be conducted by Design-Builder and NHDOT; (iii) requirement to provide progress reports to Design-Builder appropriate for the type of work it is performing sufficient to enable Design-Builder to provide the reports it is required to furnish NHDOT under this Contract; (iv) requiring the Subcontractor to maintain all appropriate licenses, and (v) provision prohibiting assignment of the Subcontract by the Subcontractor without Design-Builder's prior written consent.

f. For Major Subcontracts: (i) be terminable by the Subcontractor only for cause; and (ii) include an indemnity from the Subcontractor in favor of Design-Builder and the Indemnified Parties against any and all Losses arising out of, related to, or associated with, the actions, omissions, negligence, willful misconduct, or breach of Governmental Approvals, Governmental Rules, or contract by the Subcontractor or any of its officers, employees, agents, or representatives.

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

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

i. Expressly provide that all Liens, claims, and charges of the Subcontractor and its Subcontractors at any time shall not attach to any interest of NHDOT in the Project or the Project ROW.

j. 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 Contract.

k. NHDOT shall have the right, but not the obligation, to review the form of subcontract used by Design-Builder for the Project.

7.3 Labor Code Requirements

7.3.1 Design-Builder shall strictly adhere to the provisions of the New Hampshire Department of Labor Revised Statutes Annotated and Administrative Rules and RSA 228:4-b Certification of Current Workers' Compensation Coverage Required.

7.4 Key Personnel; Character of Employees

7.4.1 Appendix 7 hereto identifies certain job categories of "Key Personnel" for the Project. NHDOT may, with Design-Builder's approval, at any time elect to add job categories to the "Key Personnel" list. Design-Builder shall not change, or permit any change in, Key Personnel without the prior written consent of NHDOT.

7.4.2 Design-Builder shall designate an Authorized Representative who shall have onsite field and office authority to represent and act for Design-Builder. An Authorized Representative shall be present at the jobsite at all times while Work is actually in progress. Design-Builder shall provide phone, e-mail addresses and mobile telephone numbers for all Key Personnel. NHDOT requires the ability to contact the following Key Personnel 24 hours per day, seven Days per week: (a) Project Manager; (b) Construction Manager; (c) Environmental Compliance Manager; and (d) Safety Manager.

7.4.3 NHDOT shall have the right to review the qualifications and character of each individual to be appointed to a Key Personnel position (including personnel employed by Subcontractors) and to approve or disapprove use of such person in such position prior to the commencement of any Work by such individual or during the prosecution of the Work. Design-Builder shall notify NHDOT in writing of any proposed changes in any Key Personnel. Design-Builder shall not change any Key Personnel without the prior written consent of NHDOT.

7.4.4 All individuals performing the Work shall have the skill and experience and any licenses or certifications required to perform the Work assigned to them. If NHDOT determines in its sole discretion that any Person employed by Design-Builder or by any Subcontractor is not performing the Work in a proper, safe, and skillful manner, then at the written request of NHDOT, Design-Builder or such Subcontractor shall remove such Person and such Person shall not be re-employed on the Project without the prior written approval of NHDOT in its sole discretion. If Design-Builder or the Subcontractor fails to remove such Person or Persons or fails to furnish skilled and experienced personnel for the proper performance of the Work, then NHDOT may, in its sole discretion, suspend the affected portion of the Work by delivery of written notice of such suspension to Design-Builder. Such suspension shall in no way relieve Design-Builder of any obligation contained in the Contract Documents or entitle Design-Builder to a Change Order. Once compliance is achieved, NHDOT will notify Design- Builder and Design-Builder shall be entitled to and shall resume the Work.

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

7.4.6 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, Design-Builder acknowledges that NHDOT, the Work, and the Project will suffer significant and substantial damages and that it is impracticable and extremely difficult to ascertain and determine the actual damages which would accrue to NHDOT in such event. Therefore, if a Key Person is not promptly available or not actively involved in the prosecution and performance of the Work as required to meet the level of involvement required in Section 4 of the RFQ, the requirements of the Technical Provisions, and as

determined by NHDOT in its sole discretion, Design-Builder agrees to pay NHDOT a liquidated amount as follows, for each position held by such individual, as deemed compensation to NHDOT for such damages:

POSITION	LIQUIDATED AMOUNT
Category A Key Personnel	
Project Manager	$25,000
Construction Manager	$25,000
Design Manager	$25,000
Quality Control Administrator	$25,000
Environmental Compliance Manager	$25,000
ROW Project Administrator	$25,000
Category B Key Personnel	
All other Key Personnel positions	$ 0

Design-Builder understands and agrees that any damages payable in accordance with this Section 7.4.6 are in the nature of liquidated damages and not a penalty and that such sums are reasonable under the circumstances existing as of the Proposal Date. NHDOT shall have the right to deduct any amount owed by Design-Builder to NHDOT hereunder from any amounts owed by NHDOT to Design-Builder, or to collect from any bond furnished under this Contract for such liquidated damages. Notwithstanding the foregoing, Design-Builder shall not be liable for liquidated damages under this Section 7.4.6 if: (a) Design-Builder removes or replaces such personnel at the direction of NHDOT; (b) such individual is unavailable due to death, retirement, injury or no longer being employed by the applicable DB-Related Entity (provided that moving to an affiliated company shall not be considered grounds for avoiding liquidated damages), or (c) such individual is unavailable due to NHDOT's failure to issue NTP2 within 120 Days of the Proposal Date for a reason other than the acts, omissions, negligence, intentional misconduct, or breach of Governmental Rule, contract, or Governmental Approval of any DB-Related Entity; provided, however, in each such case, Design-Builder shall propose to NHDOT a replacement for such personnel, which individual shall be subject to NHDOT's review and written consent within seven Days. If NTP2 has not been issued within 120 Days after the Proposal Date through no act, omission, negligence, intentional misconduct, or breach of Governmental Rule, contract or Governmental Approval of any DB-Related Entity, Design-Builder shall have 30 Days after issuance of NTP2 to identify any change in Key Personnel without incurring any liquidated damages. Following any NHDOT-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 this Contract, including the provisions of this Section 7.4.6 relative to liquidated damages.

7.5 Lobbying

7.5.1 The certification and disclosure of lobbying activities described in Appendix 14 shall be included in each Subcontract (including any lower-tier Subcontracts exceeding $100,000). All disclosure forms, but not certifications, shall be forwarded from tier to tier until received by NHDOT's Project Administrator.

7.5.2 Design-Builder and Subcontractors (including lower-tier Subcontractors) shall be required to file a disclosure form at the end of each calendar quarter in which there occurs any event that requires disclosure or that materially affects the accuracy of the information contained in any disclosure form previously filed by Design-Builder or the Subcontractor. An event that materially affects the accuracy of the information reported includes:

(1) A cumulative increase of $25,000 or more in the amount paid or expected to be paid for influencing or attempting to influence a covered Federal action; or

(2) A change in the Person(s) or individual(s) influencing or attempting to influence a covered Federal action; or

(3) A change in the officer(s), employees(s), or member(s) contacted to influence or attempt to influence a covered Federal Action.

SECTION 8. PERFORMANCE AND PAYMENT BONDS

8.1 Provisions of Bonds

Design-Builder shall provide performance, payment, and warranty bonds to NHDOT securing Design-Builder's obligations under the Contract Documents, and shall maintain such bonds in full force and effect as described below (or other assurance satisfactory to NHDOT in its sole discretion). Each bond required hereunder shall be provided by a Surety authorized to do business in the State with an A.M. Best Co. "Best's Rating" of A or better and Class VIII or better, or as otherwise accepted by NHDOT, in its sole discretion. If any bond previously provided becomes ineffective, or if the Surety that provided the bond no longer meets the requirements hereof, Design-Builder shall, within 7 Days after such event, deliver to NHDOT a replacement bond in the required form issued by a Surety meeting the foregoing requirements, or other assurance satisfactory to NHDOT, in its sole discretion.

8.1.1 On or before the issuance by NHDOT of NTP1, Design-Builder shall deliver to NHDOT a performance bond in the initial amount of $5,000,000 and in the form attached hereto as Appendix 8 (the "NTP1 Performance Bond").

8.1.2 On or before the issuance by NHDOT of NTP1, Design-Builder shall deliver to NHDOT a payment bond in the initial amount of $5,000,000 and in the form attached hereto as Appendix 8 (the "NTP1 Payment Bond").

8.1.3 Upon the issuance by NHDOT of NTP2, the amount of the Performance Bond shall increase to 100% of the Contract Amount ("NTP2 Performance Bond Amount"), in accordance with the Performance Bond rider included in Appendix 8 affecting such increase (the "NTP2 Performance Bond"). NHDOT will release the Performance Bond upon Final Acceptance provided that all of the following conditions have been met: (a) Design-Builder is not in default under the Contract Documents and no event has occurred which, with the passage of time or the giving of notice, would constitute a default under the Contract Documents and (b) NHDOT has received the Warranty Bond in accordance with Section 8.1.6. If the Contract Price is increased in connection with a Change Order, NHDOT may, in its sole discretion, require a corresponding proportionate increase in the amount of the Performance Bond or a new performance bond covering the Change Order Work.

8.1.4 Upon the issuance by NHDOT of NTP2, the amount of the Payment Bond shall increase to 20% of the Contract Amount ("NTP2 Payment Bond Amount") in accordance with the Payment Bond rider included in Appendix 8 effecting such increase (the "NTP2 Payment Bond"). Design-Builder shall maintain the Payment Bond in full force and effect until (a) Design-Builder has delivered to NHDOT (i) evidence satisfactory to NHDOT 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 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 the Contract Price is increased in connection with a Change Order, NHDOT may, in its sole discretion, require a corresponding proportionate increase in the amount of the Payment Bond or a new payment bond covering the Change Order Work.

8.1.5 Design-Builder shall not commence or permit or suffer commencement of any design Work or construction Work until Design-Builder obtains from its Sureties and provides to NHDOT 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 8.

8.1.6 Upon Final Acceptance, subject to the requirements herein, Design-Builder may obtain a release of the Performance and Payment Bonds by providing a warranty bond, or such other security as is accepted by NHDOT in its sole discretion, which shall guarantee performance of Work required to be performed during the period following Final Acceptance, including Warranty and Plant Establishment Work and which shall also constitute a payment bond guaranteeing payment to Persons performing such Work ("Warranty Bond"). The Warranty Bond shall be in an amount equal to 10% of the Contract Price and shall be in form satisfactory to NHDOT in its sole discretion. The Warranty Bond shall be released upon the expiration of the Warranty period or Plant Establishment Period, whichever is later, and: (a) receipt of (i) evidence satisfactory to NHDOT 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.

8.2 No Relief of Liability

Notwithstanding any other provision set forth in the Contract Documents, performance by a Surety of any of the obligations of Design-Builder shall not relieve Design-Builder of any of its obligations hereunder.

SECTION 9. INSURANCE

Design-Builder shall purchase, at its own expense, and continuously maintain in full force and effect through Final Acceptance, or such longer or shorter time as may be specifically provided below, the insurance coverages specified in this Section 9. The Design-Builder shall have a continuing duty to provide new certificates of insurance as policies are amended or renewed.

9.1 Design-Builder Provided Insurance

Design-Builder shall indemnify, and save-harmless the State; cities or towns; the railroad where operations will affect railroad property; and all of their officers, agents, and employees from and against any and all claims, liabilities, suits, or penalties arising out of (or which may be claimed to arise out of) acts or omissions of the Design-Builder or Subcontractors in the performance of the work covered by the Contract. This responsibility shall survive the expiration of the Warranty period, or such longer or shorter time as may be specifically provided in this Section 9. Notwithstanding the foregoing, nothing herein contained shall be deemed to constitute a waiver of sovereign immunity of the State, which immunity is hereby reserved by the State.

Before submittal of the Contract to Governor and Executive Council for approval, certificates of insurance in the standard form employed in the State of New Hampshire by underwriters licensed or approved by the Department of Insurance shall be furnished evidencing the required coverages and conditions. In addition, the underwriters must have a rating A.M. Best and Company rating level of A- or better, Class VII or better.

Liability insurance for damages imposed by law of the kinds and amounts specified herein shall be obtained and maintained by the Design-Builder. The insurance obtained shall cover all operations under the Contract whether performed by the Design-Builder or Subcontractor of any tier and shall be maintained until acceptance / warranty.

All limits of liability set forth below are in U.S. dollars.

9.1.1 Commercial General Liability Insurance

Design-Builder shall include commercial general liability insurance coverage. The commercial general liability insurance shall include a policy or policies of commercial general liability insurance for bodily injury, property damage, personal injury, and advertising injury with policy to have per project aggregate endorsement. Such insurance shall include, by its terms or appropriate endorsements, coverage for bodily injury, property damage, fire legal liability (not less than the replacement value of the portion of the premises occupied), personal injury, blanket contractual liability, independent contractors, premises operations, products and completed operations (without limitation as to time and with acknowledgement that the Project constitutes the

premises and not a product), broad form property damage, hazards commonly referred to as "x" (explosion), "c" (collapse) and "u" (underground) exposures, fellow employee coverage for supervisory personnel, incidental medical malpractice, owner's and contractor's protective liability and cross liability or severability of interests. The policy or policies shall be endorsed to state that the exclusions for railroads (except where the Site is more than 20 feet from any railroad, including tracks, bridges, trestles, roadbeds, terminals, underpasses or crossings) shall be removed.

With respect to all operations performed by the Design-Builder, the Design-Builder shall carry commercial general liability insurance in an amount not less $1,000,000 Each Occurrence; $5,000,000 General Aggregate-Include Per Project Aggregate-Include Per Project Aggregate Endorsement; $5,000,000 Products/Completed Operations Aggregate.

Blasting and demolition is required by the Contract, the Design-Builder or Subcontractor shall obtain the respective coverage and shall furnish to the Department a Certificate of Insurance evidencing the required coverages prior to commencement of any operations involving blasting or demolition or both.

9.1.2 Workers' Compensation and Employer's Liability Insurance

Workers' Compensation Insurance

The Design-Builder shall carry workers' compensation statutory limits policy in conformance with the laws of the States of New Hampshire. Design-Builder shall be the named insured on these policies. The workers' compensation policy shall contain the following endorsements:

(a) An endorsement extending the policy to cover the liability of the insureds under the Federal Employer's Liability Act;

(b) A voluntary compensation endorsement.

(c) An alternative employer endorsement.

(d) An endorsement extending coverage to all states operations on an "if any" basis.

Limits of Liability shall be $100,000 each accident; $500,000 disease – policy limit; and $100,000 disease – each employee. Deductible, if applicable, to be shown on certificate.

9.1.3 Automobile Liability Insurance

The Design-Builder shall include comprehensive business or commercial automobile insurance as specified herein. Each policy shall cover accidental death, bodily injury, and property damage liability arising from the ownership, maintenance, or use of all owned, non-owned, 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. The minimum limit of automobile liability insurance shall be $1,000,000 per occurrence.

9.1.4 Commercial Umbrella Liability Insurance

The Design-Builder shall include Commercial Umbrella Liability insurance with a coverage limit in the amount of $1,000,000 per occurrence and $2,000,000 in the Aggregate.

9.1.5 Professional Liability Insurance

The Design-Builder and/or subconsultants who engage in design Work, preliminary engineering Work, and environmental consulting Work for the project shall maintain a Professional Liability policy for errors and omissions with a minimum limit of liability of $1,000,000 per claim and $5,000,000 in the aggregate. No retention (deductible) shall be more than $75,000. The policy shall have a three- year extended reporting period (ERP) from the date of Project Completion with respect to events which occurred but were not reported during the term of the policy, if available, but the total term of the policy (policy term plus ERP) shall be no less than 3 years.

9.1.6 Builder’s Risk

The Design-Builder shall include a policy of builder’s risk insurance for the Project. The insurance shall be maintained until the transfer of control thereof to NHDOT or a Local Agency.

9.1.6.1 Minimum Scope

A blanket builder's risk insurance policy on an "all risk" basis for the entire Project including: (1) coverage for any ensuing loss from faulty workmanship, Nonconforming Work, omission or deficiency in design or specifications; (2) coverage against damage or loss caused by earth movement, flood, fire, theft, collapse, explosion, vandalism and malicious mischief, machinery accidents, and operational testing; (3) coverage for removal of debris, and insuring the buildings, structures, machinery, equipment, materials, facilities, fixtures, and all other properties constituting a part of the Project; (4) transit coverage, including ocean marine coverage (unless insured by the supplier), with sub-limits sufficient to insure the full replacement value of any key equipment item; and (5) coverage with sub-limits sufficient to insure the full replacement value of any property or equipment stored either on or off the Site. Such insurance shall be on a form acceptable to NHDOT to ensure adequacy of terms and sublimits.

9.1.6.2 Minimum Coverage

Coverage shall be for the replacement value thereof for "all risks" of direct physical loss or damage, including earth movement and flood coverage, with a minimum limit of liability equal to the lesser of $100,000,000 or the price of the project. Coverage shall include earthquake insurance with limits not less than $25,000,000 and flood insurance with limits not less than $25,000,000. The coverage shall be written without risk of liability of NHDOT for payment and without deduction for depreciation.

9.2 General Insurance Requirements

9.2.1 Premiums, Deductibles and Self-Insured Retentions

Design-Builder shall be responsible for payment of premiums for all insurance required under this Section 9. Indemnified Parties have no obligation to pay any premium. Design-Builder further agrees that for each claim, suit or action made against insurance provided hereunder, with respect to all matters for which Design-Builder is responsible hereunder, Design-Builder shall be solely responsible for all deductibles, self-insured retentions and amounts in excess of the coverage provided. Any deductibles or self- insured retentions over $25,000 must be declared and accepted by NHDOT or procure a bond acceptable to NHDOT guaranteeing payment of losses and related investigations, claims administration, and defense expenses. With respect to all matters for which NHDOT is responsible hereunder, NHDOT shall remain fully responsible for all deductibles and amounts in excess of the coverage provided.

9.2.2 Verification of Coverage

9.2.2.1 Design-Builder Policies

Concurrently with Design-Builder's execution hereof or on such later date on which coverage is required to be provided hereunder, Design-Builder shall deliver to NHDOT a certificate of insurance with respect to each policy required to be provided by Design-Builder under this Section 9. The required certificates must be personally and manually signed by the authorized representative of the insurance company shown on the certificate with proof that he/she is an authorized representative thereof and is authorized to bind the named underwriter(s) and their company to the coverage, limits, and termination provisions shown thereon. NHDOT shall have no duty to pay or perform under the Contract until such certificate(s), in compliance with all requirements of this Section 9, have been provided. Upon NHDOT's request, certified, true and exact copies of each of the insurance policies (including renewal policies) required under this Section 9 shall be provided to NHDOT.

9.2.2.2 Renewal Policies

Design-Builder shall deliver to NHDOT a certificate of insurance with respect to each renewal policy, as necessary to demonstrate the maintenance of the required insurance coverages for the terms specified herein within. Such certificate shall be delivered to NHDOT not less than 30 Days prior to the expiration date of any policy and bear a notation evidencing payment of the premium therefor. If requested by NHDOT from time to time, certified duplicate copies of the renewal policy shall also be provided.

9.2.3 Endorsements and Waivers

All insurance policies required to be provided by Design-Builder hereunder shall contain or be endorsed to comply with the following provisions, provided that, for the workers' compensation policy, only the following provisions (d) and (h) shall be applicable:

(a) For claims covered by the insurance specified herein, said insurance coverage shall be primary insurance with respect to the insureds, additional insureds, and their respective members, directors, officers, employees, agents, and consultants, and shall specify that coverage continues notwithstanding the fact that Design-Builder has left the Site. Any insurance or self-insurance beyond that specified in this Contract that is maintained by an insured, additional insured, or their members, directors, officers, employees, agents, and consultants shall be excess of such insurance and shall not contribute with it.

(b) Any failure on the part of a named insured to comply with reporting provisions or other conditions of the policies, any breach of warranty, any action or inaction of a named insured or others, any foreclosure relating to the Project, or any change in ownership of all or any portion of the Project shall not affect coverage provided to the other insureds or additional insureds (and their respective members, directors, officers, employees, agents, and consultants).

(c) The insurance shall apply separately to each insured and additional insured against whom a claim is made or suit is brought, except under Professional Liability.

(d) Each policy shall be endorsed to state that coverage shall not be suspended, voided, canceled, modified, or reduced in coverage or in limits except after 30 Days prior written notice by certified mail, return receipt requested, has been given to NHDOT. Such endorsement shall not include any limitation of liability of the insurer for failure to provide such notice.

(e) All endorsements adding additional insureds to required policies shall be on form CG-20-10 (10/01 edition) or an equivalent form providing additional insureds with coverage for "completed operations".

(f) The commercial general liability insurance policy shall be endorsed to state that coverage for Subcontractor employees shall not be excluded.

(g) The automobile liability insurance policy shall be endorsed to include Motor Carrier Act Endorsement-Contaminated Materials Clean Up (MCS-90).

(h) Each policy shall provide coverage on an "occurrence" basis and not a "claims made" basis (with the exception of professional liability and environmental liability policies) and no policy issued on an occurrence basis shall have any sunset clause requiring reporting within a specified period of time.

9.2.4 Waivers of Subrogation

NHDOT, Town of Derry, Town of Londonderry and Design-Builder waive all rights against each other, against each of their agents and employees, and against Subcontractors and their respective members, directors, officers, employees, agents, and consultants for any claims to the extent covered by insurance obtained pursuant to this Section 9, except such rights as they may have to the proceeds of such insurance. Design-Builder shall require all Subcontractors to provide similar waivers in writing each in favor of all other parties enumerated above. Each policy, including workers' compensation, shall include a waiver of any right of subrogation against the additional insureds (and their respective members, directors, officers, employees, agents, and consultants).

9.2.5 Changes in Insurance Requirements

NHDOT shall notify Design-Builder in writing of any changes in the requirements applicable to insurance required to be provided by Design-Builder. Except as set forth in Section 9.2.8, any additional cost from such change shall be paid by NHDOT and any reduction in cost shall reduce the Contract Price pursuant to a Change Order.

9.2.6 No Recourse

There shall be no recourse against NHDOT for payment of premiums or other amounts with respect to the insurance required to be provided by Design-Builder hereunder, except for deductibles payable by NHDOT as specified herein.

9.2.7 Support of Indemnifications

The insurance coverage provided hereunder by Design-Builder shall support but is not intended to limit Design-Builder's indemnification obligations under Section 18, nor do the indemnity obligations limit the rights of the insured parties to the coverage afforded by their insured status.

9.2.8 Commercial Unavailability of Required Coverages

If, through no fault of Design-Builder, any of the coverages required in this Section 9 (or any of the required terms of such coverages, including policy limits) become unavailable or are available only with commercially unreasonable premiums, NHDOT will consider in good faith alternative insurance packages and programs proposed by Design-Builder, with the goal of reaching agreement on a package providing coverage equivalent to that specified herein. Design-Builder must demonstrate to NHDOT's reasonable satisfaction that it has used diligent efforts in the global insurance markets to place the required insurance coverages, and shall advise NHDOT of the specific results of those efforts. Design-Builder shall not be entitled to any increase in the Contract Price for increased costs resulting from the unavailability of coverage and the requirement to provide acceptable alternatives. NHDOT shall be entitled to a reduction in the Contract Price if it agrees to accept alternative policies providing less than equivalent coverage, with the amount to be determined by extrapolation using the insurance quotes included in the Escrowed Proposal Documents (or based on other evidence of insurance premiums as of the Proposal Date if the EPD does not provide adequate information).

9.3 Prosecution of Claims

Unless otherwise directed by NHDOT in writing, Design-Builder shall be responsible for reporting and processing all potential claims by NHDOT or Design-Builder against the insurance required to be provided under this Section 9. Design-Builder agrees to report timely to the insurer(s) any and all matters which may give rise to an insurance claim and to diligently pursue any and all insurance claims on behalf of NHDOT, whether for defense or indemnity or both. NHDOT agrees to notify Design-Builder of NHDOT's incidents, potential claims, and matters which may give rise to an insurance claim by NHDOT, to tender its defense or the claim to Design-Builder, and to cooperate with Design-Builder as necessary for Design-Builder to fulfill its duties hereunder within seven Days.

9.4 Commencement of Work

Design-Builder shall not commence Work under this Contract until it has obtained the insurance required under this Section 9, has furnished original certificates of insurance evidencing the required coverage as required under Section 9.2.2.

9.5 Design-Builder's Failure to Comply

If Design-Builder fails to provide and maintain insurance as required herein, then NHDOT shall have the right but not the obligation, to purchase such insurance or to suspend Design-Builder's right to proceed until proper evidence of insurance is provided. Any amounts paid by NHDOT (plus an administrative charge equal to 10% of the cost) shall, at NHDOT's sole option, be deducted from amounts payable to Design- Builder or reimbursed by Design-Builder upon demand, plus interest thereon from the date of payment by NHDOT to the reimbursement date, at the lesser of (a) 10% per annum or (b) the maximum rate allowable under applicable Governmental Rules. Nothing herein shall preclude NHDOT from exercising its rights and remedies under Section 16 as a

result of the failure of Design-Builder to satisfy the obligations of this Section 9.

If on account of Design-Builder's failure to comply with the provisions of this Section 9, NHDOT is adjudged to be a co-insurer or otherwise held responsible for all or any portion of a judgment, loss, or settlement (through admission or stipulation by Design- Builder or court decision) that would have been covered by insurance but for non- compliance with this Section 9, then any loss or damage it shall sustain by reason thereof shall be borne by Design-Builder, and Design-Builder shall immediately pay the same to NHDOT, upon receipt of written demand therefor and evidence of such loss or damage.

9.6 Disclaimer

Design-Builder and each Subcontractor shall 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.

NHDOT makes no representation or warranty that the coverage, limits of liability, or other terms specified for the insurance policies to be carried pursuant to this Section 9 are adequate to protect Design-Builder against its undertakings under the Contract Documents or its liability to any third party or preclude NHDOT from taking any actions as are available to it under the Contract or otherwise at law. NHDOT shall not be limited to the amount of the insurance premium not paid in the proof of any damages it may claim against Design-Builder arising out of or by reason of failure of Design-Builder to provide and keep in force the insurance policies required by and on the terms of this Section 9, but NHDOT shall instead be entitled to recover the full amount of damages available.

SECTION 10. TITLE; SITE SECURITY; MAINTENANCE AND REPAIR; OPERATION

10.1 Title

Design-Builder 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 NHDOT for the operation, maintenance, or repair thereof, free and clear of all Liens. Title to all of such materials, equipment, tools, and supplies which shall have been delivered to the Site shall pass to NHDOT, free and clear of all Liens, upon the sooner of (a) incorporation into the Project, or (b) payment by NHDOT to Design-Builder of invoiced amounts pertaining thereto. Notwithstanding any such passage of title, Design-Builder 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 Design-Builder is removed from the Project.

10.2 Site Security

Design-Builder 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 Design-Builder, NHDOT, or any other Person.

10.3 Obligation to Maintain and Repair

10.3.1 NHDOT, Town of Derry, Town of Londonderry Responsibility

NHDOT, Town of Derry, and Town of Londonderry will continue to be responsible for normal maintenance and utility services until NTP2. The Design-Builder shall be responsible for all maintenance and utility services from NTP2 until Project Completion. If requested by the Design-Builder and approved in writing by NHDOT, the NHDOT, Town of Derry and Town of Londonderry will continue to be responsible for normal maintenance and utility services after NTP2 and until the start of physical construction by the Design-Builder on the project.

10.3.2 Design-Builder Maintenance and Repair Liability; Use of Insurance Proceeds

Design-Builder shall be responsible for maintenance of the Work and the Project Site in accordance with Section 8 of the Technical Provisions effective NTP1 through Project Completion.

Design-Builder 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 and regardless of whether NHDOT has title thereto), that is injured or damaged prior to acceptance of liability by third parties as specified in Section 10.3.2. All such Work shall be at no additional cost to NHDOT except to the extent that it constitutes Extra Work. Design-Builder shall also have full responsibility for rebuilding, repairing, and restoring all other property at the Site whether owned by Design-Builder, NHDOT, or any other Person. Where necessary to protect the Work or materials from damage, Design-Builder shall, at Design-Builder's expense, provide suitable drainage of the roadway and erect those temporary structures that are necessary to protect the Work or materials from damage. The suspension of the Work, regardless of cause, shall not relieve Design-Builder of the responsibility for the Work and materials as herein specified. If ordered by NHDOT, Design-Builder shall, at Design-Builder's expense, properly store materials, which have been partially paid for by NHDOT. Storage by Design-Builder shall be on behalf of NHDOT; NHDOT shall at all times be entitled to the possession of the materials; and Design-Builder shall return the materials to the Site of the Work when requested. Design-Builder shall not dispose of any of the materials so stored except on written authorization from NHDOT.

NHDOT may, at their option, be available to assist the Design-Builder with operational problems or repairs after the responsibility for such maintenance and repair is the Design-Builder's responsibility. The Design-Builder shall lead any such efforts and shall reimburse NHDOT for actual costs plus overhead (including NHDOT Contractor costs). NHDOT's assistance shall not relieve the Contractor of any responsibility for payment of fines under this section.

If insurance proceeds with respect to any loss or damage are paid to NHDOT under any insurance policies required to be provided hereunder, then NHDOT shall arrange for such proceeds to be paid to Design-Builder as repair or replacement work is performed by Design-Builder to the extent that NHDOT has not previously paid for such repair or replacement work; provided, however, that release of such proceeds to Design-Builder shall not be a condition precedent to its performing such repair or replacement work or indicate that such repair or replacement work has been accepted by NHDOT, and Design-Builder shall remain obligated to pay deductibles as specified in Section 9.

