

NEBRASKA DEPARTMENT OF TRANSPORTATION

CONSTRUCTION MANAGER / GENERAL CONTRACTOR (CM/GC)

CM/GC Master Contract

FOR THE

Saddle Creek Road Bridge Project

Project Number: NH-6-7(187)

Control Number: 22761

Project Location: Omaha

ISSUED:

June 27, 2025 - DRAFT

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EXHIBITS

Exhibit A	Form of Preconstruction Services Amendment
Exhibit B	Form of Construction Services Amendment
Exhibit C	Construction Manager/General Contractor (CM/GC) Division 100 General Requirements and Covenants (Specifications)
Exhibit D	Federal Rider

CM/GC MASTER CONTRACT

RECITALS

This CM/GC Master Contract (**Contract**), entered into as of [_____] (**Effective Date**), is by and between the Nebraska Department of Transportation (**Department**) and [enter contractor name] (**Contractor**), collectively referred to as the “Parties”.

WITNESSETH

WHEREAS, the Department has contracted with the Engineer of Record to advance the development and design of the Project, and

WHEREAS, the Department determined that Contractor input and feedback will aid in the further development and design of the Project, and

WHEREAS, the Department selected the Contractor under a procurement consistent with Neb. Rev. Stat. § 39-2817(5); and

WHEREAS, the Contractor agrees to assist in the development of the Project in accordance with the terms and conditions of this Contract.

NOW THEREFORE, in consideration of these facts and mutual promises, and other good and valuable consideration, the receipt and sufficiency of which being agreed by the Parties, the Parties agree as follows:

1 GENERAL

1.1 Project Description

[General Project Description]

1.2 Term

This Contract shall take effect on the Effective Date and will remain in effect until the earlier of:

1. The Department has issued Final Acceptance for all Construction Services Amendments under this Contract;
2. Early termination in accordance with the terms of this Contract; or
3. Mutual agreement of both Parties.

1.3 Certain Definitions

Exhibit C (*Specifications*) contains the meaning of various capitalized terms used in this Contract.

1.4 Phases and Order of Precedence

This Contract includes requirements for two Project phases; the Preconstruction Phase and the Construction Phase. The Preconstruction Phase and the Construction Phase may overlap if more than one Construction Services Amendment for Construction Services is executed as described in Section 2.2.1 (*Construction Services Amendment*).

For avoidance of doubt, any Preconstruction Services Amendment shall be generally in the form of Exhibit A (*Form of Preconstruction Services Amendment*) and may include certain Project-specific provisions. In the event of any conflicts in this Contract applicable to the Preconstruction Services, the order of precedence shall be as follows:

1. Amendments to the CM/GC Master Contract that are not Preconstruction Services Amendments or Construction Services Amendments;
2. The CM/GC Master Contract;
3. Any Preconstruction Services Amendment; and
4. The Division 100 General Requirements and Covenants (The Specifications).

All Construction Services shall be performed in accordance with the requirements of this Contract, excluding any Preconstruction Services Amendment, except as may be expressly incorporated into a Construction Services Amendment, and any additional requirements in the Construction Services Amendment. For avoidance of doubt, any Construction Services Amendment shall be generally in the form of Exhibit B (*Form of Construction Services Amendment*) and may include certain Project-specific provisions.

In the event of any conflict in this Contract applicable to Construction Services, the order of precedence shall be as follows:

1. Change Orders;
2. Amendments to the CM/GC Master Contract that are not Preconstruction Services Amendments or Construction Services Amendments;
3. The CM/GC Master Contract;
4. Any Construction Services Amendment;
5. The Specifications.

1.5 Form of Preconstruction Services and Construction Services Amendments

Exhibit A (*Form of Preconstruction Services Amendment*) and Exhibit B (*Form of Construction Services Amendment*) are intended to contemplate the terms and conditions of the Contract documents that will eventually be executed by the Parties during the ordinary course of the Project. Once a Preconstruction Services Amendment or Construction Services Amendment is executed by the Parties, it will replace the form of language currently contained in Exhibits A and B.

2 CM/GC PROGRESSION

2.1 Preconstruction Phase

The Preconstruction Phase shall begin upon execution of the first Preconstruction Services Amendment. Each Preconstruction Services Amendment shall set forth the then-authorized scope of the Preconstruction Services and the Preconstruction Compensation Cap. The Department may elect, in its sole discretion, to issue one or more Preconstruction Services Amendments to manage progression of the Preconstruction Phase. Each subsequent Preconstruction Services Amendment shall replace or amend all prior Preconstruction Services Amendments. The Parties shall engage in good faith negotiations to finalize any Preconstruction Services Amendment on a timely basis. Each Preconstruction Services Amendment shall include:

1. The scope of Preconstruction Services;
2. An anticipated completion date for the Preconstruction Services; and
3. The Preconstruction Compensation Cap, hourly rates, anticipated distribution of hours, and allowable direct expenses.

The Parties anticipate that Exhibit A (Form of Preconstruction Services Amendment) may need to be modified as the Contractor advances the Preconstruction Services. The Department may, on its own initiative or at the request of the Contractor, determine that modification of Exhibit A is needed and notify the Contractor in writing of the proposed modification. Upon notification by the Department, and mutual agreement of the Parties, the modification shall be appended to the Contract without further action.

The Preconstruction Phase shall continue until:

1. The Department exercises its right to terminate under Section 11 (Termination);
2. The Preconstruction Compensation Cap for the Preconstruction Phase is reached;
3. One or more Construction Services Amendments have been executed for all Project scope; or
4. For the Department's convenience.

2.1.1 Preconstruction Multiplier

The Preconstruction Multiplier for all Preconstruction Services labor, including all Subcontracted Preconstruction Work, shall be 1.45, and applied to the actual cost of labor. For more information regarding how the Preconstruction Multiplier is applied to the hourly rates, refer to Attachment 3 to Exhibit A (Form of Preconstruction Services Amendment – Fees and Payment). Direct expenses during the Preconstruction Phase shall be reimbursed in accordance with Attachment 3 to Exhibit A.

2.2 Construction Phase

2.2.1 Construction Services Amendment

The Construction Phase shall begin upon execution of the first Construction Services Amendment. Development of the Construction Services Amendment shall be part of the Preconstruction Services. The Parties shall engage in good faith negotiations to finalize the first and subsequent Construction Services Amendments on a timely basis.

The first and subsequent Construction Services Amendments shall include the requirements specified in Exhibit B (Form of Construction Services Amendment). An executed Construction Services Amendment shall not be modified except through a Change Order.

Construction Services shall be authorized by the execution of one or more Construction Services Amendments. There may be instances where insufficient information is available to fully develop the Construction Services Amendment prior to progressing the Work including but not limited to acquisition of long lead time materials, and other Construction Services. In this event, the Department may, in its sole discretion, waive certain requirements specified in Exhibit B.

It is the Department's intent that the Contractor construct the Project through as few Construction Services Amendments as practicable.

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

1. For all executed Construction Services Amendments, direct the Contractor to complete the Construction Services identified in the Construction Services Amendment, but contract with another contractor to construct the remainder of the Project; or
2. Terminate this Contract pursuant to Section 11 (*Termination*)

2.2.1.1 Construction Service Amendment GMPs

Each Construction Services Amendment shall have a Construction Services Amendment Guaranteed Maximum Price (**GMP**). The Project's Total Construction GMP shall be the sum of all Construction Services Amendment GMPs. Each Construction Services Amendment GMP shall be computed as the sum of the following and any other components agreed to by the Parties:

1. The Contractor's reasonable, good faith estimate of the cost of the Construction Services for the Construction Services Amendment;
2. The Construction Markup;
3. The cumulative total amount of Department Risk Contingency specific to the Construction Services Amendment documented in the Risk Register (to be included as Attachment 5 of the Construction Services Amendment) which shall include other details relating to relief for each Risk Register Event (e.g., assumptions regarding quantities, unit prices). See Section 2.3 (*Risk Register*) for more information on Risk Register Events; and
4. Such other amounts as may be agreed upon by the Parties.

Construction Services Amendment GMPs shall be developed on an Open Book Basis, and the Department shall have the right to access and copy all records, accounts, and other data used by the Contractor in connection with the preparation of any Construction Services Amendment GMP.

Upon reaching the Construction Services Amendment GMP for any given Construction Services Amendment, the Contractor shall not have recourse to the Construction Services Amendment GMP of other Construction Services Amendments without documenting the Department's Approval via Change Order to both Construction Services Amendments.

2.2.2 Construction Markup Percentage

The Construction Markup to be applied to eligible Construction Services expenses shall be [11%]. For more information on what items are included as part of the Construction Markup, refer to Attachment 1, Section G of Exhibit A (*Form of Preconstruction Services Amendment – Cost Estimating*).

2.3 Risk Register

The Contractor shall assist the Department in development of a Risk Register with respect to the entire Project in accordance with the guidelines and principles described in Attachment 1, Section E of Exhibit A (*Form of Preconstruction Services Amendment – Risk Management and Workshops*).

The Department, or its designees, shall be responsible for maintaining and updating the Risk Register. The Risk Register shall identify risks related to Construction Services (each, a Risk Register Event) and for each Risk Register Event: whether any cap on Department risk is

applicable (and if applicable, the amount of such cap), a description of how such Risk Register Event is triggered, and any required mitigation efforts or other Contractor required actions following such a Risk Register Event. All Risk Register Events shall be categorized as either a Department Risk or a Contractor Risk. The Risk Register shall also define mitigation strategies to be used with respect to Risk Register Events and identify any probable cost and time impacts to the Project.

The Risk Register shall include dates on which the Department gives its Approval of a particular Risk Register Event on the Risk Register (including its associated relief), and the Risk Register Event shall be deemed as being in effect as of that Approval date. All Construction Services Amendments shall include the most-current Risk Register as of the Effective Date of the respective Construction Services Amendment.

2.3.1 Department Risks

All Risk Register Events that are a Department Risk shall describe the types and extent of relief that the Contractor shall be entitled to seek upon occurrence of the Risk Register Event. Risk Register Events that are Department Risks may also include requirements for cost sharing, determination of time impacts, payment requirements, triggers, and other details as agreed upon by the Parties.

If a Risk Register Event occurs while performing Construction Services, and the Risk Register Event is a Department Risk, then the Contractor shall be entitled to seek a Change Order in accordance with the Specifications, Section 108.04 (Change Orders).

The sum of all Department Risks identified in the Risk Register as part of a Construction Services Amendment shall be the Department Risk Contingency for the Construction Services Amendment.

2.3.2 Authorization for Payment of Department Risk Contingency

Department Risk Contingency may be used as a risk mitigation measure for certain items of Work where either the quantity was uncertain or the need to perform the Work was uncertain at the time the Construction Services Amendment was executed.

Department Risk Contingency may be paid on a per unit price basis or an allowance basis, as set forth in the Risk Register. Payment for unit price Department Risk Contingency will be made at the prices agreed upon in the Risk Register, based on actual quantities measured. The Construction Markup will not be added to Risk Events paid for on a unit price basis but will be applied to other payment methods when using the Department Risk Contingency. Department Risk Contingency unit prices will not be eligible for an increase or decrease in the unit price, regardless of the actual quantity placed, unless mutually agreed to by the Department and the Contractor and documented in the Risk Register.

Upon written notice by the Contractor, or unilaterally by the Department, the Department will examine the conditions of the Project and determine whether to initiate and authorize payment of all or a portion of the Department Risk Contingency amount set forth in the Risk Register. The Department will notify the Contractor in writing of its determination. The Contractor shall include Department Risk Contingency, identified by Risk Register line item, that have been authorized for payment by the Department in its Request for Monthly Progress Payment in accordance with Exhibit B, Section 5 (Form of Construction Services Amendment - Construction Services Amendment Compensation).

If the Contractor does not agree with the Department's decision, the Contractor shall notify the Department of its intent to appeal the Department's decision in accordance with Section 12 (Partnering and Dispute Resolution).

2.3.3 Contractor Risks

To facilitate transparent pricing, the Risk Register may also include Contractor Risks and identify Contractor Risk Contingency for Contractor Risks. Contractor Risk Contingency identified in the Risk Register is not shared and is retained by the Contractor whether or not it is used. For avoidance of doubt, any risk not identified in the Risk Register shall also be considered a Contractor Risk notwithstanding it not being included in the Risk Register. Additionally, any Relief Event identified in the Specifications, Section 108.03 (Relief and Compensation) shall not be considered a Contractor Risk.

3 DEPARTMENT OVERSIGHT

3.1 Approval

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

Any time that the Department does not Approve a Submittal, it shall provide comments explaining the denial to the Contractor. Unless the Approval is expressly described in the Preconstruction Services Amendment or Construction Services Amendment as being in the Department's sole discretion, the Department's determination as to whether to review any Submittal shall be in its reasonable discretion. The Contractor shall address the comments in revisions or shall explain why it believes it cannot or should not address the comments. Once all comments have been fully resolved to the reasonable satisfaction of the Department, any revised Submittal shall then be resubmitted to the Department for Approval.

The Department may, at its discretion, conditionally Approve a Submittal, allowing the Contractor to proceed with the Work related to the Submittal, provided that the Contractor addresses minor deficiencies, clarifications or edits identified in such Approval.

3.2 Review and Comment

When the Contractor is required to submit a Submittal to the Department for review and comment, the Department shall have an opportunity to provide comments. If the Department does not provide comments within the required timeframe set forth in the Contract, or within ten Business Days if the Contract does not provide a timeframe, then the Contractor shall notify the Department that it has not received comments. Upon receipt of notice by the Contractor, the Department shall provide comments or notify the Contractor in writing that the Department has no comments within two Business Days or other time frame agreed to by the Parties. The Contractor may proceed to advance the Work without Department review and comment if the Department does not provide a response within two Business Days of the notice by the Contractor, or other timeframe agreed upon by the Parties.

4 APPLICABLE LAW

The Contractor shall comply with and shall cause its Subcontractors of all tiers to comply with all applicable Laws.

The Project will be funded in part with federal funds. Notwithstanding anything to the contrary in the Contract, if any conflict is identified between any Federal Requirement and the requirements of the Contract, the Federal Requirements shall prevail over any such conflicting provisions.

