

Request for Proposals (RFP)

To Design and Construct [PROJECT] Through a Design-Build Agreement

Volume II Design-Build Agreement

DRAFT [DATE HERE]



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Request for Industry Feedback

Exhibits

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Forms

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Recitals

This Design-Build Agreement (“Agreement”) is entered into between the Nebraska Department of Transportation, a public entity of the State of Nebraska (“Department”), and [ENTER DESIGN-BUILDER] (“Design-Builder”). This Agreement is effective as of the date of its execution by both Parties (the “Effective Date”), with reference to the definitions contained in Exhibit 1 (Initialisms and Definitions) and the following facts:

- A. The Department wishes to develop, design, and construct improvements along [ENTER BRIEF PROJECT DESCRIPTION] (“Project”) through the Agreement Documents.
- B. Under the Agreement Documents, Design-Builder shall design and build the civil infrastructure for the Project.
- C. The Project is authorized pursuant to Neb. Rev. Stat. Sections 39-2101 to 39-2824, which authorizes The Department to award design-build contracts for highway projects. Contracts authorized under this program are awarded on the basis of the lowest responsible bid or best value, as determined by the Department.
- D. On [ENTER DATE], the Department issued the RFP to the Short-listed Proposers.
- E. An RFP evaluation committee determined that Design-Builder was the Proposer which best met the selection criteria contained in the RFP and that the Proposal was the one which provided the best value to the Department.
- F. On [ENTER DATE], the Department accepted the recommendation of the RFP Evaluation Committee to award this Agreement to Design-Builder.
- G. The Parties intend for this Agreement to be a lump sum design-build contract obligating Design-Builder to perform all Work necessary to achieve the Completion Milestones by the Completion Deadlines, and for the Agreement Price, subject only to certain specified limited exceptions. Design-Builder has agreed in the Agreement Documents to assume such responsibilities and risks and has reflected the assumption of such responsibilities and risks in the Agreement Price.
- H. Following completion and acceptance of the Project by the Department, the Project will become part of the state highway system, and the Department will own all real property located within the Project ROW.

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

1 AGREEMENT COMPONENTS; INTERPRETATION OF AGREEMENT

1.1 Certain Definitions

Capitalized terms used herein shall have the meanings given in Exhibit 1 (Initialisms and Definitions) or the Design-Build Specifications, as the case may be.

1.2 Order of Precedence

The Agreement Documents and order of precedence are listed in this Section 1.2 (Order of Precedence). Each Agreement Document is an essential part of the Agreement, and a requirement occurring in one is as though occurring in all. The Agreement Documents are intended to be complementary and to comprise a complete Agreement. In the event of any conflict among the Agreement Documents, the order of precedence is as follows:

1. Change Orders and Agreement Amendments;
2. The Agreement including all Exhibits, Schedules, and Attachments to this Agreement (excluding Exhibit 2 (Proposal Commitments));
3. Exhibit 2 (Proposal Commitments);
4. Technical Provisions (excluding TP Attachments);
5. All TP Attachments (excluding the Project Standards);
6. Any Special Provisions developed under, and in compliance with processes described under, the Technical Provisions and other Agreement Documents; and
7. the Design-Build Specifications, as modified by these Agreement Documents.

Without limiting the foregoing:

1. The Design-Build Specifications have precedence over Plans; and
2. Any other Deviations contained in the Plans take priority over conflicting requirements of other parts of the Agreement Documents but only to the extent that Design-Builder specifically identifies the conflicts to the Department and the Department Approves such Deviations by Notice to Design-Builder.

1.3 Conflicting Requirements

Notwithstanding the order of precedence among Agreement Documents, as set forth in Section 1.2 (Order of Precedence) if a Agreement Document contains differing provisions on the same subject matter than another Agreement Document, the provisions that establish the higher quality, manner or method of performing the Work or use more stringent standards will prevail. In the event of a conflict among any standards, criteria, requirements, conditions, procedures, specifications, or other provisions applicable to the Project established by reference to a described manual or publication within an Agreement Document or set of Agreement Documents, the standard, criterion, requirement, condition, procedure, specification, or other provision offering higher quality or better performance will apply. If either Party becomes aware of any such conflict, it shall promptly notify the other Party of the conflict.

1.4 Omission of Details; Clarifications by Department

The Design-Builder shall not exploit any errors or omission in the Agreement, including lack of detail or description of Work. Upon discovery of any errors or omission, the Design-Builder shall notify the Department immediately and obtain written instructions from the Department before

proceeding with Work that may be impacted by the error or omission. Errors or omission in the Agreement Documents shall not excuse the Design-Builder from performing the Work in accordance with the applicable standard of care.

1.5 Referenced Standards and Specifications

Work that must comply with a specified standard established by reference to a described publication must comply with the latest edition or revision of that standard in effect on the Effective Date of the Agreement, including any amendments in effect on that date, unless otherwise specified in the Agreement or otherwise directed by the Department.

1.6 Incorporation of Alternative Technical Concepts (ATC)

The ATCs shall hereby incorporated into the Agreement Documents. The Design-Builder is solely responsible for obtaining any Governmental Approvals from Persons other than the Department, when required to implement ATC(s) incorporated in the Agreement Documents, unless specifically written otherwise. If the Design-Builder fails to obtain any Governmental Approval, the Design-Builder will comply with the Base Technical Concept (unmodified by the ATC) without any increase in the Agreement Price or extension of the Completion Dates. The Design-Builder shall use its good faith efforts to obtain Governmental Approvals.

If the Agreement Documents incorporate any ATC and either (a) the Design-Builder does not comply with one or more conditions of Approval for the ATC, or (b) the Design-Builder does not comply with the required Third-Party Approval for the ATC, then the Design-Builder shall comply with the requirements in the Agreement Documents that would have applied in the absence of such ATC. Such compliance shall be without an increase to the Agreement Price or adjustment to Completion Dates. To the extent the ATC represented additional Work or higher quality materials from what is otherwise required by the Agreement Documents, the Department shall be entitled to a credit for the reduced cost to Design-Builder of reverting to the Base Technical Concept of the Agreement Documents.

The Department may present to the Design-Builder, for incorporation into the Project, (i) ATCs submitted by unsuccessful proposers and (ii) the Design-Builder's ATCs that were approved by the Department for inclusion into its Proposal but were not incorporated into the Design-Builder's Proposal. The incorporation of such ATC's will be considered a Department-Directed Change.

1.7 Reference Information Documents

The Department has provided Reference Information Documents (RIDs) to the Design-Builder. The RIDs are not mandatory and Design-Builder is not entitled to rely on the RIDs. Design-Builder acknowledges and agrees that it is obligated to conduct its own studies, analyses, and investigations to verify and supplement information in the RIDs, reports, explorations and subsurface conditions at the Site. Any use of information in the RIDs in performance of the Work, without independent verification or supplement by the Design-Builder, is entirely at the Design-Builder's own risk.

The Base Technical Concept is provided only to illustrate the Department's objectives and creates no warranty or contractual obligation. It is informational only, and the Design-Builder may not rely on it for accuracy, completeness, or constructability. No claims for additional compensation, time, or relief will be allowed based on deficiencies in the Base Technical Concept.

[NTD – include if NDOT will provide RIDs that the Design-Builder may rely upon: Design-Builder may rely on the accuracy of only those portions of the RIDs that are expressly identified as "Rely-Upon Information" in Exhibit 3 (Rely-Upon Information) without independent verification, but only for the limited purposes and to the extent stated in Exhibit 3 (Rely-Upon Information). Nothing in

this clause relieves the Design-Builder of its obligation to exercise the standard of care required under this Agreement in reviewing, evaluating, and incorporating the RIDs into its design and construction means and methods, or from complying with any independent investigation, verification, or due diligence obligations expressly set forth in this Agreement.]

1.8 Approval, Acceptance; Limitations on Design-Builder's Right to Rely

The Design-Builder shall comply with the submittal requirements set forth in TP Section 2.2.6 (Submittals and Review Process). The Department's review, comment, acceptance, rejection, approval, disapproval, inspection, or failure to act with respect to any Submittal shall not:

1. Constitute approval of the Design-Builder's performance, concession of compliance, or a waiver of Design-Builder's obligation to perform all Work in accordance with the Agreement Documents;
2. Relieve Design-Builder of responsibility for the acts, errors, or omissions of Design-Builder-Related Entities;
3. Create or impose upon the Department any duty, obligation, or warranty, express or implied, regarding the adequacy of the Submittal or the Work;
4. Be relied upon by the Design-Builder as evidence of compliance with the Agreement Documents, or as a defense to liability for Nonconforming Work; or
5. Limit or prejudice the Department's rights or remedies under the Agreement Documents or applicable law.

Design-Builder remains fully responsible for the accuracy, adequacy, and performance of its Work, notwithstanding any Department action or inaction on a Submittal. Notwithstanding the foregoing, the Design-Builder may rely on formal Notices issued by the Department under the Agreement Documents, and the Department remains responsible for any material misrepresentation it knowingly and intentionally provides, as well as for its own contractual obligations.

1.9 Integration of the Standard Specifications into Agreement

The Design-Build Standard Specifications are incorporated into and made part of the Agreement Documents as if fully set out, subject to the modifications, clarifications, and priorities stated in this Agreement, the Technical Provisions/Special Provisions, and any Change Orders or written directives issued under this Agreement.

1.10 Project Standards and Specifications

Except as otherwise specified in the Agreement Documents or directed by the Department, material and workmanship shall comply with the applicable standards identified in the Technical Provisions, including the latest editions, revisions, amendments, and supplements in effect as of the Effective Date of the Agreement. For purposes of interpreting such standards:

1. References to the "project owner" or "owner" shall mean the Department;
2. References to an "engineer" or "Engineer" relates to design responsibilities or other technical issues, "Engineer" shall mean the Design-Builder's Design Manager. When a reference to "Engineer" relates to administrative issues, "Engineer" shall mean the Department. It shall be in the Department's sole discretion to determine when the context refers to technical or administrative responsibilities.
3. References to "plan(s)" shall mean the RFC Documents; and

4. Cross-references to measurement and payment provisions contained in the Project Standards shall be deemed to refer to the measurement and payment provisions in the Agreement Documents.

1.11 Changes in Project Standards

If a Project Standard changes after the Effective Date of the Agreement, the Department shall notify the Design-Builder within thirty (30) Calendar Days. The Department may direct compliance with either the new or existing standard. If the Department directs compliance with the new standard and such compliance directly and materially impacts the Work, the Design-Builder may request a Change Order for a Department-Directed Change under Section 17 (Change Orders). If the Department directs continued compliance with the prior standard (and the new standard is not legally required), the Design-Builder shall proceed accordingly without entitlement to a Change Order. This Section 1.11 shall not apply to Changes in Law.

1.12 Standard for Approvals

If the Department or Design-Builder must give any Approval, consent, or determination under the Agreement Documents, such Approvals, consents, or determinations shall not be withheld unreasonably unless a different standard (such as sole discretion) is specified. Where sole discretion is applied, the decision shall not be subject to dispute resolution under the Agreement Documents. Where good faith discretion applies, the approval, consent or determination is binding, unless it is finally determined through the dispute resolution under the Agreement Documents by clear and convincing evidence that such approval, consent, determination, acceptance, decision or other action was arbitrary or capricious.