10.3.3 Relief from Maintenance Liability

Refer to Appendix 2, 104 (Amended NHDOT Standard Specifications) for provisions regarding relief from maintenance responsibility for certain portions of the Work in advance of Project Completion. Effective as of the date on which Project Completion occurs, Design-Builder shall be relieved of maintenance liability for those elements of the Project, which are then placed in full operations and service, which decision shall be solely within the discretion of NHDOT. All remaining elements of the Project shall be considered accepted for maintenance purposes, and relief from maintenance responsibility for the Design-Builder shall occur, as of the date on which Final Acceptance occurs. Notwithstanding the foregoing, all elements of the Work which will be owned by Persons other than NHDOT (such as Utility facilities) will be considered accepted for maintenance purposes only as of the date of acceptance of maintenance responsibilities by such Persons.

10.3.4 Extension of Maintenance and Repair Obligation

NHDOT may require Design-Builder to continue to have responsibility for maintaining, rebuilding, repairing, restoring, and replacing Work accepted by NHDOT and shall do so pursuant to a Change Order under Section 13.2.

SECTION 11. WARRANTIES

11.1 Warranties

11.1.1 Warranty

The general warranty contained in this Section 11 is in addition to any express warranties provided for elsewhere in the Contract Documents. Design-Builder warrants that (a) all design Work furnished pursuant to the Contract Documents shall conform to all professional engineering principles generally accepted as standards of the industry in the State; (b) the Project shall be free of defects, except to the extent that such defects are inherent in prescriptive specifications included in the Contract Documents; (c) materials and equipment furnished under the Contract Documents shall be of good quality and when installed, shall be new; (d) equipment provided by Design-Builder shall be of modern design and in good working condition;
(e) the Work shall meet all of the requirements of the Contract Documents; (f) the specifications and/or drawings selected or prepared for use during construction are appropriate for their intended use; and (g) the Project shall be designed and constructed so that it can be used for the intended function.

11.1.2 Warranty Period

The Warranty period for each element of the Project (excluding those elements of the Project that will be owned by Persons other than NHDOT) shall commence upon Final Acceptance. Subject to extension under Section 11.2, the Warranties regarding all elements of the Project that will be owned by NHDOT shall remain in effect until two years after the Final Acceptance Date. The Warranty period for elements of the Project that will be owned by Persons other than NHDOT shall commence upon acceptance thereof by the appropriate Person that will own such element and shall remain in effect for one year from the commencement thereof. If NHDOT determines that any of the Work has not met the standards set forth in this Section 11.1 at any time within the Warranty period, then Design-Builder shall correct such Work as specified below, even if the performance of such corrective Work extends beyond the stated Warranty period. NHDOT and Design-Builder shall conduct a walkthrough of the Site prior to expiration of the Warranty period and shall produce a Punch List of those items requiring Warranty Work.

11.1.3 Remedy

Within seven Days of receipt by Design-Builder of notice from NHDOT and specifying a failure of any of the Work to satisfy Design-Builder's Warranties, or of any Subcontractor representation, warranty, guarantee, or obligation which Design-Builder is responsible to enforce, Design-Builder and NHDOT shall mutually agree when and how Design- Builder shall remedy such violation; provided, however, that in case of an emergency requiring immediate curative action, Design-Builder shall implement such action as it deems necessary and shall notify NHDOT in writing of the urgency of a decision. In situations

when remedies requiring immediate curative action for which the Design- Builder cannot perform in a timely manner, NHDOT shall have the right, but not the obligation, to perform or have performed by third parties the necessary remedy, and the costs thereof, including fines / penalties associated with operational delays associated with failure to timely warranty repairs shall be borne by Design- Builder. Design-Builder and NHDOT shall meet in order to agree on a remedy within five days. If Design-Builder does not effectuate such remedy within the agreed time, or should Design-Builder and NHDOT fail to reach such an agreement within such seven-Day period (or immediately in the case of emergency conditions), or should Design- Builder disapprove of the actions being taken, NHDOT, after notice to Design-Builder, shall have the right, but not the obligation, to perform or have performed by third parties the necessary remedy, and the costs thereof, including fines / penalties associated with operational delays associated with failure to timely warranty repairs , and further warranty obligations with respect to such work performed by NHDOT shall be borne by Design-Builder. Reimbursement therefor (plus an administrative charge equal to 10% of the costs) shall be payable to NHDOT within ten Days after Design-Builder's receipt of an invoice therefor. Alternatively, NHDOT may deduct the amount of such costs and expenses (including the administrative charge equal to 10% of the costs) from any sums owed by NHDOT to Design-Builder pursuant to this Contract or from the Warranty Period Letter of Credit. NHDOT may agree to accept Nonconforming Work in accordance with Section 5.7.2.

11.2 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 the Contract. The Warranties as to each re-done, repaired, corrected, or replaced element of the Work shall extend beyond the original warranty period if necessary to provide at least a two year Warranty period regarding all elements of the Project (but not to exceed three years from the Final Acceptance Date), following acceptance by NHDOT of the re-done, repaired, corrected, or replaced Work.

11.3 Blank

11.4 No Limitation of Liability

The foregoing Warranties and Subcontractor warranties are in addition to all rights and remedies available under the Contract Documents or applicable law, and shall not limit Design-Builder's liability or responsibility imposed by the Contract Documents or applicable law with respect to the Work, including liability for design defects, latent construction defects, strict liability, negligence, or fraud.

11.5 Damages for Breach of Warranty

Subject to Section 17.5 and in addition to NHDOT's other rights and remedies hereunder, at law or in equity, Design-Builder shall be liable for actual damages resulting from any breach of an express or implied warranty, Subcontractor warranty, or any defect in the Work, including the cost of performance of such obligations by others.

11.6 Third Party Rights

The Town of Derry and the Town of Londonderry shall have the direct right to enforce the Warranties and Subcontractor warranties provided to NHDOT under this Section 11 (including Warranties for re-done, repaired, corrected or replaced Work). Furthermore, The Town of Derry and the Town of Londonderry shall have the direct right to pursue any remedies available at law against Design-Builder and the DB- Related Entities for defects in the Project, including design defects and latent construction defects. In addition to benefiting NHDOT, The Town of Derry and the Town of Londonderry and their respective successors and assigns, the Warranties and Subcontractor warranties provided under this Section 11 shall inure to the benefit of, and shall be directly enforceable by, Local Agencies (including the Town of Derry and the Town of Londonderry, New Hampshire) and Utility Owners, with respect to those portions of the Work owned or controlled by each such Person, respectively.

11.7 Warranty Disputes

Any Dispute relating to this Section 11 shall be subject to dispute resolution in accordance with Section 19.

11.8 Warranty Period Letter of Credit

In additional to the general Warranty provisions described in this Section 11, the Design-Builder shall provide the NHDOT with a Warranty Period Letter of Credit or Warranty Bond. The Warranty Period Letter of Credit or Warranty Bond shall be in the amount of $250,000 and shall remain in effect until two years after the Final Acceptance Date. The Warranty Period Letter of Credit or Warranty Bond shall be drawn upon by the NHDOT for reimbursement as noted in Section 11.1.3.

SECTION 12. PAYMENT FOR SERVICES

12.1 Contract Price

12.1.1 Contract Amount

Subject to Section 12.1.4, as full compensation for the Work and all other obligations to be performed by Design-Builder under the Contract Documents, NHDOT shall pay to Design-Builder a lump sum Contract Price. The term "Contract Price" as used herein shall be subject to adjustment from time to time to account for Change Orders. The Contract Price shall be increased or decreased only in accordance with Section 13 or by a Contract amendment. The Contract Price shall be paid in accordance with Section 12.2. The initial Contract Price shall be the lump sum amount of $_____.

12.1.2 Payment for Extra Work

Payment for Extra Work shall be made in accordance with the Change Order directing such Work to be performed.

12.1.3 Items Included in Contract Price

Design-Builder acknowledges and agrees that, subject only to Design-Builder's rights under Section 13, the Contract Price includes (a) all designs, equipment, materials, labor, insurance and bond premiums, home office, jobsite and other overhead, profit and services relating to Design-Builder'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 2.2.4); (d) all costs of compliance with and maintenance of the Governmental Approvals and compliance with Governmental Rules, except for the work to be undertaken by NHDOT as described in the Mitigation Monitoring Plan; (e) payment of any taxes, duties, permit and other fees and/or 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 Design-Builder under the Contract Documents.

12.1.4 NTP1 Work; Delay in Issuance of NTP2

Design-Builder acknowledges and agrees that the amount of funds available to pay for Work authorized by NTP1 prior to issuance of NTP2 is limited to $1,000,000 for design and construction activities and $250,000 for the other work being performed. NHDOT has no obligation to make any payments to Design- Builder in excess of the stated $1,000,000 and $250,000 until such time (if any) as NTP2 is issued.

NHDOT anticipates that it will issue the NTP2 concurrently with NHDOT approval and acceptance as described in Section 4.4, but shall have the right in its sole discretion to defer issuance. If the effective date of NTP2 is more than 180 Days after the Proposal Date and such delay in issuing the NTP2 was not caused in whole or in part by the acts, omissions, negligence, intentional misconduct, or breach of applicable Governmental Rule, contract or Governmental Approval of any DB-Related Entity, the Contract Price will be adjusted based on the change in the three-year rolling average of the monthly Construction Cost Index, by adding or subtracting the product of the following from the Contract Price

D = (Contract Price) * ([A-B]/B)

where:

“D” is the adjustment amount;

"A" is the average of the **ENR Boston Construction Cost Index (CCI)** published during the 36-month period preceding the date of issuance of the NTP2 (i.e., the amount determined by taking the average of the index most recently published as of the date of the NTP2, the index most recently published as of the date one month prior to that date, etc.); and

"B" is the average of the **ENR Boston Construction Cost Index (CCI)** published during the 36-month period preceding the date that is 180 Days after the Proposal Date.

For example, if the Proposal Date was October 17, 2019, the date for commencement of escalation would be April 14, 2020. Assuming (a) the as-proposed Contract Price is $100,000,000, (b) NTP2 is issued on July 1, 2020, (c) the average monthly Construction Cost Index for the three-year period ending April 14, 2020 was 7500, and (d) the average monthly **ENR Boston Cost Index (CCI)** published for the three-year period ending July 1, 2020 was 7875, then the price adjustment amount would be:

D = $100,000,000 x (([7875-7500]/7500)) = $5,000,000

Accordingly, the Contract Price of $100,000,000 would be increased to $105,000,000 as a result of the delay in issuance of the Notice to Proceed.

If the NTP2 has not been issued on or before 21 months after the Proposal Date, the Parties may mutually agree to terms allowing an extension in time for issuance of the NTP2 and an adjustment in the Contract Price mutually acceptable to Design-Builder and NHDOT. Design-Builder shall provide evidence satisfactory to NHDOT, meeting the requirements of Section 13.4, justifying the amount of any increase in the Contract Price. If the delay in issuance of NTP2 was not caused in whole or in part by the acts, omissions, negligence, intentional misconduct, or breach of Governmental Rule, contract or Governmental Approval of any DB-

Related Entity and Design-Builder does not wish to negotiate an extension or if the Parties fail to reach agreement in accordance with this Section 12.1.4, then Design-Builder's sole remedy shall be to terminate the Contract in accordance with Section 15.10.

If the effective date of NTP2 is more than 120 Days after the issuance of NTP1 and such delay in issuing the NTP2 was not caused in whole or in part by the acts, omissions, negligence, intentional misconduct, or breach of applicable Governmental Rule, contract or Governmental Approval of any DB-Related Entity, the number of days allowed between NTP1 and the required completion of each of Interim Milestone #1 Completion, Interim Milestone #2 Completion and Intermediate Completion Dates shall be extended by the number of days between the 120th day after the issuance of NTP1 and the date on which NHDOT issues NTP2.

12.1.5 Additional Provisions Relating to Delays in NTP2

Notwithstanding anything to the contrary contained herein, Design-Builder shall not be entitled to an increase in the Contract Price or extension of the Completion Deadlines, nor shall Design-Builder have a right to terminate this Contract in accordance with Section 15.10 with respect to any delay in issuance of NTP2 due to the acts, omissions, negligence, intentional misconduct, or breach of applicable Governmental Rules, contract or Governmental Approval of any DB-Related Entity.

Any price increase under this Section 12.1 shall be amortized proportionally over all Work at issue, and shall be evidenced by a Change Order accompanied by a revised Project Schedule.

12.1.6 Estimated Cost Items

The Department has determined that the work shown in the BTC plans for the items in the table below have quantities that cannot be estimated reasonably prior to construction. Estimated cost items are used to cover work that has quantities that have the potential for significant changes during construction of the project. NHDOT has establish a budget value for each item that will be used to draw off of as the work progresses. Payment will be made according to the provisions in Section 12.1.2 Payment for Extra Work in the Contract.

Item No.	Item Description	Estimated Cost
8009.2	Excavation, Handling, Testing, Characterization, Storage, Transporting and Disposal of Regulated Materials	$ 400,000.00
8009.3	Handling, Testing, Characterization, Storage, Transporting and Disposal of Regulated Materials in Acquired Properties	$ 250,000.00

Work will be measured and paid for as follows:

12.1.6.1 Measurement and Payment

The sum of money identified in the Schedule of Values on the Price Proposal Form as "Estimated Cost" for each of these items of work will be considered the bid price for them, even though payment will be made as described below. The estimated cost figure is not to be altered in any manner by the Proposer. Should the Proposer alter the amount shown, the altered figures will be disregarded and the original Estimated Cost price will be used to determine the total amount for the Contract.

The Department will pay the Contractor consistent with the provisions for Extra Work in the Contract. Prices negotiated for this work shall be consistent with the applicable unit of measure and method of measurement.

Work under these items performed without prior written approval from the Department will not be measured for compensation.

12.1.6.2 Excavation, Handling, Testing, Characterization, Storage, Transporting and Disposal of Regulated Excavated Materials

The Design-Builder will be responsible for the proper excavation, handling, testing, characterization, storage, transporting, reuse and off-site disposal of all excavated materials not designated as Limited Reuse Soils (LRS) required for the completion of the project under the condition that the materials are characterized as reusable within the project site. When the DB Entity performs support work required for the removal, handling, characterization, storage, transporting, treatment or disposal of controlled or hazardous material, the Department will pay for the same at the applicable Contract unit prices, subject to the conditions noted in Section 12.1.6.3 – "Responsibility of Design-Builder for Initial Excavated Materials Disposal Costs". When the Contract does not include appropriate pay items for same, payment will be made in accordance with Extra Work associated with Differing Site Conditions in the Contract. The DB Entity shall observe all security precautions established pursuant to 29 CFR 1910.120 and 1926.65, including all revisions and amendments thereof, and shall not work in any area known to contain or suspected of containing controlled or hazardous material without prior written approval from the Department.

The DB Entity shall assume sole responsibility for the proper storage, handling, management, and disposal of all regulated materials and wastes associated with its operations, including, but not limited to, lubricants, antifreeze, engine fluids, paints, and solvents. All costs associated with any failure by the DB Entity to properly manage such materials in accordance with federal and State regulations, and all remedial and punitive costs incurred by the Department as a result of such failure, shall be borne by the DB Entity. This section does not apply to coatings removed by the DB Entity.

12.1.6.3 Responsibility of Design-Builder for Initial Excavated Materials Costs

Design-Builder shall be fully responsible for, and thus shall not receive a Change Order with respect to, the first $100,000 in costs incurred directly attributable to occurrences of Differing Site Conditions involving controlled or hazardous excavated materials as noted above, for such costs resulting from the $100,000 "deductible" amounts borne by Design-Builder.

The Design-Builder and NHDOT shall have a cost sharing of 50 and 50 percent respectively for any additional costs incurred in excess of $100,000 directly attributable to changes in Design-Builder's obligations hereunder resulting from each separate occurrence of Differing Site Conditions, and a Change Order shall be issued to compensate Design-Builder for such additional costs. Costs borne by the Design-Builder that are reimbursable by DES will not count toward the $100,000 deductible.

If Differing Site Conditions are encountered, Design-Builder shall immediately notify the NHDOT. The Design-Builder shall be responsible for determining the appropriate action to be undertaken, subject to concurrence by NHDOT. In the event that any Governmental Approvals specify a procedure to be followed, Design-Builder shall follow the procedure set forth in the Governmental Approvals.

Design-Builder hereby acknowledges and agrees that it has assumed all risks with respect to the need to work around locations impacted by Differing Site Conditions. Design-Builder 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. Design-Builder shall track the first $100,000 in costs associated with a Differing Site Condition in accordance with the requirements and limitations in the Contract, and shall track the costs incurred in excess of $100,000 in accordance with the requirements and limitations in the Contract. The tracking results shall be forwarded to NHDOT for information and review on a monthly basis or at each $10,000 increment of tracked costs, whichever is more frequent.

Design-Builder shall not be entitled to an extension of any Completion Deadline with regard to any Differing Site Condition except as described below:

A. If Design-Builder encounters Differing Site Conditions at the four locations described in the Technical Provisions for which Design-Builder is entitled to compensation, and such Differing Site Conditions result in delays to the Critical Path, then NHDOT shall bear 100% of the risk of such delay up to an amount of 90 days for such location. The risk of delays to the Critical Path in excess of 90 days for such location shall be borne by Design-Builder. If a delay as described in this Section is concurrent with another delay which is Design-Builder's responsibility hereunder, then the delay shall be borne 100% by Design-Builder. If a delay due to Differing Site Conditions at one location is concurrent with another delay due to Differing Site Conditions at another location, the 90- day period of NHDOT's responsibility for the delays shall run concurrently.

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 Design-Builder 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 Design-Builder 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.

12.1.6.4 Handling, Testing, Characterization, Storage, Transporting and Disposal of Regulated Materials in Acquired Properties

The Design-Builder, with oversight from NHDOT throughout the process, will be responsible for the proper demolition, handling, testing, characterization, storage, transporting, reuse and disposal of all materials on properties acquired through the project ROW process, either in total or as part of a partial acquisition, required for the completion of the project under the condition that the materials are characterized as reusable within the project site or disposable as unregulated construction debris. When the DB Entity performs support work required for the demolition, removal, handling, characterization, storage, transporting, treatment or disposal of controlled or hazardous material, the Department will pay for same at the applicable Contract unit prices, subject to the conditions noted in Section 12.1.6.5 – "Responsibility of Design-Builder for Initial Disposal of Acquired Property Costs". When the Contract does not include appropriate pay items for same, payment will be made in accordance with Extra Work associated with Differing Site Conditions in the Contract. The DB Entity shall observe all security precautions established pursuant to 29 CFR 1910.120 and 1926.65, including all revisions and amendments thereof, and shall not work in any area known to contain or suspected of containing controlled or hazardous material without prior written approval from the Department to do so.

12.1.6.5 Responsibility of Design-Builder for Initial Disposal of Acquired Property Costs

Design-Builder shall be fully responsible for, and thus shall not receive a Change Order with respect to, the first $50,000 in additional costs incurred directly attributable to occurrences of Differing Site Conditions involving controlled or hazardous materials encountered on properties acquired, either as part of a full or partial acquisition, as noted above, for such additional costs resulting from the $50,000 "deductible" amounts borne by Design-Builder.

NHDOT shall be fully responsible for any additional costs incurred in excess of $50,000 directly attributable to changes in Design-Builder's obligations hereunder resulting from each separate occurrence of Differing Site Conditions, and a Change Order shall be issued to compensate Design-Builder for such additional costs.

If Differing Site Conditions are encountered, Design-Builder shall immediately notify NHDOT. The Design-Builder shall be responsible for determining the appropriate action to be undertaken, subject to concurrence by NHDOT. In the event that any Governmental Approvals specify a procedure to be followed, Design-Builder shall follow the procedure set forth in the Governmental Approvals.

Design-Builder hereby acknowledges and agrees that it has assumed all risks with respect to the need to work around locations impacted by Differing Site Conditions. Design-Builder 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. Design-Builder shall track the first $50,000 in costs associated with a Differing Site Condition in accordance with the requirements and limitations in the Contract, and shall track the costs incurred in excess of $50,000 in accordance with the requirements and limitations in the Contract. The tracking results shall be forwarded to

NHDOT for information and review on a monthly basis or at each $10,000 increment of tracked costs, whichever is more frequent.

Design-Builder shall not be entitled to an extension of any Completion Deadline with regard to any Differing Site Condition except as described below:

A. If Design-Builder encounters Differing Site Conditions at the 16 locations described in the Technical Provisions for which Design-Builder is entitled to compensation, and such Differing Site Conditions result in delays to the Critical Path, then NHDOT shall bear 100% of the risk of such delay up to an amount of 90 days for such location. The risk of delays to the Critical Path in excess of 90 days for such location shall be borne by Design-Builder. If a delay as described in this Section is concurrent with another delay which is Design-Builder's responsibility hereunder, then the delay shall be borne 100% by Design-Builder. If a delay due to Differing Site Conditions at one location is concurrent with another delay due to Differing Site Conditions at another location, the 90- day period of NHDOT's responsibility for the delays shall run concurrently.

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 Design-Builder 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 Design-Builder 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.

12.2 Invoicing and Payment

The following process shall apply to invoicing and payment:

12.2.1 Draft Invoice and Progress Meeting

On or about the first Business Day of each month following NTP1 and continuing through the last date of the Payment Schedule, Design-Builder shall deliver a draft invoice to NHDOT. At each Progress Meeting, Design-Builder and NHDOT's Authorized Representative shall ascertain the progress of the Work and verify the quantities for any unit priced Work. Each Progress Meeting shall be attended by Design-Builder and NHDOT and/or its consultants. Design-Builder and NHDOT's Authorized Representative shall review the draft invoice and certificate reflecting the value of Work completed as of the date of the meeting (based on quantities and unit prices for unit priced Work, based on time and materials for Time and Materials Work and, for all other Work, based on the percentage completion of Project Schedule activities and the values distributed to such activities). Progress of design and construction management Work shall be tracked separately from other Work. Design-Builder and NHDOT's Authorized Representative shall sign the draft invoice, indicating the portions of it that have been approved and

setting forth the proposed total payment amount, which shall be the approved value of the Work then completed, calculated in accordance with the Project Schedule, plus the value of unit priced and Time and Materials Work, less progress payments previously made. The amounts set forth in the draft invoice shall be used by Design-Builder in preparation of its monthly payment request described in Section 12.2.2.

12.2.2 Delivery of Invoice

Within seven Days after each Progress Meeting, Design-Builder shall submit to NHDOT five copies of an invoice in the form attached hereto as Appendix 9 for the Work performed under the Contract Documents during the immediately preceding month. The form of invoice shall be modified as appropriate to account for unit priced and Time and Materials Work. Each invoice shall be based upon the approved draft invoice. No invoice shall be considered complete unless it (a) describes the status of completion as it relates to the Project Schedule, (b) sets forth the related payments which are then due in accordance with the Project Schedule, as of the date of the most recent Progress Meeting, (c) includes the submittals identified in Appendix 9, (d) includes the reports required under Appendix 14 and (e) satisfies the requirements set forth in Section 12.2.3. Design-Builder acknowledges that NHDOT will obtain funding for portions of the Work from various sources, and agrees to segregate billings for all such Work in a format reasonably requested by NHDOT and with detail and information as reasonably requested by NHDOT. Within ten Business Days after NHDOT's receipt of the invoice, NHDOT will review the invoice and all attachments thereto for consistency with the draft invoice prepared at the most recent Progress Meeting and conformity with all requirements of the Contract Documents, and shall notify Design-Builder of the amount approved for payment and specify the reason for disapproval of any remaining invoiced amounts. Design-Builder may include such disapproved amounts in the next month's invoice after correction of the deficiencies noted by NHDOT (all such disapproved amounts shall be deemed in dispute unless otherwise agreed).

12.2.3 Form of Invoice

Each invoice submitted by Design-Builder shall include the Construction Certificate in the form included in Appendix 9 hereto, with no additions or deletions other than those approved by NHDOT. Design-Builder's Authorized Representative shall execute each invoice and Construction Certificate.

In addition, no invoice shall be considered complete unless it: (a) describes in detail the status of completion as it relates to the Project Schedule; (b) sets forth separately and in detail the related payments which are then due in accordance with the Project Schedule; (c) in the case of amounts to be paid on a unit price basis, includes invoices, receipts or other evidence establishing the number of units delivered; (d) in the case of amounts invoiced for Time and Materials Work, includes all supporting documentation described in Section 13.7; (e) sets forth in detail the amounts paid to Subcontractors (including Suppliers and Subcontractors at lower tiers) from the payments made by NHDOT to Design-Builder with respect to the prior month's invoice; and (f) includes affidavits of payment and unconditional waivers of Liens and claims executed by Design-Builder and

each Subcontractor with respect to all amounts paid in the prior month's invoice.

12.2.4 Payment by NHDOT

Within 30 Days after receipt by NHDOT of each complete invoice (including all required materials and reports) and the related Construction Certificate, NHDOT shall pay Design-Builder the amount of the invoice approved for payment less any amounts, which NHDOT is otherwise entitled to withhold or deduct. In no event shall NHDOT have any obligation to pay Design-Builder any amount: (a) which would result in payment for any activity in excess of the value of the activity times the completion percentage of such activity (for non-unit priced Work) or (b) which would result in aggregate payments hereunder in excess of (i) the overall completion percentage for the Project times the Contract Price (for non-unit priced Work) or (ii) the Maximum Payment Schedule for the month to which the invoice applies, plus amounts allowed by Change Orders.

12.3 Deductions, Exclusions and Limitations on Payment

12.3.1 Retainage

NHDOT shall not withhold funds (the "Retainage") from each payment to be made to Design-Builder as described in Section 12.2.4.

12.3.2 Deductions

NHDOT may deduct from each progress payment and the Final Payment the following:

(a) Any Losses of NHDOT or Third Party Claims for which Design-Builder is responsible hereunder or any Liquidated Damages which have accrued as of the date of the application for payment or which are anticipated to accrue based on the dates shown in the current Project Schedule for (i) Project Completion, (ii) Intermediate Completion and (iii) Interim Milestones;

(b) Any Liquidated Damages for which Design-Builder is liable pursuant to Section 17 which have accrued as of the date of the application for payment;

(c) If a notice to stop payment is filed with NHDOT, due to Design-Builder's failure to pay for labor or materials used in the Work, money due for such labor or materials, plus 25%, will be withheld from payment to the Design- Builder. NHDOT may accept a bond by a corporate surety in lieu of withholding payment,

(d) Any sums expended by or owing to NHDOT as a result of Design-Builder's failure to maintain the as-built drawings,

(e) Any sums expended by NHDOT in performing any of Design-Builder's obligations under the Contract Documents which Design-Builder has failed to perform plus an administrative charge equal to 10% of such costs; and

(f) Any other sums which NHDOT is entitled to recover from Design-Builder under the terms of the Contract Documents.

(g) Any sum relating to the QC/QA paving adjustment set forth in Special Attention included in Volume 2 Book 3.

The failure by NHDOT to deduct any of these sums from a progress payment shall not constitute a waiver of NHDOT's right to such sums.

All amounts owing by Design-Builder to NHDOT under the Contract shall earn interest from the date on which such amount owes at the lesser of (i) 10% per annum or (ii) the maximum rate allowable under applicable Governmental Rules.

12.3.3 Unincorporated Materials

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

Material shall be delivered to the Site, or delivered to Design-Builder and stored by Design-Builder an accepted location approved by NHDOT. Design-Builder shall submit certified bills for such materials with the invoice, as a condition to payment for such materials. NHDOT shall allow only such portion of the amount represented by these bills as in its opinion is consistent with the reasonable cost of such materials.

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

Payment for material furnished and delivered as indicated in this Section 12.3.3 will not exceed the amount paid by Design-Builder as evidenced by a bill of sale supported by the paid invoice.

12.3.4 Mobilization Payments;

Design-Builder shall be entitled to payment for mobilization in installments, in an amount equal to the bid item price for mobilization, not to exceed $5,000,000. The first payment for mobilization shall be in an amount not to exceed 5% of the bid item price for mobilization, payable as part of the first invoice following NTP1 up to the amount allowed in Section 12.1.4. The second payment for mobilization shall be in an amount not to exceed 20% of the bid item price for mobilization, payable as part of the first invoice following NTP2. The third payment for mobilization shall be in an amount not to exceed 50% of the bid item price for mobilization; payable when at least 10% of the Contract Price (less mobilization) is earned. The fourth payment for mobilization shall be in the remaining amount of the bid item price for mobilization; payable when at least 25% of the Contract Price (less mobilization) is earned. The amounts paid under this Section 12.3.4 shall be taken into account in assessing the maximum amount payable under an invoice through application of the Maximum Payment Schedule.

The amount payable for as-built documents acceptable to NHDOT shall equal 1% of the

Contract Price. Design-Builder shall not be entitled to payment for the last 1% of the Contract Price until acceptable as-builts have been delivered to NHDOT.

12.3.5 Equipment

NHDOT 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 12.3.4, shall be allocated to and paid for as part of the activities with which the equipment is associated in a manner which is consistent with the requirements of Section 13.7.3.

12.4 Final Payment

Final Payment for all Work will be made as follows:

12.4.1 On or about the date of delivery of its Affidavit of Final Completion, Design-Builder shall prepare and submit a proposed Application for Final Payment to NHDOT showing the proposed total amount due Design-Builder. In addition to meeting all other requirements for invoices hereunder, the Application for Final Payment shall propose a schedule for monthly payment that does not exceed the amounts set forth on the Maximum Payment Schedule. The Application for Final Payment shall list all outstanding or pending Request for Change Notices and all existing or threatened claims, Liens and stop notices by Subcontractors, Utility Owners or other third parties relating to the Project, including any notices filed or to be filed with the Affidavit of Final Completion, stating the amount at issue associated with each such notice. The Application for Final Payment shall be accompanied by: (a) complete and legally effective releases or waivers of Liens and stop notices satisfactory to NHDOT, from all Persons legally eligible to file Liens and stop notices in connection with the Work; (b) consent of any Surety(ies) to final payment; (c) an executed release meeting the requirements of Section 12.4.4 and otherwise satisfactory in form and content to NHDOT; and (d) such other documentation as NHDOT may reasonably require. Prior applications and payments shall be subject to correction in the proposed Application for Final Payment. Request for Change Notices filed concurrently with the Application for Final Payment must be otherwise timely and meet all requirements under Section 13.