The Contractor shall comply with and shall cause its Subcontractors of all tiers to comply with all Federal Requirements. The Contractor shall include the Federal Requirements in all Subcontracts on the Project, so that such provisions will be binding upon each Subcontractor working on the Project. The Contractor shall take such action with respect to any Subcontract or purchase order as the Department may direct as means of enforcing such provisions.

For a full list of applicable Federal Requirements, see Exhibit D (*Federal Rider*).

4.1 Nebraska-Specific Requirements

4.1.1 Fair Employment Practices Act

The Contractor agrees to abide by the Nebraska Fair Employment Practices Act, as provided by Neb. Rev. Stat. §§ 48-1101 through 48-1126.

4.1.2 Drug-Free Workplace Policy

The Contractor shall have, and comply with, an acceptable and current drug-free workplace policy on file with the Department. The Contractor's employees shall not use illegal drugs or consume alcohol during work hours and while performing Services for the Department.

4.1.3 New Employee Work Eligibility Status

The Contractor agrees to use a federal immigration verification system to determine the work eligibility status of new employees physically performing services within the State of Nebraska. The Contractor agrees to contractually require any Subcontractors to use a federal immigration verification system to determine the work eligibility status of new employees physically performing services within the State of Nebraska. A federal immigration verification system means the electronic verification of the work authorization program authorized by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, 8 U.S.C. 1324a, known as the E-Verify Program, or an equivalent federal program designated by the United States Department of Homeland Security or other federal agency authorized to verify the work eligibility status of a newly hired employee.

The undersigned duly authorized representative of the Contractor, by signing this Contract, hereby attests to the truth of the following certifications, and agrees as follows:

Neb. Rev. Stat. § 4-114. I certify compliance with the provisions of Section 4-114 and, hereby certify that this Contractor shall register with and use a federal immigration verification system to determine the work eligibility status of new employees physically performing services within the State of Nebraska. I agree to require all Subcontractors, by contractual agreement, to require the same registration and verification process.

If the Contractor is an individual or sole proprietorship, the following applies:

1. The Contractor must complete the United States Citizenship Attestation form and attach it to this Amendment. This form is available on the Department of Transportation's website at <http://dot.nebraska.gov/media/2802/ndot289.pdf>.
2. If the Contractor indicates on such Attestation form that he or she is a qualified alien, the Contractor agrees to provide the US Citizenship and Immigration Services documentation required to verify the Contractor's lawful presence in the United States using the Systematic Alien Verification for Entitlements (SAVE) Program.

The Contractor understands and agrees that lawful presence in the United States is required and the Contractor may be disqualified or the contract terminated if such lawful presence cannot be verified as required by Neb. Rev. Stat. §4-108.

4.1.4 Forbidding Use of Outside Agents

The Contractor warrants that it has not employed or retained any company or person, other than a bona fide employee working for the Contractor, to solicit or secure this Contract, and that it has not paid or agreed to pay any company or person, other than a bona fide employee, any fee, commission, percentage, brokerage fee, gift, or any other consideration contingent upon or resulting from the award or making of this Contract. For breach or violation of this warranty, the Department has the right to annul this Contract without liability or, in its discretion, to deduct from the agreement price or consideration, or otherwise recover the full amount of such fee, commission, percentage, brokerage fee, gift, or contingent fee.

4.1.5 Contractor Certifications

The undersigned duly Authorized Representative of the Contractor, by signing this Contract, hereby swears, under the penalty of law, to the best of their knowledge and belief, the truth of the following certifications, and agrees as follows:

Neb. Rev. Stat. § 81-1715(1). I certify compliance with the provisions of Section 81-1715 and, to the extent that this Contract is a specific rates of compensation type professional services agreement, I hereby certify that wage rates and other factual unit costs supporting the fees in this Contract are accurate, complete, and current as of the date of this Contract. I agree that the Preconstruction Compensation Cap and any additions thereto shall be adjusted to exclude any significant sums by which the Department determines the Preconstruction Compensation Cap had been increased due to inaccurate, incomplete, or noncurrent wage rates and other factual unit costs.

4.2 Standard of Care

4.2.1 Standard of Care for Preconstruction Work

The Contractor shall furnish and perform the Preconstruction Services in accordance with the standard of care and diligence normally practiced by recognized construction contractors performing professional construction management services of a similar nature in the United States at the same time and under similar circumstances, consistent with the requirements of this Contract and that of applicable Preconstruction Services Amendments and Construction Services Amendments, as applicable, in no case less than in accordance with Good Industry Practice, and in accordance with all implied warranties arising pursuant to Nebraska Law.

4.2.2 Standard of Care for Construction Work

The Contractor shall construct the Project and perform the Construction Services as designed (in accordance with the Contract and that of applicable Construction Services Amendments, as applicable, and as reflected in the corresponding Design Plans), free from defects and deficiencies, and in accordance with Good Industry Practice, and in accordance with all implied warranties arising pursuant to Nebraska Law. The Contractor shall perform the Construction Services as the Project is designed, in a good, safe, and workmanlike manner.

Furthermore, the Contractor shall perform the Construction Services in accordance with (a) the requirements, terms and conditions set forth in the Contract, (b) all Laws, (c) each Construction Schedule, (d) the requirements, terms and conditions set forth in all Governmental Approvals, and (e) the requirements of the Approved quality-related plans, if any, in each case taking into account the limits of the Site and constraints affecting it and the Project.

5 PAYMENT & COMPENSATION

5.1 Preconstruction Phase Compensation

All terms and conditions for compensation for Preconstruction Services are identified in the executed Attachment 3 to Exhibit A (*Preconstruction Services Amendment - Fees and Payment*)

5.2 Construction Phase Compensation

All terms and conditions for compensation for Construction Services are identified in the executed Construction Services Amendment Exhibit B, Section 5 (*Construction Services Amendment, Construction Services Amendment Compensation*).

6 CONTRACT DEFAULT

6.1 Termination for Cause/Default

6.1.1 Events of Default

The Contractor shall be in default of Contract upon the occurrence of any one or more of the following events or conditions:

1. The Contractor fails, following authorization by the Department, to begin the Work under the Contract within ten Business Days;
2. The Contractor fails to perform the Work with sufficient resources to ensure the prompt completion thereof;
3. The Contractor fails to perform the Work in accordance with the Contract;
4. The Contractor discontinues or suspends the prosecution of the Work wrongfully or for reasons not permitted in the Contract;
5. The Contractor fails to resume performance of Work, which has been suspended or stopped, within a reasonable time after receipt of notice from the Department to do so or (if applicable) after cessation of the event preventing performance;
6. The Contractor breaches any other agreement, representation, or warranty contained in the Contract, or the Contractor fails to perform any other obligation under the Contract;
7. The Contractor fails to provide and maintain the required insurance or Contract Bond;

8. The Contractor assigns or transfers the Contract or any right or interest therein, contrary to Section 14.5.2 (*Assignment by the Contractor; Changes of Control; Change of Organization*).
9. The Contractor fails, without good cause, to make payment when due for labor, equipment, or materials in accordance with the Contract, its agreements with Subcontractors, or applicable Law; fails to comply with any Law or Governmental Approval; or fails to comply with the instructions of the Department consistent with the Contract;
10. The Contractor becomes insolvent, generally does not pay its debts as they become due, admits in writing its inability to pay its debts, or makes an assignment for the benefit of creditors;
11. Insolvency, receivership, reorganization, or bankruptcy proceedings have been commenced by or against the Contractor and not dismissed within sixty Calendar Days;
12. Any representation or warranty made by the Contractor in the Contract or in any certificate, schedule, instrument, or other document delivered pursuant to the Contract shall have been false or materially misleading when made;
13. The Contractor loses its Department prequalification status;
14. The Contractor ceases or fails to enforce its Drug-Free Workplace Policy;
15. (i) there occurs any disqualification, suspension, or debarment (distinguished from ineligibility due to lack of financial qualifications), or other exclusion from bidding, or proposing or contracting with a federal or a State of Nebraska department or agency of (A) the Contractor; (B) any Contractor-Related Entity (excluding Subcontractors), or (C) any affiliate of the Contractor for whom transfer of ownership would constitute a Change of Control, or (ii) the Contractor has not dismissed any Subcontractor whose Work is not substantially complete and who it is aware of (exercising all reasonable diligence) is determined disqualified, suspended or debarred, or otherwise excluded from bidding, or proposing or contracting with a federal or a State of Nebraska department or agency;
16. The Contractor is a party to fraud;
17. The Contractor fails to pay Liquidated Damages due to the Department within the timeframes specified in this Contract;
18. The Contractor changes or substitutes Key Personnel without Department approval;
19. The Contractor fails to satisfy any Completion Deadline; or
20. The Contractor fails to timely observe or perform or cause to be observed or performed any other material covenant, agreement, obligation, term or condition required to be observed or performed by the Contractor under the Contract.

6.1.2 Right to Cure

The Department agrees to provide the Contractor and Surety ten Business Days' notice and opportunity to cure any default before declaring any the Contract in default, provided that no such notice and opportunity to cure is required for any default which by its nature cannot be cured or for any default that poses an immediate and imminent danger to public health or safety. If a default is curable, but by its nature cannot be cured within ten Business Days, as reasonably determined by the Department, the Department agrees not to declare an event of default provided that the Contractor commences such cure within such ten Business Day period and thereafter diligently prosecutes such cure to completion; provided, however, that in no event will such cure period

exceed sixty Calendar Days in total unless mutually agreed upon by the Parties. Notwithstanding the foregoing, it is expressly agreed by the Parties that the defaults described in Section 6.1.1(10), (11), and (16) shall not be subject to any cure period under this Contract and the Contractor shall immediately be in default upon the occurrence thereof. If the Contractor does not cure any default or if the default is not curable, the Department may provide the Contractor and Surety notice of default.

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

6.2 Remedies

6.2.1 Rights of the Department

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

1. The Department may order the Contractor to suspend or terminate the Work or any portion of the Work in accordance with the respective suspension or termination provisions in Section 11 (Termination);
2. The Department may terminate the Contract or a portion thereof;
3. If and as directed by the Department, the Contractor shall withdraw from the Site; and shall remove such materials, equipment, tools and instruments used by, and any debris or waste materials generated by, any Contractor-Related Entity in the performance of the Work;
4. The Contractor shall deliver to the Department possession of any or all facilities of the Contractor located on the Site, as well as any or all partially completed drawings (including plans, elevations, details, and diagrams), specifications, records, information, schedules, samples, shop drawings, and other documents that the Department deems necessary for completion of the Work;
5. The Contractor shall confirm assignment to the Department of Subcontracts requested by the Department, and the Contractor shall terminate, at its cost, all other Subcontracts;
6. The Department may deduct from any amounts payable by the Department to the Contractor such amounts payable by the Contractor to the Department, damages payable to the Department under the Contract;

7. The Department, without incurring any liability to the Contractor, shall have the right to:
 - i. Take the performance of all or a portion of the Work from the Contractor (without the use of the Contractor's equipment, tools, and instruments) and enter into an agreement with another Person for the completion of such Work, if the Contractor or Surety has not proceeded satisfactorily within the cure period described in Section 6.1.2 (Right to Cure);
 - ii. Use such other methods, as in the opinion of the Department, will be required for the completion of the Project.
8. Require the Surety to take the performance of all or a portion of the Work from the Contractor (without the use of the Contractor's equipment, tools, and instruments) and enter into an agreement with another Person for the completion of such Work; or
9. "Step-in" to perform the obligations of the Contractor, and if the Department "steps-in", the Department exercises any right to perform any obligations of the Contractor, in the exercise of such right the Department may, but is not obligated to, among other things:
10. Perform or attempt to perform, or cause to be performed, such Work;
11. Spend such sums as the Department deems necessary and reasonable to employ and pay such engineers, consultants, and contractors, and obtain materials and equipment as may be required for the purpose of completing such Work;
12. Execute all applications, certificates, and other documents as may be required for completing the Work;
13. Modify or terminate any contractual arrangements;
14. Take any and all other actions which it may in its sole discretion consider necessary to complete the Work; and
15. Prosecute and defend any action or proceeding incidental to the Work.
16. Without limiting Section 6.3.1 (Liability of Contractor; Cumulative, Non-Exclusive Remedies of the Department) and Section 6.3 (Department Right of Offset), recover any and all damages available at Law on account of the occurrence of a Contractor event of default; or
17. Exercise any other right or remedy available at law or in equity.

6.3 Department Right of Offset

Notwithstanding whether there exists any Contractor event of default, the Department may deduct and offset the amount of any demand for payment of money or damages from the Contractor to the Department then due and owing to the Department and not otherwise subject to dispute by the Contractor from and against any amounts the Department may owe to the Contractor pursuant to this Contract. The Department will not deduct disputed amounts from payments owed hereunder until the amount in dispute exceeds expected remaining payments under the Contract, with payment pending resolution of the dispute.

6.3.1 Liability of Contractor; Cumulative, Non-Exclusive Remedies of the Department

If a default has occurred, the Contractor and Surety shall be liable to the Department (in addition to any other damages under the Contract) for all costs reasonably incurred by the Department or any party acting on the Department's behalf in completing the Work or having the Work completed by another Person (including any re-procurement costs, throw away costs for unused portions of

the completed Work, and increased financing costs). Upon the occurrence of an event of default, the Department shall be entitled to withhold all or any portion of further payments to the Contractor until such time as the Department is able to determine how much (if any) remains owing to the Contractor. Promptly upon such determination, the Department shall notify the Contractor in writing of the amount, if any, that the Contractor shall pay the Department or that the Department shall pay the Contractor with respect thereto. All costs and charges incurred by the Department, including attorneys', accountants', and expert witness fees and costs, together with the cost of completing the Work under the Contract, will be deducted from any monies due or which may become due to the Contractor. If such expense exceeds the sum which would have been payable under the Contract, then the Contractor and its Surety shall be liable and shall pay to the Department the amount of such excess.