1.13 Applicable Law

To the extent applicable to the services and work performed under this Agreement, all mandatory state and federal statutes, regulations, executive orders and orders are incorporated into this Agreement as if fully set forth with appropriate substitutions of "Design-Builder" or "Consultant" with "Design-Builder" and "Government" or "Owner" with "Owner," as the context requires. Without limiting the generality of the foregoing, the Parties agree that this Agreement, and the design and construction of the Project are subject to the laws of the state of Nebraska (collectively "Nebraska-Specific Requirements").

[NTD: delete if no federal funding: For a full list of Federal Requirements, see Exhibit 4-A (Federal Rider).]

The Design-Builder will comply, and will require its Subcontractors and Subconsultants of every tier to comply, with all applicable federal, state, and local laws, regulations, codes, and ordinances.

2 DESIGN-BUILDER REPRESENTATIONS, WARRANTIES, AND COVENANTS

Design-Builder and, as applicable, Design-Builder-Related Entities, represents, warrants, acknowledges, agrees and covenants that:

1. Design-Builder and its members have full power and authority to execute, deliver, and perform the Agreement. Execution has been duly authorized and will not breach governing documents, agreements, or applicable Law.
2. Based on its investigation, Design-Builder reasonably believes the Project can be designed and constructed within the ROW limits, constraints, Completion Deadlines, and Agreement Price.

3. Prior to Proposal submission, Design-Builder reviewed the Agreement Documents and Reference Documents in accordance with Good Industry Practice and identified any known errors.
4. As of the Effective Date, Design-Builder conducted a reasonable investigation of the Site, and satisfied itself as to Site conditions, including surface and subsurface materials, utilities, hazardous substances, environmental and cultural resources, and other reasonably ascertainable obstacles. This investigation formed the basis of its Proposal Price.
5. Failure to investigate shall not relieve Design-Builder of responsibility for performance. Entitlement to Change Orders for differing conditions shall be only as permitted under Section 17 (*Change Orders*).

3 AGREEMENT PRICE

The Agreement Price sets forth the total compensation payable to the Design-Builder pursuant to this Agreement. Except as provided in Section 17 (*Change Orders*), the Design Builder shall not be entitled to any increase in the Agreement Price.

3.1 NTP1 Milestone Payments

For Work authorized by NTP1, the Design-Builder will be paid through the milestone payments described in Exhibit 5 (*NTP1 Milestone Payments*). Upon demonstration to the Department that the Design-Builder has achieved a milestone described in Exhibit 5 the Design-Builder shall submit an invoice to the Department requesting payment. The invoice shall be in a form Approved by the Department.

3.2 NTP2 Progress Payments

For Work authorized by NTP2 the Design-Builder shall be paid as described in this Section 3.2 (*NTP2 Progress Payments*).

3.2.1 Schedule of Values

The Design-Builder shall develop and maintain a Schedule of Values that is a detailed, itemized list of payment activities for the Design-Builder to be paid that established the value or cost for each Work activity. The Design-Builder shall incorporate Change Orders into new or revised payment activities as each is Approved. New or revised payment activities must be Approved by the Department.

The Schedule of Values shall be developed from the Approved cost-loading of the Baseline Schedule and conform with the requirement set forth in the Technical Provisions. The Design-Builder shall allocate the Agreement Price amount in the Schedule of Values. The Design-Builder shall submit the Schedule of Values with the Baseline Schedule. The Design-Builder shall attach costs to all activities in the Baseline Schedule for which Design-Builder may request payment. The Design-Builder shall designate the payment activities in the Schedule of Values to have identical activity IDs and descriptions to what is in the Baseline Schedule and conform with other requirements for payment activities set forth in the Technical Provisions. The Schedule of Values may contain more items for payment than the number of activities in the Baseline Schedule. If the DBT is requesting payment for stored materials, include the cost of these materials as earned value for the associated payment activities.

The Design-Builder shall update its Schedule of Values as follows.

1. Once established, the Design-Builder may update the Schedule of Values, maintaining it separately from the Baseline Schedule.
2. The Department may, at its discretion, require the submittal of a Re-Baselined Schedule when the Schedule of Values is updated by the Design-Builder.

3.2.2 Measurement and Progress

The Department shall measure progress for payment activities using the approved Schedule of Values as outlined in this subsection.

The Department will measure progress for payment activities based on physical completion of the Work on an activity basis. The Parties shall agree on the physical percent complete for each activity prior to the Design-Builder submitting each Monthly Progress Payment in accordance with the Agreement Documents. For continuing or LOE activities, the Department will make payment based on the amount apportioned for the period in which payment is being requested. If Work for the period is not accomplished or is not in compliance, then the apportioned amount may be withheld from payment until the Work is fully compliant.

3.2.3 Request for Monthly Payment

The Design-Builder shall submit a Request for Monthly Progress Payment in a form Approved by the Department, including all of the information required by Section 3.2.4 (Required Documentation for Requests for Monthly Progress Payment), containing the amount claimed to be payable for Work based upon the agreed value by reference to the Approved Schedule of Values.

The Department and Design-Builder shall meet to review the Request for Monthly Progress Payment to resolve any outstanding issues. The Design-Builder shall submit a revised Request for Monthly Progress Payment to address any outstanding issues identified by the Department.

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

3.2.4 Required Documentation for Requests for Monthly Progress Payment

All documents reasonably requested by the Department shall be submitted with each Request for Monthly Progress Payment. No Request for Monthly Progress Payment will be Approved without the following documentation:

1. A Progress Report of the Work;
2. Any Approved updates to the Schedule of Values;
3. Certified payrolls;
4. A Department-Approved certification that all maintenance activities described in TP Section 16 (Maintenance of Traffic) have been completed for the previous month;
5. Material certifications and material testing results for all materials incorporated into the Project during the previous month; and
6. A Monthly Progress Schedule update.

3.3 Final Acceptance Payment

The Department shall pay Design-Builder any unpaid portion of the Agreement Price within thirty (30) Calendar days of providing notice that the Project is accepted pursuant to Design-Build Specification Section 108.15 (Final Acceptance).

3.4 Deductions, Withholding, Exclusions and Limitations on Payment

In addition to adjustments that the Department may make to the Requests for Monthly Payment, the Department may deduct from each Monthly Progress Payment and the Final Acceptance Payment:

1. any Department or Third-Party Losses for which Design-Builder is responsible;
2. any Liquidated Damages;
3. any Nonconforming Work that has not been remedied;
4. any materials that do not have the completed testing results in accordance with the Applicable Standards; or
5. any deductions made pursuant to Section 3.5 (Unit Price Adjustments).

3.5 Unit Price Adjustments

Nonconforming Work subject to price adjustments are included in Exhibit 9 (Unit Pay Cost Adjustment). Price adjustments will be calculated following the processes included in Exhibit 9. The unit prices set forth in Exhibit 9 are for adjustment purposes only and shall not serve as a basis of payment.

3.6 Partial Payment for Materials Delivered to the Site

The Design-Builder shall be compensated for stockpiled materials in accordance with Design-Build Specification Section 109.07 (Stockpiled Materials).

4 AGREEMENT TIME

4.1 Time of Essence

Time is of the essence for all obligations under this Agreement. All deadlines, milestones, delivery dates, approval periods, submittal cycles, payment dates, cure periods, and other time-related requirements are material terms.

4.2 Notices to Proceed

4.2.1 NTP 1

The Design-Builder is authorized to commence NTP1 Work upon Design-Builder's satisfaction of Conditions Precedent to NTP1 and at the Department's issuance of the NTP1.

Conditions Precedent for NTP1 include:

1. All Insurance Policies required under Design-Build Specification Section 107.15 (Insurance) have been obtained and are in full force and effect, and Design-Builder has delivered to Department written binding verifications of coverage from the relevant issuers of such Insurance Policies.

2. Design-Builder has developed and delivered to Department the directory of Key Personnel listed in Exhibit 2 (Proposal Commitments).
3. Design-Builder has developed and delivered to the Department, and the Department has approved the component parts, plans and documentation of the Design Quality Management Plan TP Section 2 (Quality Program).
4. Design-Builder has developed and delivered to the Department, and the Department has Approved the NTP 1 Deliverable Schedule.
5. Design-Builder has obtained all licenses and certifications required by the Agreement Documents.
6. There exists no uncured Design-Builder Default for which Design-Builder has received written Notice from the Department.
7. The Department has Approved the NTP1 Milestone Payments for NTP1 Work as described in Section 3.1 (NTP1 Milestone Payments).
8. Design-Builder has satisfied any other requirements or conditions for commencing NTP1 Work, set forth in the Agreement Documents.

4.2.2 NTP2

The Design-Builder is authorized to commence final design and NTP 2 Work contemplated by the Agreement Documents upon Design-Builder's satisfaction of Conditions Precedent for NTP 2 and the Department's issuance of NTP 2 for the associated Work.

When the Design-Builder believes it has satisfied all conditions precedent to the start of construction for identified Work, the Design-Builder may request NTP2 substantially in the form set out in Form A (Request for NTP2) for identified Work. The Department will issue NTP2 using substantially the form set out in Form B (NTP2 Form).

Conditions Precedent for NTP2 include:

1. The Department has Approved the NTP 2 Submittals in TP Section 1.5, including the Baseline Schedule;
2. The Department has accepted the Transportation Management Plan in accordance with TP Section 18.3.1 (Transportation Management Plan);
3. the Department has Approved the Construction Quality Management Plan;
4. All insurance policies required to be delivered to the Department under the Agreement Documents prior to commencement of construction have been received by the Department and shall remain in full force and effect;
5. The Department has accepted the Health and Safety Plan in accordance with TP Section 22 (Health and Safety);
6. All pre-construction environmental surveys and mitigation have been completed as required by the Governmental Approvals or otherwise under the Agreement Documents for the area(s) proposed for construction, and Design-Builder has performed all other survey work and delivered all notices required by the Agreement Documents to be delivered prior to commencement of construction on such portion of the Project;

7. All representations and warranties of Design-Builder in Section 2 (Design-Builder Representation Warranties and Covenants) remain true and correct in all material respects;
8. There exists no uncured Event of Default for which Design-Builder has received Notice from the Department; and
9. Design-Builder has provided to the Department at least fourteen (14) Calendar Days advance Notice of the date Design-Builder determines it will satisfy the conditions in this Section 4.2.2 (NTP 2).

As used in this Section 4.2.2 (NTP 2), the term “construction” specifically excludes potholing and geotechnical investigations incidental to design Work, mobilization, Site security and establishment of work yard(s) and storage sites.

4.2.3 Prerequisites Required to Commence Construction

In addition to the conditions precedent identified in Section 4.2.2 (NTP2) above, the Design-Builder may only begin construction once the following conditions are met:

1. The Department has accepted all Release for Construction Packages and Construction Documents for the applicable portion of the Project;
2. Design-Builder has obtained and delivered to the Department in fully executed, required form, all approvals from the Department and any Governmental Approvals necessary for construction of the applicable portion of the Project required by the Project Management Plan and the Agreement Documents;
3. Design-Builder has complied with and performed all conditions of Governmental Approvals which are a prerequisite to commencement of the applicable portion of the Project;
4. Each Performance Bond and Payment Bond required under Section 13.2 (Payment and Performance Bonds) has been obtained and such Bonds remain in full force and effect.