12.4.2 As a condition to its obligation to make payment to Design-Builder based on the Application for Final Payment, NHDOT shall have received an executed release meeting the requirements of Section 12.4.4 and otherwise satisfactory in form and content to NHDOT. The payment amount will be reduced by any amounts deductible under Section 12.3.2.

12.4.3 If the Application for Final Payment lists any existing or threatened claims, Liens and stop notices of Subcontractors, Suppliers, laborers, or other third parties against Design-Builder, NHDOT or the Project, or if any is thereafter filed, NHDOT may withhold from payment such amount as NHDOT deems advisable to cover any amounts owing or which may become owing to NHDOT by Design-

Builder, including costs to complete or remediate uncompleted Work or Nonconforming Work, and 125% of the amount of any existing or threatened claims, Liens and stop notices of Subcontractors, Suppliers, laborers, and other third parties against Design-Builder, NHDOT or the Project.

12.4.4 The executed release from Design-Builder shall be 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 Request for Change Notices listed as outstanding in the Application for Final Payment. The release shall be accompanied by an affidavit from Design-Builder certifying that:

(a) All Work has been performed in strict accordance with the requirements of the Contract Documents;

(b) It has resolved any claims made by Subcontractors, and others against Design-Builder or the Project;

(c) It has no reason to believe that any Person has a valid claim against Design-Builder or the Project which has not been communicated in writing by Design-Builder to NHDOT as of the date of the certificate; and

(d) All guarantees and warranties are in full force and effect.

The release and the affidavit shall survive Final Payment.

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

12.4.6 NHDOT will review Design-Builder's proposed Application for Final Payment, and any changes or corrections, including deductions described in Section 12.3.2, will be forwarded to Design-Builder for correction within 20 Business Days. Any changes or corrections made pursuant to this Section 12.4.6 will be reflected in an updated monthly payment schedule showing the net amount owed to Design-Builder by month.

12.4.7 NHDOT shall fulfill its payment obligations under this Contract by paying the amounts identified in Section 12.4.6, in accordance with the schedule described in Section 12.4.6.

12.5 Prompt Payment to Subcontractors

The Design-Builder shall pay all subcontractors for the work performed no later than 21 calendar days from the date the Design-Builder received payment from the Department for said work, including payment for materials on hand and materials not on hand as specified in Section 109.07 and/or 109.08 of the NHDOT Standard Specification for Road and Bridge Construction paid for in the progress payments. Subcontractors are required to pay their Subcontractors and/or material suppliers, within 21 calendar days from the

date they receive payment for satisfactory work performed or supplies received. This Prompt Pay requirement shall be made part of all subcontracts and agreements.

If the Design-Builder believes that any portion of the payment should be withheld from the subcontractor, the Design-Builder shall notify the NHDOT Contract Administrator in writing, prior to the estimate being processed. The NHDOT Office of Federal Compliance shall be made part of this notification. The NHDOT may withhold payment for the portion of work in dispute pending resolution.

This prompt payment provision is a requirement of 49 CFR 26.29 and does not confer third-party beneficiary right or other direct right to a Subcontractor against the Department. This provision applies to both DBE and non-DBE Subcontractors.

12.5.1 Satisfactory Work Performed

Satisfactory work performed shall be defined for purposes of this prompt payment provision as:

a) Upon review, NHDOT finds the work completed in accordance with the contract, plans and specifications, and;

b) Required paperwork, for Progress and Partial payments, including material certifications and payrolls, has been received.

The determination of whether work meets the standards set forth above is the responsibility of NHDOT. If the subcontractor becomes insolvent after it satisfactorily performs work as defined above but before payment is due, the obligation to pay is not extinguished.

The Design-Builder must include, in all subcontract agreements, notices to subcontractors of their right to prompt payment, and of the Department's policy prohibiting Design-Builder's from holding retainage from Subcontractors under 49 CFR 26.29.

Failure of a Design-Builder or a subcontractor to comply with these prompt payment provisions may result in sanctions.

12.5.2 Non-Payment Claims

Subcontractors shall refer all notifications of failure to meet prompt payment provisions in writing, to the NHDOT Office of Federal Compliance with a copy supplied to the respective NHDOT Contract Administrator.

12.5.3 Payment Certifications

The Design-Builder or any subcontractor who receives payment for work and/or materials (specifically supplied to the project in excess of $10,000) shall submit a "Monthly Prompt Pay Certification," OFC Form 18, to the NHDOT Office of Federal Compliance no later than the 10th calendar day of each month.

12.6 Disputes

Failure by NHDOT to pay any amount in dispute shall not alleviate, diminish or modify in any respect Design-Builder's obligation to perform under the Contract Documents, including Design-Builder's obligation to achieve the Completion Deadlines and perform all Work in accordance with the Contract Documents, and Design-Builder shall not cease or slow down its performance under the Contract Documents on account of any such amount in dispute. Any Dispute regarding such payment shall be resolved pursuant to Section 19. Design-Builder shall proceed as directed by NHDOT pending resolution of the Dispute. Upon resolution of any such Dispute, each Party shall pay to the other any amount owing.

12.7 Interest on Late Payments

If payment of any undisputed amount is made after the 30th day following the proper submission of a complete invoice, then the payment shall include interest on the amount owing, at the rate of 10 percent per annum on the principal amount, from the 30th day after the payment was due until the date of payment.

SECTION 13. CHANGES IN THE WORK

This Section 13 sets forth the requirements for obtaining all Change Orders under the Contract. Design-Builder hereby acknowledges and agrees that the Contract Price constitutes full compensation for performance of all of the Work, subject only to those exceptions specified in this Section 13, and that NHDOT is subject to constraints limiting its ability to increase the Contract Price or extend the Completion Deadlines. Design-Builder hereby waives the right to make any Claim for a time extension or for any monetary compensation in addition to the Contract Price and other compensation specified in the Contract for any reason whatever, except as specifically set forth in this Section 13. To the extent that any other provision of this Contract expressly provides for a Change Order to be issued, such provision is incorporated into and subject to this Section 13.

13.1 Circumstances Under Which Change Orders May Be Issued

13.1.1 Definition of and Requirements Relating to Change Orders

13.1.1.1 Definition of Change Order

The term "Change Order" shall mean a written amendment to the terms and conditions of the Contract Documents issued in accordance with this Section 13. NHDOT may issue unilateral Change Orders as specified in Section 13.2.2. Change Orders may be requested by Design-Builder only pursuant to Section 13.3. A Change Order shall not be effective for any purpose unless executed by NHDOT. Change Orders may be issued for the following purposes (or combination thereof):

a) To modify the scope of the Work;

b) To revise a Completion Deadline;

c) To revise the Contract Price;

d) To approve a Basic Configuration Change, subject to Section 3.3.4; and

e) To revise other terms and conditions of the Contract Documents.

Upon NHDOT's approval of the matters set forth in the Change Order form (whether it is initiated by NHDOT or requested by Design-Builder), NHDOT shall sign such Change Order form indicating approval thereof. A Change Order may, at the sole discretion of NHDOT, direct Design-Builder to proceed with the Work with the amount of any adjustment of any Completion Deadline or Contract Price to be determined in the future.

13.1.1.2 Issuance of Directive Letter

NHDOT may at any time issue a Directive Letter to Design-Builder in the event of any desired change in the Work or in the event of any dispute regarding the scope of Work. The Directive Letter will state that it is issued under this Section 13.1.1, will describe the Work in question and will state the basis for determining compensation, if any. Design-Builder shall proceed immediately as directed in the letter, pending the execution of a formal Change Order (or, if the Directive Letter states that the Work is within Design-Builder's original scope of Work, Design-Builder shall proceed with the Work as directed but shall have the right pursuant to Section 13.3 to request that NHDOT issue a Change Order with respect thereto).

13.1.1.3 Directive Letter as Condition Precedent to Claim that NHDOT-Directed Change Has Occurred

Receipt of a Directive Letter from NHDOT shall be a condition precedent to Design-Builder's right to claim that an NHDOT-Directed Change has occurred, in addition to provision of notice and subsequent Request for Change Order pursuant to Section 13.3.2; provided that no Directive Letter shall be required for any NHDOT-Directed Changes directly attributable to delays caused by bad faith actions, active interference, gross negligence or comparable tortuous conduct by NHDOT.

The fact that a Directive Letter was issued by NHDOT shall be considered evidence that in fact an NHDOT-Directed Change occurred. The requirements of Section 13.1.1 shall not imply that a Directive Letter would be required in order for Design-Builder to have the right to receive compensation for Work within its original scope for which additional compensation is specifically allowed under this Section 13.

13.1.2 Right of NHDOT to Issue Change Orders

NHDOT may, at any time and from time to time, without notice to any Surety, authorize and/or require changes in the Work within the general scope of the Contract Documents pursuant to a Change Order. For the purpose of this Section 13.1.2, any direction to perform work shall be considered within the general scope of the Contract if it is related to the Project; any direction to delete or modify Work shall be considered within the general scope unless as a result the Contract Documents would no longer be considered a design-build contract for the Project of the nature described in the RFP. Design-Builder shall have no obligation to perform any work outside the general scope of the Contract Documents, except on terms mutually acceptable to NHDOT and Design-Builder.

13.2 NHDOT-Initiated Change Orders

This Section 13.2 concerns (a) Change Orders issued by NHDOT following a Change Notice and (b) Change Orders unilaterally issued by NHDOT.

13.2.1 Change Notice

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

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

Within five Business Days after the second consultation and provision of any data described in Section 13.2.1, NHDOT shall notify Design-Builder whether NHDOT (a) wishes to issue a Change Order, (b) wishes to request Design-Builder to provide a Cost and Schedule Proposal as discussed at the meeting, (c) wishes to request Design- Builder to prepare a modified work plan for the change and a Cost and Schedule Proposal based on the modified plan, or (d) no longer wishes to issue a Change Order. NHDOT may at any time, in its sole discretion, require Design-Builder to provide two alternative Cost and Schedule Proposals, one of which shall provide for a time extension and any additional costs permitted hereunder, and the other of which shall show all Acceleration Costs associated with meeting the original Completion Deadlines, as well as any additional costs permitted hereunder.

If so requested, Design-Builder shall, within ten Business Days after receipt of the notification described in Section 13.2.1, or such longer period as may be mutually agreed to by NHDOT and Design-Builder, prepare and submit to NHDOT for review and approval by NHDOT a Cost and Schedule Proposal (in the format provided by NHDOT) for the requested change, complying with all applicable requirements of Section 13.4, and incorporating and fully reflecting all requests made by NHDOT. Design-Builder shall bear the cost of developing the Cost and Schedule Proposal, including any modifications thereto requested by NHDOT, except that actual and reasonable costs of design and engineering work required for preparation of plans or exhibits necessary to the Cost and Schedule Proposal, as pre-authorized by NHDOT, may be included in the Change Order as reimbursable items. If the Change Order is approved, such actual and reasonable design and engineering costs will be included within the Change Order, otherwise, they shall be separately reimbursed through a separate Change Order.

If Design-Builder and NHDOT agree that a change in the requirements relating to the Work has occurred but disagree as to whether the change justifies additional compensation or time or disagree as to the amount of any change to be made to the Contract Price or a Completion Deadline, NHDOT may, in its sole discretion, order Design-Builder to proceed with the performance of the Work in question notwithstanding such disagreement. Such order may, at NHDOT's option, be in the form of: (a) a Time and Materials Change Order as provided in Section 13.7 or (b) a Directive Letter under Section 13.1.1.

If it is not practicable, due to the nature and/or timing of the event giving rise to a proposed Change Order, for Design-Builder to provide a complete Cost and Schedule Proposal meeting all of the requirements of Section 13.4, Design-Builder shall provide an incomplete proposal which includes all information capable of being ascertained. Said incomplete proposal shall: (a) include a list of those Change Order requirements which are not fulfilled together with an explanation reasonably satisfactory to NHDOT stating why such requirements cannot be met, (b) provide such information regarding projected impact on a critical path as is requested by NHDOT, 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. Design-Builder shall provide monthly updates to any incomplete Cost and Schedule Proposals in the same manner as updates to incomplete Requests for Change Order under Section 13.3.2.

13.2.2 Unilateral Change Orders

NHDOT may issue a Change Order at any time, regardless of whether it has issued a Change Notice. Design-Builder shall be entitled to compensation in accordance with Section 13.7 for additional Work which is required to be performed as the result of any unilateral Change Order, and shall have the right to submit the issue of entitlement to an extension of the Completion Deadlines to dispute resolution in accordance with Section 19. For deductive unilateral Change Orders, the Change Order may contain a price deduction deemed appropriate by NHDOT, and Design-Builder shall have the right to submit the amount of such price deduction to dispute resolution in accordance with Section 19. NHDOT may at any time issue a unilateral Change Order for Extra Work.

13.2.3 NHDOT-Directed Changes Under $10,000

Design-Builder shall not be entitled to an increase in the Contract Price for any NHDOT-Directed Changes involving less than $10,000 in additional direct costs incurred by Design-Builder, nor shall the Design-Builder be subject to a Contract Price reduction involving less than $10,000 in reduced direct costs incurred for and NHDOT-Directed Changes.

13.2.4 Blank

13.2.5 NHDOT Delay in Issuance of NTP1

Design-Builder may request a Change Order to extend a Completion Deadline for delays directly attributable to the failure of NHDOT to award the DB Contract and issue NTP1 by **November 4, 2020**, which change the duration of a Critical Path.

If such event affects a Critical Path, Design-Builder may request the Project Completion Date be extended by a number of Days no greater than the difference between **November 4, 2020**, and the date NTP1 was issued.

13.3 Design-Builder-Initiated Change Orders

13.3.1 Eligible Changes

Design-Builder 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 which change the duration of a Critical Path:

a) Force Majeure Events;

b) NHDOT-Caused Delays;

c) Delays relating to Differing Site Conditions, discovery of Contaminated Materials, and/or Changes in Law, to the extent permitted by Section 13.9; or

d) Delays relating to Necessary Basic Configuration Changes, to the extent permitted by Section 13.8.

Design-Builder may request a Change Order to increase the Contract Price only for increased costs of performance of the Work as follows:

a) Subject to Section 13.2.3, additional costs directly attributable to additional Work resulting from NHDOT-Directed Changes and NHDOT-Caused Delays for which NHDOT has not submitted a Change Order or a Change Notice;

b) Additional costs directly attributable to Necessary Basic Configuration Changes, to the extent provided in Section 13.8;

c) Additional costs relating to Differing Site Conditions, Contaminated Materials, Changes in Law and maintenance and repair of the Project, to the extent provided in Section 13.9;

d) Additional costs directly attributable to uncovering, removing and restoring Work, to the extent provided in Section 5.5.3; or

e) Adjustments as specified in Section 12.1.

Design-Builder's entitlement to a Change Order for eligible changes is subject to the restrictions and limitations contained in this Section 13 and furthermore are subject to Design-Builder's compliance with all notification and other requirements identified herein. Design-Builder shall initiate the Change Order process by delivery of a Request for Change Notice as described in Section 13.3.2, followed by submittal of a Request for Change Order and supporting documentation to NHDOT.

13.3.2 Procedures

The requirements set forth in this Section 13.3.2 constitute conditions precedent to Design-Builder's entitlement to request and receive a Change Order except those involving (a) a Change Notice, or (b) a price increase under Section 12.1.4. Design-Builder understands that it shall be forever barred from recovering against NHDOT under this Section 13 if it fails to give notice of any act, or failure to act, by NHDOT or any of its representatives or the happening of any event, thing or occurrence pursuant to a proper Request for Change Notice, and thereafter complies with the remaining requirements of this Section 13.3.

13.3.2.1 Request for Change Notice (RFC Notice)

Design-Builder shall deliver to NHDOT a written notice ("Request for Change Notice") stating that an event or situation has occurred within the scope of Section 13.3.1 which Design-Builder believes justifies a change in the Contract Price and/or a Completion Deadline and shall state which subsection (s) thereof is applicable. The first notice shall be labeled "RFC No. 1" and subsequent notices shall be numbered sequentially. Any notice regarding a situation involving a Necessary Basic Configuration Change shall specifically state that it involves such a change.

Each Request for Change Notice shall be delivered within five Days after the Design-Builder discovers the occurrence of such event or situation. If any Request for Change Notice is delivered later than 21 Days after Design-Builder first discovered (or should have discovered in the exercise of reasonable prudence) the occurrence described therein, Design-Builder shall be deemed to have waived the right to collect any and all costs incurred prior to the date of delivery of the Request for Change Notice, and shall be deemed to have waived the right to seek an extension of any Completion Deadline with respect to any delay in a Critical Path which accrued prior to the date of delivery of the written notice. Furthermore, if a Request for Change Notice concerns any condition or material described in Section 5.3.1, Design-Builder shall be deemed to have waived the right to collect any and all costs incurred in connection therewith to the extent that NHDOT is not afforded the opportunity to inspect such material or condition before it is disturbed. Design-Builder's failure to provide a Request for Change Notice within 60 Days after Design-Builder first discovered (or should have discovered in the exercise of reasonable prudence) the occurrence of a given event or situation shall preclude Design-Builder from any relief, unless Design-Builder can show, based on a preponderance of the evidence, that (a) NHDOT was not materially prejudiced by the lack of notice, or (b) NHDOT's Authorized Representative specified in accordance with Section 24.5.1 had actual knowledge, prior to the expiration of the 60-day period, of the event or situation and that Design-Builder believed it was entitled to a Change Order with respect thereto.

The Request for Change Notice shall: (a) state in detail the facts underlying the anticipated Request for Change Order, the reasons why Design-Builder believes additional compensation or time will or may be due and the date of occurrence, (b) state

the name, title, and activity of each NHDOT and NHDOT 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) state in detail the basis for necessary accelerated schedule performance, if applicable, (e) state in detail the basis that the work is not required by the Contract Documents, if applicable, (f) identify particular elements of Contract Document performance for which additional compensation may be sought under this Section 13.3.2, (g) identify any potential critical path impacts, and (h) 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 Request for Change Order relates to a decision which the Contract Documents leave to the discretion of a Person or as to which the Contract Documents provide that such Person's decision is final, the Request for Change Notice shall set out in detail all facts supporting Design-Builder'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.

The written notification described in Section 5.3.1 may also serve as a Request for Change Notice provided it meets the requirements for Request for Change Notices.

Any adjustments made to the Contract shall not include increased costs or time extensions for delay resulting from Design-Builder's failure to timely provide requested additional information under this Section 13.3.2.

13.3.2.2 Delivery of Request for Change Order

Design-Builder shall deliver all Requests for Change Order under this Section 13.3 to NHDOT within 30 Days after delivery of the Request for Change Notice, or such longer period of time as may be allowed in writing by NHDOT. NHDOT may require design and construction costs to be covered by separate Requests for Change Order. If Design-Builder requests a time extension, then NHDOT, in its sole discretion, may require Design-Builder 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 original Completion Deadlines, as well as any additional costs permitted hereunder. If it is not feasible to recover to the original Completion Deadline or if Design-Builder believes that the costs associated with such a recovery are prohibitive, then Design- Builder shall recommend a date to be shown in the alternative Change Order form. If Design-Builder fails to deliver a complete Request for Change Order or incomplete Request for Change Order meeting all of the requirements of Section 13.3.2 within the appropriate time period, Design-Builder shall be required to provide a new Request for Change Notice before it may submit a Request for Change Order.

13.3.2.3 Incomplete Requests for Change Order

Each Request for Change Order provided under Section 13.3.2 shall meet all requirements set forth in Section 13.4; provided that if any such requirements cannot be met due to the nature and/or timing of the occurrence, Design-Builder shall provide an incomplete Request for Change Order which fills in all information capable of being ascertained. Said incomplete Request for Change Order shall: (a) include a list of those Change Order requirements which are not fulfilled together with an explanation reasonably satisfactory to NHDOT stating why such requirements cannot be met, (b) provide such information regarding projected impact on a critical path as is requested by NHDOT, 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.

Design-Builder shall furnish, when requested by NHDOT or its designee, such further information and details as may be required to determine the facts or contentions involved. Design-Builder agrees that it shall give NHDOT or its designee access to any and all of Design-Builder's books, records and other materials relating to the Work, and shall cause its Subcontractors to do the same, so that NHDOT or its designee can investigate the basis for such proposed Change Order. Design-Builder shall provide NHDOT 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 NHDOT, expenditures to date and time anticipated for completion of the activities for which the time extension is claimed. NHDOT may reject the Request for Change Order at any point in the process. Once a complete Request for Change Order is provided, NHDOT's failure to respond thereto within 21 Days of delivery of the request shall not be deemed approval of such request. NHDOT will provide written documentation of approval or disapproval of all requests.

13.3.2.4 Importance of Timely Response

Design-Builder acknowledges and agrees that, due to limitations on funding for the Project, timely delivery of notification of such events and situations and Requests for Change Orders and updates thereto are of vital importance to NHDOT. NHDOT is relying on Design-Builder to evaluate upon the occurrence of any event or situation whether the event or situation will affect the Project Schedule or Contract Price and, if so, whether Design-Builder believes a time extension and/or price increase is required hereunder. If an event or situation occurs which may affect the Contract Price or a Completion Deadline, NHDOT 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 NHDOT's funding and time restraints. The following matters (among others) shall be considered in determining whether NHDOT has been prejudiced by Design-Builder's failure to provide timely notice: (a) the effect of the delay on alternatives available to NHDOT (that is, a comparison of alternatives which are available at the time notice was actually given and alternatives which 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 NHDOT's ability to obtain and review objective information contemporaneously with the event.

13.3.2.5 Compliance With Section 5.3.1 Requirements

Design-Builder shall comply with all applicable requirements contained in Sections 5.3.1 and 13.9.4, unless precluded from doing so by emergency circumstances.

13.3.2.6 Review of Subcontractor Claims

Prior to submission by Design-Builder of any Request for Change Order which is based in whole or in part on a request by a Subcontractor to Design-Builder for a price increase or time extension under its Subcontract, Design-Builder shall have reviewed all claims by the Subcontractor which constitute the basis for the Request for Change Order and determined in good faith that each such claim is justified hereunder and that Design-Builder is justified in requesting an increase in the Contract 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 Design-Builder's analysis of all Subcontractor claims components and shall include a certification signed by Design-Builder's Project Manager stating that Design-Builder 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 21.2, 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.

13.3.3 Performance of Disputed Work

If NHDOT refuses to issue a Change Order based on Design-Builder's request, Design-Builder 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 19. Design- Builder shall maintain and deliver to NHDOT, upon request, contemporaneous records, meeting the requirements of Section 13.10, for all work performed which Design-Builder believes constitutes extra work (including non-construction work), until all Disputes regarding entitlement or cost of such work are resolved.

13.4 Contents of Change Orders

13.4.1 Form of Change Order

Each Cost and Schedule Proposal and Request for Change Order shall be prepared in form acceptable to NHDOT, and shall meet all applicable requirements of this Section 13. Each Request for Change Order shall specify whether it is the result of an NHDOT-Directed Change.

13.4.2 Scope of Work, Cost Estimate, Delay Analysis and Other Supporting Documentation

Design-Builder shall prepare a scope of work, cost estimate, delay analysis and other information as required by this Section 13.4.2 for each Cost and Schedule Proposal and Request for Change Order.

13.4.2.1 Scope of Work

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

13.4.2.2 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 NHDOT agrees otherwise. The estimate shall include costs allowable under Section 13.5.2, if any. If the work is to be performed by Subcontractors and if the work is sufficiently defined to obtain Subcontractor quotes, Design-Builder 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 Design-Builder's estimate. No markup shall be allowed in excess of the amounts allowed under Sections 13.5.2 and 13.7. Design-Builder 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.

13.4.2.3 Delay Analysis

If Design-Builder claims that such event, situation or change affects a Critical Path, it shall provide an impacted delay analysis indicating all activities represented or affected by the change, with activity numbers, durations, predecessor and successor activities, resources and cost, and with a narrative report, in form satisfactory to NHDOT, which compares the proposed new schedule to the current accepted Project Schedule.

13.4.2.4 Other Supporting Documentation

Design-Builder shall provide such other supporting documentation as may be required by NHDOT.

13.4.3 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 13 which permit a Change Order to be issued, and describing the data and documents (including all data and reports required under Section 13.10) which establish the necessity and amount of such proposed change.

13.4.4 Design-Builder Representation

Each Change Order shall contain a certification under penalty of perjury, in form acceptable to NHDOT, executed by Design-Builder and stating that (a) the amount of time and/or compensation requested is justified as to entitlement and amount, (b) the amount of time and/or compensation requested includes all known and anticipated impacts or amounts, direct, indirect and consequential, which may be incurred as a result of the event or matter giving rise to such proposed change, and (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 21.2 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 21.2.

13.5 Certain Limitations

13.5.1 Limitation on Contract Price Increases

Any increase in the Contract Price allowed hereunder shall exclude: (a) costs caused by the acts, omissions, negligence, intentional misconduct or breach of Governmental Rules, contract or Governmental Approval by any DB-Related Entity; (b) costs to the extent that they are unnecessary or could reasonably be avoided by Design-Builder, including by resequencing, reallocating or redeploying its forces to other portions of the Work or to other activities unrelated to the Work (including in the equation any additional costs reasonably incurred in connection with such reallocation or redeployment); and (c) costs for remediation of any Nonconforming Work.

13.5.2 Limitation on Delay and Disruption Damages

13.5.2.1 Acceleration Costs; Delay and Disruption Damages

Acceleration Costs shall be compensable hereunder only with respect to Change Orders issued by NHDOT as an alternative to allowing an extension of a Completion Deadline as contemplated by Sections 13.2.1 and 13.3.2. Other delay and disruption damages shall be compensable hereunder only in the case of delays which qualify as NHDOT-Caused Delays entitling Design-Builder to an extension of a Completion Deadline. Without limiting the generality of the foregoing, delay and disruption damages and the costs of rearranging, resequencing or reallocating Design-Builder's work plan to accommodate NHDOT-Directed Changes not associated with an extension of a Completion Deadline shall not be compensable hereunder.

13.5.2.2 Other Limitations

Delay and disruption damages shall be limited to direct costs directly attributable to the delays described in Section 13.5.2 and markups thereon in accordance with Section 13.7 and any additional field office and jobsite overhead costs incurred by Design- Builder directly attributable to such delays. In addition, before Design-Builder may obtain any increase in the Contract Price to compensate for additional or extended overhead, Acceleration Costs or other damages relating to delay, Design-Builder shall have demonstrated to NHDOT's satisfaction that:

a. Its schedule which defines the affected Critical Path in fact set 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 which impacted the Critical Path activity (i.e. consumed all available Float and extended the time required to achieve Project Completion, or Final Acceptance beyond the applicable Completion Deadline); and

c. The delay or damage was not due to any breach of contract, Governmental Approval or Governmental Rule or fault or negligence, or act or failure to act of any DB-Related Entity, and could not reasonably have been avoided by Design- Builder, including by resequencing, reallocating or redeploying its forces to other portions of the Work or other activities unrelated to the Work (subject to reimbursement for additional costs reasonably incurred in connection with such reallocation or redeployment); and

d. The delay for which compensation is sought is not concurrent with any delay for which any DB-Related Entity is responsible hereunder; and

Design-Builder has suffered or will suffer actual costs due to such delay, each of which costs shall be documented in a manner satisfactory to NHDOT.

13.5.3 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-Related Entity, (c) is concurrent with any other unrelated delay to a Critical Path that is Design-Builder's responsibility hereunder, or (d) could reasonably have been avoided by Design-Builder, including by resequencing, reallocating or redeploying its forces to other portions of the Work (provided that if the request for extension involves an NHDOT-Caused Delay, NHDOT shall have agreed, if requested to do so, to reimburse Design-Builder for its costs incurred, if any, in resequencing, reallocating or redeploying its forces). Design-Builder shall be required to demonstrate to NHDOT's satisfaction that the change in the Work or other event or situation which 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 which has impacted the Critical Path activity (i.e. consumed all available Float and extended the time required to achieve Project Completion, or Final Acceptance beyond the applicable Completion Deadline).

13.5.4 Work Performed Without Direction

To the extent that Design-Builder undertakes any efforts outside of the scope of Work, unless Design-Builder has received a Directive Letter or Change Order signed by NHDOT to undertake such efforts, Design-Builder shall be deemed to have undertaken the extra work voluntarily and shall not be entitled to a Change Order in connection therewith. In addition, NHDOT may require Design-Builder to remove or otherwise undo any such work, at Design-Builder's sole cost and without any time extension.

13.6 Change Order Pricing

The price of a Change Order under this Section 13.6 shall be a negotiated lump sum price or unit prices as provided below. Lump sum price or unit prices shall be based on the original allocations of the Contract Price to comparable activities, whenever possible. If reference to price allocations is inappropriate and if requested by NHDOT, negotiation for lump sum or unit price Change Orders shall be on an Open Book Basis and may be based on the pricing contained in Escrowed Proposal Documents as well as competitive Subcontractors' bid prices.

13.6.1 Detailed Cost Proposal

Design-Builder may be required to submit a detailed cost proposal identifying all categories of costs in accordance with the requirements of Section 13.7: (a) showing all impacts on the Contract 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.