If a default under Section 6.1.1 (Events of Default) subsection 10 or 11 occurs, the Department shall be entitled to request of the Contractor, or its successor in interest, adequate assurance of future performance in accordance with the terms and conditions hereof. Failure to comply with such request within ten Business Days of delivery of the request shall entitle the Department to terminate the Contract and to enforce the accompanying rights set forth above. Pending receipt of adequate assurance of performance and actual performance in accordance therewith, the Department shall be entitled to proceed with the Work with its own forces or with other contractors on a time and material or other appropriate basis, the cost of which will be credited against and deducted from the Department's payment obligations hereunder. The foregoing shall be in addition to all other rights and remedies provided by law or equity and such rights and remedies as are otherwise available under the Contract and the Contract Bond.

In lieu of the provisions of this Section 6.3.1 for terminating the Contract and completing the Work, the Department may pay the Contractor for the Work already done according to the provisions of the Contract and may treat the Work remaining undone as if it had never been included or contemplated by the Contract. The Contractor will not be allowed to claim Construction Markup on, or any other compensation relating to, Work uncompleted by the Contractor under this provision.

If the Contract is terminated for grounds that are later determined not to justify a termination for default, such termination shall be deemed to constitute a termination for convenience pursuant to Section 11 (Termination).

If the Department suffers actual damages as a result of the Contractor's default or failure to perform an obligation under the Contract, then the Department shall be entitled to recovery of such damages from the Contractor.

The exercise or beginning of the exercise by the Department of any one or more rights or remedies under this Section 6.3.1 shall not preclude the simultaneous or later exercise by the Department of any or all other rights or remedies, each of which shall be cumulative, and not exclusive.

7 INSURANCE

Prior to execution of this Contract, the Contractor shall obtain insurance coverage to fully protect it from loss associated with the Work, and have at a minimum the insurance described below:

1. General Liability:
2. Limits of at least:

- i. \$ 1,000,000 per Occurrence
- ii. \$ 2,000,000 General Aggregate
- iii. \$ 2,000,000 Completed Operations Aggregate
- iv. \$ 1,000,000 Personal and Advertising Injury

The Contractor shall be responsible for the payment of any deductibles. Coverage shall be provided by a standard form Commercial General Liability Policy (CG0001 or equivalent) covering bodily injury, property damage including loss of use, and personal injury. The General Aggregate shall apply on a Per Project Basis.

The State of Nebraska, Department of Transportation, shall be named as an Additional Insured on a primary and non-contributory basis including completed operations for three years after Final Acceptance.

The Contractor agrees to waive its rights of recovery against the State of Nebraska, Department of Transportation. Waiver of Subrogation in favor of the State of Nebraska, Department of Transportation shall be added to the policy.

Contractual liability coverage shall be on a broad form basis and shall not be amended by any limiting endorsements. If Work is being performed near a railroad track, the 50-foot railroad right-of-way exclusion must be deleted. Products and completed operations coverage in the amount provided above shall be maintained for the duration of the Work and shall be further maintained for a minimum period of three years after Final Acceptance.

Coverage shall be included for demolition of any building or structure, collapse, explosion, blasting, excavation and damage to property below surface of ground (XCU coverage).

Policy shall not contain a total or absolute pollution exclusion. Coverage shall be provided for pollution exposures arising from products and completed operations as per standard CG0001 Pollution Exclusion or equivalent. If the standard pollution exclusion as provided by CG0001 has been amended, coverage must be substituted with a separate Pollution Liability policy of \$1.0 million per occurrence and \$2.0 million aggregate. If coverage is provided by a "claims made" form, coverage will be maintained for three years after Project completion. Any applicable deductible is the responsibility of the Contractor.

- 1. Automobile Liability:
- 2. Limits of at least \$ 1,000,000 CSL per Accident

Coverage shall apply to all Owned, Hired, and Non-Owned Autos. If Work is being performed near a railroad track, the 50-foot railroad right-of-way exclusion must be deleted.

The Contractor agrees to waive its rights of recovery against the State of Nebraska, Department of Transportation. Waiver of Subrogation in favor of the State of Nebraska, Department of Transportation, shall be added to the policy.

Automobile liability coverage shall be obtained from an insurance carrier who is licensed in Nebraska and any other State in which the Project is located.

- 1. Workers' Compensation:
- 2. Limit: Statutory coverage for Nebraska and for any other State in which the project is located.

3. Employer's Liability limits:

- i. \$500,000 Each Accident
- ii. \$500,000 Disease – Per Person
- iii. \$500,000 Disease – Policy Limit

The Contractor agrees to waive its rights of recovery against the State of Nebraska, Department of Transportation. Waiver of Subrogation in favor of the State of Nebraska, Department of Transportation shall be added to the policy.

Workers' compensation coverage shall be obtained from an insurance carrier who is licensed in Nebraska and any other State in which the Project is located. Where applicable, the Longshore and Harbor Workers Compensation Act endorsement shall be attached to the policy.

- 1. Umbrella/Excess:
- 2. Limits of at least \$1,000,000 per Occurrence

Policy shall provide liability coverage in excess of the specified Employers Liability, Commercial General Liability, and Automobile Liability.

The State of Nebraska, Department of Transportation shall be an "Additional Insured". The Contractor agrees to waive its rights of recovery against the State of Nebraska, Department of Transportation. Waiver of subrogation in favor of the State of Nebraska, Department of Transportation shall be provided.

1. Pollution Liability:

When Hazardous Wastes or contaminated or polluted materials must be handled and/or moved, the Contractor shall obtain Pollution Liability Coverage with minimum limits of \$1,000,000 per occurrence and \$2,000,000 aggregate.

If, during Construction Services, Hazardous Wastes, contaminated or polluted material are discovered on the Project, the Contractor shall immediately cease any operation that may disturb these materials, and shall immediately notify the Department of all facts related to the discovery of these materials.

Discovery of Hazardous Materials shall be considered a Relief Event pursuant to the Specifications, Section 108.03 (Relief and Compensation).

7.1 Additional Insurance Requirements

The Contractor shall provide and carry any additional insurance required by the Special Provisions, if applicable.

Except as otherwise provided herein, all insurance shall be kept in full force and effect until Final Acceptance. If any of the Work is sublet, equivalent insurance shall be provided by or on behalf of the Subcontractor or Subcontractors (at any tier) to cover all operations.

Approved trucking Subcontractors (at any tier) who are being utilized only for the purpose of hauling materials shall be exempt from the General Liability, Umbrella/Excess, and Pollution insurance requirements above.

When a Contractor or Subcontractor chooses to employ a trucker by carrying the driver on his or her payroll and entering into a lease agreement for the truck, the owner-operator of the truck shall be required to comply with the Automobile Liability provisions of Section 7 Umbrella/Excess. It shall be the duty of the Contractor to ensure that the owner-operator of the truck has such insurance in effect. The Contractor shall maintain evidence that any truckers so utilized (at any tier) are insured to the minimum limits specified and be able to furnish documentation of the same on demand.

Failure to ensure that insurance coverage exists and failure to maintain evidence thereof shall be considered a breach of the Contract. Any insurance policy shall be written by an insurance company with a Best's Insurance Guide Rating of A – VII or better.

Prior to execution of the Contract, the Contractor shall provide the State of Nebraska, Department of Transportation evidence of such insurance coverage in effect in the form of an ACORD® (or equivalent) certificate of insurance executed by a licensed representative of the participating insurer(s). Certificates of insurance shall show the Nebraska Department of Transportation as the certificate holders. Failure of the Department to review, Approve, and/or reject a certificate of insurance in whole or in part does not waive the requirements of the Contract.

The limits of coverage set forth in this Section 7 are required minimum limits of coverage. The required minimum limits of coverage shall not be construed to be a limitation of the liability on the part of the Contractor or any of its Subcontractors or lower-tier Subcontractors. The carrying of insurance described shall in no way be interpreted as relieving the Contractor, Subcontractor, or tier Subcontractors of any responsibility or liability under the Contract.

If there is a discrepancy of coverage between this Section 7 and any other insurance specification for this Project, the greater limit or coverage requirement shall prevail.

For so long as insurance coverage is required under this Contract, the Contractor shall have a duty to notify the Department when the Contractor knows, or has reason to believe, that any insurance coverage required under this Contract will lapse, or may be cancelled or terminated. The Contractor must forward any pertinent notice of cancellation or termination to the Department by mail (return receipt requested), hand-deliver, email, or facsimile transmission within two Business Days of receipt by the Contractor of any such notice by an insurance carrier. Notice shall be sent to the Department at the following address:

Nebraska Department of Transportation
Construction Division -- Insurance Section
1500 Nebraska Parkway, P.O. Box 94759
Lincoln, NE 68509-4759
Facsimile No. 402-479-4854
NDOT.ConstructionInsurance@nebraska.gov

8 INDEMNIFICATION

The Contractor shall indemnify and hold harmless the Department, including their agents, their respective successors and assigns, and their respective shareholders, officers, directors, agents, and employees (collectively referred to as the Indemnified Parties) from and against any and all Third Party claims, causes of action, suits, judgments, investigations, legal or administrative proceedings, penalties, fines, damages, losses, liabilities, costs, and expenses, including any

injury to or death of persons, or damage to or loss of property (including damage to utility facilities), and including reasonable attorneys', accountants', and expert witness fees and defense costs, arising out of, relating to, or resulting from any of the following:

1. The breach of this Contract by any Contractor-Related Entity.
2. The failure by any Contractor-Related Entity to comply with any applicable Laws (including Laws regarding handling, generation, treatment, storage, transportation, and disposal of Hazardous Materials) or Governmental Approvals in performing the Work.
3. Any patent or copyright infringement, or other improper appropriation or use of trade secrets, patents, proprietary information, know-how, copyright rights, or inventions in performance of the Work, or arising out of any use in connection with the Project of methods, processes, designs, information, or other items furnished or communicated to the Department or another Indemnified Party pursuant to this Contract; provided that this indemnity shall not apply to any infringement resulting from the Department's failure to comply with specific written instructions regarding use provided to the Department by the Contractor.
4. The negligent act or omission or willful misconduct of any Contractor-Related Entity.
5. Any and all claims of inverse condemnation.
6. Any and all claims under Third Party Agreements.
7. Any and all claims by any Governmental Entity or taxing authority claiming taxes based on gross receipts, purchases, or sales, or the use of any property or income of the Contractor 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 Contractor-Related Entity.
8. Any and all stop notices and liens filed in connection with the Work, including all expenses and attorneys', accountants', and expert witness fees and costs incurred in discharging any stop notice or lien.
9. Any spill or release or threatened spill or release of Hazardous Materials (i) attributable to the negligence, willful misconduct, or breach of contract by any Contractor-Related Entity; or (ii) that was brought onto the Site by any Contractor-Related Entity.
10. The claim or assertion by any contractor of inconvenience, disruption, delay, or loss caused by interference by any Contractor-Related Entity with or hindering the progress or completion of work being performed by other contractors as described in the Specifications, Section 105.07 (Cooperation Between the Contractor and Other Contractors), or failure of any Contractor-Related Entity to cooperate reasonably with other contractors in accordance therewith.

The Contractor's responsibility for attorneys', accountants', and expert witness fees and defense costs, to the extent caused by a Contractor-Related Entity will not include fees of attorneys, accountants, and experts retained directly by an Indemnified Party or employed by an Indemnified Party.

The Contractor's indemnity obligations under this Section 8 shall not extend to any loss, damage, or cost to the extent that such loss, damage or cost was caused by the negligence or willful misconduct of such Indemnified Party or its agents, servants, or independent contractors who are directly responsible to such Indemnified Party.

9 SUBCONTRACTING

The Contractor will not be allowed to sublet, assign, sell, transfer, or otherwise dispose of any portion of the Contract or any right, title, or interest therein; or to either legally or equitably assign any of the money payable under the Contract or the claims without the prior written consent of the Department.

The Contractor shall perform with its own firm Work amounting to not less than 30% of the Total Construction GMP. Any items designated in a GMP Workbook as "specialty items" may be performed by a Subcontractor. The cost of any Subcontracted "specialty items" may be deducted from the Construction Services GMP before computing the percentage of Work required to be performed by the Contractor.

Subcontracts, or transfer of contract, will not release the Contractor of any liability under the Contract and Contract Bond.

All certified Subcontractor payrolls shall be checked by the Contractor before submittal to the Department.

The Contractor's failure to comply with this Section 9 is a breach of this Contract pursuant to Section 6.1.1 (Events of Default). Remedies for this breach may include the Department withholding Monthly Progress Payments to the Contractor, terminating the Contract, or applying remedies described elsewhere in the Contract. Remedies shall be in the sole discretion of the Department and in no event shall a Subcontractor have rights, or cause of action, against the Department under this Section 9.

The failure of any Subcontractor to comply with applicable terms of this Section 9 shall be communicated by the Contractor or upper-tier Subcontractor to the Subcontractor or lower-tier Subcontractor in writing and may result in the Department withholding Subcontract Approval for future Work.

9.1 Second Tier Subcontracts

All requests for second tier Subcontracting shall be submitted to and approved by the Contractor before they are forwarded to the Department for Approval. Work subcontracted by a DBE firm to a non-DBE Subcontractor will not be counted toward the DBE goal.

9.2 Prompt Payment of Subcontractors

The Contractor shall pay first-tier Subcontractors within twenty Calendar Days of receipt of the Monthly Progress Payments from the Department for Work performed by the Subcontractor.

The Contractor shall return any and all retainage to a Subcontractor within thirty Calendar Days after the satisfactory completion of the Work by the Subcontractor.

The Contractor shall not withhold payments except for just cause and payment shall not be withheld, delayed, or postponed without first receiving written Approval from the Department. Requests from the Contractor to withhold, delay, or postpone payment shall be submitted to the Department in writing, describing the reason for the request, within ten Calendar Days of receiving knowledge of the cause that supports the request.