5 PROJECT SCHEDULE

5.1 General

The Work shall be undertaken and completed in accordance with the Approved Baseline Schedule prepared in conformance with this Section 5 (Project Schedule) and TP Section 4.0 (Project Schedule).

5.2 Submission of Recovery Schedule

If any Schedule Update indicates that (a) the Design-Builder is behind the current Progress Schedule, (b) any Completion Milestone or Completion Deadline, will not be achieved, or (c) the Department reasonably determines that progress is inadequate to meet any Completion Milestone or Completion Deadline, the Department may direct the Design-Builder to submit a Recovery Schedule in accordance with the requirements of this Section 5.2 (Submission of Recovery Schedule) and TP Section 3.3.5 (Recovery Schedule). Within fourteen (14) Calendar Days of such direction—or sooner if required to avoid further delay—the Design-Builder shall prepare and submit a detailed Recovery Schedule, in the same format and scheduling software as the Project Schedule, that demonstrates a practical, fully supported plan for regaining lost time and achieving all Completion Milestones and Completion Deadlines.

The Recovery Schedule shall:

1. Identify the causes of delay and the effect on the critical path;
2. Show specific recovery measures, including additional crews, added shifts, resequencing, modified means and methods, early procurement, or other actions necessary to restore progress;
3. Include a comprehensive Schedule Narrative explaining the recovery logic, changes to activity durations or relationships, risks to the plan, and any required Department actions; and
4. Maintain all contractual logic and incorporate all approved Time Adjustments to date.

Submission or acceptance of a Recovery Schedule does not constitute approval of any Time Adjustment or a Change Order, nor does it waive the Design-Builder's obligation to complete the Work within the Agreement Time. Upon the Department's acceptance or non-objection, the Design-Builder shall perform the Work in accordance with the Recovery Schedule at its own cost, unless otherwise provided by Change Order. Continued failure to provide or execute an acceptable Recovery Schedule constitutes a material breach and may result in withholding of Monthly Progress Payments or other remedies available under the Agreement.

If Design-Builder fails to provide an acceptable Recovery Schedule within thirty (30) Calendar Days after the Department's notice to do so, the Department may withhold all subsequent Monthly Progress Payments until an acceptable Recovery Schedule is approved. Neither the preparation, submittal, nor approval of a Recovery Schedule shall entitle Design-Builder to any time extension, Agreement Price adjustment, or other compensation, nor shall it delay regular quarterly Project Schedule update.

5.3 Re-Baselining the Baseline Schedule

In addition to the rights identified in Section 5.2 (*Submission of Recovery Schedule*) above, the Department may, at its sole discretion, allow the Design-Builder to Re-Baseline the Construction Schedule. Neither the preparation, submittal, nor approval of a Re-Baselined Schedule shall entitle Design-Builder to any time extension, Agreement Price adjustment, or other compensation.

6 CONTROL OF THE WORK

6.1 Control of the Work

6.1.1 Control and Coordination of Work.

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

6.1.2 Safety

Design-Builder shall take all reasonable precautions and be solely responsible for the safety of, and shall provide protection to prevent damage, injury, or loss to, all persons on the Site or who would reasonably be expected to be affected by the Work, including individuals performing Work, employees of the Department and its consultants, visitors to the Site and members of the traveling public who may be affected by the Work. Design-Builder shall at all times comply with all health and safety requirements contained in the Agreement Documents and Design-Builder's Health and Safety Plan and all such requirements under applicable Law, including all rules, directives and guidance of the U.S. Department of Homeland Security or comparable State agency. Design-

Builder shall coordinate and cooperate with all Governmental Entities providing security, first responder and other public emergency response services.

6.1.3 Obligation to Minimize Impacts

Design-Builder shall undertake the Work in a manner that will minimize the effect on surrounding property and the public to the extent practicable.

7 STANDARDS FOR REVIEW OF, COMMENT ON AND APPROVAL OF SUBMITTALS

In all cases where Approvals, acceptances or consents are required to be provided by the Department or the Design-Builder hereunder, such Approvals, acceptances, or consents shall not be withheld unreasonably, except in cases where a different standard is specified. In cases where sole discretion of the Department is specified, the decision is in the sole discretion of the Department and shall not be subject to dispute resolution hereunder.

7.1 Approval

When the Design-Builder is required to submit an item to the Department “for Approval”, the Design-Builder shall obtain the Department’s written Approval of such item and may not proceed to incorporate that item into the Work or the Project without the Department’s written Approval.

If the Department does not respond to such a Submittal within any required timeframe set forth in the Agreement Documents, the Design-Builder shall send to the Department a written notice reminding the Department that it is awaiting Approval as a condition precedent to submission of a Request for Change Order for a Relief Event. All Submittals seeking Approval must be accurate, complete, and free of deficiencies as a condition precedent to requesting a Change Order.

Any time that the Department does not Approve a Submittal, it shall provide comments explaining the denial to the Design-Builder. Unless the Approval is expressly described as being in the Department’s sole discretion, the denial shall be based on the requirements of the Agreement Documents. The Design-Builder shall address the comments in revisions or shall explain why it believes it cannot or should not address the comments. Once all comments have been fully resolved to the reasonable satisfaction of the Department, any revised Submittal shall then be resubmitted to the Department for Approval.

The Department may, at its discretion, conditionally Approve a Submittal, allowing the Design-Builder to proceed with the Work related to the Submittal.

7.2 Review and Comment

When the Design-Builder is required to submit an item to the Department for review and comment, or similar action not requiring the Department’s prior Approval before the Design-Builder may proceed, the Department shall have an opportunity to provide comments. All Submittals seeking Review and Comment must be accurate, complete, and free of deficiencies. If the Department does not provide any comments within the applicable timeframe set forth in the Agreement Documents, or within ten (10) Business Days from receipt of the Design-Builder’s submission if the Agreement Documents do not provide a timeframe, then the Design-Builder shall notify the Department that it has not received comments and may proceed at risk and without prejudice to the Department’s rights to later object to Nonconforming Work in accordance with the Section 9 (Nonconforming Work). Upon receipt of notice by the Design-Builder, the Department shall provide comments within two (2) Business Days or other time frame agreed to by the Parties.

7.3 Responsibility For Design

7.3.1 Design-Builder Responsibility

Design-Builder acknowledges and agrees that:

1. It has full responsibility and liability for the design of the Project and that Design-Builder will provide the design of the Project, regardless of the fact that aspects of the Base Technical Concept have been provided to Design-Builder prior to the Effective Date of the Agreement, as a preliminary basis for Design-Builder's design;
2. Except to the extent specifically permitted in the Agreement Documents, Design-Builder is not entitled to rely on (i) the Base Technical Concept, except as expressly specified in Section 1.6 (Reference Information Documents), (ii) the other Reference Information Documents, or (iii) any other documents or information provided by or on behalf of the Department, except, in each case to the extent specifically permitted in the Agreement Documents, including:
 - a. Design-Builder may rely on written approvals and acceptances from the Department (A) for the limited purpose of establishing that the approval or acceptance occurred or (B) that are within its sole or absolute discretion, but only to the extent that Design-Builder is prejudiced by a subsequent decision of the Department to rescind such approval or acceptance, in which case the extent of such prejudice may be forwarded as an Department-Directed Change;
 - b. Design-Builder shall be entitled to rely on specific written Deviations the Department Approves under this Agreement;
 - c. Design-Builder shall be entitled to rely on the certificates of Substantial Completion, Final Acceptance and Notices issuing NTP1 and NTP2, in each case, from the Department for the limited purpose of establishing the respective dates thereof, nevertheless without prejudice to any other rights and remedies available to the Department under the Agreement Documents (e.g., respecting unapproved Deviations, Nonconformances, and Events of Default); and
 - d. The Department is not relieved from performance of its express responsibilities under the Agreement Documents in accordance with all standards applicable thereto.
3. Design-Builder shall correct any Errors in the Base Technical Concept through the design and/or construction process without any increase in the Agreement Price, extension of a Completion Deadline or any other relief, subject only to the right to a Change Order with respect to any Necessary Basic Configuration Changes to the extent permitted by Design-Build Specifications Section 104 and Section 17.3 (Limitations to Changes to the Basic Configuration).
4. The Department's liability for Errors in the Base Technical Concept is limited to its obligations relating to Necessary Basic Configuration Changes, and is subject to the requirements and limitations of Design-Build Specifications Section 104 and Section 17.3 (Limitations to Changes to the Basic Configuration).
5. Except for Necessary Basic Configuration Changes to the extent permitted by Design-Build Specifications Section 104 and Section 17.4 (Limitations to Changes to the Basic Configuration), Design-Builder's warranties and indemnities under this Agreement

- cover Errors in the Project even though they may be related to, result from, or arise out of Errors in the Base Technical Concept.
6. Design-Builder shall verify all calculations contained in this Agreement or otherwise provided by the Department without any increase in the Agreement Price, extension of a Completion Deadline or any other relief.

7.3.2 Design Review Process and Compliance with RFC Documents

Design-Builder shall complete and submit RFC Documents for Department review and acceptance in accordance with the requirements set forth in TP Sections 2.2.7.3 (Intermediate Design Requirements) and Section 2.2.7.4 (Final Design Requirements). The Department will review the RFC Documents for general conformance with the Agreement Documents. The Department's review, acceptance, or "no-exceptions" response shall not constitute Approval of design adequacy, relieve the Design-Builder or Design-Builder-Related Entity of professional responsibility, or shift liability for design errors or omissions. The Design-Builder shall incorporate all the Department comments, resolve exceptions, and resubmit revised documents until the Department issues written notice that the Final Design is accepted for construction.

7.3.3 Role of the Department's Consultants

The Department reserves the right to (i) retain the services of consultants and any other experts to perform services in connection with the Work and the Project (collectively, "Department Consultants") and (ii) delegate all or part of its rights and obligations from time to time as it may deem appropriate, in its sole discretion to Department Consultants. Throughout the Term, the Department has delegated certain responsibilities to Department Consultants.

8 OVERSIGHT AND INSPECTION

8.1 Design-Builder Inspection and Testing

Design-Builder shall perform the inspection, sampling, testing, quality control and quality assurance necessary for Design-Builder to comply with its obligations under the Agreement Documents. Without in any way diminishing its obligations under the Agreement Documents, Design-Builder may utilize information developed by the Department related to acceptance testing for offsite fabricated materials for quality control.

8.2 Oversight by the Department and others

1. The Department and its Authorized Representative shall have the right at all times to monitor, inspect, sample, measure, attend, observe or conduct tests and investigations, and conduct any other oversight respecting any part or aspect of the Project or the Work.
2. The Department shall have the right to attend and witness any tests and verifications to be conducted pursuant to the Technical Provisions and applicable Management Plans. Design-Builder shall provide to the Department all test results and reports (which may be provided in electronic format in accordance with the Technical Provisions) within ten (10) Business Days after Design-Builder receives them.
3. At all points in performance of the Work at which specific inspections and/or approvals by the Department are required by the Agreement Documents and/or the Project Management Plan, Design-Builder shall not proceed beyond that point until the Department has made such inspection or approval or waived its right in writing to inspect or approve.