13.6.2 Identification of Conditions

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

13.6.3 Contents

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

13.6.4 Added Work

When the Change Order adds Work to Design-Builder's scope, the increase in the Contract Price shall be negotiated based on estimated costs of labor, material and equipment, or shall be based on actual costs in accordance with Section 13.7. For negotiated Change Orders, markups for profit and overhead shall be consistent with Sections 13.5.2 and 13.7.3. Risk associated with the Work described in the Change Order shall be addressed through the assumptions contained therein regarding the scope of such Work.

13.6.5 Deleted Work

When the Change Order deletes Work from Design-Builder's scope, the amount of the reduction in the Contract Price shall be based upon Design-Builder's estimated price for such work included in the Proposal, including a bill of material and a breakdown of labor and equipment costs, plus variable overhead and profit associated with the deleted work. Estimated costs that the Design-Builder applied to develop the original Contract Price, as well as markup for profit and variable overhead at the rates the Design-Builder applied to develop the Contract Price, as reflected in the Escrowed Proposal Documents, shall apply for determining the amount of the Contract Price reduction for deleted Work Change Orders. The amount of risk associated with such Work as of the Proposal Date by Design-Builder shall be a factor in determining the markup for the deduction. When a deduction is involved, documented cancellation and restocking charges may be included in costs and subtracted from the price deduction. Reimbursement will be made for actual work done and all costs incurred, including mobilization of materials, prior to the date of the Directive Letter or other notification by NHDOT eliminating the work.

13.6.6 Change Order Both Adding and Deleting Work

When the Change Order includes both added and deleted Work, Design-Builder 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 13.6.4 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 Contract Price.

(b) Net decrease in cost, the change shall be treated as work deleted and the provisions of Section 13.6.5 shall be used on the net decrease in cost in order to establish the amount deducted from the Contract Price.

(c) Net change of zero, there will be no change in the Contract Price.

13.6.7 Unit Priced Change Orders

Measurement of unit-priced quantities will be in accordance with Section 109 of the 2016 Standard Specifications, published by NHDOT. 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 Contract Price based on estimated quantities. Upon final determination of the quantities, NHDOT will issue a modified Change Order setting forth the final adjustment to the Contract Price.

13.7 Time and Materials Change Orders

13.7.1 Issuance

NHDOT may, at its discretion, issue a Time and Materials Change Order whenever NHDOT determines that a Time and Materials Change Order is advisable or for force account work. The Time and Materials Change Order shall instruct Design-Builder to perform the Work, indicating expressly the intention to treat the items as changes in the Work, and setting forth the kind, character, and limits of the Work as far as they can be ascertained, the terms under which changes to the Contract Price will be determined and the estimated total change in the Contract Price anticipated thereunder. Upon final determination of the allowable costs, NHDOT shall issue a modified Change Order setting forth the final adjustment to the Contract Price.

13.7.2 Pricing and Payment

NHDOT will pay the Design-Builder for Time and Materials Change Orders as specified in article 109.04.4.2 through 109.04.4.6 of the 2016 NHDOT *Standard Specifications for Road and Bridge Construction*, as full compensation for performing the work.

Time and Materials Change Orders shall comply with all recordkeeping and other obligations set forth in said Section 13.7.4.

Payments for Time and Materials Work shall be invoiced with the regular monthly invoice, based on the extra work reports furnished by Design-Builder for each period. Costs evidenced by daily extra work reports furnished less than five business days prior to preparation of the invoice shall be included in the subsequent month's invoice.

13.7.3 Overhead Items

The following items are considered overhead costs and are included in the Change Order markups are paid in accordance with 2016 NHDOT *Standard Specifications for Road and Bridge Construction* 109.04.4.2 through 109.04.4.6 and no extra payments will be made for the items listed below:

Salary and expenses of executive officers, supervising officers or supervising employees;

a. Design-Builder's superintendent (general foreman);

b. Clerical or stenographic employees;

c. Charges for minor equipment, such as small tools, including shovels, picks, axes, saws, bars, sledges, lanterns, jacks, cables, pails, wrenches, etc., consumables, and other miscellaneous supplies and services;

d. Any and all field and home office overhead and operating expenses whatsoever;

e. Subsistence and travel expenses for all personnel;

f. Design-Builder's Quality Control system; and

g. All bond and insurance premiums.

h. With respect to non-construction related labor costs, overhead is covered by the labor surcharge, and includes accessories such as computer assisted drafting and design (CADD) systems, software and computers, facsimile machines, scanners, plotters, etc.

13.7.4 Change Order Data

Design-Builder shall contemporaneously collect, record in writing, segregate and preserve: (a) all data necessary to determine the costs described in this Section 13.7 with respect to all Work which is the subject of a Change Order or a requested Change Order (excluding negotiated lump sum Change Orders previously executed and delivered), and (b) all data necessary to show the actual impact (if any) on the Critical Path, the Project Schedule, and Completion Deadlines with respect to all Work which is the subject of a Change Order or a proposed Change Order. Such data shall be provided to NHDOT and any authorized representative of NHDOT reviewing any Claim or Dispute regarding compensation for such Work immediately upon their request or demand. Design-Builder hereby waives the right to obtain compensation for any Work for which cost data is required to be maintained and provided hereunder, if Design- Builder fails to maintain and timely provide to NHDOT cost data meeting the requirements of the Contract Documents.

Design-Builder 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 Contract Price and (b) the costs of other operations. Design-Builder shall furnish daily, on forms accepted by NHDOT, reports of all costs described in the foregoing clause (a). The reports shall itemize all costs for labor, materials, and equipment rental and give a 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 NHDOT upon its request. The cost of furnishing such reports are deemed to be included in Design-Builder's overhead and fee percentages.

All reports shall be signed by Design-Builder and certified as true, accurate and complete. NHDOT will compare its records with Design-Builder's reports, make the necessary adjustments and compile the costs of Work completed under a Time and Materials Change Order. When such reports are agreed upon and signed by both Parties, they will become the basis of payment.

13.8 Necessary Basic Configuration Changes

NHDOT acknowledges and agrees that Design-Builder's Proposal was based on certain assumptions regarding the feasibility of developing the Project without any material deviation from the Basic Configuration contained in the Project Schematics.

13.8.1 Notwithstanding the fact that the Contract generally obligates Design-Builder to undertake all Work necessary to complete the Project without an increase in the Contract Price, this Section 13.8 provides for an increase in the Contract Price to be made in conjunction with Necessary Basic Configuration Changes. Delay or disruption damages are not allowable for Necessary Basic

Configuration Changes. Furthermore, if Design-Builder commenced any construction work affected by the change prior to delivery of an appropriate Request for Change Notice, the Change Order shall allow NHDOT a credit for the cost of any unnecessary work performed and/or shall exclude any additional costs associated with redoing the work already performed.

13.8.2 Design-Builder shall be responsible for any cost increases and/or delays which affect the duration of a Critical Path resulting from changes in requirements and obligations of Design-Builder relating to the Project due to Errors in the Project Schematics other than those which require a Necessary Basic Configuration Change. In such event, no change in the Work shall be deemed to have occurred and no Change Order shall be issued for any such cost increases and/or delays.

13.9 Change Orders for Differing Site Conditions, Force Majeure Events, Contaminated Materials, and Changes in Law

13.9.1 Differing Site Conditions

Upon Design-Builder's fulfillment of all applicable requirements of Section 5.3.1 and Section 13, and subject to the limitations contained therein, NHDOT shall be responsible for, and agrees to issue Change Orders, (a) to compensate Design-Builder for additional costs (excluding delay and disruption damages) directly attributable to changes in the scope of the Work arising from Differing Site Conditions, and (b) to extend the Completion Deadlines as the result of any delay in the Critical Path caused by any such conditions.

Design-Builder 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. 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 Design-Builder 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 Design-Builder 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 in Sections 5.3.1 and 5.3.2.

Prior to filing any request for a Change Order relating to a Differing Site Condition, Design-Builder shall inquire if insurance proceeds may be available to cover costs in connection with such item. If Design-Builder finds that reasonable grounds for filing an insurance claim exist, then Design-Builder shall so notify NHDOT. NHDOT shall not be in default for failure to pay any amounts which Design-Builder or NHDOT finds may be covered by insurance, unless and until the claim is denied by the insurance company, at which time Design-Builder may invoice NHDOT for the amount of such claim, to the extent permitted by this Contract. Design-Builder shall maintain contemporaneous records of all costs incurred by it with respect to the Differing Site Condition pending the insurance company's determination regarding the claim. Upon denial of any such claim by the insurance

company and receipt of a Change Order request, NHDOT will process the Request for Change Order. NHDOT shall have the right to contest the denial of any insurance claim, and Design-Builder shall cooperate with NHDOT in that regard. Notwithstanding anything to the contrary contained in Section 13.3.2, Design-Builder shall not be obligated to include amounts which may be covered by insurance in any Change Order request until 20 Days after the insurance company has denied the claim. However, the notice requirements of Section 13.3.2 shall remain effective with respect to the event in question.

13.9.2 Force Majeure Events

Subject to the limitations contained in, and upon Design-Builder's fulfillment of all applicable requirements of, this Section 13, NHDOT shall issue Change Orders to extend the applicable Completion Deadlines as the result of any delay in a Critical Path directly caused by a Force Majeure Event. Costs of Extra Work due to Force Majeure Events shall be subject to reimbursement in accordance with Section 12.1.2.

13.9.3 Contaminated Materials Management

If Design-Builder is entitled to a Change Order pursuant to Section 6.3 with respect to Contaminated Materials Management, such Change Order shall be subject to the applicable limitations and requirements set forth in Sections 5.3, 6.3, this Section 13.9.3 and elsewhere in this Section 13. The amount of Change Orders for Specified Site Contaminated Materials shall be determined in accordance with Section 13.6.7. The amount of the Change Order for all other Contaminated Materials Management shall either be a negotiated amount acceptable to the Parties, or an amount determined in accordance with Section 13.7 and this Section 13.9.3 for the work in question. Design-Builder shall not be entitled to a Change Order for additional compensation or extension of time with respect to the Contaminated Materials Management responsibilities set forth in Section 6.3.3.

13.9.3.1 Determination of Reimbursable Amount

Design-Builder shall be deemed to have waived the right to collect any and all costs incurred in connection with any Contaminated Materials Management and any right to obtain an extension of a Completion Deadline if NHDOT is not provided written notice of the discovery of Contaminated Materials and afforded the opportunity to inspect sites containing Contaminated Materials before any action is taken which would inhibit the ability of NHDOT to ascertain, based on a Site inspection, the nature and extent of the materials. In the event of an emergency involving Contaminated Materials, Design-Builder may take such limited actions as are required by Governmental Rules without advance notice to NHDOT, 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 Contaminated Materials Management under this Section 13.9.3, allowable costs shall be limited to the incremental costs (excluding delay and disruption damages or markup for overhead or profit) incurred after completion of the

testing process to determine whether Contaminated Materials are present, associated with the Contaminated Materials at issue (deducting any avoided costs such as the cost of disposal that would have been incurred had Contaminated Materials not been present). Investigating and characterizing of Contaminated Materials are included in the Contract Price and Design-Builder shall not be entitled to additional compensation therefor. Design-Builder shall take all reasonable steps to minimize any such costs. Compensation shall be allowed only to the extent that Design-Builder demonstrates to NHDOT's satisfaction that (a) the Contaminated Materials Management could not have been avoided by reasonable design modifications or construction techniques and (b) Design-Builder's plan for the Contaminated Materials Management represents the approach which is most beneficial to the Project and the public. Design-Builder shall provide NHDOT with such information, analyses and certificates as may be requested by NHDOT in order to enable a determination regarding eligibility for payment.

13.9.3.2 Time Extensions

If Design-Builder encounters Contaminated Materials within the NHDOT-Provided Property which, due to no act, omission, negligence, willful misconduct, or breach of Governmental Rules, Governmental Approvals or contract by any DB-Related Entity, results in delays to a Critical Path, then NHDOT shall bear the risk of such delay (excluding those conditions for which Design-Builder has agreed to be responsible as described in Section 18.1.1(g)).

13.9.3.3 Limitations on Change Orders

Notwithstanding any contrary provision of the Contract Documents, Design-Builder shall have no right to receive (a) any compensation for delay and disruption damages or markup for overhead and profit related to Contaminated Materials Management, (b) any compensation for any Contaminated Materials Management resulting from a situation described in Section 18.1.1(g), or (c) any compensation or time extension in connection with any work stoppage in affected areas during the investigation period described in Sections 5.3.1 and 5.3.2. Design-Builder shall also not be entitled to receive any compensation or time extension for (1) immaterial quantities of Contaminated Materials, (2) any Contaminated Materials that could have been avoided by reasonable design modifications or construction techniques, (3) any costs that could have been avoided, (4) Contaminated Materials on any Additional Properties, or (5) any Contaminated Materials encountered during or in connection with the demolition of buildings, fixtures or other improvements on any parcels within the Site. Such limitations shall apply to all Change Orders related to Contaminated Materials Management, including Change Orders payable from the Specified Site Contaminated Materials Allowance.

13.9.3.4 Insurance Proceeds

If the cost of any Contaminated Materials Management is covered by the insurance described in Section 9, Design-Builder shall be entitled to reimbursement of its costs from proceeds of insurance and self-insurance, up to the limits of the applicable policy, less any deductibles which shall be Design-Builder's responsibility. To the extent that such proceeds are available, Design-Builder shall not be entitled to payment hereunder on any other basis for such Contaminated Materials Management.

13.9.3.5 Specified Site Contaminated Materials Allowance

The limitations and exclusions set forth in this Section 13.9.3 shall apply to all Change Orders related to Contaminated Materials, including Change Orders for Specified Site Contaminated Materials. Change Orders for Specified Site Contaminated Materials shall be payable from the Specified Site Contaminated Materials Allowance established under Technical Provisions Section 6.6 until it is exhausted at which point such Change Orders will be treated as all other Change Orders for Contaminated Materials Management to which the Design-Builder is entitled pursuant to Section 6.3 and this Section 13.9.3.

13.9.4 Change in Law; New Approvals

Upon Design-Builder's fulfillment of all applicable requirements of this Section 13, and subject to the restrictions and limitations contained therein, NHDOT shall be responsible for, and agrees to issue Change Orders (a) to compensate Design-Builder for additional costs (excluding delay and disruption damages) directly attributable to a Change in Law or New Approval required as the result of a Force Majeure Event, to the extent that the Change in Law or New Approval (i) requires a material modification in the design of the Project, (ii) results in imposition of additional mitigation requirements on the Project due to impacts on archaeological, paleontological, biological or cultural resources, or (iii) increases the sales tax rate or changes the taxing authority's definition of the taxable costs; and/or (b) to extend the Completion Deadlines as the result of any delay in the Critical Path caused by any Change in Law or New Approval described in clause (a) (i) or (ii) above.

13.10 Change Order Records

Design-Builder shall maintain its records in such a manner as to provide a clear distinction between the direct costs of Work for which it is entitled (or for which it believes it is entitled) to an increase in the Contract Price and the costs of other operations. Design-Builder shall contemporaneously collect, record in writing, segregate and preserve (a) separate daily occurrence logs, together with all other data necessary to determine the costs of all Work which is the subject of a Change Order or a requested Change Order, specifically including costs associated with design Work as well as Relocations, and (b) all data necessary to show the actual impact (if any) of the change on each Critical Path with respect to all Work which 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 the DRB, NHDOT and its authorized representatives as directed by NHDOT, on forms accepted by NHDOT. The cost of furnishing such reports is included in Design-Builder's predetermined overhead and profit markups and shall not be the subject of any additional claims for compensation.

13.10.1 Daily Work Reports and Data Collection

Design-Builder shall furnish NHDOT completed daily work reports within 48 hours for each day's Work, which is to be paid for on a time and material basis. The daily time and material 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.

13.10.2 The reports shall also state the total costs to date for the Time and Materials Change Order Work.

13.10.3 Supplier's Invoices

Valid copies of Supplier's invoices shall substantiate materials charges. Such invoices shall be submitted with the daily time and material Work reports, or if not available, they shall be submitted with subsequent daily time and material Work reports. Should said Supplier's invoices not be submitted within 60 Days after the date of delivery of the materials, NHDOT 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.

13.10.4 Execution of Reports

Design-Builder's Project Manager shall sign all Time and Materials Change Order reports.

13.10.5 Adjustment

NHDOT will compare its records with the completed daily time and material Work reports furnished by Design-Builder and make any necessary adjustments. When these daily time and material Work reports are agreed upon and signed by both Parties, said reports shall become the basis of payment for the Work performed, but shall not preclude subsequent adjustment based on a later audit. Design-Builder's cost records pertaining to Work paid for on a time and material basis shall be open, during all regular business hours, to

inspection or audit by representatives of NHDOT during the life of the Contract and for a period of not less than five years after the Final Acceptance Date, and Design-Builder shall retain such records for that period. Where payment for materials or labor is based on the cost thereof to any Person other than Design-Builder, Design-Builder shall make every reasonable effort to insure that the cost records of each such other Person will be open to inspection and audit by representatives of NHDOT on the same terms and conditions as the cost records of Design-Builder. Payment for such costs may be deleted if the records of such third parties are not made available to NHDOT's representatives. If an audit is to be commenced more than 60 Days after the Final Acceptance Date, Design-Builder will be given a reasonable notice of the time when such audit is to begin.

13.11 Matters Not Eligible for Change Orders and Waiver

Design-Builder acknowledges and agrees that no increase in the Contract Price or extension of a Completion Deadline is available except in circumstances expressly provided for in the Contract, that such price increase and time extension shall be available only as provided in this Section 13 and that Design-Builder shall bear full responsibility for the consequences of all other events and circumstances. Matters which are Design-Builder's exclusive responsibility include the following:

(a) Errors in the Design Documents and Construction Documents (including Errors therein traceable to Errors in the Project Schematics or Reference Materials, subject only to the right to a Change Order to the extent permitted by Section 13.8 or 13.9;

(b) Any design changes requested by NHDOT as part of the process of accepting the Design Documents for consistency with the requirements of the Contract Documents, the Governmental Approvals and/or applicable Governmental Rules;

(c) Defective or incorrect schedules of Work or changes in the planned sequence of performance of the Work (unless arising from causes which otherwise give rise to a right to a Change Order);

(d) Action or inaction of any DB-Related Entity (unless arising directly from causes which otherwise give rise to a right to a Change Order);

(e) Groundwater levels or subsurface moisture content;

(f) Untimely delivery of equipment or material, or unavailability or defectiveness or increases in costs of material, equipment or products specified by the Contract Documents, except to the extent resulting from a Force Majeure Event;

(g) Any costs covered by insurance proceeds received by (or on behalf of) Design-Builder;

(h) Correction of Nonconforming Work and review and acceptance thereof by NHDOT (including rejected design submittals);

(i) Failure by any DB-Related Entity to comply with the requirements of the Contract Documents, Governmental Approval or Governmental Rules (including any failure to provide the notifications to property owners, Utility Owners and others required by the Contract Documents);

(j) Delays not on a Critical Path;

(k) Obtaining all Governmental Approvals except as specified in Section 2.2.4, and compliance with the terms and conditions of all Governmental Approvals;

(l) Any suspensions, terminations, interruptions, denials, non-renewals of, or delays in issuance of a Governmental Approval that is required to be obtained by Design-Builder, or any failure to obtain such Governmental Approval;

(m) Any situations (other than Force Majeure 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 or arise out of the nature of the Work; and

(n) All other events beyond the control of NHDOT for which NHDOT has not expressly agreed to assume liability hereunder.

Design-Builder hereby assumes responsibility for all such matters, and acknowledges and agrees that assumption by Design-Builder of responsibility for such risks, and the consequences and costs and delays resulting therefrom, is reasonable under the circumstances of the Contract and that contingencies included in the Proposal Price in Design-Builder's sole judgment, constitute sufficient consideration for its acceptance and assumption of said risks and responsibilities.

DESIGN-BUILDER HEREBY EXPRESSLY WAIVES ALL RIGHTS TO ASSERT ANY AND ALL CLAIMS BASED ON ANY CHANGE IN THE WORK, DELAY, SUSPENSION OR ACCELERATION (INCLUDING ANY CONSTRUCTIVE CHANGE IN THE WORK, DELAY, SUSPENSION OR ACCELERATION) FOR WHICH DESIGN-BUILDER 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 OR DAMAGES WHATSOEVER IN CONNECTION WITH THE WORK EXCEPT TO THE EXTENT THAT THE CONTRACT DOCUMENTS EXPRESSLY SPECIFY THAT DESIGN-BUILDER IS ENTITLED TO A CHANGE ORDER OR OTHER COMPENSATION, DAMAGES OR TIME EXTENSION.

13.12 Disputes

If NHDOT and Design-Builder agree that a request to increase the Contract Price and/or extend any Completion Deadline by Design-Builder has merit, but are unable to agree as to the amount of such Contract Price increase and/or time extension, NHDOT agrees to mark up the Request for Change Order or Cost and Schedule Proposal, as applicable, provided by Design-Builder to reduce the amount of the price increase or time extension as deemed appropriate by NHDOT. In such event, NHDOT will execute and deliver the marked-up Change Order to Design-Builder within a reasonable period after receipt of a request by Design-Builder to do so, and thereafter will make payment and/or grant a time extension based on such marked-up Change Order. The failure of NHDOT and Design-Builder to agree to any Change Order under this Section 13 (including agreement as to the amount of compensation allowed under a Time and Materials Change Order and the disputed amount of the increase in the Contract Price and/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 19. Except as otherwise specified in the Change Order, execution of a Change Order by both Parties shall be deemed accord and satisfaction of all claims by Design-Builder of any nature arising from or relating to the Work covered by the Change Order. Design-Builder's Claim and any award by the dispute resolver shall be limited to the incremental costs incurred by Design-Builder with respect to the disputed matter (crediting NHDOT for any corresponding reduction in Design-Builder's other costs) and shall in no event exceed the amounts allowed by Section 13.7 with respect thereto.

13.13 Changes Not Requiring Change Order

Subject to Section 13.8, deviations from design standards specified in the Contract Documents which have a neutral net cost effect shall not require a Change Order provided such deviations are approved by NHDOT. Any other change in the requirements of the Contract Documents shall require either a Directive Letter or a Change Order.

13.14 No Release or Waiver

13.14.1 No extension of time granted hereunder shall release Design-Builder's Surety from its obligations. Work shall continue and be carried on in accordance with all the provisions of the Contract Documents and the Contract Documents shall be and shall remain in full force and effect until Final Acceptance unless formally suspended or terminated by NHDOT in accordance with the terms hereof. Permitting Design-Builder to finish the Work or any part thereof after a Completion Deadline, or the making of payments to Design-Builder after such date, shall not constitute a waiver on the part of NHDOT of any rights under the Contract Documents.

13.14.2 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 the Contract after a Completion Deadline, shall be deemed to be a waiver by NHDOT of its right to terminate the 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.

13.14.3 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 NHDOT has been unjustly enriched shall be the basis for any Claim, request for additional compensation or extension of a Completion Deadline. Design- Builder shall only take authorized direction from NHDOT by NHDOT representative appointed by the NHDOT Authorized Representative. Further, Design-Builder shall undertake, at its risk, work included in any request, order or other authorization issued by a Person not identified by NHDOT Authorized Representative. Design-Builder shall be deemed to have performed such work as a volunteer and at its sole risk and cost. In addition, NHDOT may require Design-Builder to remove or otherwise undo any such work, at Design-Builder's sole risk and cost.

SECTION 14. SUSPENSION

14.1 Suspensions for Convenience

NHDOT may, at any time and for any reason, by written notice, order Design-Builder to suspend all or any part of the Work required under the Contract Documents for the period of time that NHDOT deems appropriate for the convenience of NHDOT. Design- Builder shall comply with any such written suspension order. Design-Builder shall recommence the Work upon receipt of written notice from NHDOT directing Design- Builder to resume Work. Any such suspension for convenience shall be considered an NHDOT-Directed Change; provided that NHDOT shall have the right to direct suspensions for convenience not exceeding 48 hours each up to a total of 144 hours, which shall not be considered an NHDOT-Directed Change; and provided further that all suspensions shall be considered an NHDOT-Caused Delay, if a Critical Path is delayed. Adjustments of the Contract Price and the Completion Deadlines shall be available for any such NHDOT-Directed Change, subject to Design-Builder's compliance with the terms and conditions set forth in Section 13.

14.2 Suspensions for Cause

NHDOT has the authority to suspend the Work by written order, wholly or in part, for Design-Builder's failure to:

(a) Correct conditions unsafe for the Project personnel or the general public; or

(b) Comply with any Governmental Approval, Governmental Rule or otherwise carry out the requirements of the Contract Documents; or

(c) Carry out orders of NHDOT or Directive Letters; or

(d) Comply with requirements for developing and implementing the Quality Management Plan and Construction QC Plans;

(e) Certain failures to remove and replace personnel as set forth in Section 7.4.6;

(f) Failure to provide proof of required insurance coverage as set forth in Section 9.5; or

(g) Comply with environmental requirements.

Design-Builder shall comply with any such written suspension order. Design-Builder shall recommence the Work upon receipt of written notice from NHDOT directing Design-Builder to resume the Work. Design-Builder shall have rights to an adjustment in the Completion Deadline(s) in connection with any suspension of Work properly founded on any of the grounds set forth in this Section 14.2. If NHDOT orders suspension of Work on one of the foregoing grounds but it is finally determined under the dispute resolution

procedures of this Contract that such grounds did not exist, it shall be treated as a suspension for NHDOT's convenience under Section 14.1.

14.3 Responsibilities of Design-Builder During Suspension Periods

During periods that Work is suspended, Design-Builder 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. Additionally, Design-Builder shall continue other Work that has been or can be performed on-Site or off-Site during the period that Work is suspended.

SECTION 15. TERMINATION FOR CONVENIENCE

15.1 Termination

15.1.1 NHDOT may, at any time, terminate the Contract and the performance of the Work by Design-Builder in whole or in part, if NHDOT determines, in its sole discretion, that a termination is in NHDOT's best interest. NHDOT shall terminate by delivering to Design-Builder 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 the Contract shall not relieve any Surety of its obligation for any claims arising out of the Work performed.

15.1.2 Within three Days after receipt of a Notice of Termination for Convenience or Notice of Partial Termination for Convenience, Design-Builder shall meet and confer with NHDOT for the purpose of developing an interim transition plan for the orderly transition of the terminated Work, demobilization and transfer of the Project to NHDOT. The Parties shall use diligent efforts to complete preparation of the interim transition plan within 15 Days after the date Design- Builder 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 NHDOT in its good faith discretion and shall include and be consistent with the other provisions and procedures set forth in Section 15.2, all of which provisions and procedures Design-Builder shall immediately follow, regardless of any delay in preparation or acceptance of the transition plan.

15.1.3 Design-Builder acknowledges and agrees that NHDOT has no obligation to issue a Notice to Proceed hereunder, and further agrees that unless and until a Notice to Proceed is issued, NHDOT shall have no liability to Design-Builder hereunder, except as provided under Section 15.10.

15.2 Design-Builder'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 NHDOT, Design-Builder shall immediately proceed with the following obligations, regardless of any delay in determining or adjusting any amounts due under this Section 15:

15.2.1 Stop Work as specified in the notice.

15.2.2 Notify all affected Subcontractors that the 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 NHDOT.

15.2.3 Place no further Subcontracts (including orders for materials, services or facilities), except as necessary to complete the continued portion of the Work, if any, or for mitigation of damages.

15.2.4 Unless instructed otherwise by NHDOT, terminate all Subcontracts to the extent they relate to the Work terminated.

15.2.5 To the extent directed by NHDOT, execute and deliver to NHDOT written assignments, in form and substance acceptable to NHDOT, acting reasonably, of all of Design-Builder's right, title, and interest in and to: (a) Subcontracts that relate to the terminated Work, provided NHDOT assumes in writing all of Design-Builder's obligations thereunder that arise after the effective date of the termination and (b) all assignable warranties, claims and causes of action held by Design-Builder 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.

15.2.6 Subject to the prior written approval of NHDOT, settle all outstanding liabilities and all termination settlement proposals arising from termination of Subcontracts.

15.2.7 No later than 30 Days from the effective date of termination, unless extended in writing by NHDOT upon written request of Design-Builder within this 30-day period, provide NHDOT with an inventory list of all materials previously produced, purchased or ordered from Suppliers for use in the Work and not yet used in the Work, including its storage location, as well as any documentation or other property required to be delivered hereunder which is either in the process of development or previously completed but not yet delivered to NHDOT, and such other information as NHDOT may request; and transfer title and deliver to NHDOT through bills of sale or other documents of title, as directed by NHDOT, (a) the Work in process, completed Work, supplies and other material produced or acquired for the Work terminated, and (b) the Design Documents, Construction Documents and all other completed or partially completed drawings (including plans, elevations, sections, details and diagrams), specifications, records, samples, information and other property that would have been required to be furnished to NHDOT if the Work had been completed.

15.2.8 Complete performance in accordance with the Contract Documents of all Work not terminated.

15.2.9 Take all action that may be necessary, or that NHDOT 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 Design-Builder and in which NHDOT has or may acquire an interest.

15.2.10 As authorized by NHDOT in writing, use its best efforts to sell at reasonable prices any property of the types referred to in Section 15.2.7; provided, however, that Design-Builder (a) is not required to extend credit to any purchaser, and (b) may acquire the property under the conditions prescribed and at prices accepted by NHDOT. The proceeds of any transfer or disposition will be applied to reduce any payments to be made by NHDOT under the Contract Documents or paid in any other manner directed by NHDOT.

15.2.11 If requested by NHDOT, withdraw from the portions of the Site designated by NHDOT and remove such materials, equipment, tools and instruments used by, and any debris or waste materials generated by, Design-Builder and any Subcontractor in the performance of the Work as NHDOT may direct.