The Contractor and the upper-tier Subcontractor(s) shall include language as a part of every Subcontract that can be identified as a "Prompt Payment Clause". This "Prompt Payment Clause" shall stipulate:

1. Payment to first-tier Subcontractors for Work completed to date shall be made by the Contractor within twenty Calendar Days of receipt of Monthly Progress Payments from the Department for said Work.
2. For lower-tier Subcontracts the payment by any upper-tier Subcontractor to a lower-tier Subcontractor for Work completed to date shall be made within ten Calendar Days of receipt of Monthly Progress Payments from the upper-tier Subcontractor for said Work.
3. The return of any and all retainage withheld by any upper-tier Subcontractor shall be made within thirty Calendar Days after the satisfactory completion of the Work by the lower-tier Subcontractor.
4. Subcontractors at any tier shall return to the Contractor or upper tier Subcontractor, as the case may be, any and all overpayments that result from adjustments to measured and recorded quantities (as part of the preparation of subsequent Monthly Progress Payments or the final records) within twenty Calendar Days of receipt of written notice of the amount of overpayment.
5. Subcontractors at any tier may not withhold, delay, or postpone payment to lower-tier Subcontractors without just cause and the written Approval from the Department. Requests from the upper-tier Subcontractor to withhold, delay, or postpone payment shall be submitted to the Department in writing, through the Contractor, describing the reason for the request, within ten Calendar Days of receiving knowledge of the cause that supports the request.

The Contractor, including upper-tier Subcontractors, shall report payments made to lower-tier Subcontractors on the date of payment using the prompt payment reporting system specified by the Department. Information on the prompt payment reporting system is available on the Department's website on the Contractor Information webpage. The Contractor shall record in the Department's prompt payment reporting system the amount of the payment, whether the amount paid was subject to withholding, the date of payment, and the name of the Subcontractor to which the payment was made. The Contractor shall ensure it has or develops access to the reporting system prior to beginning the Construction Services.

9.3 Affiliate Subcontracts

The Contractor shall have the right to have Work performed by Affiliates only under the following terms and conditions:

1. The Contractor shall execute a written Subcontract with the Affiliate;
2. The Subcontract shall be consistent with the Contract and the performance standards identified in Section 4.2 (Standard of Care), and be in form and substance similar to Subcontracts being used by the Contractor for similar Work with unaffiliated Subcontractors;
3. The Subcontract shall set forth the scope of Work and all pricing, terms, and conditions;
4. The pricing, scheduling, and other terms and conditions of the Subcontract shall be no less favorable to the Contractor than those that the Contractor could reasonably obtain in an arm's length, competitive transaction with an unaffiliated Subcontractor. The

Contractor shall bear the burden of proving that the same are no less favorable to the Contractor;

5. No Affiliate shall be engaged to perform any Work that the Contract indicates shall be performed by an independent or unaffiliated party; and
6. No Affiliate shall be engaged to perform any Work that would be inconsistent with the requirements of the Contract.

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

The Contractor shall make no payments to Affiliates for Work in advance of performance thereof, except for reasonable mobilization payments or other payments consistent with arm's length, competitive transactions of similar scope. Advance payments in violation of this provision shall be excluded from the calculation of termination compensation under Section 11.2 (Post-Termination Responsibilities).

10 SUSPENSION OF THE WORK

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

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

1. Correct conditions unsafe for the Project personnel or the general public;
2. Comply with any Governmental Approval, Law, or otherwise carry out the requirements of this Contract;
3. Carry out directives or orders of the Department; or
4. Remove an employee whom the Department has requested be removed pursuant to the Specifications Section 108.07 (Contractor Employees, Methods, and Equipment).

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

11 TERMINATION

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

11.1 Notice of Termination

After receipt of a Notice of Termination, and except as otherwise directed by the Department, the Contractor shall immediately proceed as follows, regardless of any delay in determining or adjusting any amounts due under this Section 11:

1. Stop Work as specified in the Notice of Termination.
2. Communicate to all affected Subcontractors such Notice of Termination and that their Subcontracts are not to be further performed unless otherwise authorized in writing by the Department.
3. Place no further Subcontracts or orders for materials, services, or facilities, except as necessary to complete the continued portion of the Work, if any, or for mitigation of damages.
4. Terminate all Subcontracts to the extent that they relate to the Work terminated.
5. Assign to the Department in the manner, at the times, and to the extent directed by the Department, all of the right, title, and interest of the Contractor under the Subcontracts so terminated, in which case the Department will have the right, in its sole discretion, to accept performance, settle, or pay any or all claims arising out of the termination of such Subcontracts.
6. Settle all outstanding liabilities and claims arising out of such termination of Subcontracts, with the Approval or ratification of the Department, to the extent it may be required, which Approval or ratification shall be final.
7. Provide the Department with an inventory list of all materials previously produced, purchased, or ordered from Suppliers for use in the Work and not yet used in the Work, including its storage location, as well as any documentation or other property required to be delivered hereunder, which is either in the process of development or previously completed but not yet delivered to the Department, and such other information as the Department may request; and transfer title and deliver to the Department, in the manner, at the times, and to the extent, if any, directed by the Department of:
8. Fabricated or unfabricated parts, the Work in process, completed Work, supplies, and other material produced or acquired for the Work terminated; and
9. The completed or partially completed drawings (including plans, elevations, sections, details, and diagrams), specifications, records, samples, information, and other property that would have been required to be furnished to the Department if the Work had been completed.
10. Complete performance, in accordance with the Contract, of all Work not terminated.

11. Take all action that may be reasonably necessary, or that the Department may direct, for the safety, protection, and preservation of:
12. The public;
13. The Work; and
14. The equipment, machinery, materials, and property related to the Contract that is in the possession of the Contractor and in which the Department has or may acquire an interest.
15. As authorized by the Department in writing, use the Contractor's best efforts to sell, in a manner, at the times, to the extent, and at the price or prices directed or authorized by the Department, any property of the types referred to in subsection 7 above; provided, however, that the Contractor:
16. Is not required to extend credit to any purchaser; and
17. May acquire the property under the conditions prescribed and at prices Approved by the Department.
18. The proceeds of any transfer or disposition will be applied to reduce any payments to be made by the Department under the Contract or paid in any other manner directed by the Department. If requested by the Department, withdraw from the portions of the Site designated by the Department and remove such materials, equipment, tools and instruments used by, and any debris or waste materials generated by, the Contractor and any Subcontractor in the performance of the Work as the Department may direct.
19. Take other actions related to the termination that are directed by the Department.

11.2 Post-Termination Responsibilities

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

11.2.1 Termination Settlement

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

The Contractor and the Department may agree upon the whole or any part of the amount or amounts to be paid to the Contractor by reason of termination of Work pursuant to this Section 11. Such negotiated settlement may include a reasonable allowance for profit solely on Work that has been completed as of the termination date and subsequently accepted by the Department

but not an amount for lost, anticipated, or unearned profit or other costs disallowed in this Section 11. Such agreed upon termination settlement amount, exclusive of settlement costs, shall not exceed the Total Construction GMP as reduced by the amount of payments otherwise made and as further reduced by the cost of the Work not terminated, as determined by the costs allocated to such Work in the Schedule of Values. Upon determination of the termination settlement amount, the Contract will be amended accordingly, and the Contractor will be paid the agreed amount. Unless otherwise agreed to by the Parties as a part of a negotiated settlement, the Department's execution and delivery of any settlement agreement shall not affect any of its rights under the Contract with respect to completed Work.

11.2.2 Disagreement on Termination Settlement

If the Contractor and the Department fail to agree, as provided in Section 11.2.1 (Termination Settlement), upon the whole amount to be paid to the Contractor in whole or in part by reason of the termination of Work pursuant to this Section 11, the amount payable (exclusive of interest charges) shall be determined by the Department in accordance with the following:

1. For Terminations for Convenience, the Department will pay the Contractor the sum of the following amounts for Work performed prior to the effective date of the Notice of Termination, as such amounts are determined by the Department:
2. The Contractor's actual reasonable out-of-pocket cost (without Construction Markup) for all Work performed, including mobilization, demobilization, and Work done to secure the Project for termination, including reasonable overhead and accounting for any refunds payable with respect to insurance premiums, deposits, or similar items, as established to the Department's satisfaction. In determining the reasonable cost, deductions will be made for the cost of materials to be retained by the Contractor, amounts realized by the sale of materials, and for other appropriate credits. Deductions will also be made for the cost of damaged materials. When, in the opinion of the Department, the cost of an item of Work is excessively high due to costs incurred to remedy or replacement of defective or rejected Work, the reasonable cost to be allowed will be the estimated reasonable cost of performing that Work in compliance with the requirements of the Contract, and the excessive actual cost will be disallowed.
3. As to Construction Markup on the actual out-of-pocket cost permitted in paragraph 1(a) above, a sum determined by the Department to be fair and reasonable; provided, however, that if it appears that the Contractor would have sustained a loss on the entire Contract had it been completed, no Construction Markup shall be included or allowed, and an appropriate adjustment shall be made by reducing the amount of the settlement to reflect the indicated rate of loss.
4. The cost of settling and paying claims arising out of the termination of Work under Subcontracts, 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 under the Contract, which amounts shall be included in the cost on account of which payment is made under Section 11.1 (Notice of Termination).
5. The reasonable out-of-pocket cost (including reasonable overhead) of the preservation and protection of property incurred pursuant to Section 11.1(9), and any other reasonable out-of-pocket cost (including overhead) incidental to termination of Work under the Contract including the reasonable cost to the Contractor of handling material returned to the vendor, delivered to the Department, or otherwise disposed of as directed by the Department, and including a reasonable allowance for the Contractor's

administrative costs in determining the amount due to the Contractor as the result of the termination of Work under the Contract.

6. The actual out-of-pocket costs of any non-perishable materials or supplies identified in Section 11.1(7) that are specifically fabricated for the Project and permanently incorporated into the Project;
7. The actual out-of-pocket costs associated with any materials identified in Section 11.1(7) that the Department, in its sole discretion, may utilize on the Project.
8. For Termination for default, the Department, in its sole discretion, will pay the Contractor the sum of the following amounts for Work performed prior to the effective date of the Notice of Termination, as such amounts are determined by the Department:
9. The Contractor's actual reasonable out-of-pocket cost (without Construction Markup) for all Work performed, excluding 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. In determining the reasonable cost, deductions will be made for the cost of materials to be retained by the Contractor, amounts realized by the sale of materials, and for other appropriate credits. Deductions will also be made for the cost of damaged materials.
10. The actual out-of-pocket costs associated with any materials identified in Section 11.1(7) that the Department, in its sole discretion, may utilize on the Project.
11. All costs and charges incurred by the Department, together with the cost of completing the Work under Contract, shall be deducted from any money due or which may become due to the Contractor. In case the expense so incurred by the Department shall be less than the sum which would have been payable under the Contract if it had been completed by the Contractor, then the Contractor shall be entitled to receive the difference, and in case such expense shall exceed the sum which would have been payable under the Contract, then the Contractor and the Surety shall be liable and shall pay to the Department the amount of said excess.
12. The actual out-of-pocket costs of any non-perishable materials or supplies identified in Section 11.1(7) that are specifically fabricated for the Project and permanently incorporated into the Project;
13. The actual out-of-pocket costs associated with any materials identified in Section 11.1(7) that the Department, in its sole discretion, may utilize on the Project.

11.2.3 Completion of Project in Default

The Department shall give the Contractor and the Contractor's surety written notice of default, delay, and/or neglect, as appropriate, whenever the Contractor violates any provision of Section 6.1.1 (Events of Default).

If the Contractor or Surety does not proceed according to the Department's default, delay and/or neglect notice within ten Business Days of its receipt, the Department has full power and authority, without violating the Contract, to take the prosecution of the Work out of the hands of the Contractor. The Department may appropriate or use any or all materials and equipment at the Site as may be suitable and acceptable and may enter into an agreement with others for the completion of the Contract according to the terms and provisions thereof, or use such other methods as shall be required for the completion of the Contract in an acceptable manner.

11.3 Additional Termination Provisions

11.3.1 Restrictions on Compensation

The Contractor acknowledges and agrees that it shall not be entitled to any compensation in excess of the value of the Work performed (determined as provided in Section 11.2.2 (Disagreement on Termination Settlement) plus its settlement costs, and that items such as lost, anticipated or unearned profit, unabsorbed overhead, opportunity costs, or consequential or other damages shall not be recoverable by the Contractor for itself or for its Subcontractors on account of the termination of the Contract. However, the total termination settlement amount to be paid to the Contractor, exclusive of costs described in Sections 11.2.2(1)(c) and 11.2.2(1)(d), may not exceed the Total Construction GMP less the amount of payments previously made and less the cost of the Work not terminated, as determined by the costs allocated to such Work in the Schedule of Values. Furthermore, if any refund is payable with respect to Project-specific insurance or Contract Bond premiums, deposits, or similar items which were previously passed through to the Department by the Contractor, such refund shall be paid directly to the Department or otherwise credited to the Department.

11.3.2 Reductions in Compensation

Any amount due to the Contractor pursuant to this Section 11 shall be reduced by:

1. All unliquidated payments for Work or materials not yet performed on or supplied to the Project at the time of the payment, excluding payments made to or on behalf of the Contractor applicable to the terminated portion of the Contract;
2. The amount of any claim which the Department may have against any Contractor-Related Entity in connection with the Contract;
3. The agreed price for, or the proceeds of the sale of, any property, materials, supplies, or other things acquired by the Contractor or sold, pursuant to the provisions of this Section 11, and not otherwise recovered by or credited to the Department;
4. Amounts that the Department reasonably deems advisable to retain to cover any existing or threatened claims, Liens, and stop notices relating to the Project, including claims by Utility Owners;
5. The cost of repairing, replacing or otherwise correcting any Nonconforming Work; and
6. Any amounts due or payable by the Contractor to the Department.

11.3.3 Additional Provisions

The Department may, from time to time, under such terms and conditions as it may prescribe and in its sole discretion, make partial payments on account against costs incurred by the Contractor in connection with the terminated portion of the Contract, whenever, in the opinion of the Department, the aggregate of such payments shall be within the amount to which the Contractor will be entitled under this Section 11.

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

Under no circumstances shall the Contractor be entitled to lost, anticipated or unearned profit, unabsorbed overhead, opportunity costs, or consequential or other damages as a result of a

termination under this Section. The payment to the Contractor determined in accordance with this Section constitutes the Contractor's sole and exclusive remedy for a termination under this Section 11.