4. In addition, when any Utility Owner is to accept or pay for a portion of the cost of the Work, its respective representatives have the right to oversee, inspect and/or test the work. Such oversight, inspection and/or testing does not make such Person a party to this Agreement nor will it change the rights of the Parties. Design-Builder hereby consents to such oversight, inspection and owner verification testing. Upon request from the Department, Design-Builder shall furnish information to such Persons as are designated in such request and shall permit such Persons access to the Site and all parts of the Work.
5. Design-Builder at all times shall coordinate and cooperate, and require its Subcontractors to coordinate and cooperate, with the Department and its Authorized Representative to facilitate the Department's oversight activities. Design-Builder shall cause its representatives to be available at all reasonable times for consultation with the Department.
6. Without limiting the foregoing, Design-Builder shall afford the Department and its Authorized Representative: (a) safe and unrestricted access to the Project at all times, (b) safe access during normal business hours to Design-Builder's Project offices and operations buildings and (c) unrestricted access to data related to the Work, subject to Section 21.1 (Limitation of Liability). Without limiting the foregoing, Design-Builder shall deliver to the Department upon request accurate and complete books, records, data and information regarding Work, the Project and the Utility Work, in the format required by the Technical Provisions.
7. Nothing in the Agreement Documents shall preclude, and Design-Builder shall not interfere with, any review or oversight of Submittals or of Work that the FHWA may desire to conduct.

8.3 Obligation to Uncover Finished Work

Design-Builder shall inform the Department in writing of any part of the Work which is about to be covered and offer a full and adequate opportunity to the Department to inspect and test such part of the Work before it is covered. At all times before Final Acceptance, Design-Builder shall remove or uncover such portions of the finished Work as directed by the Department. After examination by the Department and any other Persons designated by the Department, Design-Builder shall restore the Work to the standard required by the Agreement Documents. If the Work exposed or examined is not in conformance with the requirements of the Agreement Documents, then uncovering, removing and restoring the Work and recovery of any delay to any Critical Path shall be at Design-Builder's cost and Design-Builder shall not be entitled to any adjustment to the Agreement Price or any Completion Deadline or any other relief. Furthermore, any Work done or materials used without adequate notice to and opportunity for prior inspection by the Department (if applicable) or without inspection in accordance with Agreement Documents and/or Project Management Plan may be ordered uncovered, removed or restored at Design-Builder's cost and without an adjustment to the Agreement Price or any Completion Deadline or any other relief, even if the Work proves acceptable and conforming after uncovering. Except with respect to Work done or materials used as described in the foregoing sentence, if Work exposed or examined under this Section 8.3 is in conformance with the requirements of the Agreement Documents, then any delay in any Critical Path from uncovering, removing and restoring Work shall be considered a Department-Caused Delay, and Design-Builder shall be entitled to a Change Order for the cost of such efforts and recovery of any delay to any Critical Path occasioned thereby.

8.4 Meetings

Design-Builder shall conduct regular progress meetings with the Department in accordance with TP Section 1.4 (Project Communication).

8.5 Effect of Oversight

The oversight, spot checks, inspections, verifications, audits, tests, reviews, acceptances and approvals conducted by the Department and other Persons do not constitute acceptance of Nonconforming Work (except in limited circumstances as expressly provided in Section 9 (Nonconforming Work) or waiver of any warranty or legal or equitable right of the Department. Design-Builder shall not be relieved of obligations to perform the Work in accordance with the Agreement Documents, or any of its Warranty or indemnity obligations, as the result of oversight, spot checks, audits, reviews, tests or inspections performed by any Persons, approvals or acceptances made by any Persons, or any failure of any Person to take such action.

9 NONCONFORMING WORK

9.1 Reporting Nonconforming Work

Each instance of Nonconforming Work shall be documented on a Nonconformance Report (NCR) prepared by Design-Builder and submitted to the Department for review in accordance with the requirements of TP Section 2.3.11 (Nonconformance Report).

9.2 Rejection, Removal and Replacement of Nonconforming Work

Nonconforming Work rejected by the Department shall be removed and replaced so as to conform to the requirements of the Agreement Documents, at Design-Builder's cost and without any adjustment to the Agreement Price or any Completion Deadline or any other relief; and Design-Builder shall promptly take all action necessary to prevent similar Nonconforming Work from occurring in the future. The fact that the Department may not have discovered the Nonconforming Work shall not constitute an acceptance of such Nonconforming Work. If Design-Builder fails to correct any Nonconforming Work within ten (10) Business Days of receipt of notice from the Department requesting correction, or as agreed upon by the Parties, or if such Nonconforming Work cannot be corrected within ten (10) Business Days, and Design-Builder fails to: (a) provide to the Department a schedule acceptable to the Department for correcting any such Nonconforming Work within such ten-day period, (b) commence such corrective Work within such ten-day period and (c) thereafter diligently prosecute such correction in accordance with such approved schedule to completion, then the Department may cause the Nonconforming Work to be remedied or removed and replaced and may deduct the cost of doing so from any moneys due to the Design-Builder.

9.3 Agreement to Accept Nonconforming Work

If the Department agrees to accept any Nonconforming Work without requiring it to be fully corrected, the Department shall be entitled to reimbursement of a portion of the Agreement Price in an amount equal to either the (a) the amount deemed appropriate by the Department to provide compensation for known impacts to all affected Persons (including the Department) such as future maintenance and/or other costs relating to the Nonconforming Work, or (b) the amount of the Agreement Price allocated to such Work or (c) for those Work Items that are listed in Exhibit 9 (Unit Pay Cost Adjustments), an amount equal to the result of the calculation. Such reimbursement shall be payable to the Department within ten (10) Business Days after Design-Builder's receipt of an invoice, therefore. Alternatively, the Department may deduct the amount of such costs and expenses from any sums owed by the Department to Design-Builder pursuant to

this Agreement. Design-Builder acknowledges and agrees that subject to Design-Builder's correction of Nonconforming Work in accordance with Section 9.2 (Rejection, Removal and Replacement of Nonconforming Work), including the timelines therein, the Department shall have sole discretion regarding acceptance or rejection of Nonconforming Work and shall have sole discretion with regard to the amount payable in connection therewith. Payment, reimbursement or deduction of the amounts owing to the Department under this Section 9.3 shall be a condition precedent to the acceptance of the applicable Nonconforming Work.

10 ACCESS TO SITE, UTILITIES; ENVIRONMENTAL MITIGATION; HAZARDOUS MATERIALS; APPROVALS; COOPERATION WITH LOCAL AGENCIES

10.1 Acquisition of Project ROW

The Department shall be solely responsible for the acquisition of all ROW, easements, and access rights required for the Project in accordance with applicable State and Federal laws, including the Uniform Relocation Assistance and Real Property Acquisition Policies Act (42 U.S.C. § 4601 et seq.) and 23 CFR 710. The Department retains exclusive authority for any negotiation, condemnation, or compensation related to property acquisition.

On the Effective Date, the Department will provide the Design-Builder with available ROW status information and updates in accordance with the schedule set forth in the Agreement Documents.

The Design-Builder shall be responsible for securing all temporary ROW needed to construct the Project.

10.2 Access to Site

10.2.1 Access to Available Properties; Changes to Planned ROW Limits

If there are any changes in ROW requirements in connection with any Department-Directed Change or Necessary Basic Configuration Change, then the Planned ROW Limits shall be deemed modified to incorporate the change.

10.2.2 Access to Certain Additional Properties

1. If the Department fails to make ROW available by the dates identified in the Agreement Documents or otherwise required for access to perform the Work, the Design-Builder shall be entitled to a non-compensable time extension, provided that:
 - a. The Design-Builder provides written notice in accordance with this Section 10.2.2 (Access to Certain Additional Properties) within seven (7) Calendar Days of first becoming aware of the delay; and
 - b. The delay demonstrably impacts the Critical Path of the Project Schedule.
 - c. No monetary compensation or equitable adjustment shall be due for ROW delays, except to the extent such delay results from the Department's failure to comply with a directive, commitment, or obligation under this Agreement or constitutes a Department-Directed Change.

The Design-Builder shall use reasonable efforts to mitigate impacts to the Project Schedule through resequencing of the Work or other measures until the affected ROW is available.

10.3 Utility Adjustments

All Utility Work shall be performed in accordance with TP Section 7.0 (Utilities) and managed in accordance with the applicable requirements of the Design-Build Specifications, including but not limited to the Design-Build Specifications Sections 104, 107, 108, and 109, as appropriate.

10.3.1 Responsibilities of the Design-Builder

Design-Builder shall perform the following:

1. Utility Identification and Investigation. Identify all utilities within the Project limits that are identified in the Utility Disposition Documents, as well as identify any utilities that are not listed in the Utility Disposition Documents and perform Subsurface Utility Engineering (SUE) to the quality levels appropriate to the Project and consistent with the Department's policies to verify the accuracy of the Utility Disposition Documents and as required for the Work
2. Coordination with Utility Owners. Design-Builder shall initiate and maintain coordination with Utility Owners, participate in coordination meetings with Utility Owners, and provide sufficient design information for Utility Owners to determine relocation needs and prepare or update Permit to Occupy applications.
3. Develop and maintain a Utility Relocation Schedule and incorporate Utility Owner's timelines into the overall Project Schedule. The Design-Builder shall also confirm the disposition timelines in the Utility Disposition Documents are accurate. The Department will assist in coordinating Utility Owner participation and securing their timely performance.
4. Design to Avoid or Minimize Conflicts. Design-Builder shall design the Work to avoid or minimize utility impacts where reasonable and consistent with Project requirements. Where avoidance is not feasible, the Design-Builder shall identify required adjustments or relocations and communicate such needs to the Department and the affected Utility Owners.
5. Support for Utility Relocation. To the extent required by this Agreement, the Design-Builder shall:
 - a. Provide design information, staging requirements and traffic control consistent with MUTCD and Department requirements;
 - b. Coordinate and sequence construction activities to permit timely access by Utility Owners;
 - c. Protect existing facilities during Work;
 - d. Provide as-built information consistent with for survey as-builts
6. Where operations are adjacent to properties of Utilities and railroads, Work shall not begin until all arrangements necessary for their protection have been made by the Design-Builder and the Department has Approved the Utility Protection Plan in accordance with TP Section 7.0.
7. Compliance with Notification and Permits. Design-Builder shall comply with Nebraska 811 requirements and all applicable regulatory permits. Design-Builder shall not commence utility-impacting work without the Department's Approval where required by policy or this Agreement.

8. Additional Design-Builder Obligations. Project-specific, detailed requirements for utility identification, SUE, design, protection, sequencing, coordination, submittals, notifications, and deliverables are further described in TP Section 7.0. The Design-Builder shall comply with all such requirements.

10.3.2 Responsibilities of the Department

The Department shall:

1. Provide the Design-Builder with the Utility Disposition Documents
2. Determine whether utility adjustments, modifications, relocations, or removals are required for the Project and shall notify the affected Utility Owner;
3. Execute or update Utility Agreements and Permits to Occupy Right-of-Way, and determine cost reimbursement eligibility.
4. Review and comment on Design-Builder utility-related submittals and may impose reasonable conditions related to safety, access, Right-of-Way preservation, and future Department needs.