15.2.12 Take other actions directed by NHDOT.

15.3 Acceptance

15.3.1 Acceptance of the Contract as hereinafter specified shall not relieve Design-Builder of responsibility for damage to materials. Design-Builder shall continue to be responsible for damage to materials after issuance of the Notice of Termination for Convenience, except as follows:

(a) Design-Builder's responsibility for damage to materials for which partial payment has been made as provided herein shall terminate when NHDOT's Authorized Representative certifies that those materials have been stored in the manner and at the locations directed by NHDOT.

(b) Design-Builder's responsibility for damage to materials purchased by NHDOT subsequent to the issuance of the notice that the Contract is to be terminated shall terminate when title and delivery of those materials has been taken by NHDOT.

15.3.2 When NHDOT determines that the Design-Builder has completed the Work directed to be completed prior to termination and such other work as may have been ordered to secure the Project for termination, NHDOT's Project Manager will recommend that NHDOT formally accept such Work, and immediately upon and after the acceptance by NHDOT, Design-Builder will not be required to perform any further work thereon and shall be relieved of the contractual responsibilities for injury to persons or property which occurs after the formal

acceptance of such Work by NHDOT.

15.4 Settlement Proposal

After receipt of a Notice of Termination for Convenience or Notice of Partial Termination for Convenience, Design-Builder shall submit a final termination settlement proposal to NHDOT in the form and with the certification prescribed by NHDOT. Design-Builder shall submit the proposal no later than 120 Days from the effective date of termination unless Design-Builder has requested a time extension in writing within such 120-day period and NHDOT has agreed in writing to allow such an extension. Design-Builder's termination settlement proposal shall then be reviewed by NHDOT and acted upon, returned with comments, or rejected. If Design-Builder fails to submit the proposal within the time allowed, NHDOT may determine, on the basis of information available, the amount, if any, due Design-Builder because of the termination and shall pay Design- Builder the amount so determined.

15.5 Amount of Negotiated Termination Settlement

Design-Builder and NHDOT may agree, as provided in Section 15.4, upon the whole or any part of the amount or amounts to be paid to Design-Builder by reason of the total or partial termination of Work for convenience pursuant to this Section 15. Such negotiated settlement may include a reasonable allowance for profit solely on Work which has been completed as of the termination date and subsequently inspected and accepted by NHDOT. Such agreed amount or amounts, exclusive of settlement costs, shall not exceed the total Contract Price as reduced by the amount of payments otherwise made and the Contract Price of Work not terminated. Upon determination of the settlement amount the Contract will be amended accordingly, and Design-Builder will be paid the agreed amount as described in this Section 15.5. Nothing in Section 15.6, prescribing the amount to be paid to Design-Builder in the event that Design- Builder and NHDOT fail to agree upon the whole amount to be paid to Design-Builder by reason of the termination of Work pursuant to this Section 15, shall be deemed to limit, restrict or otherwise determine or affect the amount or amounts which may be agreed upon to be paid to Design-Builder pursuant to this Section 15.5. NHDOT'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 Design-Builder from its obligations with respect thereto, including Warranties, or affect Design-Builder's obligations under the Performance Bond, Payment Bond, and/or Warranty Bond as to such completed or non-terminated Work.

15.6 No Agreement as to Amount of Termination Settlement

If Design-Builder and NHDOT fail to agree upon the whole amount to be paid Design-Builder by reason of the termination of Work for convenience pursuant to this Section 15, the amount payable (exclusive of interest charges) shall be determined by NHDOT in accordance with the following, but without duplication of any items or of any amounts agreed upon in accordance with Sections 15.4 and 15.5:

15.6.1 NHDOT will pay Design-Builder the sum of the following amounts for Work performed prior to the effective date of the Notice of Termination for Convenience or Notice of Partial Termination for Convenience:

(a) Design-Builder's actual reasonable out-of-pocket cost, without profit, and including equipment costs only to the extent permitted by Section 13.7.3, for all Work performed, including mobilization, demobilization and work done to secure the Project for termination, including reasonable overhead and accounting for any refunds payable with respect to insurance premiums, deposits or similar items, as established to NHDOT's satisfaction. In determining the reasonable cost, deductions will be made for the cost of materials to be retained by Design-Builder, amounts realized by the sale of materials, and for other appropriate credits against the cost of the Work. Deductions will also be made, when the Contract is terminated as the result of a Force Majeure Event, for the cost of materials damaged by the "occurrence." When, in the opinion of NHDOT's Project Manager, the cost of a contract item of Work is excessively high due to costs incurred to remedy or replace defective or rejected Work, the reasonable cost to be allowed will be the estimated reasonable cost of performing that Work in compliance with the requirements of the Contract Documents and the excessive actual cost shall be disallowed.

(b) The cost of settling and paying claims arising out of the termination of Work under Subcontracts as provided in Section 15.2.6, 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 the Contract, which amounts shall be included in the cost on account of which payment is made under clause (a) above;

(c) The reasonable out-of-pocket cost (including reasonable overhead) of the preservation and protection of property incurred pursuant to Section 15.2.9 and any other reasonable out-of-pocket cost (including overhead) incidental to termination of Work under the Contract, including the reasonable cost to Design-Builder of handling material returned to the vendor, delivered to NHDOT or otherwise disposed of as directed by NHDOT, and including a reasonable allowance for Design-Builder's administrative costs in

determining the amount payable due to termination of the Contract.

15.6.2 Design-Builder acknowledges and agrees that it shall not be entitled to any compensation in excess of the value of the Work performed (determined as provided in Section 15.6.1) 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 the Contract. The total amount to be paid to Design-Builder, exclusive of costs described in Sections 15.6.1(b) and (c), may not exceed the total Contract Price less the amount of payments previously made. Furthermore, in the event that any refund is payable with respect to insurance or bond premiums, deposits or other items which were previously passed through to NHDOT by Design-Builder, such refund shall be paid directly to NHDOT or otherwise credited to NHDOT. Except for normal spoilage, and except to the extent that NHDOT will have otherwise expressly assumed the risk of loss, there will be excluded from the amounts payable to Design-Builder under Section 15.6.1, the fair value, as determined by NHDOT, of equipment, machinery, materials and property which is destroyed, lost, stolen, or damaged so as to become undeliverable to NHDOT, or sold pursuant to Section 15.2.10. Information contained in the Escrowed Proposal Documents may be a factor in determining the value of the Work terminated. Upon determination of the amount of the termination payment, the Contract shall be amended to reflect the agreed termination payment, Design-Builder shall be paid the agreed amount, and the Contract Price shall be reduced to reflect the reduced scope of Work.

15.6.3 If a termination hereunder is partial, Design-Builder may file a proposal with NHDOT for an equitable adjustment of the price for the continued portion of the Contract. Any proposal by the Design-Builder for an equitable adjustment under this clause shall be requested within 90 Days from the effective date of termination unless extended in writing by NHDOT. The amount of any such adjustment as may be agreed upon shall be set forth in an amendment to the Contract.

15.7 Reduction in Amount of Claim

The amount otherwise due Design-Builder under this Section 15 shall be reduced by (a) the amount of any claim which NHDOT may have against any DB-Related Entity in connection with the Contract, (b) the agreed price for, or the proceeds of sale, of property, materials, supplies or other things acquired by Design-Builder or sold, pursuant to the provisions of this Section 15, and not otherwise recovered by or credited to NHDOT, (c) all unliquidated advance or other payments made to or on behalf of Design-Builder applicable to the terminated portion of the Work or Contract, (d) amounts that NHDOT deems advisable, in its sole discretion, to retain to cover any existing or threatened claims, Liens and stop notices relating to the Project, (e) the cost of repairing any Nonconforming Work and (f) any amounts due or payable by Design-Builder to NHDOT.

15.8 Payment

NHDOT may from time to time, under such terms and conditions as it may prescribe and in its sole discretion, make partial payments on account against costs incurred by Design-Builder in connection with the terminated portion of the Contract, whenever in the opinion of NHDOT the aggregate of such payments shall be within the amount to which Design-Builder 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 15, such excess shall be payable by Design-Builder to NHDOT upon demand together with interest at the rate of the lesser of (a) 10% per annum or (b) the maximum rate allowable under applicable Governmental Rules.

15.9 Subcontracts

15.9.1 Provisions shall be included in each Subcontract (at all tiers) regarding terminations for convenience, allowing such terminations 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 15.

15.9.2 Each Major Subcontract shall provide that, in the event of a termination for convenience by NHDOT, the Subcontractor will not be entitled to any anticipatory or unearned profit on Work terminated or partly terminated, or to any payment which constitutes consequential damages on account of the termination or partial termination.

15.10 Termination Based on Delay in NTP2

If NTP2 has not been issued on or before 18 months after the Proposal Date, due to no fault, negligence, act, failure to act or breach of contract, Governmental Approval or Governmental Rule by any DB-Related Entity, Design-Builder shall have the right to terminate this Contract at any time, which right shall be exercised by delivery of notice of termination to NHDOT. In such event no compensation shall be allowed hereunder in connection with the termination.

15.11 No Consequential Damages

Under no circumstances shall Design-Builder be entitled to anticipatory or unearned profits or consequential or other damages as a result of a termination or partial termination under this Section 15. The payment to Design-Builder determined in accordance with this Section 15 constitutes Design-Builder's exclusive remedy for a termination hereunder.

15.12 No Waiver; Release

15.12.1 Anything contained in the Contract Documents to the contrary notwithstanding, a termination under this Section 15 shall not waive any right or claim to damages which NHDOT may have and NHDOT may pursue any cause of action which it may have by law, in equity or under the Contract Documents.

15.12.2 NHDOT's payment to Design-Builder of the amounts required under this Section 15 shall constitute full and final satisfaction of, and upon payment NHDOT 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 Design-Builder may have against NHDOT arising out of or relating to the terminated Work. Upon such payment, Design-Builder shall execute and deliver to NHDOT all such releases and discharges as NHDOT 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.

15.13 Dispute Resolution

The failure of the Parties to agree on amounts due under this Section 15 shall be a Dispute to be resolved in accordance with Section 19.

15.14 Allowability of Costs

All costs claimed by Design-Builder under this Section 15 shall be allowable, allocable and reasonable in accordance with the cost principles and procedures of 48 CFR Part 31.

SECTION 16. DEFAULT

16.1 Default of Design-Builder

16.1.1 Design-Builder shall be in default under the Contract upon the occurrence of any one or more of the following events or conditions (each a "Design-Builder Default"):

(a) Design-Builder fails to begin the Work under the Contract Documents following issuance of a Notice to Proceed, or fails to resume performance of Work which has been suspended or stopped, within a reasonable time after receipt of notice from NHDOT to do so or (if applicable) after cessation of the event preventing performance; or

(b) Design-Builder fails to perform the Work in accordance with the Contract Documents, including conforming to applicable standards set forth therein in design and construction of the Project, or refuses to remove and replace rejected materials or Nonconforming Work or unacceptable Work; or

(c) Design-Builder suspends, ceases, stops or abandons the Work; or

(d) Design-Builder fails to for a period of more than one month prosecute the Work (exclusive of Work stoppage (i) due to termination by NHDOT, or (ii) due to and during the continuance of a Force Majeure Event or suspension by NHDOT) as outlined in the Project Schedule; or

(e) Design-Builder fails to obtain, provide and maintain any insurance, bonds, guarantees, or other performance security as and when required hereunder for the benefit of relevant parties, or fails to comply with any requirement of this Contract pertaining to the amount, terms or coverage of the same; or

(f) Design-Builder makes or attempts to make or suffers a voluntary or involuntary assignment or transfer of the Contract Documents or any right or interest herein, except as expressly permitted under Section 24.4; or

(g) Design-Builder shall have failed, absent a valid dispute, to make payment when due for labor, equipment or materials in accordance with its agreements with Subcontractors and applicable law, or shall have failed to comply with any Governmental Rule or failed reasonably to comply with the instructions of NHDOT consistent with the Contract Documents; or

(h) Failure of Design-Builder to discharge or obtain a stay of any final judgment(s) or order for the payment of money against it in excess of

$100,000 in the aggregate (provided that for purposes hereof posting of a bond in the amount of 125% of such judgment or order shall be deemed an effective stay); or

(i) Issuance of any final judgment holding Design-Builder 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

(j) Any representation or warranty made by Design-Builder in the Contract Documents (including the Responsible Bidder Questionnaire included in the Proposal and the questionnaire included in the Statement of Qualifications) or any certificate, schedule, instrument or other document delivered by Design-Builder pursuant to the Contract Documents shall have been false or materially misleading when made; or

(k) Design-Builder commences a voluntary case seeking liquidation, reorganization or other relief with respect to itself or its debts under any bankruptcy, insolvency or other similar law now or hereafter in effect; seeks the appointment of a trustee, receiver, liquidator, custodian or other similar official of it or any substantial part of its assets; becomes insolvent, or generally does not pay its debts as they become due; admits in writing its inability to pay its debts; makes an assignment for the benefit of creditors; or takes any action to authorize any of the foregoing; or any of the foregoing acts or events shall occur with respect to any Surety; or

16.1.2 Except with respect to the events described in Sections 16.1.1(c), (e), (f) and (i) through (k), Design-Builder and Surety shall be entitled to 15 Days written notice and opportunity to cure any breach before an Event of Default is declared, provided that no such notice and opportunity to cure is required for any breach which by its nature cannot be cured. Failure to provide notice to Surety shall not preclude NHDOT from exercising its remedies against Design- Builder. If a breach (other than the events described in Sections 16.1.1(c), (e), (f) and (i) through (k)), is capable of cure but, by its nature, cannot be cured within 15 Days, as determined by NHDOT, such additional period of time shall be allowed as may be reasonably necessary to cure the breach so long as Design-Builder commences such cure within such 15-day period and thereafter diligently prosecutes such cure to completion; provided, however, that in no event shall such cure period exceed 60 Days in total. In the event of a Design- Builder Default under Section 16.1.1(e), Design-Builder shall be entitled to 7 Days written notice and opportunity to cure. Design-Builder hereby acknowledges and agrees that the events described in Sections 16.1.1(c), (f) and (i) through (k) are not curable and no notice or cure period shall apply. Notwithstanding the foregoing, NHDOT may, without notice and without awaiting lapse of the period to cure any default, in the event of existence of a condition on or affecting the Project which NHDOT believes poses an

immediate and imminent danger to public health or safety, rectify the dangerous condition at Design-Builder's cost, and so long as NHDOT undertakes such action in good faith, even if under a mistaken belief in the occurrence of such default, such action shall not expose NHDOT to any liability to Design-Builder and shall not entitle Design-Builder to any other remedy, it being acknowledged that NHDOT has a paramount public interest in providing and maintaining safe public use of and access to the Project. NHDOT's good faith determination of the existence of such danger shall be deemed conclusive in the absence of clear and convincing evidence to the contrary.

16.2 Remedies

16.2.1 If any breach described in Section 16.1.1 is not subject to cure or is not cured within the period (if any) specified in Section 16.1.2, NHDOT may declare that an "Event of Default" has occurred and notify Design-Builder to discontinue the Work. The declaration of an Event of Default shall be in writing and given to Design-Builder. In addition to all other rights and remedies provided by law or in equity and such rights and remedies as are otherwise available under the Contract Documents, the Performance Bond, and/or the Warranty Bond, if an Event of Default shall occur, then NHDOT shall have the following rights without further notice and without waiving or releasing Design-Builder from any obligations and Design-Builder shall have the following obligations (as applicable):

(a) NHDOT may terminate the Contract or a portion thereof, including Design-Builder's rights of entry upon, possession, control and operation of the Project, in which case, the provisions of Sections 15.2 and 15.3 shall apply;

(b) If and as directed by NHDOT, Design-Builder shall withdraw from the Site and shall remove materials, equipment, tools and instruments used by, and any debris or waste materials generated by, any DB-Related Entity in the performance of the Work;

(c) Design-Builder shall deliver to NHDOT possession of any or all Design Documents, Construction Documents and all other completed or partially completed drawings (including plans, elevations, sections, details and diagrams), specifications, records, information, schedules, samples, shop drawings, electronic files and other documents and facilities related to the Project that NHDOT deems necessary for completion of the Work;

(d) Design-Builder shall confirm the assignment to NHDOT the Subcontracts requested by NHDOT and Design-Builder shall terminate, all other Subcontracts;

(e) NHDOT may deduct from any amounts payable by NHDOT to Design- Builder such amounts payable by Design-Builder to NHDOT, including

reimbursements owing, Liquidated Damages, for which Design-Builder is liable pursuant to Section 17, 125% of the amounts NHDOT 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 NHDOT has determined are or may be payable to NHDOT under the Contract Documents;

(f) NHDOT shall have the right, but not the obligation, to pay such amounts and/or perform such act as may then be required from Design-Builder under the Contract Documents or Subcontracts;

(g) NHDOT may appropriate any or all materials on the Site as may be suitable and acceptable and may direct the Surety to complete the Contract or may enter into an agreement for the completion of the 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 Contract, including completion of the Work by NHDOT; and/or

(h) If NHDOT exercises any right to perform any obligations of Design-Builder, in the exercise of such right NHDOT 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 NHDOT deems necessary and reasonable to employ and pay such architects, engineers, consultants and contractors and obtain materials and equipment as may be required for the purpose of completing such work; (iii) execute all applications, certificates and other documents as may be required for completing the work; (iv) modify or terminate any contractual arrangements; (v) take any and all other actions which it may in its sole discretion consider necessary to complete the Work; and (vi) prosecute and defend any action or proceeding incident to the Work.

16.2.2 If an Event of Default shall have occurred, Design-Builder, any Surety shall be jointly and severally liable to NHDOT (in addition to any other Losses under the Contract Documents except for those Losses intended to be covered by Liquidated Damages payable hereunder) for all Losses reasonably incurred by NHDOT or any party acting on NHDOT's behalf in completing the Work or having the Work completed by another Person (including any re-procurement costs, throw away costs for unused portions of the completed Work, and increased financing costs). Upon occurrence of an Event of Default and so long as it continues, NHDOT shall be entitled to withhold all or any portion of further payments to Design-Builder until the Final Acceptance Date or the date on which NHDOT otherwise accepts the Project as complete or determines that it will not proceed with completion, at which time NHDOT will determine whether Design-Builder is entitled to further payments. Following the Final Acceptance Date or the date on which NHDOT 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 NHDOT shall notify Design- Builder and each Surety in writing of the amount, if any, that Design-Builder, each Surety shall pay NHDOT or NHDOT shall pay Design-Builder or its Surety with respect thereto. All costs and charges incurred by NHDOT, including attorneys', accountants' and expert witness fees and costs, together with the cost of completing the Work under the Contract Documents, will be deducted from any moneys due or which may become due Design-Builder or its Surety. If such expense exceeds the sum which would have been payable under the Contract, then Design-Builder and its Surety(ies) shall be liable and shall pay to NHDOT the amount of such excess. If any Surety fails to pay such amount immediately upon NHDOT's demand, then NHDOT shall be entitled to collect interest from the Surety on the amounts Design-Builder is required to pay in excess of the remaining balance of the Contract Price. The interest rate which the Surety shall pay shall be the lesser of (a) 10% per annum or (b) the maximum rate allowable under applicable Governmental Rules. The interest rate shall accrue on all amounts NHDOT has had to pay in excess of the remaining balance of the Contract Price from the date of NHDOT payment.

16.2.3 Design-Builder acknowledges that if a default under Section 16.1.1 occurs, such event could impair or frustrate Design-Builder's performance of the Work. Accordingly, Design-Builder agrees that upon the occurrence of any such event, NHDOT shall be entitled to request of Design-Builder, or its successor in interest, adequate assurance of future performance in accordance with the terms and conditions hereof. Failure to comply with such request within ten Days of delivery of the request shall entitle NHDOT to terminate the Contract and to the accompanying rights set forth above. Pending receipt of adequate assurance of performance and actual performance in accordance therewith, NHDOT shall be entitled to proceed with the Work with its own forces or with other contractors on a time and material or other appropriate basis, the cost of which will be credited against and deducted from NHDOT's payment obligations hereunder. The foregoing shall be in addition to all other rights and remedies provided by law or equity and such rights and remedies as are otherwise available under this Contract, and the Performance Bond.

16.2.4 In lieu of the provisions of this Section 16.2 for terminating the Contract and completing the Work, NHDOT may pay Design-Builder for the Work already done according to the provisions of the Contract Documents and may treat the Work remaining undone as if they had never been included or contemplated by this Contract. No claim under this provision will be allowed for prospective profits on, or any other compensation relating to, Work uncompleted by Design- Builder.

16.2.5 In the event that the Contract is terminated for grounds which are later determined not to justify a termination for default, such termination shall be deemed to constitute a termination for convenience pursuant to Section 15.

16.2.6 The exercise or beginning of the exercise by NHDOT of any one or more rights or remedies under this Section 16.2 shall not preclude the simultaneous or later exercise by NHDOT of any or all other such rights or remedies, each of which shall be cumulative.

16.2.7 In the event NHDOT suffers Losses as a result of Design-Builder's breach or failure to perform an obligation under the Contract Documents, then, subject to the limitation on liability contained in Section 17, NHDOT shall be entitled to recovery of such Losses from Design-Builder regardless of whether the breach or failure that gives rise to the damages ripens into an Event of Default.

16.2.8 Design-Builder, each Surety shall not be relieved of liability for continuing Liquidated Damages on account of a default by Design-Builder hereunder or by NHDOT's declaration of an Event of Default, or by actions taken by NHDOT under this Section 16.2.

16.2.9 NHDOT's remedies associated with any false statement contained in the Responsible Bidder Questionnaire included in the Proposal or the questionnaire included in the Statement of Qualifications shall include the right to rescind the Contract.

16.3 Right to Stop Work for Failure by NHDOT to Make Undisputed Payment

Design-Builder shall have the right to stop Work if NHDOT fails to make an undisputed payment due hereunder within 15 Business Days after receipt of notice of nonpayment. Any such Work stoppage shall be considered a suspension under Section 14. Design-Builder shall not have the right to terminate the Contract for default as the result of any failure by NHDOT to make an undisputed payment due hereunder. However, if such nonpayment continues for more than 180 Days, upon written notice from Design-Builder to NHDOT, Design-Builder shall have the right to declare a termination for convenience under Section 15 by delivering to NHDOT a written notice of termination specifying its effective date. Upon such termination, the Parties' rights and obligations shall be as set forth in Section 15.

16.4 Event of Default Due Solely to Design-Builder's Failure to Achieve Completion Deadlines

16.4.1 If an Event of Default consists solely of Design-Builder's failure to achieve Project Completion or Final Acceptance by the applicable Completion Deadline, NHDOT'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 Project Completion or

Final Acceptance beyond 180-Days of the applicable Completion Deadline; and (b) Design-Builder continues to diligently perform the Work despite such Event of Default. Nothing in this Section 16.4 shall prejudice any other rights or remedies that NHDOT may have due to any other Event of Default during such 180-day period.

16.4.2 If Project Completion, or Final Acceptance has not occurred within 180-Days of the applicable Completion Deadline, NHDOT shall have the right to: (a) terminate this Contract; (b) continue to assess Liquidated Damages subject only to the limitations set forth in Section 17.1; and/or (c) exercise any other right or remedy under the Contract Documents, at law or in equity.

SECTION 17. LIQUIDATED DAMAGES; INTERIM MILESTONES; AND LIMITATION OF LIABILITY

Design-Builder understands and agrees that if Design-Builder fails to complete the Work in accordance with the Contract Documents, NHDOT will suffer damages which cannot be quantified as of the date of execution hereof. Therefore, Design-Builder and NHDOT have agreed to stipulate the amount payable by Design-Builder in the event of its failure to meet a Completion Deadline. Design-Builder acknowledges and agrees that the Liquidated Damages are intended to compensate NHDOT solely for Design-Builder's failure to meet the deadlines for completion of the Project which are set forth in Section 4.2, and shall not excuse Design-Builder from liability from any other breach of Contract requirements, including any failure of the Work to conform to applicable requirements. The fact that NHDOT has agreed to accept Liquidated Damages as compensation for its damages associated with any delay in meeting a Completion Deadline shall not preclude NHDOT from exercising its other rights and remedies respecting the delay as set forth in Section 16.2 other than the right to collect other damages due to the delay, except that NHDOT agrees not to exercise such other rights and remedies respecting the delay so long as (a) the Project Schedule demonstrates that Design-Builder is capable of meeting such Completion Deadline within 180 Days after the Completion Deadline and (b) Design-Builder diligently performs the Work in accordance with said schedule.

17.1 Amount of Liquidated Damages

17.1.1 Design-Builder shall be liable for and pay to NHDOT liquidated damages, including stacking of all liquidated damages, with respect to any failure to achieve Interim Milestone #1 Completion, Interim Milestone #2 Completion, Intermediate Completion, Project Completion or Final Acceptance by the applicable Completion Deadline, as the same may be extended pursuant to this Contract. Such liability shall apply even though: (a) a cure period remains available to Design-Builder or (b) cure occurs. The amounts of such liquidated damages are as follows ("Liquidated Damages"):

(a) $10,000 for each day after the Project Completion Deadline through the date of Project Completion;

(b) $2,500 for each day after the Final Acceptance Deadline and through the date of Final Acceptance.

(c) $1,000 for each day after the Interim Milestone #1 Completion Deadline through the date of Interim Milestones #1 Completion.

(d) $1,000 for each day after the Interim Milestone #2 Completion Deadline through the date of Interim Milestones #2 Completion.

(e) $10,000 for each day after Intermediate Completion Deadline through the date of Intermediate Completion.

17.1.2 Liquidated Damages shall commence on the applicable Completion Deadline, as the same may be extended pursuant to this Contract, and shall continue to accrue until the date of Interim Milestone #1 Completion, Interim Milestone #2 Completion, Intermediate Completion, Project Completion or Final Acceptance, as applicable, or until termination of this Contract.

17.1.3 In no event shall more than 730 total Days of Liquidated Damages be assessed under this Section 17.1.

17.2 Reasonableness of Liquidated Damages

Design-Builder acknowledges and agrees that the foregoing damages have been set based on an evaluation by NHDOT of damages to NHDOT and the public caused by late completion. Such damages include loss of use and benefit of the Project by the general public, loss of overall connectivity within the NHDOT transportation facilities, injury to the credibility and reputation of NHDOT's transportation improvement program with policy makers and with the general public who depend on and expect availability of service by the Interim Milestone #1 Completion, Interim Milestone #2 Completion, Intermediate Completion, or Project Completion Deadline, and additional costs of administering this Contract (including engineering, legal, accounting, overhead and other administrative costs). Design-Builder and NHDOT agree that the amount of such damages are impossible to ascertain as of the date of execution hereof and the Parties have agreed to such Liquidated Damages in order to fix Design-Builder's costs and to avoid later disputes over which items are properly chargeable to Design-Builder. It is understood and agreed by Design-Builder that any Liquidated Damages payable in accordance with Section 17.1 are in the nature of liquidated damages and not a penalty and that such sums are reasonable in light of the anticipated or actual harm caused by the breach, the difficulties of the proof of loss, and the inconvenience or nonfeasibility of otherwise obtaining an adequate remedy. Design-Builder further acknowledges and agrees that Liquidated Damages may be owed even though no Event of Default has occurred. Liquidated Damages are not intended to, and do not, liquidate Design- Builder's liability under the indemnification provisions of this Agreement, including Section 18.1, 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.

17.3 Payment; Offset; Reduction; Waiver

17.3.1 Liquidated Damages shall be payable by Design-Builder to NHDOT within ten Days after Design-Builder's receipt of an invoice therefor from NHDOT.

17.3.2 NHDOT shall have the right to deduct any amount owed by Design-Builder to NHDOT hereunder from any amounts owed by NHDOT to Design-Builder, which may be payable by NHDOT to Design-Builder pursuant to Section 12.3.2.

17.3.3 Permitting or requiring Design-Builder to continue and finish the Work or any part

thereof after a Completion Deadline shall not act as a waiver of NHDOT's right to receive Liquidated Damages hereunder or any rights or remedies otherwise available to NHDOT.

17.4 Non-Exclusive Remedy

Subject to Section 16.4, NHDOT's right to, and imposition of Liquidated Damages, are in addition, and without prejudice, to any other rights and remedies available to NHDOT under this Contract, at law or in equity respecting the breach, failure to perform, or Design-Builder Default that is the basis for the Liquidated Damages or any other breach, failure to perform or Design-Builder Default, except for recovery of the monetary damage that the Liquidated Damages are intended to compensate.

17.5 Limitation of Design-Builder's Liability

Design-Builder's liability to NHDOT for damages resulting from breach of the Contract shall not exceed the sum of (a) all those costs reasonably incurred by NHDOT or any party acting on NHDOT's behalf in completing or correcting the Work or having the Work completed or corrected by another Person, including costs as described in Section 19, (b) an amount equal to $3,000,000 (which amount shall specifically include any Liquidated Damages paid pursuant to this Section 17 as well as any payments made by Design-Builder pursuant to Section 18), (c) any amounts paid by or on behalf of Design-Builder which are covered by insurance proceeds; 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-Related Entity.

17.6 Interim Milestones, Intermediate Completion and Liquidated Damages

It is anticipated that NTP1 will be issued to the Design-Builder on or about the date specified in Section 1.4 of the Instructions to Proposers. The Design-Builder shall complete the following Work in accordance with the Interim Milestones listed below:

1. **Interim Milestone #1** – Complete Clearing and Tree Removal for Eversource Overhead Transmission Facility Relocation Work
2. **Interim Milestone #2** –Completion of I-93 Exit 4A Interchange Bridge and Full Beneficial use of Connector Roadway from Exit 4A to the intersection with North High Street
3. **Intermediate Completion** – Completion and Full Beneficial use of Folsom Road between the intersection with North High Street and Pinkerton Street.

As per Section 1.8 of the Contract, all reference to time in this specification is set on calendar day basis and includes all consecutive calendar days, INCLUDING the days from December 1 through March 31 of each year, and INCLUDING all Saturdays, Sundays, holidays, and non-work days.