Anything contained in this Contract to the contrary notwithstanding, a termination under this Section 11 shall not waive any right or claim to damages, which the Department may have, and the Department may pursue any cause of action, which it may have at law or in equity or under this Contract.

All costs claimed by the Contractor under this Section 11 shall, at a minimum, be allowable, allocable, and reasonable in accordance with the cost principles and procedures of 48 CFR Part 31.

12 PARTNERING AND DISPUTE RESOLUTION

12.1 Partnering

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

Requirements for the partnering program for the Project will be included in the Preconstruction Services Amendment and Construction Services Amendment(s).

12.2 Dispute Resolution

Disputes Resolution shall be based on an escalation of authority within the Parties. The "NDOT Construction Project Communication and Decision Guide" will identify the key individuals at each level who may be utilized for project decision resolution. When agreement cannot be reached at the first level, the next Person identified in the *NDOT Construction Project Communication and Decision Guide* may be contacted by either Party while still maintaining open communication on the Project. The decision authority will progressively move to the next levels as necessary.

The Department will collect the required information from the Contractor and complete the *NDOT Construction Project Communication and Decision Guide* for the Project prior to execution of this Contract. The Parties agree to utilize this guide to facilitate effective resolution of disputes.

13 ADDITIONAL CONTRACTOR OBLIGATIONS

13.1 Maintenance of Records

The Contractor shall maintain at the [Contractor] office in the State a complete set of all books, records and documents prepared or employed by the Contractor with respect to the Project.

13.2 Audit and Inspection Rights

The Contractor and its Subcontractors at all tiers shall grant to the Department, FHWA, and the U.S. Comptroller General and their respective authorized representatives, access, audit, and inspection rights, with right to copy any books and records of the Contractor as such Persons may reasonably request from time to time in connection with the issuance of Change Orders, Claims, the resolution of disputes, and other matters as such Persons reasonably deem necessary for purposes of complying or verifying compliance with the Contract and Laws, including responding

to requests pursuant to the Nebraska Open Records Act. The Contractor shall grant to Utility Owners and their respective authorized representatives such audit and inspection rights, access and the right to copy such books and records as such Persons may request in connection with the resolution of disputes or other matters, as such Persons reasonably deem necessary for purposes of complying or verifying compliance with the Utility-related contractual or Utility Agreement requirements. The Contractor shall also allow the Department access to all Subcontracts and records regarding Subcontracts.

The Contractor shall insert in all Subcontracts a requirement that the Subcontractor shall permit access, audit, and inspection rights in accordance with this Section 13.2 and shall require Subcontractors to insert the same provision in each Subcontract at all tiers.

13.3 Retention of Records

Except as otherwise required by law, the Contractor shall maintain all records and documents relating to the Contract (including copies of all original documents delivered to the Department) at the [Contractor] office in the State, or as otherwise agreed by the Department in writing, until three years after the earlier occurrence of:

1. the Department provides written notice that the final reimbursement has been issued by FHWA; or
2. the Contract termination date.

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

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

13.4 Intellectual Property

13.4.1 Proprietary Intellectual Property

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

13.5 Assignment of Causes of Action

The Contractor hereby offers and agrees to assign to the Department all rights, title, and interest in and to all causes of action it may have under Section 4 of the Clayton Act (15 U.S.C. § 15), arising from purchases of goods, services, or materials pursuant to this Contract or any Subcontract. This assignment shall be made and become effective at the time the Department

notifies the Contractor that the final reimbursement has been made by FHWA, without further action of the Parties.

14 MISCELLANEOUS PROVISIONS

14.1 Amendments

14.1.1 General Contract Amendments

This Contract may be amended only by a written instrument duly executed by the Parties in accordance with Section 14.6 (*Designation of Authorized Representatives*).

14.1.2 Phase Amendments and Change Orders

Preconstruction Services Amendments, Construction Services Amendments, and Change Orders shall be executed as described in Section 14.6.1 (*Designation of Authorized Representatives*).

14.2 Waiver

14.2.1 No Waiver of Subsequent Rights

Either Party's waiver of any breach or failure to enforce any of the terms, covenants, conditions, or other provisions of the Contract 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. 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 was given.

14.2.2 Custom Does not Constitute Waiver

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

14.2.3 Waivers Must be in Writing

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

14.3 Independent Contractor

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

14.4 Mutual Waiver of Consequential Damages

Notwithstanding anything contrary in the Contract, the Department and the Contractor agree to waive all claims against each other for any consequential or indirect damages that may arise out of or relate to this Contract. The Department agrees to waive damages including but not limited to the Department's loss of use of the Project. The Contractor agrees to waive damages including but not limited to loss of business, loss of financing, principal office overhead and expenses, loss of profits not related to this Project, loss of bonding capacity, loss of reputation, or insolvency.

14.5 Successors and Assigns

The Contract shall be binding upon and inure to the benefit of the Department and its successors and assigns and to the benefit of the Contractor and its permitted successors, permitted assigns and legal representatives.

14.5.1 Assignment by the Department

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

14.5.2 Assignment by the Contractor; Changes of Control; Change of Organization

The Contractor shall not otherwise sublet, transfer, assign, or dispose of any portion of this Contract, delegate any of its duties hereunder, or suffer a voluntary or involuntary Change of Control, except in each case, with the Department's prior written Approval, given in the Department's sole discretion. Except and after any Approval only, any of the foregoing actions shall be null and void *ab initio* and otherwise ineffective to relieve the Contractor of its responsibility for the Work assigned or delegated.

The Contractor shall not change the legal form of its organization in a manner that adversely affects the Department's rights, protections, and remedies under the Contract without the prior written Approval of the Department, given in the Department's sole discretion.

14.6 Designation of Authorized Representatives

All Contract documents requiring Contractor signature shall be accompanied by a certification from the Contractor affirming that the Person executing the Contract document is duly authorized to bind the Contractor.

The Parties may designate Authorized Representatives who shall be authorized to investigate and report on matters relating to the Project and negotiate on behalf of each of the Parties but who do not have authority to bind the Department or the Contractor. Authorized Representatives may be changed in accordance with Section 14.10 (*Notices and Communications*)

14.7 Gratuities and Conflicts of Interest

Neither the Contractor nor any of its employees, agents, or representatives shall offer or give to an officer, official, or employee of the Department or the State gifts, entertainment, payments, loans, or gratuities.

14.8 Survival

The dispute resolution provisions contained in Section 12 (*Partnering and Dispute Resolution*); the indemnification provisions contained in Section 8 (*Indemnification*); the Contractor's obligations post-termination in Section 11.2 (*Post-Termination Responsibilities*); any release or waiver by or on behalf of any Contractor-Related Entity; the Contractor's obligations to pay the Department amounts owed hereunder; the Parties' respective rights and obligations under applicable Law as pertains to this Contract, the Work, or the Project; the mutual waiver of consequential damages contained in Section 14.4 (*Mutual Waiver of Consequential Damages*); and all other provisions, which by their inherent character should survive termination of this Contract, shall survive the termination of this Contract.

14.9 Limitation on Third-Party Beneficiaries

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

14.10 Notices and Communications

Notices and all other communications under the Contract shall be in writing and shall be delivered by e-mail to the Department's Authorized Representatives identified in Section 14.6 (*Designation of Authorized Representatives*).

14.10.1 Delivery of Notices

All correspondence with the Contractor shall be addressed to the Authorized Representative, except as otherwise directed by the Authorized Representative.

14.10.2 Receipt of Notices

Notices shall be deemed received at the time and date logged by the e-mail. Notices received after 5:00 p.m. Central Time shall be deemed received on the first Business Day following delivery.

14.11 Further Assurances

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

14.12 Construction and Interpretation of the Contract

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

Wherever the word "including," and variants, shall be deemed to be followed by the words "without limitation". Unless otherwise specified, lists contained in the Contract defining the Project or the

Work shall not be deemed all-inclusive. "Or" means the inclusive connotation of "or" (i.e., meaning one, some, or all of a number of possibilities). "May," when used in the context of a power or right exercisable by the Department (or either's designee) means the power to exercise that right or power in its sole discretion, with no obligation to any Contractor-Related Entity to do so. "May," when used in all other contexts, indicates permission by the Department for the Contractor to do (or refrain from doing) an action.

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

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

The Contractor acknowledges and agrees that it had the opportunity and obligation to review the terms and conditions of this Contract (inclusive, for avoidance of doubt, the Exhibits hereto, with expectation that provisions within Exhibits A and B will largely, if not entirely, be replicated in executed Preconstruction Services Amendments and Construction Services Amendments, respectively) and to bring to the attention of the Department any conflicts, errors, inconsistencies or ambiguities contained therein. The Contractor further acknowledges and agrees that it has independently reviewed the Contract (inclusive of such Exhibits) 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 entire Contract. Accordingly, in the event of any such conflicts, errors, inconsistencies or ambiguities in or dispute regarding the interpretation of the Contract, they shall not be interpreted or construed against the Department and instead other rules of interpretation and construction shall be used.

Inconsistent or conflicting provisions of the Contract shall not be treated as erroneous provisions under this Section 14.12, but instead shall be governed by Section 1.4 (Phases and Order of Precedence). The Contractor shall not take advantage of, or benefit from, any apparent or actual error in the Contract. The Contractor may request in writing an explanation from the Department as to any such apparent or actual error, and if the Department is in error, it shall correct the error. The Contractor shall accept the explanation and agrees that a non-material error shall not in itself be the basis for any contractual relief, or other claim at law or in equity, including claims against the Engineer of Record or any Department-Related Entity. The fact that the Contract omit or misdescribe any detail of the Work that is otherwise necessary to carry out the intent of the Contract and delivery of the Project, or that are customarily performed, shall not relieve the Contractor from its obligation to perform such omitted or misdescribed details as if fully and correctly set forth in the Contract, which omissions, correction of misdescriptions, or performance of those aspects customarily performed shall not in itself be the basis for contractual relief, or other claim at Law or in equity.

14.13 Computation of Periods

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

14.14 Severability

If any clause, provision, section, or part of this Contract is ruled invalid under a Dispute Resolution proceeding or otherwise by a court having jurisdiction agreed under this Contract, then the Parties shall:

1. Promptly meet and negotiate a substitute for such clause, provision, section, or part, which shall, to the greatest extent legally permissible, effect the original intent of the Parties, including an equitable adjustment to the applicable Preconstruction Compensation Cap or Construction Services Amendment GMP and Completion Deadline(s); and
2. If necessary or desirable, apply to such court or other decision maker (as applicable) that 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 this Contract, which shall be construed and enforced as if this Contract did not contain such invalid or unenforceable clause, provision, section, or part.

14.15 Headings

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

14.16 Governing Law

The Contract shall be governed by and construed in accordance with the law of the State of Nebraska without regard to conflict of laws principles. The venue for any legal action in connection with the Contract shall be State District Court in Lancaster County, Nebraska.

14.17 Authorization to Execute, Deliver, and Perform

The undersigned attests, subject to the penalties for perjury, that the undersigned is the Contractor, or that the undersigned is the properly authorized representative, agent, member or officer of the Contractor, has been duly authorized to execute this Contract on behalf thereof, and has obtained all necessary or applicable approvals to make this Contract fully binding upon the Contractor when his/her signature is affixed and accepted by the Department.

14.18 Entire Agreement

The Contract 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.

14.19 Counterparts and Electronic Signatures

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

[SIGNATURES PAGE]

EXHIBIT D – FEDERAL RIDER

This Federal Rider is intended to be attached to the CM/GC Master Contract for any Project that utilizes Federal funds. The Federal Rider contains a list of applicable Federal Requirements for the Project. The requirements listed in this document are subject to change based on the most up to date Federal Requirements in effect at the time of execution of the Contract.

DISADVANTAGED BUSINESS ENTERPRISES

1. The Contractor agrees to ensure that Disadvantaged Business Enterprises as defined in 49 CFR Part 26 shall have a “level playing field” and equal opportunity to participate in the performance of contracts financed in whole or in part with Federal funds under this Contract. Consequently, the Disadvantaged Business requirements of 49 CFR Part 26 are hereby made a part of and incorporated by this reference into this Contract.
2. The Contractor agrees to ensure that Disadvantaged Business Enterprises as defined in 49 CFR Part 26 have a “level playing field” and equal opportunity to participate in the performance of contracts and subcontracts financed in whole or in part with Federal funds provided under this agreement. In this regard, the Contractor shall take all necessary and reasonable steps in accordance with 49 CFR Part 26 to ensure that Disadvantaged Business Enterprises have a “level playing field” and equal opportunity to compete for and perform contracts. The Contractor shall not discriminate on the basis of race, color, national origin, or sex in the award and performance of FHWA assisted contracts.
3. The specific requirements of the use of Disadvantaged Business Enterprises, hereinafter referred to as DBEs, are set forth below and are imposed pursuant to the Code of Federal Regulations, Title 49, Part 26 and the Nebraska Department of Transportation’s Disadvantaged Business Enterprise (DBE) Program, which are hereby made a part of and incorporated by this reference into this Contract. Copies of these documents are available, upon request, from the Nebraska Department of Transportation, Disadvantaged Business Enterprise Office, P.O. Box 94759, Lincoln, Nebraska 68509 4759.
4. For purposes of this Exhibit D (Federal Rider), the following definitions apply:
 - a. Whenever “NDOT” is used it shall refer to the Nebraska Department of Transportation.
 - b. Whenever “DOT” is used, it shall refer to the United States Department of Transportation.
 - c. Disadvantaged Business Enterprise (DBE) means a for profit small business concern, as defined pursuant to Section 3 of the Small Business Act and Small Business Administration regulations implementing it, which is independently owned and controlled by one or more socially and economically disadvantaged individuals.
 - d. Owned and controlled means a business:
 - (i) Which is at least 51 percent (51%) owned by one or more socially and economically disadvantaged individuals or women, or, in the case of a public owned business, such individuals must own at least 51 percent (51%) of each class of voting stock and 51 percent of the aggregate of all stock outstanding.