10.4 Utility Relief Event Cutoff

10.4.1 Utility Disposition Documents

The Department has prepared Utility Disposition Documents as a Reference Information Document, consisting of a utility matrix and accompanying K Sheets, detailing Utilities it has identified as being in within the Project limits or otherwise affected by the Work. The Utility Disposition Documents detail the owner, size, type, and location of each utility and intended disposition (protect-in-place, adjust, modify, relocate, abandon, remove, or relocate by others) of each utility and Party responsible for carrying out that disposition.

(1) Design-Builder Investigation

Using the Utility Disposition Documents as a starting point, and in advance of any final design submittals, the Design-Builder shall take all actions necessary to verify the disposition, existence, owner, type, location, and size of utilities within the Project limits or that otherwise may affect or be affected by the Work.

(2) Relation to Utility-Related Relief Events

The Design-Builder shall coordinate, complete, and report on utility investigation work within a maximum of one hundred twenty (120) Calendar Days of NTP 1. The Design-Builder shall prepare a report that identifies any differing utility conditions from those shown on the Utility Disposition Documents that the Design-Builder requests to claim as changed conditions. Failure to comply with this requirement shall waive the Design-Builder's right to claim differing conditions encountered during the work, and at the end of the allowable investigation period, the Design-Builder shall assume all responsibility for utilities within the Project limits or that otherwise may affect or be affected by the Work, excepting, however, any action or inaction by parties other than the Design-Builder responsible for undertaking the disposition of the utilities identified in the Utility Disposition Documents, as updated by the Design-Builder as a result of the Design-Builder investigation.

11 APPROVALS

11.1 Governmental Approvals and Third Party Agreements

The Department retains responsibility for processing all the Department-Provided Approvals (based on the Basic Configuration) that the Department has not obtained as of the Effective Date. Design-Builder shall obtain all other Governmental Approvals, including any modifications, renewals and extensions of the Department-Provided Approvals, and, except to the extent the Agreement Documents expressly provide the Department is responsible therefor, all third-party approvals and agreements required in connection with the Project, the Project Right of Way or the Work.

Prior to submitting to a Governmental Entity any application for a Governmental Approval (or any proposed modification, renewal, extension or waiver of a Governmental Approval or provision thereof), Design-Builder shall submit the same, together with any supporting environmental studies and analyses, to the Department for review and comment, as specified in the Technical Provisions.

The Design-Builder shall not enter into any agreement with a Governmental Entity, Utility Owner, property owner, or other third party that purports to bind or obligate the Department in any manner without the Department's prior written approval. The Design-Builder has no authority to act as the Department's agent or representative.

11.2 New Approvals

During the Project, responsibility for any New Approvals shall be negotiated between the Parties. Notwithstanding, the Department shall obtain any New Approvals required due to a Department-Directed Change, Force Majeure Event, or a Necessary Basic Configuration Change. Design-Builder shall provide reasonable support services to assist the Department. Any Change Order associated with such New Approvals shall compensate Design-Builder for material changes to the Work (including additional mitigation measures, but excluding support services) and any resulting time extensions, subject to Section 17 (Change Orders).

11.3 Cooperation with Local Agencies

11.3.1 Compliance with Local Agency Requirements

Design-Builder shall comply with all Local Agency terms, requirements and conditions applicable to the Work, including payment of all plan review and construction inspection costs charged by Local Agencies relating to the Work.

11.3.2 Bonds and Insurance

Design-Builder shall obtain and maintain any payment and performance security as may be required by any Local Agency, the costs for which are included in the Agreement Price. Design-Builder shall neither agree to nor permit addition of any Local Agency as an additional obligee to the Payment Bonds and Performance Bonds.

Upon request by the Department, Design-Builder shall provide certificates naming Local Agencies as additional insureds to the insurance policies required to be provided under Section 14 (Insurance) and Design-Build Specification Section 107.15 (Insurance).

12 SUBCONTRACTORS AND LABOR

12.1 Subcontracts

12.1.1 General

The Design-Builder shall retain Subcontractors that are qualified, experienced and capable in the performance of the portion of the Work assigned. The Design-Builder shall assure that each Subcontractor has and maintains all licenses required by applicable Laws during the performance of the assigned Work. Design-Builder certifies that it will enter a fully executed Subcontract with each Subcontractor that includes all provisions required under this Design-Build Agreement, prior to permitting the Subcontractor to perform any part of the Work or provide any materials, equipment or supplies for any part of the Work.

12.1.2 Subcontract Requirements

Each Subcontract shall:

1. set forth a professional responsibility or a standard for commercial practice equal to the requirements of the Agreement Documents and Good Industry Practice for work of similar scope and scale and shall set forth effective procedures for claims and change orders.
2. require the Subcontractor to carry out its scope of work in accordance with the Agreement Documents, the Governmental Approvals and applicable Law.
3. expressly permit the assignment of all Design-Builder's rights under the Subcontract to the Department or its successor, assignee, or designee, without contingencies. This permits the Department (or its successor, assignee, or designee) to assume the benefits of the Design-Builder's rights, with liability only for obligations arising after the date of assumption. This assignment includes all Subcontractor warranties, indemnities, guarantees, and professional responsibilities.
4. expressly state that any acceptance of assignment of the subcontract to the Department shall not operate to make the assignee responsible or liable for any breach of the Subcontract by Design-Builder or for any amounts due and owing under the subcontract for Work or services rendered prior to assumption (but without restriction on the Subcontractor's rights to suspend Work or demobilize due to Design-Builder's breach);
5. include the right of Design-Builder to terminate the Subcontract in whole or in part upon any Termination for Convenience of the Agreement without liability of Design-Builder or the Department for the Subcontractor's lost profits or business opportunity;
6. include an agreement by the Subcontractor to give evidence in any Dispute resolution proceeding pursuant to Section 23 (*Partnering and Dispute Resolution*) if such participation is requested by either the Department or the Design-Builder.

12.2 Prevailing Wage

Prevailing wage rates apply to this Agreement. The Design-Builder shall comply and cause its Subcontractors to comply with all laws regarding prevailing wages rates.

12.3 Equal Employment Opportunity

Design-Builder will not discriminate—and will ensure its Subcontractors do not discriminate—on the basis of race, color, national origin, religion, sex, age, or disability. This prohibition applies to (i) employees and applicants with respect to hiring, tenure, terms, conditions, and privileges of employment; (ii) the selection of Subcontractors; and (iii) the performance of the Work under the Agreement Documents. Failure by Design-Builder to comply with this Section is a material breach of this Agreement, which may result in the termination of this Agreement or such other remedy as the Department deems appropriate, in each case (subject to Design-Builder's rights to notice and opportunity to cure set forth in this Agreement).

Design-Builder shall include the requirements of Section 12.1.3 (Subcontract Requirements) in every Subcontract (including in every subcontract of any Design-Builder-Related Entity for the Work), and shall require that they be included in all Subcontracts at lower tiers, so that such provisions will be binding upon each Subcontractor.

Design-Builder represents that it maintains an equal employment opportunity policy providing equal opportunity without regard to race, color, national origin, religion, sex, age, or disability, and that it maintains no employee facilities segregated on the basis of race, color, religion, or national origin. Design-Builder will comply with all applicable Governmental Rules relating to equal employment opportunity and nondiscrimination and shall require its Subcontractors to comply with such provisions.

12.4 Labor Requirements; Wages; Brokers

Design-Builder shall comply with the applicable provisions of the Nebraska Fair Employment Practices Act, Neb. Rev. Stat. Section 4-1101, et seq. and applicable federal requirements relating to labor nondiscrimination, and with the applicable federal requirements. Design-Builder shall post in a conspicuous place or places a notice to be provided by the Department which sets forth excerpts of such law.

The Nebraska Commission of Industrial Relations (CIR) is responsible for monitoring and enforcing certain wage requirements of applicable labor laws to insure that all contractors working on the Project are in compliance with State (Neb. Rev. Stat. Sections 48-1201 to 48-1209.01) and, as applicable, federal (Code of Federal Regulations 29) wage-related statutes and regulations.

Accordingly, the Project is subject to the requirements of CIR's compliance monitoring and enforcement program, which include, among other requirements, the obligation to provide payroll records directly to the CIR Presiding Commissioner, if required

12.5 Key Personnel; Qualifications of Employees

The Design-Builder's organizational structure for the performance of the Work is provided in Exhibit 2 (Proposal Commitments). Prior to the commencement of the Work, the Key Personnel shall hold the positions indicated in Exhibit 2 (Proposal Commitments). The Design-Builder acknowledges and agrees that the continuity of Key Personnel in connection with the Work is a material requirement of this Agreement and that the replacement of any Key Personnel will be detrimental to the Department and the overall quality of the Work. The Key Personnel will be engaged full-time and exclusively in the prosecution of the Work continuously until their role is completed, unless otherwise agreed to or directed by the Department; provided however, Key Personnel may be removed by Design-Builder without Department's consent for (a) termination of a Key Personnel's employment with the Design-Builder, or (b) a Key Personnel dying, retiring, resigning, or becoming seriously ill, or a serious illness or death in the family of a Key Personnel.

Revisions to the organizational structure of Key Personnel shall be subject to the Department's prior Approval, and replacement of, or additions to, such Key Personnel shall only be made with Persons having qualifications equal to or better than those replaced or added to and shall be similarly subject to Department's prior Approval. All requests for the substitution of Key Personnel shall include a detailed explanation and reason for the request and the resume of professional education and experience of the candidate having equal or superior qualifications. Should the Department approve of the replacement of Key Personnel, the Design-Builder shall allow for an overlap of a minimum of two (2) weeks during which both the Key Personnel to be replaced and the Department-approved new Key Personnel shall work together full time. The Department may, if it is concerned with the performance thereof request in writing the removal of, and the Design-Builder shall promptly remove and replace, any Key Personnel. The Design-Builder agrees that, notwithstanding its other business commitments, it will give the Work a priority and commit sufficient resources to the Work that will enable Design-Builder to perform its obligations under this Agreement.

13 PERFORMANCE AND PAYMENT BONDS

13.1 Provision of Bonds

Design-Builder shall provide the Department with Bonds securing Design-Builder's obligations under the Agreement Documents, each in the amount specified in Exhibit 7 (Bonding Requirements) and shall maintain such Bonds in full force and effect as described below.

13.2 Payment and Performance Bonds

1. No Performance or Payment bond is required for NTP1 unless specifically stated here
2. Before issuance of NTP2, Design-Builder will furnish a Payment Bond and Performance Bond each in the amount specified in Exhibit 7 (Bonding Requirements), of this Agreement.
3. The Department will release the NTP2 Performance Bond upon Final Acceptance so long as the Design-Builder is not in default under this Agreement and no event has occurred which, with the passage of time or the giving of notice, would constitute a default under this Agreement.

13.3 No Relief of Liability

Notwithstanding any other provision of the Agreement Documents, performance by a Surety of any of the obligations of Design-Builder shall not relieve Design-Builder of any of its obligations under the Agreement Documents.

14 INSURANCE

Design-Builder shall procure and maintain, at its own expense, insurance meeting or exceeding the requirements of the current edition of Design-Build Specifications Section 107.15 and as amended or supplemented by the Agreement Documents. The Design-Builder shall provide and carry any additional insurance required by the Special Provisions, if applicable.

Failure of the Department to review, approve, or reject any certificate, policy, or endorsement in whole or in part shall not waive or modify the insurance requirements of this Agreement.