Where the number of calendar days are specified, the number of days used will be rounded up to the next full day. For example, 6 days plus one hour will equate to 7 days.

The work hours and days shall be contiguous and continuous.

The Proposal shall indicate how the Design-Builder intends to meet these Interim Milestones and show the Interim Milestones on the schedule submitted with the Proposal.

17.6.1 Interim Milestone #1 Completion:

Complete Demolition, Clearing and Tree Removal for Eversource Overhead Transmission Facility Relocation Work

The requirements for Interim Milestone #1 Completion, Demolition of building on Parcel 16, Clearing and Tree Removal for Eversource Overhead Transmission Facility Relocation Work, will be considered complete when all contract work, as determined by NHDOT, for demolition, clearing, grubbing and tree removal required and associated work to support the relocation work to be performed by Eversource to relocate their existing overhead transmission facility spanning I-93 to a new crossing of I-93 approximately 400 feet north of the proposed Exit 4A interchange, has been substantially completed.

Completion of the milestone shall require the following:

A. Remove all trees within the project ROW and slope easements required to facilitate the relocation of the overhead transmission line as well as necessary access and staging, including disposal of trees, branches, and small brush.

B. Complete demolition of building on Parcel 16 at 36 Trolley Car Lane within the relocation corridor. Demolition to be performed in accordance with contract requirements including Section 6.3 of the Contract.

C. Design builder shall provide access to the relocation corridor through the project area by means of a continuous pathway. The pathway shall be a minimum of 12' wide, be accessible from and existing paved roadway and shall be cleared of all trees, brush, rocks, boulders, stumps, fences and any other obstructions to vehicles. The pathway shall be located such that vehicles and equipment necessary for relocation of the facility may access the utility relocation route and any associated work areas required to complete the work.

D. Fill any depressions greater than 12" in depth within the pathway with a suitable material to support passage of vehicles and equipment necessary for relocation of the facility along the entirety of the pathway.

E. As required, construct embankment within the Project ROW and roadway slope easements to allow poles to be set at final grade.

F. All work shall be completed in compliance with the Contract requirements including all permit restrictions.

G. Notification has been provided in accordance with Section 17.6.4 below.

The Design-Builder will be assessed liquidated damages as specified in Section 17.1.1 per day for each calendar day greater than the 155 calendar days specified above beyond

the issuance of NTP1 that Interim Milestone #1 Completion is achieved. There is no maximum number of calendar days that will be counted for liquidated damages for this milestone.

17.6.2 Interim Milestone #2 Completion:

Completion of I-93 Exit 4A Interchange Bridge and Full Beneficial use of Connector Roadway from Exit 4A to the intersection with North High Street, BTC Station 1052+25

The requirements for Interim Milestone #2 Completion, Completion of the Exit 4A Interchange Bridge and Full Beneficial use of Connector Roadway from Exit 4A to the intersection with North High Street, will be considered complete when all contract work, as determined by NHDOT, for the construction of the new bridge carrying traffic over I-93 NB & SB, all associated ramps, and the connector roadway have been substantially completed and the bridge, ramps and roadway are available for full beneficial use, has been achieved.

Completion of the milestone shall require the following:

A. Full multi-modal transportation use of all lanes and shoulders above and below the bridge, except for limited contract work items beneath the bridge that do not materially impair or hinder the intended public use of the I-93 NB & SB, and all anticipated lane closings have been completed except for minor, short-term work items such as the installation of landscaping restoration and restoration of the median of I-93.

B. Full beneficial use includes but is not limited to the completion of all portions of the superstructure and all portions of the substructure, including the bridge deck, all cast-in-place concrete, concrete closure pours, waterproofing membrane, bituminous wearing surface, approach pavement, bridge joints, bridge parapets, bridge railing, approach slabs, wingwalls, drainage, protective fence on the bridge and wingwalls, guide railing and all end connections, barriers including any required in the median of I-93 below the bridge, signs, all safety appurtenances and establishing the full lane configuration of I-93 and the Connector Roadway (all lanes and shoulders). Final paving course and bridge joints shall be installed as part of completion.

C. Outside of bridge limits, NHDOT at its sole discretion may approve in writing, to alleviate the placement of wearing course pavement on all or part of this milestone, if requested by the Design-Builder by writing.

D. All intersecting roads shall be available for reopening to the number of lanes in each direction as described in the BTC.

E. The installation of all traffic signs and signals shall be completed at the I-93 interchange and the signs and signals shall be operational for the Connector Roadway and intersection with High Street (NHDOT may approve installation of temporary signage and signals if the High Street intersection is in a temporary configuration).

F. All safety apparatus must be installed.

G. Utility relocations within this section of roadway have been completed and all restoration completed to the satisfaction of NHDOT and the Town of Londonderry

H. All configurations as described in the BTC within this section of roadway has been completed

I. Notification has been provided in accordance with Section 17.6.4 below.

NHDOT at it's discretion may elect to not fully open the new interchange and connector road to public use. Regardless of NHDOT's determination to fully open the interchange and connector roadway, Milestone #2 will only be considered achieved when all required work to support an opening of these facilities has been completed.

The Design-Builder will be assessed liquidated damages as specified in Section 17.1.1 per day, as defined above, for each day greater than the 907 calendar days specified above beyond the issuance of NTP1 that Interim Milestone #2 is achieved. There is no maximum number of calendar days that will be counted for liquidated damages for this milestone.

NHDOT may adjust the number of days allowed until completion of Milestone #2 specified above, in accordance with the terms for Changes in the Work specified in Section 13, as the project work progresses. The Contractor may propose a revision to the number of days specified for the completion of Milestone #2 in accordance with the terms for Changes in the Work specified in Section 13, subject to NHDOT concurrence, at which point the revised dates acceptable to NHDOT will become the new contractual requirements.

17.6.3 Intermediate Completion:

Completion and Full Beneficial use of Folsom Road between the intersection with North High Street and Pinkerton Street to BTC Station 1086+00.

The requirements for Intermediate Completion, Complete and Full Beneficial use of Folsom Road between the intersection with North High Street and Pinkerton Street, will be considered complete when all contract work, as determined by NHDOT, has been completed. Completion of the milestone shall require the following:

A. The bridge carrying Folsom Road over Shields Brook shall be completed and opened to the required number of lanes of vehicular traffic on Folsom Road as shown in the BTC and to provide pedestrian and bicycle traffic access as defined in the BTC; this includes all necessary concrete deck placements (precast panels and closure pours) and concrete cure time to allow for a design strength acceptable to withstand vehicular loading.

B. The bridge carrying Folsom Road over the rail trail shall be completed and opened to the required number of lanes of vehicular traffic on Folsom Road as shown in the BTC and to provide pedestrian and bicycle traffic access as defined in the BTC; this includes all necessary concrete deck placements

(precast panels and closure pours) and concrete cure time to allow for a design strength acceptable to withstand vehicular loading. The rail trail beneath need not be completed, however all work required to complete shall be such that temporary or permanent impacts to traffic on Folsom Road is not required in order to complete any work outstanding.

C. Full beneficial use includes but is not limited to the completion of all portions of the superstructure and all portions of the substructure, including the bridge deck, all cast-in-place concrete, concrete closure pours, waterproofing membrane, bituminous wearing surface, approach pavement, bridge joints, bridge parapets, bridge railing, approach slabs if required, wingwalls, drainage, protective fence on the bridge and wingwalls, guide railing and all end connections, signs, all safety appurtenances and establishing the full lane configuration of Folsom Road (all lanes and shoulders). Final paving course and bridge joints shall be installed as part of completion.

D. The new Interchange 4A on I-93, as well as Folsom Road, has been opened to full use, including all safety features required. This interim condition will require additional evaluation for the safe passage of traffic through the remaining part of the work zone, particularly temporary sign packages

E. This includes, full multi-modal transportation use of all lanes and shoulders on the bridge, except for limited contract work items beneath the bridge that do not materially impair or hinder the intended public use of the transportation facilities noted in this paragraph, and all anticipated lane closings have been completed

F. All intersecting roads shall be reopened to the number of lanes in each direction as described in the BTC.

G. The installation of all traffic signs and signals shall be completed and the signals shall be operational.

H. All safety apparatus must be installed.

I. Utility relocations within this section of roadway have been completed and all restoration completed to the satisfaction of NHDOT and the Town of Londonderry

J. All configurations as described in the BTC within this section of roadway has been completed.

K. Notification has been provided in accordance with Section 17.6.4 below.

The Design-Builder will be assessed liquidated damages as specified in Section 17.1.1 per day, as defined above, for each day greater than the 1126 calendar days specified above beyond the issuance of NTP1 that the Intermediate Completion is achieved. There is no maximum number of calendar days that will be counted for liquidated damages for this milestone.

NHDOT may adjust the number of days allowed until achievement of Intermediate

Completion, as specified above, in accordance with the terms for Changes in the Work specified in Section 13, as the project work progresses. The Contractor may propose a revision to the number of days specified for achievement of Intermediate Completion in accordance with the terms for Changes in the Work specified in Section 13, subject to NHDOT concurrence, at which point the revised dates acceptable to NHDOT will become the new contractual requirements.

17.6.4 Notice requirements for completion of Interim Milestones

The Design-Builder shall provide written notice to NHDOT when each of the following has occurred:

A. The Design-Builder believes to have substantially completed the work required for each Interim Milestone or Intermediate Completion.

B. The Design-Builder has substantially completed the work associated with the Interim Milestone or Intermediate Completion (except for Punch List items, final cleanup and other items included in the requirements for Final Acceptance).

C. The Design-Builder has ensured that all construction associated with the Interim Milestone or Intermedidate Completion has been performed in accordance with the requirements of the Contract documents.

D. The Design-Builder has ensured that the roadway and structures included may be operated without damage to the Facility or any other property and without injury to any person.

E. The Design-Builder has ensured that the roadway and structures included are ready to be opened to the public.

F. As promptly as is practicable after receipt of notice pursuant to the requirements herein, NHDOT will notify the Design-Builder in writing of NHDOT's position related to the completion of the subject Interim Milestone or Intermediate Completion of the Contract. If appropriate, NHDOT will schedule a Semifinal inspection as specified in the Contract.

G. The Final Inspection has been conducted.

17.6.5 Milestone Liquidated Damages Terms and Conditions

These liquidated damages provisions shall apply to all circumstances in which the Engineer does not verify in writing that the pertinent Contract work has been completed the allowable time outlined herein.

If the Design-Builder does not complete the pertinent work within the allowable time, NHDOT will deduct from monies otherwise owed to the Design-Builder the pertinent liquidated damages the "daily amount" outlined herein for each calendar day that it takes the Design-Builder to complete said work beyond the days prescribed above.

SECTION 18. INDEMNIFICATION

18.1 Indemnifications by Design-Builder

18.1.1 Subject to Section 18.1.3, Design-Builder shall release, indemnify and hold harmless NHDOT, Town of Derry, Town of Londonderry, any NHDOT hired Consultants, and their successors and assigns and their respective board members, council members, officers, directors, agents and employees (collectively referred to as the "Indemnified Parties") from and against any and all claims, causes of action, suits, judgments, investigations, legal or administrative proceedings, and Losses incurred in connection with the enforcement of this indemnity, arising out of, relating to or resulting from the following (each an "Indemnified Claim"):

(a) The breach or alleged breach of any of the Contract Documents by any DB-Related Entity; and/or

(b) The failure or alleged failure by any DB-Related Entity to comply with the Governmental Approvals, any applicable Environmental Laws or other Governmental Rules (including Governmental Rules regarding Contaminated Materials Management); and/or

(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 NHDOT or another Indemnified Party pursuant to the Contract; provided that this indemnity shall not apply to any infringement resulting from NHDOT's failure to comply with specific written instructions regarding use provided to NHDOT by Design-Builder; and/or

(d) The alleged culpable act, Error, omission, negligence, breach or misconduct of any DB-Related Entity in or associated with performance of the Work; and/or

(e) Any and all claims by any Governmental Entity or taxing authority claiming taxes based on gross receipts, purchases or sales, the use of any property or income of Design-Builder or any of its Subcontractors or any of their respective agents, officers or employees with respect to any payment for the Work made to or earned by any DB-Related Entity; and/or

(f) Any and all stop notices and/or Liens filed in connection with the Work, including all expenses and attorneys', accountants' and expert witness fees

and costs incurred in discharging any stop notice or Lien and any other liability to Subcontractors for failure to pay sums due for their work or services, provided that NHDOT is not in default in undisputed payments owing to Design-Builder with respect to such Work; and/or

(g) Any spill or release or threatened spill or release of a Contaminated Material (i) which was brought onto the Site by any DB-Related Entity, or (ii) attributable to the negligence, willful misconduct, or breach of contract, Governmental Approval or Governmental Rule by any DB-Related Entity; and/or

(h) The claim or assertion by any contractor of inconvenience, disruption, delay or loss caused by interference by any DB-Related Entity with or hindering the progress or completion of work being performed by other contractors as described in Section 23.1, or failure of any DB-Related Entity to cooperate reasonably with other contractors in accordance therewith; and/or

(i) Any DB-Related Entity's breach of or failure to perform an obligation that NHDOT owes to a third Person, including Governmental Entities, under law or under any agreement between NHDOT and a third Person, where NHDOT has delegated performance of the obligation to Design-Builder under the Contract Documents or (ii) the acts or omissions of any DB- Related Entity which render NHDOT unable to perform or abide by an obligation that NHDOT owes to a third Person, including Governmental Entities, under any agreement between NHDOT and a third Person, where the agreement was expressly disclosed to Design-Builder; and/or

(j) Inverse condemnation, trespass, nuisance or similar taking of or harm to real property by reason of: (i) the failure of any DB-Related Entity to comply with Good Industry Practices, requirements of the Contract Documents, 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-Related Entity, or (iii) the actual physical entry onto or encroachment upon another's property by any DB-Related Entity.

18.1.2 Subject to Section 18.1.3, Design-Builder agrees that, because the concepts in the Project Schematics are subject to review and modification by Design- Builder, such documents shall not be deemed "design furnished" by NHDOT or any of the other Indemnified Parties, as the term "design furnished" is used in Section 18.1.3 below.

18.1.3 The following restrictions shall apply to the indemnities set forth in Sections 18.1.1 and 18.1.2:

With respect to any Loss, damage or cost of the type covered by insurance required to be provided hereunder, Design-Builder's indemnity obligation shall not extend to any loss, damage or expense arising from the sole negligence or willful misconduct of such Indemnified Party or its agents, servants or independent contractors who are directly responsible to such Indemnified Party.

With respect to any Loss, damage or cost which is not of the type covered by insurance to be provided hereunder, Design-Builder's indemnity obligation shall not extend to any loss, damage or cost to the extent that such Loss, damage or cost was caused by the gross negligence or willful misconduct of such Indemnified Party or its agents, servants or independent contractors who are directly responsible to such Indemnified Party.

Such indemnities shall not inure to the benefit of an Indemnified Party so as to impose liability on Design-Builder for the active negligence of NHDOT, or to relieve NHDOT of liability for such active negligence.

18.1.4 In claims by an employee of Design-Builder, a Subcontractor, anyone directly or indirectly employed by them or anyone for whose acts they may be liable, the indemnification obligation under this Section 18.1 shall not be limited by a limitation on the amount or type of damages, compensation or benefits payable by or for Design-Builder or a Subcontractor under workers' compensation, disability benefit or other employee benefits laws.

18.1.5 Design-Builder hereby acknowledges and agrees that it is Design-Builder's obligation to cause the Project to be designed and to construct the Project in accordance with the Contract Documents and that the Indemnified Parties are fully entitled to rely on Design-Builder's performance of such obligation.

18.2 Defense and Indemnification Procedures

18.2.1 If any of the Indemnified Parties receives notice of a claim, action, suit or other item covered under Section 18.1 or otherwise has actual knowledge of an Indemnified Claim that it believes is within the scope of the indemnities under Section 18.1, NHDOT shall by writing as soon as practicable after receipt of the Indemnified Claim: (a) inform Design-Builder of the Indemnified Claim, (b) send to Design-Builder a copy of all written materials NHDOT has received asserting such Indemnified Claim and (c) notify Design-Builder that should no insurer accept defense of the Indemnified Claim, the Indemnified Party will conduct its own defense unless Design-Builder accepts the tender of the Indemnified Claim in accordance with Section 18.2.3. As soon as practicable after Design-Builder receives notice of an Indemnified Claim or otherwise has actual knowledge of

an Indemnified Claim, it shall tender the Indemnified Claim in writing to the insurers under all potentially applicable insurance policies. NHDOT and other Indemnified Parties also shall have the right to tender such Indemnified Claims to such insurers.

18.2.2 If the insurer under any applicable insurance policy accepts the tender of defense, NHDOT and Design-Builder shall cooperate in the defense as required by the insurance policy. If no insurer under potentially applicable insurance policies provides defense, then Section 18.2.3 shall apply.

18.2.3 If the defense is tendered to Design-Builder, 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 Design-Builder:

(a) Accepts the tender of defense and confirms that the Indemnified 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 Indemnified Claim under the terms of this Contract.

18.2.4 If Design-Builder accepts the tender of defense under Section 18.2.3(a), Design-Builder shall have the right to select legal counsel for the Indemnified Party, subject to reasonable approval by the Indemnified Party, and Design- Builder shall otherwise control the defense of such Indemnified Claim, including settlement, and bear the fees and costs of defending and settling such Indemnified Claim. During such defense:

(a) Design-Builder 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 Design-Builder all materials and access to personnel it requests as necessary for defense, preparation and trial and which or who are under the control of or reasonably available to the Indemnified Party, and maintain the confidentiality of all communications between it and Design-Builder concerning such defense.

18.2.5 If Design-Builder responds to the tender of defense as specified in Section 18.2.3(b) or 18.2.3(c), the Indemnified Party shall be entitled to select its own legal counsel and otherwise control the defense of such Indemnified Claim, including settlement.

18.2.6 The Indemnified Party may assume its own defense by delivering to Design-Builder written notice of such election and the reasons therefor, if the Indemnified Party, at the time it gives notice of the Indemnified Claim or at any time thereafter, reasonably determines that:

(a) A conflict exists between it and Design-Builder which prevents or potentially prevents Design-Builder from presenting a full and effective defense;

(b) Design-Builder is otherwise not providing an effective defense in connection with the Indemnified Claim; or

(c) Design-Builder lacks the financial capacity to satisfy potential liability or to provide an effective defense.

18.2.7 If the Indemnified Party is entitled and elects to conduct its own defense pursuant hereto of an Indemnified Claim for which it is entitled to indemnification, Design-Builder shall reimburse on a current basis all reasonable costs and expenses the Indemnified Party incurs in investigating and defending. 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 18.2.3(a), it shall have the right to settle or compromise the Indemnified Claim with Design- Builder's prior written consent, which shall not be unreasonably withheld or delayed;

(b) In the case of a defense conducted under Section 18.2.3(b), it shall have the right to settle or compromise the Indemnified Claim with Design- Builder's prior written consent, which shall not be unreasonably withheld or delayed, or with approval of the court or arbitrator following reasonable notice to Design-Builder and opportunity to be heard and without prejudice to the Indemnified Party's rights to be indemnified by Design-Builder; and

(c) In the case of a defense conducted under Section 18.2.3(c), it shall have the right to settle or compromise the Indemnified Claim without Design-Builder's prior written consent and without prejudice to its rights to be indemnified by Design-Builder.

18.2.8 The Parties acknowledge that while Section 18.1 contemplates that Design-Builder will have responsibility for certain Indemnified Claims and liabilities arising out of its obligations to indemnify, hold harmless, circumstances may arise in which there may be shared liability of the Parties with respect to such Indemnified Claims and liabilities. In such case, where either Party believes an Indemnified 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 Indemnified 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 18.2, and consistent with the outcome of such proceedings concerning the respective liabilities of the Parties on the Indemnified Claim.

18.2.9 In determining responsibilities and obligations for defending suits pursuant to this Section 18.2, 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 Indemnified Claim.

18.3 No Effect on Other Rights

The foregoing obligations shall not be construed to negate, abridge, or reduce other rights or obligations, which would otherwise exist in favor of an Indemnified Party hereunder.

18.4 CERCLA Agreement

The indemnities set forth in Sections 18.1.1(g) are intended to operate as agreements pursuant to Section 107(e) of the Comprehensive Environmental Response, Compensation and Liability Act, and 42 U.S.C. Section 9607(e), to insure, protect, hold harmless and indemnify the Indemnified Parties.

SECTION 19. DISPUTES AND DISPUTE RESOLUTION

19.1 Administrative Process

19.1.1 Negotiation

If a Dispute under the Contract arises, the Authorized Representatives of NHDOT and Design-Builder shall make their best efforts to resolve the Dispute through negotiation.

19.1.2 Documentation

All Disputes and negotiations shall be documented by each Party in writing, and state the specifics of each Dispute and actions taken.

19.1.3 Agreement to Alternate Dispute Resolution

Nothing in this Section 19 shall prevent the Parties from agreeing, at any time, to submit a Dispute to mediation or arbitration as an alternative to the procedures provided herein.

19.1.4 Claims

If the Dispute involves a Claim by Design-Builder, Design-Builder shall comply with and be subject to all provisions of the Contract Documents pertaining to such Claim.

19.1.5 Applicability

The provisions of this Section 19 shall apply to all Disputes arising out of the Work, subject to certain exclusions as provided herein, that cannot be resolved through the procedures set forth in this Section 19. All Disputes shall be resolved strictly in accordance with the Contract Documents and applicable Governmental Rules.

19.1.6 Rights of Review

In the event Design-Builder disputes any unilateral determination made by NHDOT under Contract provisions herein providing for NHDOT unilateral determinations of Contract intent, interpretation, compliance, or compensation due Design-Builder, Design-Builder may pursue resolution utilizing all administrative remedies under the Contract and then appropriate judicial review.

19.2 Disputes Review Board

A Disputes Review Board ("DRB") may be established to assist in the resolution of Disputes arising out of the conduct of the Work that are covered by this Section 19. This Section 19 describes the purpose, procedure, function and key features of the

DRB. The form of a DRB Agreement, which will formalize the creation of the DRB, is attached hereto as Appendix 10.

19.3 Function and Scope of DRB

19.3.1 Responsibility

The DRB shall be responsible for considering Disputes regarding technical issues of design, engineering and construction between NHDOT and Design-Builder arising out of the conduct of the Work. The DRB shall fairly and impartially consider Disputes referred to it, and shall provide written recommendations to NHDOT and Design-Builder to assist in and facilitate the timely and equitable resolution of such Disputes.

19.3.2 Technical Issues

Technical issues include acceleration, acceptance, coordination, delays and disruption, Differing Site Conditions, inspection, payment, change cost estimating and pricing, plans and specifications, Punch List, sequence of Work, access, assessments, materials, Warranties, interpretations of the provisions of the Contract Documents and definitions of the scope of Work.

19.3.3 Good Faith Efforts

NHDOT and Design-Builder agree to first make a good faith effort to amicably and fairly settle their differences and not to indiscriminately assign such Disputes to the DRB. NHDOT and Design-Builder are encouraged to resolve potential Disputes without resorting to this DRB resolution procedure.

19.4 Continuance of Work During Dispute

At all times during the course of the dispute resolution process, Design-Builder shall continue with the Work as directed, in a diligent manner and without delay, or shall conform to NHDOT's decision or order, and shall be governed by all applicable provisions of the Contract Documents. Records of the Work shall be kept in sufficient detail to enable payment in accordance with applicable provisions in the Contract Documents, if Design-Builder is determined to be entitled to payment.

19.5 Membership

19.5.1 Membership

The DRB shall consist of (a) one member selected by NHDOT from a list of three individuals provided by Design-Builder, each of whom shall meet the requirements set forth herein; (b) one member selected by Design-Builder from a list of three individuals provided by NHDOT, each of whom shall meet the requirements set forth herein; and (c) a third member selected by the first two members, who meets the requirements set forth herein as well as the qualifications for an arbitrator. The third member shall act as

chair for all DRB proceedings and activities.

19.5.2 Experience of Members

All DRB members shall be experienced in the type of work involved in the Project and experienced in the interpretation of contract documents. The goal in selecting the third member is to complement the experience of the first two, thus furnishing technical expertise, which will facilitate the DRB's operations. Minimum DRB member qualifications are at least 15 years experience in engineering and construction on major transportation, highway, or public works projects valued at $100,000,000 or more. DRB members shall also be experienced in the design-build method of project delivery.

19.5.3 Avoidance of Appearance of Conflict

It is imperative that DRB members show no partiality to either the Design-Builder or NHDOT, or have any conflict of interest, as described in the following provisions:

(a) No member shall be an Affiliate or otherwise have a financial interest in the Project or in the outcome of any Dispute decided hereunder, except for the right to receive payment for serving on the DRB.

(b) No member shall currently be, or within two years of the selection date have been, an officer, director, or employee of, or have had financial ties to: (i) Design-Builder, any joint venture member, any Affiliate, or any Subcontractor, or any Affiliate of a Subcontractor; (ii) NHDOT or any agency represented on NHDOT's governing board, or (iii) any firm under contract to Design-Builder, any joint venture partner, any Affiliate, any Subcontractor, or any Affiliate of a Subcontractor, NHDOT or any agency represented on NHDOT's governing board; provided, however, that eligibility shall not be affected by past fee-based consulting services on other projects which are disclosed to all parties.

(c) No member shall have had substantial prior involvement in the Project or a relationship with any Party or Affiliate of a nature, which could compromise his or her ability to impartially resolve Disputes.

(d) No member shall accept employment with NHDOT, any agency represented on NHDOT's governing board, Design-Builder, any joint venture member, any Affiliate, any Subcontractor or Affiliate of a Subcontractor during the term of the Project, and for so long thereafter as any obligations remain outstanding under the Contract Documents or for one year after Final Payment, whichever occurs last, except as a member of other DRBs.

(e) No member shall discuss employment with NHDOT, any agency represented on NHDOT's governing board, Design-Builder, any joint venture member, any Affiliate, any Subcontractor, or any Affiliate of a Subcontractor, or any consultants working on the Project during the term of the Project and for so long thereafter as any obligations remain outstanding under the Contract Documents.

19.5.4 Submission of Disclosure Statements

Before their appointments are final, the first two prospective members shall submit complete disclosure statements for the approval of both NHDOT and Design-Builder. Each statement shall include a resume of experience, together with a declaration describing all past, present and anticipated or planned future relationships to the Project and with all parties involved in the Project or the Work, including disclosure of past or current professional or close personal relationships with Design-Builder, joint venture member, partner, DB-Related Entity, NHDOT, or its consultants working on the Project, or with any key member of any such entity. The third DRB member shall supply such a statement to the first two DRB members and to NHDOT and Design-Builder prior to approval of his or her appointment.

19.5.5 Selection Process

Upon selection of the first two members, NHDOT and Design-Builder shall negotiate a three-party agreement with each member. Immediately after execution of the working agreements, the first two members shall commence selection of the third member. The first two members shall ensure that the third member meets all of the criteria listed above. The third member shall be selected within four weeks after the first two members are notified to proceed with the selection. In the event of an impasse in selection of the third member, that member shall be selected by mutual agreement of NHDOT and Design-Builder. In so doing, the Parties may, but are not required to, consider the nominees offered by the first two members. If NHDOT and Design-Builder cannot agree in the selection of the third member, then each Party may submit a list of up to five candidates to a court of competent jurisdiction for judicial resolution of the selection of the third member.

19.5.6 Execution of Agreement

NHDOT, Design-Builder, and all three members of the DRB shall execute the DRB Agreement, in generally the form set forth in Appendix 10.

19.5.7 Reconstitution of the DRB

NHDOT and Design-Builder shall each have the right to require appointment of a new DRB to resolve future Disputes, which right may be exercised at any time by delivery of notice to such effect to the other Party and to the DRB. In such event, a new DRB Agreement, in the same form as Appendix 10, shall be executed establishing a new DRB, and except as otherwise mutually agreed by NHDOT and Design-Builder, the work to be performed by the prior DRB shall be limited to Disputes submitted to the prior DRB before delivery of the notice requiring appointment of a new DRB.

19.6 Operation of DRB

19.6.1 No Ex Parte Communications

The Parties are expressly prohibited from seeking any DRB member's advice or consultation or discussing with any DRB member any aspect of an existing or potential Claim or Dispute, without the concurrent participation of the other Party to the dispute, unless the Parties otherwise agree in writing.

19.6.2 Consultants to the DRB

At the request of the DRB and upon agreement of the Parties, additional experts may be engaged to assist the DRB to investigate and analyze Disputes and Claims. The duties of the experts shall be to provide independent advice and professional opinions, and otherwise assist the DRB on issues related to their areas of expertise. Experts to the DRB shall meet the same conflict-of-interest restrictions and disclosure requirements as the individual DRB members. NHDOT and Design-Builder shall be jointly responsible for the cost of the expert services, as provided in the DRB Agreement.

19.7 Procedures of DRB

19.7.1 Impartiality

The DRB shall fairly and impartially consider Disputes referred to it, and shall provide written recommendations to NHDOT and Design-Builder, to assist in the resolution of Disputes submitted to the DRB in accordance herewith.

19.7.2 Hearings

(a) Location. When a Dispute is submitted to the DRB, the DRB, with input from Design-Builder and NHDOT, shall first decide when and where to conduct the hearing. Normally the hearing will be conducted at or near 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 DRB may be held at convenient locations.

(b) Documents. Written documentation and arguments from both Parties shall be sent to each DRB member and to the other Party to the Dispute for study at least seven Days prior to commencement of the hearing. Each document shall indicate on its face that it is a confidential settlement document.