- (ii) Whose management and daily business operations are controlled by one or more of the socially and economically disadvantaged owners.
- e. Socially and economically disadvantaged individual means a person who is a citizen (or lawful permanent resident) of the United States, and who is:
 - (i) “African American,” which includes persons having origins in any of the Black racial groups of Africa;
 - (ii) “Hispanic American,” which includes persons of Mexican, Puerto Rican, Cuban, Dominican, Central or South American, or other Spanish or Portuguese culture or origin, regardless of race;
 - (iii) “Native American,” which includes persons who are American Indians, Eskimos, Aleuts, or Native Hawaiians;
 - (iv) “Asian-Pacific American,” which includes persons whose origins are from Japan, China, Taiwan, Korea, Burma (Myanmar), Vietnam, Laos, Cambodia (Kampuchea), Thailand, Malaysia, Indonesia, the Philippines, Brunei, Samoa, Guam, the U.S. Trust Territories of the Pacific Islands (Republic of Palau), the Commonwealth of the Northern Marianas Islands, Macao, Fiji, Tonga, Kiribati, Juvalu, Nauru, Federated States of Micronesia, or Hong Kong;
 - (v) “Subcontinent Asian American,” which includes persons whose origins are from India, Pakistan, Bangladesh, Bhutan, the Maldives Islands, Nepal or Sri Lanka;
 - (vi) A Woman;
 - (vii) Any additional groups whose members are designated as socially and economically disadvantaged by the SBA, at such time as the SBA designation becomes effective.

5. DBE Goal

- a. The DBE Goal for the Project is anticipated to fall within a range of 4% to 6% of the Total Construction GMP once determined. The Department will set the DBE Goal during the Preconstruction Phase but prior to the authorization of any Construction Services. The Contractor shall exercise all necessary and reasonable steps to meet the DBE Goal.
- b. A current list of certified DBE firms will be posted on the NDOT website (www.dot.nebraska.gov). Only the DBE firms whose names appear on the list will be considered in meeting the contract goal for this project. The DBE firms will be considered only for the items of work listed under the heading, “Nature of Business.” DBE firms may request to have additional items of work added to their “Nature of Business.” however, no items of work will be added after the execution of the applicable Construction Services Amendment.
- c. Contractors shall, as a minimum, seek DBE Subcontractors in the same geographic area in which they seek Subcontractors generally for a given solicitation. If the Contractor cannot meet the DBE goal using DBEs from the normal area, the Contractor will expand its search to a reasonably greater geographic area.
- d. Contractors are required to make good faith efforts to replace a DBE Subcontractor that is unable to perform with another DBE. In order to ensure compliance with this

requirement, any substitution of DBE Subcontractors after execution of the Contract must be approved by the Department.

- e. Contractors are also encouraged to use the services of banks owned and controlled by minorities and women; however, this will not be counted toward the contract DBE goal.
6. MEETING DBE GOAL CRITERIA: The award of the contract will be made upon satisfaction of the requirements of these special provisions. The Contractor must either meet or exceed the DBE goal for the contract or satisfy the Department that good faith efforts were made to meet the DBE Goal.
- a. REQUIRED DBE PARTICIPATION INFORMATION: The Contractor is required to submit to the Department the "Required DBE Participation Form" with their Construction Services Amendment on the form provided by the Department.
 - b. THE REQUIRED DBE PARTICIPATION FORM SHALL INCLUDE:
 - (i) The names and addresses of the DBE Subcontractors that will participate in meeting the DBE Goal.
 - (ii) A complete description (by item number or group, etc.) of the Work each named DBE Subcontractor will perform.
 - (iii) The dollar amount of participation by each named DBE Subcontractor.
 - (iv) Written and signed documentation from the Contractor of commitment to use a DBE Subcontractor whose participation it submits to meet the DBE Goal.
 - (v) If the DBE Goal is not met, evidence of good faith efforts.
 - c. The information submitted on the DBE Participation Form will be verified by the Department. Errors in addition will be treated in accordance with current Department specifications and procedures.
 - d. REQUIRED SUBCONTRACTOR/SUPPLIER QUOTATIONS LIST: All Contractors must provide to the NDOT the identity of all firms who provided quotations on federally assisted projects, including both DBEs and non-DBEs.

If no quotations were received, the Contractor must indicate this in the space provided.

Each bidder will be required to submit one list per letting to cover all projects bid.

7. Good Faith Determination

- e. It is the Contractor's responsibility to meet the DBE contract goal or to provide sufficient information to enable the NDOT to determine that, prior to executing a Construction Services Amendment, the Contractor made good faith efforts to meet such goals.
- f. Establishing Good Faith Efforts: To demonstrate good faith efforts to meet the DBE Goal, documentation shall be maintained and submitted to the NDOT. Such documentation may include any or all of the following: This list is not intended to be a mandatory checklist, nor is it intended to be exclusive or exhaustive. Other factors or types of efforts may be relevant in appropriate cases.

- (i) Conducting market research to identify small business contractors and suppliers and soliciting, through all reasonable and available means, the interest of all certified DBEs that have the capability to perform the work of the Contract. This may include advertising and/or written notices, posting of Notices of Sources Sought and/or Requests for Proposals, written notices or emails to all DBEs listed in the State's directory of transportation firms that specialize in the areas of work desired (as noted in the DBE directory) and which are located in the area or surrounding areas of the project.
- g. Providing interested DBEs with adequate information about the Design Plans, specifications, and requirements of the Contract in a timely manner to assist them in responding to a solicitation with their offer for the Subcontract.
- h. Negotiating in good faith with interested DBEs. It is the Contractor's responsibility to make a portion of the Work available to DBE Subcontractors and Suppliers and to select those portions of the Work or material needs consistent with the available DBE Subcontractors and Suppliers, so as to facilitate DBE participation. Evidence of such negotiation includes the names, addresses, and telephone numbers of DBEs that were considered; a description of the information provided regarding the Design Plans and specifications for the Work selected for Subcontracting; and evidence as to why additional agreements could not be reached for DBEs to perform the Work.
- i. A Contractor using good business judgment would consider a number of factors in negotiating with Subcontractors, including DBE Subcontractors, and would take a firm's price and capabilities as well as Contract goals into consideration. However, the fact that there may be some additional costs involved in finding and using DBEs, is not in itself sufficient reason for a Contractor's failure to meet the contract DBE Goal, as long as such costs are reasonable. Also, the ability or desire of the Contractor to perform the Work of the Contract with its own organization does not relieve the Contractor of the responsibility to make good faith efforts. Contractors are not, however, required to accept higher quotes from DBEs if the price difference is excessive or unreasonable.
- j. Not rejecting DBEs as being unqualified without sound reasons based on a thorough investigation of their capabilities. The Contractor's standing within its industry, membership in specific groups, organizations, or associations and political or social affiliations (for example union vs. non-union employee status) are not legitimate causes for the rejection, or non-solicitation of bids in the Contractor's efforts to meet the Project goal.
- k. A Contractor's inability to find a replacement DBE at the original price is not alone sufficient to support a finding that good faith efforts have been made to replace the original DBE. The fact that the Contractor has the ability and/or desire to perform the contract work with its own forces does not relieve the Contractor of the obligation to make good faith efforts to find a replacement DBE, and it is not a sound basis for rejecting a prospective replacement DBE's reasonable quote.
- l. Making efforts to assist interested DBEs in obtaining bonding, lines of credit, or insurance as required by the recipient or Contractor.
- m. Making efforts to assist interested DBEs in obtaining necessary equipment, supplies, materials, or related assistance or services.

- n. Effectively using the services of available minority/women community organizations; minority/women contractors' groups; local, State, and Federal minority/women business assistance offices; and other organizations as allowed on a case-by-case basis to provide assistance in the recruitment and placement of DBEs.
- o. If the NDOT's preliminary finding is that the Contractor did not demonstrate a satisfactory effort to meet the DBE Goal, the Contractor may appeal the decision by submitting a written request for reconsideration within three (3) days of the decision. The Contractor may then present information either in a written narrative supporting its good faith effort submittal or may appear in person. Any new information not included in the original submittal will not be used in the final determination. The appeal will be heard by a Hearing Officer appointed by the NDOT Director. The Hearing Officer will be an individual who is knowledgeable about the DBE Program and its good faith efforts provision, but who had no part in the initial decision.
- p. The Hearing Officer will hear the appeal within five (5) days of receipt of the written request and will issue a written decision within three (3) days after the appeal. The reconsideration process is administratively final and has no further appeal.

8. COMMERCIALLY USEFUL FUNCTION:

- q. A Contractor may count toward its DBE goals only expenditures to DBEs that perform a Commercially Useful Function (CUF) in the work of the Contract. A DBE performs a CUF when it is responsible for the execution of the Work of the Contract and is carrying out its responsibilities by performing, managing, and supervising the Work involved. The DBE must also be responsible, with respect to materials and supplies used on the Contract, for negotiating price, determining quality and quantity, ordering the material, installing (where applicable) and paying for the material itself.
- r. A DBE does not perform a commercially useful function if its role is limited to that of an extra participant in a transaction, contract, or project through which funds are passed to obtain the appearance of DBE participation.
- s. On DBE Subcontracts, the DBE must perform or exercise responsibility for at least 30 percent of the total cost of its contract with its own workforce. If a DBE subcontracts part of its work to another firm, the value of the subcontracted work may be counted toward DBE goals only if the DBE's subcontractor is itself a DBE. Work that a DBE subcontracts to a non-DBE firm does not count toward DBE goals.
- t. If a DBE subcontractor purchases supplies and/or materials from the Contractor, which are to be incorporated into the Project, the supplies and/or materials will not count toward the DBE Goal.
- u. TWO-PARTY CHECKS: The NDOT may allow the use of two-party checks to pay for material and/or supplies under certain circumstances, so long as the Contractor acts solely as a guarantor and the funds do not come from the Contractor. Two-party checks cannot be used unless formal written requests to do so from the DBE firm and the Contractor are delivered to the NDOT Civil Rights Office and written approval is given. If this provision is not strictly followed, the Contractor will not be allowed credit for the cost of the material and/or supplies toward the DBE Goal commitment.
- v. When a Contractor commits to use material and/or supplies provided by a DBE Supplier to meet a DBE Goal, the DBE Supplier must pay for the material and/or supplies without the use of two-party checks or the cost of the material and/or

supplies will not be counted toward the Contractor meeting the DBE Goal. The only exception to this policy might be if unanticipated circumstances prevent the DBE Supplier from being able to pay for a portion of the material and/or supplies and the use of two-party checks is the only viable alternative. The NDOT Civil Rights Office will make the final determination on allowing the use of two-party checks in all such circumstances.

9. **ADMINISTRATION OF THE DBE PROGRAM:** The NDOT adheres to all the rules and regulations of the DOT's DBE Program Regulations as contained in 49 CFR Part 26. The NDOT's DBE program information is located on the NDOT website at <https://dot.nebraska.gov>

10. **INVESTIGATORY POWERS, PROCEDURES FOR ENFORCEMENT AND SANCTIONS**

- a. **INVESTIGATORY POWERS:** The NDOT reserves the right and authority to investigate, monitor and/or review actions taken, statements made, documents submitted, by any Contractor, Subcontractor, or DBE firm under the terms of these provisions.

- b. **PROCEDURES FOR ENFORCEMENT:**

Whenever the NDOT believes a Contractor, Subcontractor or DBE firm may not be operating in compliance with the terms of these provisions, the NDOT will conduct an investigation. If the NDOT finds a person or entity not in compliance with these provisions, the NDOT will notify such Person in writing as to the specific instances or matters found to be in non-compliance. At the option of the NDOT, the Person shall then be allowed a reasonable time to come into compliance. In the event that the Person cannot come into compliance, or fails or refuses to do so, then the NDOT may impose one or more of the following sanctions . It is specifically provided by the NDOT that a person or entity will be found to be out of compliance with these provisions if an investigation reveals a violation or act of such serious or compelling nature that the violation or act indicates a "serious lack of business integrity or honesty".

- c. **SANCTIONS:**

In the event the NDOT finds any Contractor, Subcontractor, or DBE firm, to be out of compliance with these provisions, the NDOT may impose one or more of the following sanctions:

- (i) Termination of the contract.
- (ii) The DBE firm may be decertified and/or suspended from participating in the NDOT DBE Program.
- (iii) The Contractor may not be able to count the work performed by the non-compliant DBE toward the Project DBE Goal, and shall subcontract other Work on the Project to DBE Subcontractors to achieve the DBE Goal. In the event a DBE Subcontract cannot be procured to accomplish the DBE Goal, substantiation of a Good Faith Effort shall be required.
- (iv) The contract items involved may be considered for a monetary reduction equal to the amount of Work not done by the DBE subcontractor.
- (v) The Contractor may be suspended and/or debarred.

- (vi) If at any time during the life of the Contract, it is determined that the Contractor is out of compliance with these provisions, the NDOT may withhold payment of Monthly Progress Payments.
- (vii) If at the completion of the Project, the Contractor is determined to be out of compliance, the NDOT may sustain damages, the exact extent of which would be difficult or impossible to ascertain and, therefore, in order to liquidate such damages, the monetary difference between the amount stated by the Contractor and the amount actually paid to the DBEs will be deducted from the Contractor's payment as Liquidated Damages. These damages would be in addition to any liquidated damages assessed in accordance with Subsection 108.08 of the Specifications.
- (viii) Referral to the Attorney General for possible prosecution for fraud.
- (ix) Other action as appropriate, within the discretion of the NDOT.