14.1 Failure to Maintain Insurance

If Design-Builder (i) fails to obtain or maintain any required insurance, (ii) allows any required policy to be canceled, non-renewed, or lapse, or (iii) fails to timely provide satisfactory evidence of coverage or required endorsements, the Design-Builder shall be in Breach of the Agreement and subject to the requirements of Section 19.4.2 (*Termination for Cause*).

14.2 Subcontractor Insurance Requirements

Design-Builder shall cause each Subcontractor at every tier to procure and maintain insurance in accordance with the requirements of Exhibit 7 (*Insurance Policy Requirements*) and Design-Build Specifications Section 107.15 (*Insurance*). The Design-Builder shall ensure that all Subcontract agreements incorporate these insurance obligations and shall be responsible for verifying and certifying that each Subcontractor's insurance coverage meets or exceeds the requirements of Design-Build Specifications Section 107.15, for the nature of the Work performed. Design-Builder shall cause each such Subcontractor to include the Department and the Indemnified Parties as additional insureds under such Subcontractor's general liability and excess liability insurance policies. If requested by the Department, Design-Builder shall promptly provide certificates of insurance evidencing coverage for each Subcontractor. The Department shall have the right to contact the Subcontractors directly in order to verify the above coverage.

14.3 Disclaimer

1. Design-Builder and each Subcontractor shall have the responsibility to make sure that their insurance programs fit their needs, and it is their responsibility to arrange for and secure any insurance coverage which they deem advisable, whether or not specified herein.
2. The Department makes no representation or warranty that the coverage, limits of liability or other terms specified for the insurance policies to be carried pursuant to this Section 14 (*Insurance*) and Exhibit 7 (*Insurance Policy Requirements*) are adequate to protect Design-Builder against its undertakings under the Agreement Documents or its liability to any third party or preclude the Department from taking any actions as are available to it under the Agreement documents or otherwise at law or in equity.

15 SITE SECURITY; MAINTENANCE AND REPAIR; TITLE

15.1 Site Security

Design-Builder shall provide appropriate security for the Site, and shall take all reasonable precautions and provide protection to prevent damage, injury, vandalism, theft, and loss to the Work, equipment and materials used to perform the Work, real property within the Site (including all Project ROW), and other property at or on the Site, whether owned, or under exercise of other real property rights, by Design-Builder, the Department, or any other third party.

15.2 Obligation to Maintain and Repair

15.2.1 Maintenance and Repair Liability

Upon issuance of NTP 2 and continuing until Final Acceptance, the Design-Builder shall be responsible for the maintenance of all improvements it constructs for the Project, in accordance with the requirements of the Agreement Documents.

In addition, the Design-Builder shall be responsible for maintaining the entire Site, including maintenance activities identified in TP Section 18 and any additional maintenance activities as directed by the Department.

Any additional maintenance activities shall be considered a Department Directed Change and subject to relief as described in Section 17 (*Relief Events/Change Orders*).

Upon Final Acceptance, the Department shall assume the maintenance obligations for the Project; provided, however, that nothing contained herein shall otherwise limit any warranty obligations of the Design-Builder with respect to any Nonconforming Work or Defect.

The Design-Builder's duty to maintain the site shall not relieve it of responsibility for damage to the Work, to public or private property, or for injury to Persons resulting from inadequate maintenance, defective conditions, or the Design-Builder's operations.

16 WARRANTIES AND NONCONFORMANCES DURING THE WARRANTY PERIOD

16.1 Design-Builder Warranties

All warranties applicable to the Work shall be provided, administered, and enforced in accordance with the requirements of Design-Build Specifications Section 105.17 and Special Provisions. The Design-Builder shall be responsible for ensuring that all Subcontractor and Supplier warranties meet or exceed the requirements of the Design-Build Specifications and shall deliver all warranty documentation to the Department prior to Final Acceptance.

16.2 No Limitation of Liability

Design-Builder and Subcontractor warranties are in addition to all rights and remedies available under the Agreement Documents or applicable Governmental Rules or in equity, and, subject to the limitation on punitive, indirect, incidental, or consequential damages in Section 26.4 (*Mutual Waiver of Consequential Damages*), shall not relieve Design-Builder of any liability or responsibility imposed by the Agreement Documents or applicable Governmental Rules with respect to the Work, including liability for design defects, latent construction defects, strict liability, breach, negligence, willful misconduct or fraud.

The fact that the Department may not have discovered the Nonconformances prior to Final Acceptance shall not constitute an acceptance of such Nonconformances.

16.3 Damages for Breach of Warranty and Other Rights at Law / Equity

Subject to Section 21 (*Limitation of Design-Builder's Liability*) the Department may pursue any remedies available at law or in equity against Design-Builder and the Design-Builder-Related Entities for (a) Nonconforming Work, including design defects and latent construction defects; and (b) breach of an express or implied warranty, Subcontractor warranty, or any defect in the Work, including the cost of performance of such obligations by others.

17 RELIEF EVENTS/CHANGE ORDERS

17.1 General

Subject to the requirements, limitations, and risk allocations set forth in the Agreement Documents, the Design-Builder shall be entitled to a Change Order for Relief Events and for occurrences described below to the extent such events directly and materially impact the Work and qualify for an adjustment of Agreement Time or Agreement Price under this Agreement.

Design-Builder's entitlement to any Change Order, adjustment, or relief arising from an event described below is expressly conditioned upon the Design-Builder's strict adherence to the notice, documentation, mitigation, scheduling, and claim procedures prescribed in Design-Build Specification Section 108 (Prosecution and Progress) and any corresponding procedures in the Agreement Documents. Failure to comply with Section 108 requirements shall bar or reduce the Design-Builder's entitlement to relief.

17.2 Relief Events

The Design-Builder may be entitled to an adjustment in Agreement Time, Agreement Price, or both (collectively, "Relief") arising from events or conditions beyond the Design-Builder's control ("Relief Events"), as further described in this Section.

17.3 Types of Relief Events

Relief Event	Description
Change in Law	(a) the adoption of any Law after the issuance of NTP2; or (b) any change in any Law or in the interpretation or application thereof by any Government Entity after issuance of NTP2, in each case that is materially inconsistent with Laws in effect on the date NTP was issued; excluding, any change in or new Law passed or adopted but not yet effective as of the issuance of NTP2. The term "Change in Law" also excludes any Change in or new Law relating to Design-Builder's general business operations, including licensing and registration fees, income Taxes, gross receipts Taxes, social security, Medicare, unemployment, and other payroll-related Taxes.
Department-Caused Delay	The occurrence of any of the following events to the extent that (i) such occurrence results in a material delay or interruption in performance of the Design-Builder's obligations under the Agreement, (ii) such occurrence is beyond the Design-Builder's control and is not due to any act, omission, negligence, recklessness, willful misconduct, breach of contract or Applicable Law, or violation of a Governmental Approval of or by a Design-Builder-Related Entity, and (iii) such failure of the Department to provide any governmental approval that is responsible for obtaining; <ol style="list-style-type: none"> 1. Failure of the Department to issue a NTP within thirty (30) Calendar Days of the Design-Builder's satisfaction the applicable conditions precedent and written request for the applicable NTP; or 2. Failure of the Department to provide any information, material, correspondence, or other item within a timeframe identified in the Agreement Documents.
Department Directed Change Order	The issuance of written instructions executed by the Department directing the Design-Builder to proceed with a change in the Work.
Differing Site Conditions	The discovery of a Differing Site Condition within the Project Site (i) which differs materially from those conditions identified in the boring holes included in geotechnical reports provided with the Agreement Documents or (ii) subsurface or surface physical conditions of an unusual nature, differing materially from those ordinarily encountered in the area and generally recognized as inherent in the type of work provided for herein. Differing Site Conditions also includes discovery of unknown Archaeological Conditions and discovery of Unknown Hazardous Material. <p>Differing Site Conditions shall not include the discovery of previously unidentified Utilities.</p>

Relief Event	Description
Utility Delays	Despite the Design-Builder's diligent efforts to obtain a Utility's cooperation, the occurrence of an unreasonable and unjustified delay by a Utility where (a) the time for completion of the Work affecting the Utility in the Baseline Schedule was a reasonable amount of time for completion of such Work; and (b) the Design-Builder's position in the dispute is otherwise reasonable, as solely determined by the Department.

17.4 Additional Relief Event Requirement

Relief under this Section establishes the Design-Builder's right to seek an adjustment to the Agreement Time or Agreement Price, as applicable. The procedures for claiming and determining the amount of Relief shall be in accordance with Design-Build Specification Section 108 (Prosecution and Progress).

No event described in Section 17.3 (Types of Relief Events) shall be deemed a Relief Event to the extent that performance of the Work would have been suspended, delayed, or interrupted by any other cause, including the negligence, reckless or willful misconduct, act or omission, or breach or violation of applicable Law, Governmental Approval, or contract (including this Agreement) by the Design-Builder or any Design-Builder-Related Entity on any part of the Project.

No adjustment in Agreement Time or Agreement Price shall be made unless the Design-Builder provides timely written notice and supporting information as required under Design-Build Specification Section 108.

To make a claim for a Relief Event where the underlying basis is Unknown Hazardous Materials, the Design-Builder must comply with all requirements in the Department's Unexpected Waste Action Plan, which may be provided upon request, or publicly available on the Department's website.

17.5 Limitations to Changes to Basic Configuration

The Department's liability for changes in the Basic Configuration is limited to its obligations relating to material changes in the Basic Configuration that are necessary to meet the requirements of the Agreement Documents.

No Change Order shall be required for any non-material changes in the Basic Configuration that (a) have been approved by the Department and (b) for which Design-Builder is not claiming any right to an increase in Agreement Price or an extension of Agreement Time. Design-Builder acknowledges and agrees that constraints set forth in the Department-Provided Approvals, Design-Build Specifications, and other Agreement Documents, as well as site conditions and the Basic Configuration, will impact Design-Builder's ability to make non-material changes in the Basic Configuration.

17.6 Continuation of Work

The Design-Builder shall continue diligent performance of the Work, including any changed or disputed portions, pending resolution of the adjustment under this Agreement.

17.7 Written Authorization Required

No payment shall be made for any change or modification unless it is authorized in writing by a duly executed Change Order or Amendment to this Agreement.

17.8 Limitations on Change Orders for Deleted Work

The Department may, without notice to any surety, eliminate portions of the Work provided that such elimination shall not:

1. materially alter the overall character, intent or essential purpose of the Project
2. fundamentally change the scope, magnitude or nature of the Work bargained for at Effective Date of the Agreement; or
3. has the effect of eliminating substantial portions of the Agreement such that the Design-Builder is deprived of the benefit of this Agreement.

The Agreement Price shall be adjusted to reflect the net cost savings attributable to the deleted Work. A Change Order deleting Work shall not relieve the Design-Builder from meeting milestones, performance obligations, or other Agreement requirements.

17.9 Mitigation

The Design-Builder must act promptly and use reasonable efforts in accordance with Good Industry Practice to mitigate the delay and any other adverse impact of any Relief Events including by re-sequencing, reallocating, or redeploying its forces to other portions of the Work. If the Design-Builder fails to take mitigation measures as required in the , the delay and excuse of performance permitted under this Agreement will be reduced to the extent that such mitigation measures, if taken, would have reduced the impact of such event on the Design-Builder.