(c) Chairperson. The third member of the DRB will act as chairperson of the hearing. It is desirable to keep the hearings as informal as possible except that the DRB shall be guided by Roberts Rules of Order and may select which particular rules to follow in conducting hearings. Each member will keep its own notes, and a formal transcript is not prepared except in special cases when agreed to by both Parties, the DRB may allow preparation of a transcript by a court reporter. Audio or video recordings are not permitted.

(d) Procedures. NHDOT and Design-Builder shall have representatives at all hearings. Design-Builder will first discuss the Dispute, followed by NHDOT. Each Party will then be allowed a rebuttal, and successive rebuttals may be allowed if necessary to ensure that all aspects are fully covered. The DRB members may ask questions, request clarification, or ask for additional data. NHDOT and Design-Builder shall both be provided full and adequate opportunity to present all of their evidence, documentation, and testimony regarding all issues before the DRB. The DRB shall not be bound by the rules of evidence, except for those pertaining to privilege. During the hearings, no DRB member shall express any opinion concerning the merit of any facet of the case. Large or complex Disputes may require additional hearings in order to consider and fully understand all the evidence presented by both Parties.

19.7.3 Recommendations of DRB

After the hearings are concluded, the DRB shall meet to formulate its recommendations. All DRB deliberations shall be conducted in private, with all individual views kept strictly confidential. The recommendations shall be based on the pertinent provisions of the Contract Documents, applicable Governmental Rules, information presented at the hearing, and the facts and circumstances involved in the Dispute. Any recommendation of the DRB must be supported by at least two members. The DRB shall make every effort to reach unanimous recommendations, but if this proves impossible, the dissenting member may prepare a dissenting report. The DRB's recommendations, together with an explanation of its reasoning, shall be submitted as a written report to both Parties within two weeks of completion of the hearings. This time may be extended by mutual agreement of all parties in exceptionally difficult cases. If requested by either Party, the DRB shall meet with NHDOT and Design-Builder to provide additional clarification of its recommendation.

19.7.4 Response by Parties

Within four weeks after receiving the DRB's recommendations, or such other time specified by the DRB, NHDOT and Design-Builder shall respond to each other and to the DRB in writing, signifying either acceptance or rejection of the DRB's recommendations. The failure of either Party to respond within the specified period shall be deemed acceptance of the DRB's recommendations. If NHDOT and Design-

Builder are able to resolve the Dispute, NHDOT will process any required Contract changes within five Days.

19.7.5 Options Upon Rejection

If a Party rejects the DRB's recommendations and gives timely notice of such rejection pursuant to the requirements herein, it shall have the following options:

(a) Appeal. Within four weeks after receiving the recommendations, the Party may appeal the recommendations to the DRB. If such an appeal is made, then the six-month period described herein shall not begin until 30 Days after the DRB's ruling regarding the appeal. The DRB's recommendations regarding a particular Dispute may be appealed to the DRB only once.

(b) Disputes of $1,000,000 or less. If the amount in controversy is less than or equal to $1,000,000, and either Party appeals the recommendations to the DRB, then the DRB's decision on the appeal shall be final and binding on the Parties.

(c) Disputes over $1,000,000. If the amount in controversy is greater than $1,000,000, either Party may (whether or not it has filed an appeal with the DRB) submit the Dispute to judicial resolution by filing a complaint in a court of competent jurisdiction within six months following issuance of the DRB recommendations. In such event, the DRB recommendations shall be non-binding and the Parties shall be entitled to a trial *de novo*.

(d) Disputes Requiring NHDOT Commissioner Action. If the amount in controversy is greater than $1,000,000 and the recommendations of the DRB would require NHDOT to pay or incur costs or expenses greater than $1,000,000, the DRB recommendations shall not be binding on NHDOT unless NHDOT's governing board accepts the DRB recommendations. If NHDOT's governing board rejects or fails to accept the DRB recommendations within 120 Days, then either Party may submit the Dispute to judicial resolution by filing a complaint in a court of competent jurisdiction within six months following issuance of the DRB recommendations. Failure of Design-Builder to file a complaint in a court of competent jurisdiction within six months following issuance of the DRB recommendations shall constitute a waiver of Design-Builder's claims and any further administrative or judicial review shall be barred.

(e) Absence of Complaint; Finality. If the Dispute has not been submitted to judicial resolution by the filing of a complaint in a court of competent jurisdiction within the required six-month period, then the recommendations made by the DRB shall be final and binding on the Parties.

19.7.6 Arbitration

Notwithstanding anything to the contrary in this Section 19.7 each Dispute where the amount in controversy is equal to or less than $375,000, shall be heard and determined by an arbitrator, and in accordance with the procedures set forth in New Hampshire Code of Regulations (the "Regulations"). NHDOT and Design-Builder agree to select the DRB to act as arbitrators under the State Arbitration Act for all such Disputes; provided that the Parties may in lieu of appointing the entire DRB, agree to appoint the third member of the DRB as the single arbitrator. The Parties intend to comply with the State Arbitration Act, and agree that the State Arbitration Act and Regulations shall be applicable with respect to Disputes up to $375,000, except as otherwise provided herein. For Disputes up to $375,000, the Parties agree that the final decision of the DRB (or third member) shall be binding on the Parties.

19.7.7 DRB Recommendations Admissible

The DRB's written recommendation shall be admissible as evidence in any litigation concerning the same Dispute, but any evidence presented to the DRB, whether oral or written, shall be admissible in accordance with the applicable rules of evidence. Findings of fact by the DRB shall not be collateral estoppel in any other proceeding involving the same issue, but final DRB decisions, which are binding pursuant to this Section 19.7 shall be *res judicata*.

19.8 Compensation

NHDOT and Design-Builder shall share equally the fees and expenses of all three members of the DRB. NHDOT shall prepare and mail minutes and shall provide administrative services, such as conference facilities and secretarial services, and shall have the right to require Design-Builder to pay for half of the cost of these services. If the DRB desires special services, such as legal advice, consulting services, accounting, data research and the like, as well as other costs described herein, both Parties must agree, and the costs will be shared by them as mutually agreed. Design-Builder shall pay the invoices of all DRB members after approval by both Parties. After receipt of Design-Builder's paid invoice for DRB services, NHDOT shall reimburse Design-Builder fifty percent of such paid invoices within 30 Days.

19.9 Cooperation

Time is of the essence and the Parties shall diligently cooperate with one another and the DRB, and shall perform such acts as may be necessary to obtain a prompt and expeditious resolution of the Dispute.

19.10 Provisional Remedies

No Party shall be precluded from initiating a proceeding in a court of competent jurisdiction for the purpose of obtaining any emergency or provisional remedy that may be necessary, and which is not otherwise available under this Section 19, to protect its rights, including temporary and preliminary injunctive relief, attachment, claim and delivery, receivership and any extraordinary writ.

19.11 Continuing Performance

Failure by NHDOT to pay any amount in dispute shall not alleviate, diminish, or modify in any respect Design-Builder's obligation to perform under the Contract Documents, including Design-Builder's obligation to achieve Project Completion or Final Acceptance in accordance with the applicable Completion Deadline and the Contract Documents, and Design-Builder shall not cease or slow down its performance under this Contract on account of any such amount in dispute. Upon resolution of any such Dispute, each Party shall pay to the other any amount owing within thirty Days.

19.12 Participation in Other Proceedings

Design-Builder agrees that, at NHDOT's request, third parties, which are involved in the design or construction of any part of the Project, may be joined as parties in dispute resolution proceedings under this Section 19. Also, if requested by NHDOT, Design-Builder will allow itself to be joined as a participant in, and be bound by, any arbitration or other proceeding that involves NHDOT and any other participant in the design or construction of any part of the Project. This provision is for the benefit of NHDOT and not for the benefit of any other Party.

19.13 Standard of Review

All Disputes are to be resolved strictly in accordance with the terms and conditions of the Contract Documents.

19.14 Claim/Dispute Categories Excluded From the DRB

In addition to any other issues identified in the Contract Documents, the following categories of Claims/Disputes are excluded from consideration by the DRB:

(a) Disputes regarding compliance with Governmental Rules, Contract termination, liability or indemnification;

(b) Interest (monetary) on Progress Payments or Final Payment;

(c) Wage and hour disputes;

(d) Claims under Design-Builder's Automobile Insurance

(e) Delegated signature authority of NHDOT's Authorized Representatives for commitments or execution of Contract modifications;

(f) The amounts of any liquidated or stipulated payments set forth in the Contract Documents including those assessed pursuant to Sections 7.4 and 17; however, a Dispute of technical issues that may result in assessment of liquidated damages or stipulated payments may be submitted to the DRB.

(g) Disputes regarding safety issues and/or matters under the jurisdiction of OSHA;

(h) The right of NHDOT to issue unilateral changes (i.e. Change Orders), however, Disputes concerning quantum and related scope for a unilateral change may be considered by the DRB;

(i) Issues regarding DBE participation; and

19.15 Emergency Dispute Resolution

If a Dispute arises which must be resolved expeditiously in order to prevent serious damage to person or property, or serious interference with a critical path, both Parties shall make every effort to resolve such Dispute quickly. In such case, if Design- Builder's Project Manager and NHDOT's Project Manager cannot reach a resolution of that Dispute within 24 hours, they must refer the Dispute to their respective Executive Officers (or other officer with authority to make final decisions subject only to board approval and any required third party approvals) for a meeting between those Executive Officers to occur within the following 24 hours. Once the urgent aspects of the Dispute have been resolved, the Parties may continue with the remaining procedures for dispute resolution if necessary and to the extent applicable.

19.16 Time Limitation

Design-Builder acknowledges and agrees that NHDOT is subject to constraints, which have resulted in limitations on its ability to increase the Contract Price or extend a Completion Deadline. Design-Builder acknowledges and agrees that, due to limitations on funding for the Project, prompt resolution of Disputes is of vital importance to NHDOT. Design-Builder agrees that the time limitations stated in the Contract for the filing of Claims and/or complaints with the DRB or for judicial reference are necessary and reasonable. Design-Builder expressly waives any longer statute of limitations contained in any statute.

SECTION 20. ACCEPTANCE

20.1 Project Completion

20.1.1 Project Completion of Facilities

20.1.1.1 Notice and Inspection

Design-Builder shall provide notice to NHDOT when all of the following have occurred with respect to the facilities:

Design-Builder has completed all construction Work, including correction of all Errors in the construction Work, completion of Punch List items and NHDOT review items;

Design-Builder has furnished to NHDOT an updated certification from Design-Builder's QC Administrator, in form and substance satisfactory to NHDOT, certifying conformity of the construction with the Design Documents;

Design-Builder has satisfied all conditions to acceptance by Local Agencies; and

All of Design-Builder's and Subcontractors' personnel, supplies, equipment, waste materials, rubbish and temporary facilities shall have been removed from the Site, Design-Builder shall have restored and repaired all damage or injury arising from such removal to the satisfaction of NHDOT, and the Site shall be in good working order and condition.

Such notice shall be accompanied by a certification from Design-Builder's QC Administrator, in form and substance satisfactory to NHDOT, certifying conformity of the construction with the Design Documents.

20.1.1.2 Certificate of Project Completion

NHDOT will issue a Certificate of Project Completion at such time as (a) NHDOT finds that all conditions set forth in Section 20.1.1 with respect to the facilities have been satisfied, (b) NHDOT finds that all Errors which are prerequisites to Project Completion have been corrected, and (c) Design-Builder and NHDOT have agreed upon a Punch List for Work to be performed prior to Final Acceptance.

Design-Builder has furnished to NHDOT (i) the necessary preliminary as-built drawings associated with completed Work, (ii) the as-built drawings and documents required for conducting inspections and/or testing, and (iii) the applicable as-built drawings and documents for maintenance and operations;

Design-Builder has furnished to NHDOT a certification from Design-Builder's Design QC Administrator, in form and substance satisfactory to NHDOT, certifying conformity of the construction with the Design Documents; and

Design-Builder has ensured that the facilities may be operated without damage to the Project or any other property on or off the Site, and without injury to any Person.

NHDOT will then conduct such inspections, surveys and / or testing as it deems desirable. If such inspections, surveys and/or tests disclose that any of the Work does not meet the requirements of the Contract Documents, NHDOT will advise Design- Builder as to any Errors in the Work necessary to be corrected as a condition to Project Completion and as to any Errors, which may be corrected as Punch List items within five Days. Upon correction of the Errors identified as a prerequisite to Project Completion, Design-Builder shall provide written notification to NHDOT, and NHDOT will conduct additional inspections, surveys and/or testing, as it deems desirable. This procedure shall be repeated until NHDOT finds that all prerequisites to Project Completion have been met.

20.2 Final Acceptance

20.2.1 Conditions to Final Acceptance

After the Project Completion has occurred, Design-Builder shall perform all Work, if any, which was deferred for purposes of Project Completion, and shall satisfy all of its other obligations under the Contract Documents, including ensuring that the Project has been completed and all equipment, materials, facilities, improvements, structures and components have been properly adjusted and tested, and provision of all deliverables described in Section 20.2.2. When all of the foregoing have occurred, Design-Builder shall provide an executed sworn Affidavit of Project Completion to NHDOT including the following statement:

To the best of Design-Builder's knowledge and belief, all Work under the Contract has been completed in strict accordance with the Contract Documents, no lawful debts for labor or materials are outstanding and no federal excise tax has been included in the Contract Price; all requests for funds for undisputed work under the Contract, including changes in the Work, and under all billings of whatsoever nature are accurate, complete and final and no additional compensation over and above the final payment will be requested or is due under the Contract or under any adjustment issued thereunder for said undisputed work; there are no outstanding claims, Liens or stop notices relating to the Project, and no event has occurred which, with the passing of time or giving of notice or both, would lead to a claim relating to the Work; and upon receipt of final payment, Design-Builder and Subcontractors acknowledge that NHDOT and any and all employees of NHDOT and their authorized representatives will thereby be released, discharged and acquitted from any and all claims or liability for additional sums on account of undisputed work performed under the Contract.

If Design-Builder is unable to provide the affidavit in the above form, the affidavit shall certify that all such outstanding matters are set forth in an attached list which shall describe the outstanding matters in such detail as may be requested by NHDOT. The affidavit shall include a representation of Design-Builder that it is diligently and in good faith contesting all such matters by appropriate legal proceedings and shall provide a status report regarding the same including an estimate of the maximum payable with

respect to each such matter.

20.2.2 Checklist of Final Acceptance

Final Acceptance shall be deemed to have occurred when all of the following have occurred:

(a) All requirements for Project Completion shall have been fully satisfied;

(b) All Non-Conformance Reports (NCRs) shall have been resolved and closed out to the satisfaction of NHDOT and FHWA.

(c) NHDOT shall have received all Design Documents, original working drawings, operation manuals, shop drawings and final as-built drawings of the Project, surveys, test data and other deliverables required under the Contract Documents;

(d) All special tools, equipment, furnishings and supplies purchased and/or used by Design-Builder as provided in the Contract Documents shall have been delivered to NHDOT and all replacement spare parts shall have been purchased and delivered to NHDOT free and clear of Liens; and

(e) The items on the Final Acceptance Punch List shall have been completed to the satisfaction of NHDOT and FHWA, and all of Design- Builder's other obligations under the Contract Documents (other than obligations which by their nature are required to be performed after Final Acceptance) shall have been satisfied in full or waived in writing by NHDOT.

20.2.3 Final Inspection and Issuance of Certificate of Final Acceptance

Upon receipt of notification from Design-Builder that all conditions to Final Acceptance have been met, NHDOT will make final inspection and NHDOT will either issue a Certificate of Final Acceptance or notify Design-Builder regarding any Work remaining to be performed. Final Acceptance is subject to concurrence by the Town of Derry and the Town of Londonderry, New Hampshire. If NHDOT finds cause not to issue a Certificate of Final Acceptance, Design-Builder shall remedy the defective and/or uncompleted portions of the Work. Thereafter, Design-Builder shall give NHDOT a revised Affidavit of Project Completion with a new date based on when the defective and/or uncompleted portions of the Work were corrected. The foregoing procedure shall apply successively thereafter until NHDOT has given Design-Builder an executed Certificate of Final Acceptance.

20.2.4 No Relief from Liability

Final Acceptance will not prevent NHDOT from correcting any measurement, estimate, or certificate made before or after completion of the Work, nor shall it prevent NHDOT from recovering from Design-Builder, the Surety(ies), or other provider of performance security or any combination of the foregoing, overpayment sustained for failure of Design-

Builder to fulfill the obligations under the Contract Documents. A waiver on the part of NHDOT of any breach of any part of Design-Builder shall not be held to be a waiver of any other or subsequent breach. Final Acceptance shall not relieve Design- Builder from any of its continuing or surviving obligations hereunder, including Warranty obligations.

20.3 Opening Sections of Project to Traffic

20.3.1 Plan for Opening to Traffic

The Project Schedule shall set forth Design-Builder's plan for completing sections of the Project and opening them to traffic. If NHDOT orders Design-Builder to open portions of the Project, which cannot be accommodated without significant disruption to Design-Builder's schedule or a significant increase in Design-Builder's costs, such direction shall be considered an NHDOT-Directed Change.

20.3.2 Direction to Open Following Design-Builder Failure to Perform

If Design-Builder is delinquent in completing shoulders, drainage structures or other features of the Work, NHDOT may, but is not obligated to, order all or a portion of the Project opened to traffic notwithstanding such incomplete elements. Design-Builder shall then conduct the remainder of the construction operations, minimizing obstruction to traffic. Except as provided in Section 20.3.1, Design-Builder shall not receive any added compensation due to the added costs attributable to the opening of the Project to traffic.

20.3.3 No Waiver

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

20.4 Clayton Act Assignment

Design-Builder shall assign to NHDOT 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 NHDOT tenders Final Payment to Design-Builder, without further acknowledgment by the Parties.

SECTION 21. DOCUMENTS AND RECORDS

21.1 Escrowed Proposal Documents

Design-Builder has delivered to NHDOT one copy of all documentary information used in preparation of the Proposal Price (the "Escrowed Proposal Documents" or “EPDs”), which are being held in a locked fireproof cabinet supplied by Design-Builder and located in NHDOT’s offices or another location acceptable to both Parties, with the key held only by Design-Builder. Concurrently with submission of quotations or revisions to quotations provided in connection with formally proposed amendments to the Contract and concurrently with approval of each Change Order, if appropriate, one copy of all documentary information used in preparation of the quotation or Change Order shall be added to the cabinet to be held with the other EPDs. The EPDs will be held in such cabinet or otherwise maintained subject to Section 21.1.1 until all of the following have occurred: (a) 180 Days have elapsed from Final Acceptance or termination of the Work, as applicable; (b) all Disputes regarding the Contract have been settled; and (c) Final Payment on the Contract has been made by NHDOT and accepted by Design-Builder.

21.1.1 Availability for Review

The EPDs shall be available during business hours for joint review by Design-Builder and NHDOT, and its successors and assigns, in connection with negotiations of Change Orders, the resolution of Disputes and as described in Section 21.1.6. NHDOT 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. NHDOT shall be entitled to make and retain copies of such documents as it deems appropriate in connection with any such matters, provided that NHDOT has executed and delivered to Design- Builder a confidentiality agreement specifying that all proprietary information contained in such documents will be kept confidential, that copies of such documents will not be distributed to any third parties other than NHDOT’s attorneys and experts and the DRB, and that all copies of such documents (other than those delivered to dispute resolvers) will be either destroyed or returned to the depository (or to Design-Builder if the EPDs have been returned to it) upon final resolution of the negotiations or Disputes.

21.1.2 Proprietary Information

The EPDs are, and shall always remain, the property of Design-Builder and shall be considered to be in Design-Builder’s possession, subject to NHDOT's right to review the EPDs as provided in this Section 21. NHDOT acknowledges that Design-Builder may consider that the EPDs constitute trade secrets or proprietary information. This acknowledgment is based upon NHDOT’s understanding that the information contained in the EPDs is not known outside Design-Builder’s business, is known only to a limited extent and by a limited number of employees of Design-Builder, is safeguarded while in Design-Builder’s possession, and may be valuable to Design-Builder’s construction strategies, assumptions and intended means, methods and techniques of construction. NHDOT further acknowledges that Design-Builder expended money in developing the information included in the EPDs and further acknowledges that it would be difficult for a

competitor to replicate the information contained therein. NHDOT acknowledges that the EPDs and the information contained therein are being made accessible to NHDOT only because it is an express prerequisite to award of the Contract.

21.1.3 Representation

Design-Builder represents and warrants that the EPDs constitute all of the information used in the preparation of its Proposal Price and agrees that no other Proposal Price preparation information will be considered in resolving Disputes or Claims. Design-Builder agrees that the EPDs are not part of the Contract Documents and that nothing in the EPDs shall change or modify the Contract Documents.

21.1.4 Contents of EPDs

The EPDs provided with the Proposal shall clearly detail how the components of the Proposal Price were determined and shall be adequate to enable a complete understanding and interpretation of how Design-Builder arrived at the Proposal Price. The EPDs provided in connection with quotations and Change Orders shall, inter alia, clearly detail how the total price and individual components of that price were determined. In this regard, crews, equipment, quantities and rates of production shall be detailed. Estimates of costs shall be further divided into Design-Builder's usual cost categories such as direct labor, repair labor, equipment ownership and operation, expendable materials, permanent materials and Subcontract costs as appropriate. Plant and equipment and indirect costs shall also be detailed in Design-Builder's usual format. Design-Builder's allocation of plant and equipment, indirect costs, risk contingencies, markup and other items to each direct cost item shall be clearly identified. The EPDs shall itemize the estimated costs of the Payment and Performance Bonds and the insurance premiums for each coverage required to be provided by Design-Builder under Section 9. The EPDs shall include electronic media data files associated with all assumptions, detailed quantity takeoffs, rates of production and progress calculations, quotes from Subcontractors and Suppliers, quotes for insurance and bond premiums, memoranda, narratives and all other information used by Design-Builder to arrive at the Proposal Price or amendment or Change Order.

21.1.5 Form of EPDs

Except as otherwise provided in the RFP, Design-Builder shall submit the EPDs in such format as is used by Design-Builder. It is not intended that Design-Builder perform any significant extra work in the preparation of these documents. However, Design-Builder represents and warrants that the EPDs provided with the Proposal were personally examined prior to delivery by an authorized officer of Design-Builder and that they meet the requirements of Section 21.1.4, that the EPDs provided in connection with quotations and Change Orders will be personally examined prior to delivery by an authorized officer of Design-Builder, and that they will meet the requirements of Section 21.1.4.

21.1.6 Review by NHDOT

NHDOT may at any time conduct a review of the EPDs to determine whether they are complete. In the event NHDOT determines that any data is missing, Design-Builder shall provide such data within three Business Days of the request, and at that time it will be date stamped, labeled to identify it as supplementary EPD information, and added to the EPDs. Design-Builder shall have no right to add documents to the EPDs except upon NHDOT's request. At NHDOT's option, which may be exercised at any time, the EPDs associated with any Change Order or Contract amendment shall be reviewed, organized and indexed as described in Section 6.1.2 of the Instructions to Proposers.

21.2 Subcontractor Pricing Documents

Design-Builder shall require the principal design Subcontractor and each Major Subcontractor to submit to Design-Builder a copy of all documentary information used in determining its Subcontract price (or the price for Subcontract Work included in any Change Order), immediately prior to executing the Subcontract and each change order and Subcontract amendment, to be held in the same manner as the EPDs and which shall be accessible by Design-Builder and its successors and assigns (including NHDOT) and the DRB, on terms substantially similar to those contained herein. Each such Subcontract shall include a representation and warranty from the Subcontractor, for the benefit of Design-Builder and NHDOT, stating that its EPDs constitute all the documentary information used in establishing its Subcontract price, and agreeing to provide a sworn certification in favor of Design-Builder and NHDOT together with each supplemental set of EPDs, stating that the information contained therein is complete, accurate and current. Each Subcontract that is not subject to the foregoing requirement shall include a provision requiring the Subcontractor to preserve all documentary information used in establishing its Subcontract price and to provide such documentation to Design-Builder and/or NHDOT in connection with any claim made by such Subcontractor.

21.3 Financial Reporting Requirements

21.3.1 Design-Builder shall deliver to NHDOT financial and narrative reports, statements, certifications, budgets and information as and when required under the Contract Documents.

21.3.2 Design-Builder shall furnish, or cause to be furnished, to NHDOT such information and statements as NHDOT may reasonably request from time to time for any purpose related to the Project, the Work or the Contract Documents.

21.3.3 Design-Builder shall cooperate and provide, and shall cause the Subcontractors to cooperate and provide, such information as is necessary or requested by NHDOT to assist or facilitate the submission by NHDOT of any documentation, reports or analysis required by the State, FHWA and/or any other Governmental Entity with jurisdiction over the Project.

21.4 Maintenance of, Access to and Audit of Records

Except for EPDs (which shall be maintained as set forth in Section 21.1), Design-Builder shall maintain a complete set of all books, records and documents prepared or employed by Design-Builder in its management, scheduling, cost accounting and otherwise with respect to the Project, including copies of all original documents delivered to NHDOT. Design-Builder shall keep and maintain such books, records, and documents in accordance with applicable provisions of the Contract Documents, and of the Project Management Plan, and in accordance with Good Industry Practice. Design- Builder shall grant to NHDOT and its authorized representatives and legal counsel, and FHWA such audit rights and allow such Persons such access to and the right to copy such books, records and documents (including all tax returns and supporting documentation filed with any Governmental Entity) as such Persons may request from time to time in connection with the issuance of Change Orders, the resolution of disputes and such other matters as such Persons reasonably deem necessary for purposes of complying or verifying compliance with the Contract Documents and Governmental Rules. The right of inspection includes the right to make extracts and take notes.

21.4.1 Where the payment method for any Work is on a time and materials basis, such examination and audit rights shall include all books, records, documents and other evidence and accounting principles and practices sufficient to reflect properly all direct and indirect costs of whatever nature claimed to have been incurred and anticipated to be incurred for the performance of such Work. If an audit indicates Design-Builder has been overcredited under a previous progress report or progress payment, that overcredit will be credited against current progress reports or payments.

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

21.4.3 NHDOT shall have such rights to review and audit Design-Builder, its Subcontractors and their respective books and records as and when NHDOT deems necessary for purposes of verifying compliance with the Contract Documents, the Governmental Approvals and applicable Governmental Rules. Without limiting the foregoing, NHDOT shall have the right to audit Design-Builder's Project Management Plan and compliance therewith, including the right to inspect Work and/or activities and to verify the accuracy and adequacy of the Project Management Plan and its component parts, plans and other documentation. NHDOT 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.

21.4.4 All Claims or Disputes filed against NHDOT shall be subject to audit at any time following the filing of the Claim or Dispute. The audit may be performed by employees of NHDOT or by an auditor under contract with NHDOT. No notice is required before commencing any audit before 60 days after the Final Acceptance Date. Thereafter, NHDOT shall provide 20 days notice to Design- Builder, any Subcontractors or their respective agents before commencing an audit. Design-Builder, Subcontractors or their agents shall provide adequate facilities, acceptable to NHDOT, for the audit during normal business hours. Design-Builder, Subcontractors or their agents shall cooperate with the auditors. Failure of Design-Builder, Subcontractors or their agents to maintain and retain sufficient records to allow the auditors to verify all or a portion of the Claim or Dispute or to permit the auditor access to the books and records of Design-Builder, Subcontractors or their agents shall constitute a waiver of the Claim or Dispute and shall bar any recovery thereunder.

21.4.5 At a minimum, the auditors shall have available to them the following documents:

(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;

(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 and Dispute, together with all documents that support the amount of damages as to each Claim or Dispute;

(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, all documents that establish the time periods, individuals involved, the hours for the individuals, and the rates for the individuals;

(t) Email;

(u) Network servers, data storage devices, backup tapes/media; and

(v) Letters and correspondence.

21.4.6 Full compliance by Design-Builder with the provisions of this Section 21.4 is a contractual condition precedent to Design-Builder's right to seek relief under Section 19.

21.4.7 Any rights of the FHWA to review and audit Design-Builder, its Subcontractors and their respective books and records are set forth in Appendix 14.

21.4.8 Design-Builder represents and warrants the completeness and accuracy of all information it or its agents provide in connection with the audits identified herein, and shall cause all Subcontractors to warrant the completeness and accuracy of all information such Subcontractors or their agents provide in connection with this Section 21.4.

21.4.9 Design-Builder's internal and third party quality and compliance auditing responsibilities shall be set forth in the Project Management Plan.

21.4.10 Design-Builder shall collect and preserve each of the following types of data in written form contemporaneously during Design-Builder's performance of the Work, all of which shall be in form accepted by NHDOT, and index filed in accordance with:

(a) Monthly report of labor by classification of management, supervision, engineering and other technical personnel used on the job;

(b) Daily labor and equipment reports from Design-Builder and each Subcontractor for construction related activities;

(c) Quality Control documentation;

(d) A daily occurrence log (in the form of a bound book with entries in ink) for construction related activities which shall be maintained by Design-Builder's Project Manager or his designee(s), in which shall be recorded daily in a narrative form all significant occurrences on the Project, including permit problems, unusual weather, asserted Force Majeure Events, events and conditions causing or threatening to cause delay or disruption or interference with the progress of any of the Work, known injuries to person or property, a listing of each activity depicted on the Project Schedule which is being actively prosecuted; notifications given and received, and significant Project related meetings; and

(e) A daily record in the format acceptable to NHDOT, recording all labor, materials and equipment expenses which are being incurred by reason of any event, condition or circumstance which Design-Builder believes is or may become the subject of a Claim against NHDOT. Any initialed or signed concurrence by the NHDOT (or designees) will be for purposes of verifying physical labor, material and equipment count rather than validating Design-Builder's Claims.

21.4.11 To the extent requested by NHDOT, Design-Builder shall provide NHDOT with access to and a copy of each item described in Section 21.4.10 (provided, however, that the provision of such information shall not constitute a notice under Section 13.3.2).