TITLE VI NONDISCRIMINATION

1. During the performance of this Contract, the Contractor agrees as follows:
 - a. Compliance with Regulations: The Contractor will comply with the Acts and the Regulations relative to Nondiscrimination in Federally-assisted programs of the U.S. Department of Transportation, the Federal Highway Administration, as they may be amended from time to time, which are herein incorporated by reference and made a part of this Contract.
 - b. Nondiscrimination: The Contractor, with regard to the Work performed by it during the Contract, will not discriminate on the grounds of race, color, or national origin in the selection and retention of Subcontractors, including procurements of materials and leases of equipment. The Contractor will not participate directly or indirectly in the discrimination prohibited by the Acts and the Regulations, including employment practices when the Contract covers any activity, project, or program set forth in Appendix B of 49 CFR Part 21.
 - c. Solicitations for Subcontracts, Including Procurements of Materials and Equipment: In all solicitations, either by competitive bidding, or negotiation made by the Contractor for Work to be performed under a Subcontract, including procurements of materials, or leases of equipment, each potential Subcontractor or Supplier will be notified by the Contractor of the Contractor's obligations under this Contract and the Acts and the Regulations relative to Nondiscrimination on the grounds of race, color, or national origin.
 - d. Information and Reports: The Contractor will provide all information and reports required by the Acts, the Regulations, and directives issued pursuant thereto and will permit access to its books, records, accounts, other sources of information, and its facilities as may be determined by the Department or the Federal Highway Administration to be pertinent to ascertain compliance with such Acts, Regulations, and instructions. Where any information required of a Contractor is in the exclusive possession of another who fails or refuses to furnish the information, the Contractor will so certify to the Department or the Federal Highway Administration, as appropriate, and will set forth what efforts it has made to obtain the information.
 - e. Sanctions for Noncompliance: In the event of a Contractor's noncompliance with the nondiscrimination provisions of this Contract, the Department will impose such

contract sanctions as it or the Federal Highway Administration may determine to be appropriate, including, but not limited to:

- (i) withholding payments to the Contractor under the Contract until the Contractor complies; and/or
 - (ii) cancelling, terminating, or suspending a Contract, in whole or in part.
 - f. Incorporation of Provisions: The Contractor will include the provisions of paragraphs (a) through (f) in every Subcontract, including procurements of materials and leases of equipment, unless exempt by the Acts, the Regulations and directives issued pursuant thereto. The Contractor will take action with respect to any Subcontract or procurement as the Department or the Federal Highway Administration may direct as a means of enforcing such provisions including sanctions for noncompliance. Provided, that if the Contractor becomes involved in, or is threatened with litigation by a Subcontractor, or Supplier because of such direction, the Contractor may request the Department to enter into any litigation to protect the interests of the Department. In addition, the Contractor may request the United States to enter into the litigation to protect the interests of the United States.
2. During the performance of this Contract, the Contractor agrees to comply with the following nondiscrimination statutes and authorities; including but not limited to:
- a. Title VI of the Civil Rights Act of 1964 (42 U.S.C. § 2000d et seq., 78 Stat. 252), (prohibits discrimination on the basis of race, color, national origin); and 49 CFR Part 21.
 - b. The Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, (42 U.S.C. § 4601), (prohibits unfair treatment of persons displaced or whose property has been acquired because of Federal or Federal-aid programs and projects);
 - c. Federal-Aid Highway Act of 1973, (23 U.S.C. § 324 et seq.), (prohibits discrimination on the basis of sex);
 - d. Section 504 of the Rehabilitation Act of 1973, (29 U.S.C. § 794 et seq.), as amended, (prohibits discrimination on the basis of disability); and 49 CFR Part 27;
 - e. The Age Discrimination Act of 1975, as amended, (42 U.S.C. § 6101 et seq.), (prohibits discrimination on the basis of age);
 - f. The Civil Rights Restoration Act of 1987, (PL 100-209), (broadened the scope, coverage and applicability of Title VI of the Civil Rights Act of 1964, The Age Discrimination Act of 1975 and Section 504 of the Rehabilitation Act of 1973, by expanding the definition of the terms “programs or activities” to include all of the programs or activities of the Federal-aid recipients, subrecipients and contractors, whether such programs or activities are Federally funded or not);
 - g. Titles II and III of the Americans with Disabilities Act, which prohibit discrimination on the basis of disability in the operation of public entities, public and private transportation systems, places of public accommodation, and certain testing entities (42 U.S.C. §§ 12131-12189) as implemented by Department of Transportation regulations at 49 C.F.R. Parts 37 and 38;

DISABILITIES ACT

The Contractor agrees to comply with the Americans with Disabilities Act of 1990 (P.L. 101-366), as implemented by 28 CFR 35.

CONFLICT OF INTEREST LAWS

The Contractor shall review the conflict of interest provisions of 23 CFR 1.33 and 49 CFR 18.36(b)(3) and agrees to comply with all the conflict of interest provisions in order for the Department's project to remain fully eligible for federal funding. By signing this Contract, the Contractor certifies that the Contractor is not aware of any financial or other interest the Contractor has that would violate the terms of these federal provisions.

USE AND/OR RELEASE OF CONFIDENTIAL INFORMATION

Certain information provided by the Department to the Contractor is confidential information contained within privileged documents protected by 23 U.S.C. §407. "Confidential information" means any information that is protected from disclosure pursuant to state and federal law and includes, but is not limited to, accident summary information, certain accident reports, diagnostic evaluations, bridge inspection reports, and any other documentation or information that corresponds with said evaluations or reports, and any other information protected by 23 U.S.C. §407. "Privileged document" means any document pertaining to any file or project maintained by the Department that is privileged and protected from disclosure, pursuant to appropriate state and federal law, including any document containing attorney-client communications between the Department employee and legal counsel. This confidential and privileged information is vital and essential to the Contractor in order that the Contractor adequately advance the project at hand on behalf of the Department.

The Contractor agrees it will only use any information or documentation that is considered to be privileged or confidential for the purposes of executing the services by which it has agreed to render for the Department for the project at hand only. The Contractor agrees not to reveal, disseminate, or provide copies of any document that is confidential and privileged to any individual or entity. The Department agrees that any information or documentation that is considered to be privileged or confidential that is provided to Contractor will be marked with the following information:

"CONFIDENTIAL INFORMATION: Federal Law, 23 U.S.C §407, prohibits the production of this document or its contents in discovery or its use in evidence in a State or Federal Court. The State of Nebraska has not waived any privilege it may assert as provided by that law through the dissemination of this document and has not authorized further distribution of this document or its contents to anyone other than the original recipient."

The Contractor agrees to obtain the written approval of the Department prior to the dissemination of any privileged or confidential information or documentation if it is unclear to the Contractor whether such information or documentation is in fact privileged or confidential.

The Contractor and the Department agree that any unauthorized dissemination of any privileged or confidential information or documentation on the part of the Contractor will create liability on the part of the Contractor to the Department for any damages that may occur as a result of the unauthorized dissemination. The Contractor agrees to hold harmless, indemnify, and release the Department from any liability that may ensue on the part of the Department for any unauthorized

dissemination of any privileged or confidential information or documentation on the part of the Contractor.

BUY AMERICA/BUILD AMERICA

1. The Contractor shall comply with federal Buy America requirements established by the Federal Highway Administration and this specification. The Build America, Buy America Act requires that Steel or Iron Materials, Construction Materials, Manufactured Products, and in some instances Section 70917(c) Materials, as described below, be produced domestically. Only those products and materials which are permanently consumed in, incorporated into, or affixed to the Project are subject to Buy America requirements and this requirement. Buy America products and materials will be classified into one of the four categories: (1) Steel or Iron, (2) Construction Materials, (3) Manufactured Products, or (4) Section 70917(c) Materials. The Department will determine which category applies to a product or material based on its status at the time it is brought to the work site for incorporation into the Project.
2. The term “domestic” means within the United States, the District of Columbia, or within the territories and possessions of the United States.
3. Steel or Iron
 - a. Products and materials that are predominantly steel or iron shall be classified under this category. Reinforcing and structural steel in commercial precast concrete products, regardless of percent by cost, is also classified as steel or iron. All manufacturing processes to produce steel or iron materials, or steel or iron components of predominantly steel products, (i.e., smelting, and any subsequent process which alters the steel or iron material's physical form or shape or changes its chemical composition) must occur domestically. This includes processes such as casting, rolling, extruding, machining, bending, grinding, drilling, and coating. Coating includes epoxy coating, galvanizing, painting, and any other coating that protects or enhances the value of the material.
 - b. Raw materials used in the steel or iron materials may be imported. Raw materials are materials such as iron ore, limestone, or waste products which are used in the manufacturing process to produce the steel or iron products. Waste products include steel no longer useful in its present form from old automobiles, machinery, pipe, railroad tracks and steel trimmings from mills or product manufacturing. Extracting, crushing, and handling the raw materials which is customary to prepare them for transporting are exempt from Buy America. Pig iron and processed, pelletized, and reduced iron ore manufactured outside of the United States may be used in the domestic manufacturing process for steel or iron materials.
4. Construction Materials
 - a. Construction materials are:
 - (i) Non-ferrous metals
 - (ii) Plastic and polymer-based products (including polyvinylchloride, composite building materials, and polymers used in fiber optic cables)
 - (iii) Glass (including optic glass)
 - (iv) Fiber optic cable (including drop cable)

- (v) Optical Fiber
 - (vi) Lumber
 - (vii) Engineered Wood
 - (viii) Drywall
 - b. All manufacturing processes for the construction material must occur domestically.
 - c. Minor additions of materials, products, or binding agents to a construction material do not change the categorization of the construction material.
5. Manufactured Products
- a. Manufactured products as determined by the Department, with the exception of reinforcing and structural steel in commercially produced precast concrete products and steel and iron products referenced above, are currently exempt from Buy America requirements due to an existing FHWA waiver. Manufactured products are products or materials that have been:
 - (i) Processed into a specific form and shape; or
 - (ii) Combined with other materials or products to create a product with different properties than the individual articles, materials, or supplies.
6. Section 70917 (c) Materials
- a. These materials are cement and cementitious materials; aggregates such as stone, sand, or gravel; or aggregate binding agents or additives. Although these materials are exempt in individual form, they may be considered a manufactured product when combined with other products or materials.
7. Documentation Requirements
- a. Documentation and acceptance requirements will be in accordance with Subsection 106.02 of the NDOT Standard Specifications for Highway Construction, 2017 Edition. All materials defined above shall require a certificate of compliance as a minimum unless otherwise specified in the Materials Sampling Guide. The required Buy America (BA) certification must indicate the materials used to fabricate the contract material or product complies with federal requirements and were produced domestically.
 - b. The certification must include:
 - (i) Identifying information such as contract ID, control number, project number and project name
 - (ii) Identifying information is not required for materials submitted for pre-approval (products noted on the NDOT approved products list, lots, batches, bundles, etc.)
 - (iii) Clear and unique product identification (name of product with lot number, heat number, reel number, etc.)
 - (iv) The statement "Products or materials specified in this certification are permanently consumed in, incorporated into, or affixed to the project and meet the applicable Build America, Buy America requirements detailed in 2

CFR 184 Buy America Preferences for Infrastructure Projects, as well as the 23 CFR-635.410 Buy America requirements for steel and iron products.”

- (v) A signature by the manufacturer’s authorized representative and the representative’s title
- c. Additional required documentation for all steel and iron products incorporated in the Project will be at a minimum the mill test report and materials identification.
 - (i) The mill test report must include the following information: Steel mill name and location, material heat number, material grade, product specifications met, material dimensions, mechanical properties, chemical analysis, heat treatment (if applicable), certified mill signature.
 - (ii) The materials identification must provide traceability by heat number, grade and type. As an example, the bill of lading may help provide this traceability.
- d. Upon completion of all Work, the Contractor shall furnish a letter of certification to the Department on company letterhead and signed by an officer of the company. This letter shall state that documentation is on file showing that all steel or iron and construction materials permanently consumed in, incorporated into, or affixed to the Project comply with the Buy America requirements.

8. Waiver Requirements

- a. For Projects obligated on or after August 16, 2023, a federal waiver (Waiver of Buy America Requirements for De Minimis Costs and Small Grants) allows for non-compliant Build America, Buy America products and materials (Construction Materials, Manufactured Products, and applicable Section 70917(c) Materials, and excluding steel and iron products) to be consumed in, incorporated into, or affixed to the Project. The waiver will apply only to awards obligated or subawards made on or after the above date. The limits to the waiver are the following:
 - (i) The total value of the non-compliant products is no more than the lesser of \$1,000,000 or 5% of total applicable costs for the Project; or
 - (ii) The total amount of federal financial assistance applied to the Project, through awards or subawards, is below \$500,000.
- b. “Total applicable Costs for the Project” as noted in (8)(a)(i) is defined as the cost of materials used in the project that are subject to a domestic preference requirement, including materials that are within the scope of an existing waiver.
- c. Although referred to in the federal rules as to be calculated by Project, BABA waived material cost limits will be calculated on a Construction Services Amendment basis.
- d. For steel or iron products and materials, federal regulation allows for foreign steel or iron materials to be incorporated in the Project if its value is less than 1/10% of the Total Construction GMP or \$2,500, whichever is greater.
- e. The Contractor shall track and, when requested, report:
 - (i) the total applicable cost expense amount for the iron and steel, construction materials and manufactured products permanently consumed in, incorporated into, or affixed to the Project. The expenses reported to the Department

- cannot be the Contract or line-item cost and must be the actual expense of the materials or products incorporated into the Project.
- (ii) the non-compliant material expenses for the steel or iron, construction materials and manufactured products permanently consumed in, incorporated into, or affixed to the Project materials or products. The expenses cannot be the Contract or line-item cost and must be the actual expense of the materials or products (including shipping) incorporated into the Project.
 - (iii) except for steel and iron products, the allowable limit for non-compliant construction materials and manufactured products permanently consumed in, incorporated into, or affixed to a Project. This allowable limit shall be calculated as the lesser of 5% of the applicable cost calculated in paragraph (8)(b). above or \$1,000,000.
 - (iv) the allowable limit for non-compliant steel or iron materials is either 1/10% of the total contract cost or \$2,500, whichever is greater.
- f. The information described in paragraph (8)(e). above shall be reported to the Department upon request.

NEPA

The Department has initiated planning activities and environmental document preparation under the National Environmental Policy Act of 1970 (NEPA). The Department will retain NEPA decision-making responsibilities for the Project.

The Contractor acknowledges and agrees that the Department's advancement of the Project design shall be subject in all respects to 23 CFR Part 635.505, which includes, by reference commitments of the Contractor thereunder as part of the Work hereunder. All provisions referenced therein as being required provisions within the Contract are likewise incorporated by reference.

The Department may, without any Contractor right to additional compensation, incorporate any environmental commitments identified as part of the NEPA process that the Department determines should be performed by the Contractor in the Construction Services Amendment(s).

The Department reserves the right to terminate this Contract, without further compensation to the Contractor, if the no-build alternative is selected.