To the extent that any other provision of the Agreement Documents expressly provides for a Change Order or Directive Letter to be issued, such provision is incorporated into and subject to this Section.

18 SUSPENSION

18.1 Suspensions for Convenience

The Department may, at any time, and for any reason, by written Notice to Design-Builder suspend the Work in whole or in part for a cumulative period for the Department's convenience (Suspension for Convenience). If a Suspension for Convenience is directed by the Department, the Design-Builder shall promptly comply with any such suspension order. Design-Builder shall promptly recommence the Work upon receipt of Notice from Department directing Design-Builder to resume Work.

Any such Suspension for Convenience shall be considered a Department-Directed Change; provided however, that the Department will have the right to direct Suspensions for Convenience not exceeding five (5) Business Days (cumulatively) which shall not be considered a Department Directed Change. Adjustments to Agreement Time and Agreement Price shall be available to the Design-Builder as a Department Directed Change subject to Design-Builder's compliance with the terms and conditions set forth in Design-Build Specifications Section 108 and Section 17 (Change Orders).

18.2 Stop Work Authority

The Department may, by written order, suspend the Work without liability to the Department wholly or in part for the Design-Builder's failure to perform any of the following (Stop Work Order):

1. Correct conditions unsafe for the Project personnel or general public;
2. Comply with any Governmental Approval, governmental rule or otherwise carry out the requirements of the Agreement;
3. Carry out orders of the Department duly given;
4. Comply with environmental requirements; or
5. Comply with requirements for developing, implementing, and following the Quality Manual.

The Design-Builder shall promptly comply with a Stop Work Order even if Design-Builder disputes the grounds for such Stop Work Order. The Design-Builder shall promptly recommence the Work upon receipt of Notice from the Department directing Design-Builder to resume the Work. The Design-Builder shall be responsible for any costs incurred by the Department resulting from a Stop Work Order. Furthermore, Design-Builder shall have no right to obtain an increase in Agreement Price or Agreement Time for any Stop Work Order issued by the Department.

18.3 Responsibilities of Design-Builder during Suspension/Stop Work Periods

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

19 DEFAULT AND TERMINATION

19.1 Default

19.1.1 Events of Default

The Design-Builder shall be in default of the Agreement upon occurrence of any one or more of the following events or conditions:

1. The Design-Builder fails, following authorization by the Department, to begin the Work under the Agreement within ten (10) Business Days;
2. The Design-Builder fails to perform the Work with sufficient resources to ensure the prompt completion thereof;
3. The Design-Builder fails to perform the Work in accordance with the Agreement;
4. The Design-Builder discontinues or suspends the prosecution of the Work wrongfully or for reasons not permitted in the Agreement;

5. The Design-Builder fails to resume performance of Work, which has been suspended or stopped, within ten (10) Business Days after receipt of notice from the Department to do so or (if applicable) after cessation of the event preventing performance;
6. The Design-Builder breaches any other agreement, representation, or warranty contained in the Agreement, or the Design-Builder fails to perform any other obligation under the Agreement;
7. The Design-Builder fails to provide and maintain the required insurance or Bond;
8. The Design-Builder assigns or transfers the Agreement or any right or interest therein, contrary to Section 26.5.2 (*Assignment by the Design-Builder; Changes of Control; Change of Organization*);
9. The Design-Builder fails, without good cause, to make payment when due for labor, equipment, or materials in accordance with the Agreement, 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 Agreement;
10. The Design-Builder becomes insolvent, generally does not pay its debts as they become due, admits in writing its inability to pay its debts, or makes an assignment for the benefit of creditors;
11. Insolvency, receivership, reorganization, or bankruptcy proceedings have been commenced by or against the Design-Builder and not dismissed within sixty (60) Calendar Days;
12. Any representation or warranty made by the Design-Builder in the Agreement or in any certificate, schedule, instrument, or other document delivered pursuant to the Agreement shall have been false or materially misleading when made;
13. The Design-Builder loses its Department prequalification status;
14. The Design-Builder 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 Design-Builder; (B) any Design-Builder-Related Entity (excluding Subcontractors), or (C) any affiliate of the Design-Builder for whom transfer of ownership would constitute a Change of Control, or (ii) the Design-Builder 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 Design-Builder is a party to fraud;
17. The Design-Builder fails to pay Liquidated Damages due to the Department within the timeframes specified in the Agreement;
18. The Design-Builder changes or substitutes Category A Key Personnel without the Department approval;
19. The Design-Builder fails to satisfy any Completion Deadline; or

20. The Design-Builder 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 Design-Builder under the Agreement.

19.1.2 Notice and Opportunity to Cure

The Department agrees to provide the Design-Builder and Surety ten (10) Business Days' notice and opportunity to cure any default before declaring the Agreement 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 (10) Business Days, as reasonably determined by the Department, the Department agrees not to declare an event of default provided that the Design-Builder commences such cure within such ten (10) Business Day period and thereafter diligently prosecutes such cure to completion; provided, however, that in no event will such cure period exceed sixty (60) 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 19.1.1(10), (11), and (16) shall not be subject to any cure period under this Agreement and the Design-Builder shall immediately be in default upon the occurrence thereof. If the Design-Builder does not cure any default or if the default is not curable, the Department may provide the Design-Builder and Surety notice of default.

Notwithstanding the foregoing, if the Department believes a condition affecting the Project poses an immediate and imminent danger to public health or safety, the Department may rectify the condition at the Design-Builder's cost (excluding costs that would otherwise have been the Department's responsibility under the express terms of the Agreement, 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 Design-Builder and shall not entitle the Design-Builder to any other remedy, it being acknowledged that the Department has a paramount public interest in providing and maintaining safe public use of 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.

19.1.3 Department Remedies

If a default occurs, then, in addition to all other rights and remedies provided by Law or equity or available under the Agreement or otherwise, including the rights to recover Liquidated Damages and to seek recourse against the 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 Design-Builder and its Surety from any obligations, and the Design-Builder shall have the following obligations (as applicable):

1. The Department may order the Design-Builder to suspend or terminate the Work or any portion of the Work in accordance with the respective suspension or termination provisions in Section 19 (Termination);
2. The Department may terminate the Agreement or a portion thereof;
3. If and as directed by the Department, the Design-Builder shall withdraw from the Site; and shall remove such materials, equipment, tools and instruments used by, and any debris or waste materials generated by, any Design-Builder-Related Entity in the performance of the Work;

4. The Design-Builder shall deliver to the Department possession of any or all facilities of the Design-Builder 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 Design-Builder shall confirm assignment to the Department of Subcontracts requested by the Department, and the Design-Builder shall terminate, at its cost, all other Subcontracts;
6. The Department may deduct from any amounts payable by the Department to the Design-Builder such amounts payable by the Design-Builder to the Department, damages payable to the Department under the Agreement;
7. The Department, without incurring any liability to the Design-Builder, shall have the right to:
 - a. Take the performance of all or a portion of the Work from the Design-Builder (without the use of the Design-Builder's equipment, tools, and instruments) and enter into an agreement with another Person for the completion of such Work, if the Design-Builder or Surety has not proceeded satisfactorily within the cure period described in Section 19.1.2 (*Notice and Opportunity to Cure*);
 - b. Use of 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 Design-Builder (without the use of the Design-Builder's equipment, tools, and instruments) and enter into an agreement with another Person for the completion of such Work;
9. "Step-in" to perform the obligations of the Design-Builder in accordance with Section 19.2 (*Department Step-In Rights*);
10. Without limiting Section 19.1.5 (*Liability of Design-Builder; Cumulative, Non-Exclusive Remedies of the Department*) and Section 19.1.4 (*Department Right of Offset*), recover any and all damages available at Law on account of the occurrence of a Design-Builder event of default; or
11. Exercise any other right or remedy available at Law or in equity.

19.1.4 Department Right to Offset

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

19.1.5 Liability of Design-Builder; Cumulative, Non-exclusive Remedies of the Department

If a default has occurred, the Design-Builder and Surety shall be liable to the Department (in addition to any other damages under the Agreement) 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 Design-Builder until such time as the Department is able to determine how much (if any) remains owing to the Design-Builder. Promptly upon such determination, the Department shall notify the Design-Builder in writing of the amount, if any, that the Design-Builder shall pay the Department or that the Department shall pay the Design-Builder with respect thereto. All costs and charges incurred by the Department, including attorneys', accountants', and expert witness fees and costs, together with the cost of completing the Work under the Agreement, will be deducted from any monies due or which may become due to the Design-Builder. If such expense exceeds the sum which would have been payable under the Agreement, then the Design-Builder and its Surety shall be liable and shall pay to the Department the amount of such excess.

If a default under Section 19.1.1 (Events of Default) subsection 10 or 11 occurs, the Department shall be entitled to request of the Design-Builder, or its successor in interest, adequate assurance of future performance in accordance with the terms and conditions hereof. Failure to comply with such request within ten (10) Business Days of delivery of the request shall entitle the Department to terminate the Agreement 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 Agreement and the Bond.

In lieu of the provisions of this Section 19.3.1 for terminating the Agreement and completing the Work, the Department may pay the Design-Builder for the Work already done according to the provisions of the Agreement and may treat the Work remaining undone as if it had never been included or contemplated by the Agreement.

If the Agreement 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 this Section.

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

The exercise or beginning of the exercise by the Department of any one or more rights or remedies under this Section 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.

In the instance where a Surety is required to complete the Project, the Department is under no obligation to accept the Work of the Design-Builder in a new agreement with the Surety.

19.2 Department Step-In Rights

19.2.1 Step-In Events

In addition to all other remedies, the Department may, upon written notice to Design-Builder, exercise the step-in rights in this Section 19.2 (Department Step-In Rights) if the Department determines, acting reasonably, that any of the following has occurred or is likely to occur: (a)

Design-Builder has failed to perform the Work in accordance with the Agreement Documents and that failure materially threatens public safety, the environment, or property; (b) Design-Builder has failed to maintain required traffic control, MOT, site security, or safety measures; (c) Design-Builder has failed to diligently prosecute the Work, including failure to maintain required staffing, equipment, or critical-path progress; (d) Design-Builder has failed to timely correct nonconforming Work or remove unsafe conditions after notice; (e) an emergency exists requiring immediate action to protect persons or property; or (f) Design-Builder is in Default (as defined in the Agreement) or any event occurs that would permit termination for cause.

19.2.2 Step-In Actions

Upon a Step-In Event, the Department may take any action it considers necessary or advisable to protect the Project and the public and to preserve the Department's rights, including: (a) entering the Site and taking possession of all or part of the Work area; (b) supplementing Design-Builder's workforce, equipment, materials, and supervision; (c) performing, re-performing, correcting, removing, securing, maintaining, or protecting any part of the Work, including implementing or modifying traffic control/MOT; (d) engaging third parties (including other contractors) to perform any portion of the Work or to furnish labor, services, equipment, or materials; (e) directing Design-Builder to stop or suspend specific operations, relocate operations, or re-sequence the Work to address safety or compliance issues; and (f) using or authorizing the use of any materials, equipment, temporary works, tools, documents, permits, and submittals on Site that are reasonably necessary to complete the step-in activities, subject to any applicable license restrictions in the Agreement.