21.5 Retention of Records

Design-Builder shall maintain all records and documents relating to the Work and the Project (including copies of all original documents delivered to NHDOT) at the Design-Builder's Project Office until the termination of this Contract. Design-Builder shall notify NHDOT where such records and documents are kept. Notwithstanding the foregoing, all records which relate to Claims being processed or Disputes brought under the dispute resolution provisions hereof shall be retained and made available until such Disputes and Claims have been finally resolved. Records to be retained include all books, electronic information and files and other evidence bearing on Design-Builder's costs under the Contract Documents. Design-Builder shall make these records and documents available for audit and inspection to NHDOT, at Design-Builder's Project Office at all reasonable times, without charge, and shall allow NHDOT to make copies of such documents (at no expense to Design-Builder). If accepted by NHDOT, photographs, microphotographs or other authentic reproductions may be maintained instead of original records and documents.

The records will be turned over to NHDOT Concord Office within 5 months of the Final Acceptance Date or termination of the Contract.

21.6 Public Records Act

21.6.1 Design-Builder acknowledges and agrees that all records, documents, drawings, plans, specifications and other materials in NHDOT's possession, including materials submitted by Design-Builder, are subject to the provisions of the New Hampshire Public Records Act. If Design-Builder believes information or materials submitted to NHDOT constitute trade secrets, proprietary information or other information that is not subject to or excepted from disclosure under the Public Records Act, Design-Builder 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 21.6 shall modify or amend requirements and obligations imposed on NHDOT by the Public Records Act or other applicable Governmental Rule, and the provisions of the Public Records Act or other Governmental Rules shall control in the event of a conflict between the procedures described above and the applicable Governmental Rules. Design-Builder is advised to contact legal counsel concerning such Governmental Rules and its application to Design-Builder.

21.6.2 If NHDOT receives a request for public disclosure of materials marked "CONFIDENTIAL," NHDOT will use reasonable efforts to notify Design-Builder of the request and give Design-Builder an opportunity to assert, in writing and at its sole expense, a claimed exception under the Public Records Act or other applicable Governmental Rules within the time period specified in the notice issued by NHDOT and allowed under the Public Records Act. Under no circumstances, however, will NHDOT be responsible or liable to Design-Builder or any other Person for the disclosure of any such labeled materials, whether the disclosure is required by Governmental Rules, or court order, or occurs through inadvertence, mistake or negligence on the part of NHDOT or its officers, employees, contractors or consultants.

21.6.3 In the event of any proceeding or litigation concerning the disclosure of any material submitted by Design-Builder to NHDOT, NHDOT'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 Design- Builder shall be fully responsible for otherwise prosecuting or defending any action concerning the materials at its sole cost and risk; provided, however, that NHDOT reserves the right, in its sole discretion, to intervene or participate in the litigation in such manner as it deems necessary or desirable. Except in the case of NHDOT's voluntary intervention or participation in litigation, Design- Builder shall pay and reimburse NHDOT within 30 days after receipt of written demand and reasonable supporting documentation for all costs and fees, including attorneys' fees and costs NHDOT incurs in connection with any litigation, proceeding or request for disclosure, together with an administrative charge equal to ten percent of the costs.

21.7 Ownership of Documents

Subject to Section 21.8, all data, sketches, charts, calculations, plans, specifications, electronic files, correspondence, reports, analyses, studies and other documents and materials created or collected under the terms of the Contract Documents shall be considered "works made for hire" for which NHDOT owns the copyright. Design Documents shall become NHDOT's property upon preparation; Construction Documents shall become NHDOT's property upon delivery to NHDOT; and other documents prepared or obtained by Design-Builder in connection with the performance of its obligations under the Contract Documents, including studies, manuals, record drawings, technical and other reports and the like, shall become the property of NHDOT upon Design-Builder's preparation or receipt thereof. Copies of all Design Documents and Construction Documents shall be furnished to NHDOT upon preparation or receipt thereof by Design-Builder. Design-Builder shall maintain all other documents described in this Section 21.7 in accordance with the requirements of Section 21.4 and shall deliver copies to NHDOT as required by the Contract Documents or upon request if not otherwise required to be delivered, with an indexed set delivered to NHDOT as a condition to Final Acceptance.

21.8 Intellectual Property

21.8.1 All Proprietary Intellectual Property, including with respect to Source Code and Source Code Documentation, shall remain exclusively the property of Design-Builder or its Affiliates or Subcontractors that supply the same, notwithstanding any delivery of copies thereof to NHDOT.

21.8.2 NHDOT 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 Design-Builder, including with respect to Source Code and Source Code Documentation, solely in connection with the Project and any State Highway, owned and operated by NHDOT or a State or regional Governmental Entity; provided that NHDOT shall have the right to exercise such license only at the following times:

(a) From and after the expiration or earlier termination of this Contract for any reason whatsoever; and

(b) During any time that a receiver is appointed for Design-Builder, or during any time that there is pending a voluntarily or involuntary proceeding in bankruptcy in which Design-Builder is the debtor, in which case NHDOT may exercise such license only in connection with the Project.

21.8.3 Subject to the license and rights granted to NHDOT pursuant to Section 21.8.2, NHDOT shall not at any time sell any Proprietary Intellectual Property of Design-Builder or use, reproduce, modify, adapt and disclose, or allow any party to use, reproduce, modify, adapt and disclose, any such Proprietary Intellectual Property for any other purpose.

21.8.4 The right to transfer the license is limited to any Governmental Entity that succeeds to the power and authority of NHDOT generally or with respect to the Project.

21.8.5 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 lessees, operators, contractors, subcontractors, employees, attorneys, consultants and agents that are retained by or on behalf of NHDOT 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 21.8.6.

21.8.6 Subject to Section 21.6, NHDOT shall:

(a) Not disclose any Proprietary Intellectual Property of Design-Builder to any Person other than authorized transferees and sublicensees who agree to be bound by any confidentiality obligations of NHDOT relating thereto;

(b) Enter into a commercially reasonable confidentiality agreement if requested by Design-Builder 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 Design-Builder 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.

21.8.7 Notwithstanding any contrary provision of this Contract, in no event shall NHDOT or any of its directors, officers, employees, consultants or agents be liable to Design-Builder, 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 21.8.6 if such breach is not the result of gross negligence or intentional misconduct. Design-Builder hereby irrevocably waives all claims to any such damages.

21.8.8 Design-Builder 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.

21.8.9 With respect to any Proprietary Intellectual Property, including with respect to Source Code and Source Code Documentation, owned by a Person other than Design-Builder, including any Affiliate, and other than NHDOT or a Governmental Entity acting as a Subcontractor, Design-Builder shall obtain from such owner, concurrently with the execution of any contract, Subcontract or purchase order with such owner or with the first use or adaptation of the Proprietary Intellectual Property in connection with the Project, both for Design- Builder and NHDOT, 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 NHDOT or a State or regional Governmental Entity, of at least identical scope, purpose, duration and applicability as the license granted under Section 21.8.2. 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 NHDOT using commercially reasonable efforts. The limitations on sale, transfer, sublicensing and disclosure by NHDOT set forth in Sections 21.8.3 through 21.8.6 shall also apply to NHDOT’s licenses in such Proprietary Intellectual Property.

SECTION 22. VALUE ENGINEERING

22.1 General

This Section 22 sets forth the requirements applicable to preparation, review and approval of Value Engineering recommendations ("VECPs") for the purpose of enabling Design-Builder and NHDOT to take advantage of potential cost savings or provide potential improvements to the Work through changes in the requirements relating to the Work. Design-Builder is encouraged to submit VECPs whenever it identifies potential savings or improvements ("Design-Builder Initiated VECP") for the Project. NHDOT may also request Design-Builder to develop and submit a specific VECP ("NHDOT- Initiated VECP"). Design-Builder shall have the right to refuse to consider such NHDOT-Initiated VECP, provided that nothing herein is intended to alter NHDOT's right to issue NHDOT-Directed Changes in accordance with Section 13.

22.2 Value Engineering Recommendation

A VECP is a proposal developed and documented by Design-Builder which:

(a) Would modify or require a change in any of the commitments, requirements of or constraints set forth in the Contract Documents in order to be implemented; and

(b) Reduces the Project cost without impairing essential functions or characteristics of the Project (including the meeting of requirements contained in all Governmental Approvals) including service life, economy of operation, ease of maintenance, desirability and safety as determined by NHDOT in its sole discretion, and provided that it is not based solely upon a change in quantities, performance or reliability or a relaxation of the requirements contained in the Contract Documents.

22.3 Information to be Provided

At a minimum, the following information shall be submitted by Design-Builder with each VECP:

(a) A statement that the submission is a VECP, and a narrative description of the proposed change;

(b) Description of the existing requirements of the Contract Documents which are involved in the proposed change;

(c) Description of the proposed change;

(d) Discussion of differences between existing requirements in the Contract Documents and the proposed change, together with advantages and disadvantages of each changed item;

(e) Itemization of the requirements of the Contract Documents which must be changed if the VECP is approved (e.g., document sections, drawing numbers and specifications);

(f) A complete cost analysis including: (i) Design-Builder's cost estimate for performing the subject Work in accordance with the Contract Documents compared to Design-Builder's cost estimate for performing the subject Work in accordance with the proposed changes, (ii) an estimate of additional costs that will be incurred by NHDOT, including estimated impact on future maintenance costs; and (iii) costs of development and implementation of the VECP by Design-Builder. The cost of any additional Governmental Approvals, rights of way or easements and other costs or impacts to the Project, shall be included in the cost analysis;

(g) Justification for changes in function or characteristics of each item, and effect of the change on the performance of the end item, as well as on the meeting of requirements contained in the Contract Documents, including environmental compliance and requirements contained in Governmental Approvals;

(h) If available, a description of any previous use or tests of the VECP and the conditions and results; and

(i) Date or time, by which a Change Order adopting the VECP must be issued in order to obtain the maximum cost reduction, noting any effect on the Project Schedule.

Any additional information requested by NHDOT shall be provided in a timely manner. Additional information could include results of field investigations and surveys, design computations and field change sheets.

22.4 Review by NHDOT

Design-Builder shall submit VECPs directly to NHDOT. NHDOT will determine whether a VECP qualifies for consideration and evaluation. VECPs that require excessive time or costs for review, evaluation or investigations, or that are not consistent with NHDOT's design policies and basic design criteria may be rejected without evaluation. Design-Builder shall have no Claim for any additional costs or delays resulting from the rejection of a Design-Builder-Initiated VECP, including VECP development costs, loss of anticipated profits or increased material or labor costs. NHDOT will consider only proven features that have been employed under similar conditions or projects acceptable to NHDOT. NHDOT will process VECPs expeditiously, but shall not be liable for any delay in acting upon any proposal submitted pursuant to this Section 22.

Design-Builder may withdraw all or part of any VECP at any time prior to approval by NHDOT. Subject to Section 22.6, in all other situations each Party shall bear its own costs in connection with preparation and review of VECPs. Notwithstanding anything herein to the contrary, NHDOT will not consider any VECP with estimated net savings less than $50,000.

22.5 Approval of VECPs

NHDOT may approve, in its sole discretion, in whole or in part, by Change Order, any VECP submitted. Designs for approved VECPs shall be prepared by Design-Builder for incorporation into the Design Documents. Until a Change Order is issued based on a VECP, Design-Builder shall remain obligated to perform in accordance with the Project Design Documents and other Contract Documents. NHDOT shall have sole discretion as to rejection or approval of any VECP. NHDOT's decision to reject a VECP or place conditions on acceptance thereof shall be final and not subject to dispute resolution under Section 19.

The following provisions shall apply to any dispute between NHDOT and Design-Builder regarding Design-Builder's performance of Work that NHDOT believes should have properly been submitted as a VECP. Design-Builder agrees that, within 30 days following a request from NHDOT for a VECP with regard to any such Work, Design- Builder shall deliver a VECP to NHDOT meeting all of the requirements of this Section 22, but may specify that the VECP is delivered under protest. In such case, either Party shall have the right to submit the question of Design-Builder's entitlement to proceed without an approved VECP to dispute resolution. If a determination is ultimately made that Design-Builder is not entitled to proceed without an approved VECP, NHDOT shall be entitled to a credit against the Contract Price as provided in Section 22.6. If a determination is ultimately made that Design-Builder is entitled to proceed without an approved VECP, the VECP shall be deemed withdrawn and have no effect. If Design- Builder fails to deliver a complete VECP within the foregoing deadline, NHDOT shall have the right to submit the issue to dispute resolution at any time. In such event, if the dispute resolution proceeding ultimately results in a determination that Design-Builder was not entitled to perform such Work without a prior approved VECP, NHDOT shall be entitled to receive a credit against the Contract Price equal to 100% of Design-Builder's cost savings, plus profit, rather than 50% of estimated net savings as provided in Section 22.6.

Unless Design-Builder has received specific written permission from NHDOT to proceed with VECP work pending approval of a VECP, Design-Builder shall not have the right to proceed with such work until the VECP is approved. Furthermore, if Design-Builder proceeds with any work that might have been the basis for a VECP price increase based on savings in NHDOT's right of way costs, without first submitting a VECP, Design-Builder shall be deemed to have performed such work as a volunteer and shall not have the right to later submit a VECP hereunder.

22.6 Contract Price Adjustment

If NHDOT accepts a VECP submitted by Design-Builder pursuant to this Section 22, the Contract Price shall be adjusted in accordance with the following:

22.6.1 The term "estimated net savings" as used herein shall mean (a) the difference between the cost of performing the Work according to the Contract Documents and the actual cost to perform it according to the proposed change, less (b) the costs of studying and preparing the VECP as proven by Design-Builder and approved by NHDOT in accordance with the Change Order procedures set forth herein, less (c) any additional costs incurred or to be incurred by NHDOT resulting from the VECP, including the cost of NHDOT's review of the VECP and implementation and maintenance costs associated therewith. Design- Builder's profit shall not be considered part of the cost.

22.6.2 Except as specified in Section 22.6.4, Design-Builder is not entitled to share in either collateral or future contract savings. The term "collateral savings" means those measurable net reductions in NHDOT's costs resulting from the VECP, including maintenance costs and cost of NHDOT-furnished property. The term "future Contract savings" shall mean reductions in the cost of performance of future construction contracts for essentially the same item resulting from a VECP submitted by Design-Builder.

22.6.3 Subject to Sections 22.6.4 and 22.6.5, the Contract Price shall be reduced by an amount equal to the sum of (a) 100% of any additional costs incurred by NHDOT resulting from the VECP plus (b) 50% of estimated net savings, provided that Design-Builder's profit shall not be reduced by application of the VECP.

22.6.4 In a case where Design-Builder proposes that an adjustment be made to the planned acquisition of real property in order to result in an overall cost savings to the Project (such as a proposal that additional real property be purchased outside of the Planned ROW Limits in order to save on construction costs, or a proposal which would enable a reduction in the real property required to be obtained by NHDOT hereunder by incurring additional construction costs), the VECP shall compare (a) the incremental reduction in costs (such as for not designing and building a wall), and (b) the costs involved in adjusting the real property limits or environmental approvals (which shall be based on Design- Builder's additional costs, such as for providing real property acquisition support services (including profit) plus NHDOT's additional costs, including costs of personnel as well as out-of-pocket costs such as the price of the additional real property), or (as appropriate) shall compare (y) the incremental reduction in costs (if any) for not acquiring the unnecessary real property, and
(z) the additional construction costs to be incurred. The estimated net savings shall be shared 50-50 between NHDOT and Design-Builder. Reimbursements for Relocation expenses owed to Utility Owners shall be addressed in calculating estimated net savings to be shared between NHDOT and Design- Builder.

Design-Builder shall include in its VECP an analysis of any impacts on Utility Owners for consideration by NHDOT. If Design-Builder wishes to propose such a VECP, Design-Builder shall provide a separate notification to NHDOT describing the proposed impact concurrently with delivery of the VECP to NHDOT. Refer to Appendix 11 hereto for a sample calculation.

22.6.5 Design-Builder's share of any VECP cost savings shall be payable at such time as payments would have been made for the Work which is the subject of the VECP had the VECP not been implemented.

22.6.6 A VECP shall not be required for any changes to the concepts in the Project Schematics approved by NHDOT as specified in Section 3.3.2, or for any deviations from Referenced Standards allowed by NHDOT, except for changes based on concepts submitted by other proposers, or changes that also entail a modification of commitments contained in the Proposal or requirements of or constraints set forth in the Contract Documents.

22.7 Use of VECPs by NHDOT

All approved or disapproved VECPs will become the property of NHDOT, and shall contain no restrictions imposed by Design-Builder on their use or disclosure, except as permitted in Section 22.8 below. Notwithstanding any restrictions pursuant to Section 22.8, NHDOT retains the right to use, duplicate and disclose in whole or in part any data necessary for the utilization of the VECP on any other or subsequent projects without any obligation to Design-Builder. This provision is not intended to deny rights provided by law with respect to patented materials or processes.

22.8 Public Records Act Exclusion

If Design-Builder proposes any VECP that incorporates intellectual property or other proprietary information developed prior to award of the Contract, or developed by Design-Builder after award of the Contract provided that Design-Builder establishes to NHDOT's satisfaction that it was developed apart from, and in isolation from, the Contract, Design-Builder may identify such data and information included in the VECP as "Trade Secret" or "Confidential," in which event the provisions of Section 21.6.2 shall be applicable.

SECTION 23. COOPERATION AND COORDINATION WITH OTHER CONTRACTORS AND ADJACENT PROPERTY OWNERS

23.1 Cooperation with Other Contractors

NHDOT reserves the right to contract for and perform other or additional work on or near the Site. Design-Builder shall fully cooperate and coordinate with such other contractors to the extent reasonably necessary for the performance by such other contractors of their work, and shall cause all DB-Related Entities to so cooperate. Design-Builder and any DB-Related Entities shall fully cooperate and be solely responsible for coordinating with such other contractors and projects, and shall schedule and sequence the Work as reasonably necessary to accommodate the work of such other contractors and projects. If other separate contracts are awarded by NHDOT, the Town of Derry, or the Town of Londonderry which affect the Work, Design-Builder shall conduct its Work without interfering with or hindering the progress or completion of the work being performed by other contractors.

23.2 Interference by Other Contractors

If Design-Builder asserts that any of NHDOT, the Town of Derry's or the Town of Londonderry's other contractors have caused damage to the Work, or have hindered or interfered with the progress or completion of the Work, then Design-Builder's sole remedy shall be to seek recourse against NHDOT thru the DRB to resolve such dispute.

23.3 Coordination with Adjacent Property Owners

Design-Builder shall coordinate with owners of property adjoining the Project, and with their respective contractors, as more particularly described in the Contract Documents.

SECTION 24. MISCELLANEOUS PROVISIONS

24.1 Amendments

Only a written instrument duly executed by the Parties or their respective successors or assigns may amend the Contract Documents.

24.2 Waiver

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

24.2.2 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.

24.2.3 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.

24.2.4 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 Disputes.

24.3 Independent Contractor

Design-Builder is an independent contractor, and nothing contained in the Contract Documents shall be construed as constituting any relationship with NHDOT other than that of Project developer and independent contractor. In no event shall the relationship between NHDOT and Design-Builder be construed as creating any relationship whatsoever between NHDOT and Design-Builder's employees. Neither Design-Builder nor any of its employees is or shall be deemed to be an employee of NHDOT. Except as otherwise specified in the Contract Documents, Design-Builder has sole authority and

responsibility to employ, discharge and otherwise control its employees and has complete and sole responsibility as a principal for its agents, for all Subcontractors and for all other Persons that Design-Builder or any Subcontractor hires to perform or assist in performing the Work.

24.4 Successors and Assigns

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

24.4.1 NHDOT may assign all or part of its right, title and interest in and to any Contract Documents, including rights with respect to the Payment and Performance Bonds, and the Warranty Bond, to any other Person.

24.4.2 Design-Builder shall not voluntarily or involuntarily sell, assign, convey, transfer, pledge, mortgage or otherwise encumber Design-Builder's interest or any portion thereof without NHDOT's prior written approval, except to any entity that is under the same ultimate management control as Design-Builder. Design- Builder 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 Design-Builder performing the Work, without NHDOT'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 NHDOT, at its option, may declare any such attempted action to be a material Design-Builder Default.

24.4.3 Design-Builder shall not voluntarily or involuntarily cause, permit or suffer any Change of Control prior to Final Acceptance without NHDOT's prior written approval. If there occurs any voluntary or involuntary Change of Control without NHDOT's prior written approval, NHDOT, at its option, may declare it to be a material Design-Builder Default.

24.4.4 Where NHDOT'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, NHDOT may withhold or condition its approval in its sole discretion. Any such decision of NHDOT to withhold consent shall be final, binding and not subject to the dispute resolution procedures set forth in this Contract.

24.4.5 Assignments and transfers of Design-Builder's interest permitted under this Section 24.4 or otherwise approved in writing by NHDOT shall be effective only upon NHDOT'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 NHDOT, in which the transferee, without condition or reservation, assumes all of Design-Builder's obligations, duties and liabilities under this Contract and the other Contract Documents then in effect and agrees to perform and observe all provisions thereof applicable to Design- Builder. Each transferee shall take Design-Builder's interest subject to, and shall be bound by, the Project Management Plan, the Major Subcontracts, 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 NHDOT in writing in its good faith discretion.

24.5 Designation of Representatives; Cooperation with Representatives

24.5.1 NHDOT and Design-Builder shall each designate an individual or individuals who shall be authorized to make decisions and bind the Parties on matters relating to the Contract Documents ("Authorized Representatives"). Appendix 12 hereto provides the initial Authorized Representative designations. Such designations may be changed by a subsequent writing delivered to the other Party in accordance with Section 24.11. The Parties may also designate technical representatives who shall be authorized to investigate and report on matters relating to the construction of the Project and negotiate on behalf of each of the Parties but who do not have authority to bind NHDOT or Design- Builder.

24.5.2 Design-Builder shall cooperate with NHDOT and all representatives of NHDOT designated as described above.

24.6 Gratuities and Conflicts of Interest

24.6.1 Design-Builder shall not permit any officer, official or employee of NHDOT to have any financial interest in the Contract. In addition, Design-Builder or its employees shall not enter into any contract involving services or property with a Person or business prohibited from transacting such business with NHDOT. Except to the extent explicitly disclosed in Design-Builder's Proposal, Design-Builder affirms that no NHDOT officer, official or employee has any interest (whether contractual, non-contractual, financial, or otherwise) in this transaction or in the business of Design-Builder. If any such interest becomes known to Design-Builder at any time, Design-Builder shall submit a full and complete written disclosure of such information to NHDOT.

24.6.2 Neither Design-Builder nor any of its employees, agents and representatives shall offer or give to an officer, official or employee of NHDOT gifts, entertainment, payments, loans or gratuities. NHDOT may, by written notice to Design-Builder, terminate the right of Design-Builder to proceed under the Contract if it is found that gratuities (in the form of gifts, entertainment, or otherwise) were offered or given by Design-Builder, or any agent of Design-

Builder, to any member of NHDOT's Board of Directors or any officer, agent and/or employee of NHDOT.

24.6.3 Employment (whether as an employee, consultant, or independent contractor) of personnel on NHDOT's payroll by any DB-Related Entity is not permitted in the performance of the Contract, even though such employment may be outside NHDOT employee's regular working hours or on Saturdays, Sundays, holidays or vacation time; further, employment by any DB-Related Entity of personnel who have been on NHDOT's payroll within one year prior to the date of Contract award is also prohibited, if such employment is caused by and/or dependent upon Design-Builder securing this or a related Contract with NHDOT.

24.6.4 The rights and remedies of NHDOT specified in this Section 24.6 are not exclusive and are in addition to any other rights and remedies allowed by law.

24.7 Survival

Design-Builder's representations and warranties, the dispute resolution provisions contained in Section 19, the indemnifications and releases contained in Section 18, the express rights and obligations of the Parties following termination of this Contract under Sections 15 and 16, the provisions regarding invoicing and payment under Section 12, the obligations regarding Application for Final Payment under Section 12.4, and all other provisions which by their inherent character should survive termination of the Contract and/or Final Acceptance, shall survive the termination of the Contract and the Final Acceptance Date.

24.8 Limitation on Third Party Beneficiaries

The Town Derry and the Town of Londonderry are intended third party beneficiaries to this Contract and the Indemnified Parties are intended third party beneficiaries of the indemnity provisions of this Contract. It is not intended by any of the provisions of the Contract Documents to create any other third party beneficiary hereunder or to authorize anyone not a Party hereto (other than the Town of Derry and the Town of Londonderry or the Indemnified Parties) 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 24.8, 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 NHDOT and a Subcontractor or any Person other than Design-Builder.

24.9 Personal Liability of NHDOT, Town of Londonderry, and Town of Derry Employees

NHDOT, Town of Londonderry and Town of Derry's authorized representatives are acting solely as agents and representatives of their respective agencies when carrying out the provisions of or exercising the power or authority granted to them under the Contract. They shall not be liable either personally or as employees of Town of Londonderry, Town of Derry and NHDOT for actions in their ordinary course of employment.

No agent, consultant, officer or authorized employee of NHDOT nor any member of NHDOT's Board of Directors, shall be personally responsible for any liability arising under the Contract.

24.10 Governing Law

The Contract Documents shall be governed by and construed in accordance with the laws of the State of New Hampshire, without regard to conflict of law principles.

24.11 Notices and Communications

24.11.1 Notices under the Contract Documents shall be in writing and (a) delivered personally, (b) sent by certified mail, return receipt requested, (c) sent by a recognized overnight mail or courier service, with delivery receipt requested, or (d) sent by facsimile or email communication followed by a hard copy and with receipt confirmed by telephone, to the following addresses (or to such other address as may from time to time be specified in writing by such Person):

All correspondence with Design-Builder shall be sent to Design-Builder's Project Administrator or as otherwise directed by Design-Builder's Project Administrator. The address for such communications shall be:

[Design-Builder]
[Insert contact information**]**
Attention:
Phone:
Facsimile:
email address:

In addition, copies of all notices to proceed and suspension, termination and default notices shall be delivered to the following persons:

[Insert contact information for**]**
Phone:
Facsimile:

All communications to NHDOT shall be marked as regarding the I-93 Exit 4A Project and shall be delivered as directed by NHDOT's Project Manager. The address for such communications shall be:

New Hampshire Department of Transportation
[Insert contact information**]**
Attention:
Phone:
Facsimile:
email address:

In addition, copies of all notices regarding Disputes, termination and default notices shall be delivered to the following Persons:

[Insert contact information for NHDOT recipient of legal notices**]**

24.11.2 Notices shall be deemed received when actually received in the office of the addressee (or by the addressee if personally delivered) or when delivery is refused, as shown on the receipt of the U.S. Postal Service, private carrier or other Person making the delivery. Notwithstanding the foregoing, notices sent by facsimile after 4:00 p.m. Eastern Standard or Daylight Time (as applicable) and all other notices received after 5:00 p.m. shall be deemed received on the first Business Day following delivery (that is, in order for a fax to be deemed received on the same day, at least the first page of the fax must have been received before 4:00 p.m.). Any technical or other communications pertaining to the Work shall be conducted by Design-Builder's Project Manager and technical representatives designated by NHDOT. Design-Builder's representatives shall be available at all reasonable times for consultation. Except as otherwise provided in Section 24.5.1, each Party's Authorized Representative shall be authorized to act on behalf of such Party in matters concerning the Work.

24.11.3 Design-Builder shall copy NHDOT on all written correspondence pertaining to the Contract between Design-Builder and any Person other than Design-Builder's Subcontractors, consultants and attorneys.

24.12 Taxes

Design-Builder shall pay, prior to delinquency, all applicable taxes. Design-Builder shall have no right to an adjustment to the Contract Price or any other Claim due to its misinterpretation of Governmental Rules respecting taxes or incorrect assumptions regarding applicability of taxes.

24.13 Further Assurances

Design-Builder shall execute and deliver to NHDOT all such instruments and other documents and assurances as are reasonably requested by NHDOT to further evidence the obligations of Design-Builder hereunder, including assurances regarding the validity of (a) the assignments of Subcontracts contained herein and (b) any instruments securing performance hereof.

24.14 Severability

If any clause, provision, section or part of the Contract is ruled invalid under Section 19 or otherwise by a court having proper jurisdiction, then the Parties shall: (a) meet and negotiate a substitute for such clause, provision, section or part, which shall, to the greatest extent legally permissible, effect the original intent of the Parties, including an equitable adjustment to the Contract Price to account for any change in the Work resulting from such invalidated portion; and (b) if necessary or desirable, apply to the court or other decision maker (as applicable) which declared such invalidity for an interpretation of the invalidated portion to guide the negotiations. The invalidity or unenforceability of any such clause, provision, section or part shall not affect the validity or enforceability of the balance of the Contract, which shall be construed and enforced as if the Contract did not contain such invalid or unenforceable clause, provision, section or part.

24.15 Headings

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

24.16 Entire Agreement

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

24.17 Counterparts

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

IN WITNESS WHEREOF, the Contract has been executed as of_____.

Design-Builder

By:_____
Name:_____
Title:_____

Contractor License No.:_____

Date:_____, 202_

NEW HAMPSHIRE DEPARTMENT OF TRANSPORTATION (NHDOT)

By: _____

APPROVED AS TO FORM:

By: _____

Date:_____, 202_

ADDENDUM

[*Joint Venture Members*] agree that they shall be jointly and severally liable for the obligations of Design-Builder under the Contract Documents. [*Joint Venture Members*] agree that NHDOT and its successors and assignees shall be entitled to enforce any claim or judgment against Design-Builder arising out of the Contract Documents directly against Design-Builder, [*Joint Venture Members]* in any order.

Date:_____, 202_

[*Joint Venture Members*]

By:_____

Name:_____

Title: _____