The Contractor understands and agrees that during the Preconstruction Phase before the NEPA process is concluded, any design activities shall be strictly limited to preliminary design and activities and analyses that do not materially affect the objective consideration of alternatives in the NEPA process in accordance with all applicable restrictions and FHWA policies and rules, including FHWA Order 6640.1A and 23 CFR Part 635.506(c).

The Contractor understands and agrees that the Construction Services Amendment shall not be executed until such NEPA disposition and approval.

TRAINING

The Nebraska Department of Transportation (NDOT) Contractor-Specific On-the-Job Training (OJT) Program (NDOT OJT Program) was created by the NDOT and Federal Highway Administration (FHWA) and is administered by the NDOT Highway Civil Rights Office (HCRO) to fulfill the Training Special Provisions (TSP) requirements of federal-aid construction contracts as set forth under *Code of Federal Regulations Title 23, Part 230, Subpart A, Appendix B* (23 CFR Part 230). The purpose of the TSP is to address the under-representation of minority and female workers in the construction trades through the assignment of OJT training goals. Therefore, the training and upgrading of minorities and women toward journeyman status is a primary objective of the NDOT OJT Program.

Accordingly, the Contractor shall make every effort to enroll minority and women trainees (e.g., by conducting systematic and direct recruitment through public and private sources likely to yield minority and women trainees) to the extent that such persons are available within a reasonable area of recruitment. All Contractors will be responsible for demonstrating the good faith efforts (GFE) that they have made to recruit minority and women trainees prior to a determination as to whether the contractor is in compliance with the TSP and the NDOT OJT Program.

This training commitment is not intended and shall not be used to discriminate against any applicant for training, whether a member of a minority group or not. The Contractor shall provide on-the-job training aimed at developing full journey-level status in the type of trade or job classification involved. However, no employee shall be employed as a trainee in any classification in which he or she has successfully completed a training course leading to journeyman status or in which he or she has been employed as a journeyman.

The NDOT OJT Program in fulfillment of the TSP is implemented and administered as set forth below:

1. NDOT will assign OJT hours on a Contractor basis annually for each calendar year.

A contractor who has received an OJT assignment will be allowed to provide training on any NDOT-let project, whether federally or state funded, on which the Contractor is working as either a Contractor or a Subcontractor.

This project does not have a contract-specific training requirement. NDOT has added a training pay item with a nominal 100-hour quantity, that may overrun or underrun, which will be utilized only if the Contractor elects to provide training on this contract.

2. In January each year, NDOT will allocate OJT assignments to each contractor based on the average annual dollar amount of all work performed by a Contractor on NDOT-let projects over the previous 3 calendar years. This averaged amount will include work performed as a prime contractor, minus any amounts subcontracted out, together with work performed as a subcontractor to another prime contractor.
3. Once a contractor's average annual dollar amount of contracts awarded over the previous 3 calendar years has been calculated, training hours will be assigned to them according to the following table:

Three Year Average	OJT Hours Assigned
Nebraska Department of Transportation Saddle Creek Bridge Project – CN 22761	CM/GC Master Contract Exhibit D (Federal Rider) DRAFT – June 27, 2025

Under \$5,000,000	None
\$5,000,000 to \$6,500,000	1,000
Each additional \$1,500,000	+500

Example: Contractor A, who averaged \$28.66 million, would be assigned 8,500 hours of OJT. Contractor B, who averaged \$10.33 million, would be assigned 2,500 hours of OJT. Contractor C, who averaged \$1.9 million, would not be assigned any OJT hours.

	2014	2015	2016	3 Year Average	2017 OJT Assignment
Contractor A	24.3	33.4	28.3	28.66	8,500 hours
Contractor B	9.3	11.9	9.8	10.33	2,500 hours
Contractor C	1.7	1.4	2.6	1.9	0 hours

4. The annual OJT hours assigned to a contractor are to be completed during that calendar year, i.e., by the end December 31 of the assignment year.
5. Completion of the annual OJT assignment is the contractor's responsibility. The contractor is not allowed to assign or otherwise transfer or credit OJT hours to or from any other contractor or subcontractor. The contractor must make GFE to enroll an adequate number of trainees and provide the trainees a sufficient number of hours training to achieve the contractor's annual OJT assignment.
6. If a contractor exceeds the number of OJT hours assigned for a calendar year, the contractor may request to bank up to 30 percent of the excess hours. Banked hours may then be credited toward the contractor's OJT assignment for the next calendar year.
7. If a contractor believes they will not be able to complete their annual OJT assignment, they must submit a written request to the NDOT HCRO seeking an adjustment to or exemption from their current OJT assignment. The request must show cause for why the adjustment or exemption should be granted. Such cause may include, but is not limited to the following: absence of sufficient work on NDOT-let contracts in the assignment year; changes to the scope or scheduling of an NDOT-let contract; availability of employees eligible for training; and other circumstances demonstrated to be beyond the contractor's control. Demonstration of GFE must also be provided upon request.

After receiving from a contractor all available and relevant information the NDOT HCRO deems necessary to making a determination on the request, the NDOT HCRO will issue its determination within 7 days. The determination will be considered final and not administratively appealable. If a request is denied, the contractor will be responsible for completing the original OJT assignment. If a request is approved, the contractor will be responsible for completing the revised OJT assignment. If additional and relevant information is found or a relevant change in the contractor's circumstance occurs after the determination, the NDOT HCRO may, at its discretion, reconsider the determination and the terms thereof.

8. While trainees may be assigned to NDOT-let federally or state funded projects, the contractor must make GFE to schedule and assign trainees so that at least 50 percent of a trainee's hours are earned on federally funded projects, unless otherwise approved in advance by the NDOT HCRO.
9. The contractor must use an OJT training program approved by the NDOT and/or FHWA. An OJT training program shall be approved if it is reasonably calculated to meet the equal employment opportunity obligations of the contractor and qualify the average trainee for journey-level status in the job classification concerned by the end of the training period. An approved OJT training program must specify the number of hours required for a trainee to achieve journey-level status in each job classification. Furthermore, apprenticeship programs registered with the U.S. Department of Labor, Bureau of Apprenticeship and Training, or with a State apprenticeship agency recognized by the Bureau and training programs approved but not necessarily sponsored by the U.S. Department of Labor, Manpower Administration, Bureau of Apprenticeship and Training, shall also be considered acceptable provided they are being administered in a manner consistent with the equal employment obligations of federal-aid highway construction contracts.
10. The contractor shall furnish each trainee a copy of the OJT training program he/she will follow in providing the training. The contractor shall also provide each trainee with a certification showing the type and length of training satisfactorily completed.
11. The contractor's Equal Employment Opportunity (EEO) Officer shall be responsible for administering the contractor's OJT and monitoring the trainees' progress. The EEO Officer shall serve as the point of contact for the NDOT regarding OJT information, documentation, and conflict resolution. If necessary, the EEO Officer may designate another individual to assist with the OJT monitoring responsibilities. The NDOT must be provided the name and contact information for any such designee.
12. At least 7 days prior to commencing training, the contractor must submit a Request for Trainee Approval form to the NDOT HCRO for each individual to be enrolled as a trainee and a tentative list of the projects to which the trainee will be assigned. Requests for Trainee Approval may be submitted by mail, fax, or email.
13. If the contractor submits a Request for Trainee Approval form to the NDOT HCRO for an individual who is not a minority or female, or cannot replace departing trainees with minorities or females, the contractor must also produce sufficient GFE documentation of the type set forth below. The NDOT HCRO will reject non-minority male trainees for entry into the program if it determines that a contractor failed to make sufficient GFE to hire minorities or female trainees and/or the contractor failed to document or submit evidence of its GFE to do so.
14. Any training hours provided to a trainee prior to the contractor receiving approval from the NDOT HCRO will not be credited toward the contractor's annual OJT assignment.
15. If a trainee completes their training, or is no longer employed by the contractor, or is otherwise unavailable or ineligible for training, the contractor must notify the NDOT HCRO. The contractor may then submit a replacement trainee but must make GFE to enroll a minority or female trainee.
16. When an individual is first enrolled as a trainee, the individual will be approved for the number of hours of OJT required to achieve journey-level status in the classification for

which the individual is to receive training. (A contractor will not be penalized if a trainee does not achieve the full number of hours for which the trainee is approved.)

17. If the contractor is unable to provide a trainee the full number of training hours required to achieve journey-level status on one project, the trainee should be transferred to other NDOT-let projects on which the contractor is working.
18. A contractor may transfer trainees from one NDOT-let project to another as needed or desired. No prior approval from the NDOT HCRO is required.
19. No individual may be employed as a trainee in any classification in which they have successfully completed training leading to journey-level status or in which they have been employed at journey-level. No individual may be employed as a trainee in any classification with a lower skill level than any classification in which they have successfully completed training leading to journey-level status or in which they have been employed at journey-level (e.g., an individual who has achieved journey-level status as an equipment operator may not be trained as a laborer). The contractor should satisfy this requirement by including appropriate questions in the employee application or by other suitable means. Regardless of the method used, the contractor's records should document the findings in each case.

An individual may be trained in multiple classifications that require relatively equal skill levels but different skill sets (e.g., an individual who has received training as a milling machine operator may also receive training as a roller operator, or a scraper operator, etc.). Preferably, an individual should have achieved journey-level status in a classification before beginning training in another classification.

The contractor must request and receive approval from the NDOT HCRO for an individual to receive training in a classification other than the classification for which the individual was originally approved. Any training hours provided prior to receiving approval from the NDOT HCRO will not be credited toward the contractor's annual OJT assignment.

20. Training shall be provided in construction crafts rather than clerk-typist or secretarial-type positions. Training is permissible in positions that are not assigned to a specific project such as office engineers, estimators, timekeepers, shop mechanics, etc. if the selected OJT program includes these classifications. Training in such positions will not be eligible for reimbursement, but will be eligible to be credited toward the contractor's annual OJT assignment.
21. Some off-site training is permissible as long as the training is an integral part of an approved OJT program and does not comprise a significant part of the overall training (e.g., 16 hours training per trainee per year in areas such as jobsite safety or accident response would be permissible). A copy of a training certificate, agenda, or curriculum must be provided to verify off-site training.
22. The contractor will be reimbursed \$2.00 per each hour of training provided in accordance with an approved OJT training program, the NDOT OJT Program and the TSP.
23. Contractors shall be allowed to transfer trainees or utilize trainees on other NDOT-let projects that do not contain the Training Special Provisions. NDOT will utilize a Change

Order/ Supplemental Agreement to incorporate the Training Special Provisions and the appropriate pay item into the contracts of such projects.

24. On all federally funded NDOT-let projects, trainees must be paid at least 60 percent of the appropriate minimum journey-level rate specified in the contract for the first half of the training period, 75 percent for the third quarter, and 90 percent for the last quarter of the training period - or the appropriate rates approved by the U.S. Department of Labor or the U.S. Department of Transportation in connection with the program in which the trainee is enrolled.

25. In order to document and evaluate a trainee's progress toward journey-level status, the contractor must, at the beginning of each month, provide the NDOT HCRO a Training Special Provision Monthly On-The-Job Training Report form for each project on which training occurred the previous month. The form will list each trainee and indicate the number of hours he or she trained on the project during that month, and will confirm the trade or job classification in which the OJT training was performed and the wage the trainee received.

Note: The monthly reporting requirements may change if/when on-line reporting is implemented by NDOT.

26. Contractors will have fulfilled their OJT responsibilities if they have provided acceptable training for the number of hours assigned, or have demonstrated that they made GFE to provide the number of OJT hours assigned. Where a contractor cannot meet his or her annual training hour goal with females and minorities, the contractor remains responsible for demonstrating the GFE taken in pursuance of the goal. Examples of what actions constitute GFE are set forth below. The NDOT HCRO will make compliance determinations regarding the NDOT OJT Program and TSP based upon either attainment of the annual goal or GFE to meet it.

27. Good faith efforts are those designed to achieve equal opportunity through positive, aggressive, and continuous results-oriented measures (23 CFR 230.409(g)(4)). GFE should be taken as trainee-hiring opportunities arise and when minorities and women are under-represented in the contractor's workforce. The NDOT HCRO will consider all contractors' documentation of GFE on a case-by-case basis and take into account the following:

- Availability of minorities, females, and disadvantaged persons for training;
- The potential for effective training;
- Duration of any applicable contract;
- Dollar value of any applicable contract;
- Geographic location;
- Type of work;
- The need for journeyman level individuals in the work type or trade area;
- Total workforce the average contractor could be expected to use.

Good faith efforts may include, but are not limited to, documentation of efforts to:

- Contact minority and female employees to gain referrals on other minority and female applicants;
 - Refer specific minorities and females to training programs and specifically request these trainees by name in the future;
 - Upgrade minority and female unskilled workers into the skilled classifications when possible;
 - Accept applications at the project site or at the contractor's home office;
 - Review and follow up on previously received applications from minorities and females when hiring opportunities arise;
 - Collaborate with workforce development centers, supportive services programs and other employment and on-the-job training programs to identify and recruit minority and female applicants;
 - Maintain monthly evaluations that monitor efforts made to achieve diversity in the contractor's workforce in general (i.e., significant numbers of minorities and females employed on a company wide basis);
 - Provide incentives for project management personnel or superintendents when hiring goals are met on a project (i.e., similar to performance bonuses paid when a job is completed in a timely manner and under budget).
28. Failure by the contractor to demonstrate GFE to achieve their full OJT assignment or for failure to demonstrate GFE to achieve their full OJT assignment with minority and women trainees, may result in remedies as the NDOT deems appropriate, which may include, but are not limited to:
- Withholding monthly progress payments;
 - Assessing sanctions; and/or
 - Disqualifying the contractor from future bidding as non-responsible.
29. The established per hour unit price for the item "Training" shall be full compensation for all costs incurred, which includes but is not limited to providing the necessary supervision, labor, equipment, tools, and material. Any additional costs due to payment of wages in excess of the minimum rates specified and for the payment of any fringe benefits shall not be paid for directly, but shall be considered subsidiary to the items for which direct payment is made.

FHWA FORM 1273

[Form 1273 to be inserted here] Note to industry – See link [here](#)