19.2.3 Notice; Opportunity to Cure

Except in an emergency, the Department will provide Design-Builder written notice describing the Step-In Event and a reasonable opportunity to cure commensurate with the nature of the issue (which may be immediate for safety/MOT deficiencies). In an emergency, the Department may step in without prior notice and will provide notice as soon as practicable thereafter.

19.3 Notice of Termination

After receipt of a Notice of Termination, and except as otherwise directed by the Department, the Design-Builder shall immediately proceed as follows, regardless of any delay in determining or adjusting any amounts due under this Section 19.3:

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 Design-Builder under the Subcontracts so terminated, in which case the Department will have the right, in its sole discretion, to accept performance, settle, or pay any or all claims arising out of the termination of such Subcontracts.

6. Settle all outstanding liabilities and claims arising out of such termination of Subcontracts, with the Approval or ratification of the Department, to the extent it may be required, which Approval or ratification shall be final.
7. Provide the Department with an inventory list of all materials previously produced, purchased, or ordered from Suppliers for use in the Work and not yet used in the Work, including its storage location, as well as any documentation or other property required to be delivered hereunder, which is either in the process of development or previously completed but not yet delivered to the Department, and such other information as the Department may request; and transfer title and deliver to the Department, in the manner, at the times, and to the extent, if any, directed by the Department of:
 - a. Fabricated or unfabricated parts, the Work in process, completed Work, supplies, and other material produced or acquired for the Work terminated; and
 - b. The completed or partially completed drawings (including plans, elevations, sections, details, and diagrams), specifications, records, samples, information, and other property that would have been required to be furnished to the Department if the Work had been completed.
8. Complete performance, in accordance with the Agreement, of all Work not terminated.
9. Take all action that may be reasonably necessary, or that the Department may direct, for the safety, protection, and preservation of:
 - a. The public;
 - b. The Work; and
 - c. The equipment, machinery, materials, and property related to the Agreement that is in the possession of the Design-Builder and in which the Department has or may acquire an interest.
10. As authorized by the Department in writing, use the Design-Builder'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 Design-Builder:
 - a. Is not required to extend credit to any purchaser; and
 - b. May acquire the property under the conditions prescribed and at prices Approved by the Department.
11. The proceeds of any transfer or disposition will be applied to reduce any payments to be made by the Department under the Agreement 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 Design-Builder and any Subcontractor in the performance of the Work as the Department may direct.
12. Take other actions related to the termination that are directed by the Department.

19.4 Payment After Termination

19.4.1 Termination for Convenience

If the Department terminates for convenience, Design-Builder will be paid, as its sole and exclusive remedy:

- (i) the Agreement Price earned for Work properly performed through the effective date of termination, valued in accordance with this Agreement (including approved Change Orders), less prior payments;
- (ii) the reasonable, documented costs of demobilization, securing and protecting the Work, and close out activities reasonably required by the Department;
- (iii) the reasonable, documented termination settlement costs of cancelling or settling subcontracts and purchase orders, including restocking fees, vendor termination charges, non cancellable commitments, and the cost of specially fabricated materials that cannot be reasonably repurposed; and
- (iv) a reasonable allowance for home office overhead and profit on Work properly performed through the effective date of termination, but no allowance for anticipated profit or unabsorbed overhead on unperformed Work.

Lost profits, consequential, incidental, and similar damages on unperformed Work are excluded. Any termination fee is payable only if expressly stated elsewhere in this Agreement.

19.4.2 Termination for Cause

If the Department terminates for cause, Design-Builder will be paid the value of Work properly performed and accepted through the effective date of termination, less:

- (i) the Department's reasonable costs of completing the Work (including reprocurement and management),
- (ii) the costs to correct or complete defective, nonconforming, or incomplete Work, and (iii) any other damages, liabilities, or offsets to which the Department is entitled under this Agreement or at law. If such costs and damages exceed the unpaid balance of the Agreement Price, Design-Builder will promptly reimburse the difference within ten (10) Business Days after invoice, and the Department may set off or draw on any Bond.

19.5 No Waiver; Release

The payment to Design-Builder as determined in accordance with this Section 19 (Default and Termination) constitutes Design-Builder's exclusive remedy for a termination hereunder.

The Department's payment to Design-Builder of the amounts provided under this Section 19 (*Default and Termination*) shall constitute full and final satisfaction of, and upon payment the Department shall be forever released and discharged from, any and all Claims or Losses, known or unknown, suspected or unsuspected, that Design-Builder may have against the Department in connection with the terminated Work. Concurrently with such payment, Design-Builder shall execute and deliver to the Department all such releases and discharges the Department reasonably requires to confirm the foregoing (which releases shall include an express and unconditional waiver and release sufficient, in the Department's good faith discretion, to waive any rights and benefits Design-Builder may have pursuant to State law), but no such written release and discharge shall be necessary to give effect to the foregoing satisfaction and release.

20 LIQUIDATED DAMAGES

The Design-Builder and the Department agree that the sums payable under Design-Build Specification Section 108.08 (Liquidated Damages) of the Design-Build Specifications shall constitute liquidated damages and not penalties. The Parties agree that if Design-Builder fails to achieve Completion Dates of the Work (as adjusted under this Agreement), the Department will suffer damages that are difficult to determine with reasonable certainty, including loss of use, extended administration and coordination costs, extended costs and fees of the Department's internal staff and the Department's advisors/consultants, financing and carrying costs, extended fees and expenses for the Department's professional advisors (including program/construction managers, architects/engineers engaged by the Department, commissioning agents, schedulers, cost consultants, lenders' consultants, and legal counsel) to the extent attributable to the delay, tenant/customer impacts, and other time-related damages. The parties further acknowledge that (i) the amount of loss or damages likely to be incurred is difficult to precisely estimate, (ii) the amounts specified bear a reasonable relationship to, and are not plainly or grossly disproportionate to, the probable loss likely to be incurred by the Department in connection with any failure by the Design-Builder to meet the respective Completion Dates set forth in the Agreement Documents.

The Department's right to, and imposition of, liquidated damages are in addition, and without prejudice, to any other rights and remedies available to the Department under the Agreement Documents, at law or in equity respecting the breach, failure to perform or Design-Builder Default, except for recovery of the monetary damage that the liquidated damages are intended to compensate.

[NTD: These costs will be set based on Road User Costs and CE Costs. These items will be determined at a later date and will be included in the draft RFP documents.]

Failure to reach Substantial Completion	\$XXX per Calendar Day
Failure to reach Final Acceptance	\$XXX per Calendar Day
Failure to conform to limitations of operations listed in <u>Technical Provision Section 16 (Maintenance of Traffic)</u>	\$XXX per Hour or any portion thereof

21 LIMITATION OF DESIGN-BUILDER'S LIABILITY

21.1 Limitation of Liability

Notwithstanding anything to the contrary in the Agreement Documents, the total aggregate liability of Design-Builder under the Agreement Documents to the Department, whether for breach of contract, tort, or under any other theory of liability, will not exceed the sum of the following:

1. All costs reasonably incurred by the Department, or any party acting on the Department's behalf, to complete or correct the Work, or to have the Work completed or corrected by another Person;
2. All amounts paid by or on behalf of Design-Builder that are covered by insurance proceeds from insurance policies required under the Agreement Documents; and
3. All losses incurred by any Indemnified Party relating to or arising out of any illegal activities, fraud, criminal conduct, gross negligence, or intentional misconduct of any Design-Builder-Related Entity.

The following shall be excluded in determining whether the liability limit in this Section 21.1 has been reached:

1. All claims and amounts paid under the Payment Bond; plus
2. Design-Builder's indemnities under Section 22 (Indemnification) regarding third party suits, actions, proceedings, judgments, and claims; plus
3. Any amounts paid or payable by Design-Builder which are covered by insurance proceeds required to be carried under this Agreement, or for which Design-Builder was required to provide insurance if coverage is not in force; and plus
4. All Losses incurred relating to or arising out of any illegal activities, fraud, recklessness, criminal conduct, gross negligence, bad faith or intentional misconduct on the part of any Design-Builder-Related Entity; and plus
5. Losses arising out of Design-Builder Release of Hazardous Materials.

21.2 Mutual Waiver of Consequential Damages

Notwithstanding anything contrary in the Agreement, the Department and the Design-Builder agree to waive all claims against each other for any consequential or indirect damages that may arise out of or relate to this Agreement. The Design-Builder 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.

22 INDEMNIFICATION

22.1 Indemnifications by Design-Builder

The Design-Builder 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 Agreement by any Design-Builder-Related Entity.
2. The failure by any Design-Builder-Related Entity to comply with any applicable Laws (including Laws regarding handling, generation, treatment, storage, transportation, and disposal of Hazardous Materials) or Governmental Approvals in performing the Work.
3. Any patent or copyright infringement, or other improper appropriation or use of trade secrets, patents, proprietary information, know-how, copyright rights, or inventions in performance of the Work, or arising out of any use in connection with the Project of methods, processes, designs, information, or other items furnished or communicated to the Department or another Indemnified Party pursuant to this Agreement; 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 Design-Builder.
4. The negligent act or omission or willful misconduct of any Design-Builder-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 Design-Builder or any of its Subcontractors or any of their respective agents, officers, or employees with respect to any payment for the Work made to or earned by any Design-Builder-Related Entity.
8. 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 Design-Builder-Related Entity; or (ii) that was brought onto the Site by any Design-Builder-Related Entity.
9. The claim or assertion by any contractor of inconvenience, disruption, delay, or loss caused by interference by any Design-Builder-Related Entity with or hindering the progress or completion of work being performed by other contractors as described in the Design-Build Specifications Section 105.07 (Cooperation Between the Design-Builder and Other Design-Builders), or failure of any Design-Builder-Related Entity to cooperate reasonably with other contractors in accordance therewith.

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

In the event of a Claim to enforce these Indemnification provisions, Indemnified Parties may engage attorneys, accountants, and experts in the prosecution of that Claim. In the event that an Indemnified Party prevails in that Claim, any costs associated with engaging attorneys, accountants, and experts shall be payable to the Department.

The Design-Builder's indemnity obligations under this Section 22 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.

23 PARTNERING AND DISPUTE RESOLUTION

23.1 Partnering; Informal Process

23.1.1 Partnering

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

23.1.2 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 Design-Builder and complete the NDOT Construction Project Communication and Decision Guide for the Project prior to the Effective Date of the Agreement. The Parties agree to utilize this guide to facilitate effective resolution of disputes.

24 ACCEPTANCE

24.1 Substantial Completion

If the Design-Builder determines that Substantial Completion has been achieved, it shall proceed in accordance with Design-Build Specifications Section 105.13. If the Department and Design-Builder cannot agree as to the date of Substantial Completion, such Dispute shall be resolved in accordance with Section 23 (*Partnering and Dispute Resolution*).

24.2 Final Acceptance

If the Design-Builder determines that the Work is complete, it shall proceed in accordance with Design-Build Specifications Section 105.14 (*Completion and Final Acceptance*).

25 DOCUMENTS AND RECORDS

25.1 Maintenance of, Access to and Audit of Records

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

25.2 Audit and Inspection Rights

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

The Design-Builder shall insert in all Subcontracts a requirement that the Subcontractor shall permit access, audit, and inspection rights in accordance with this Section 25.2 and shall require Subcontractors to insert the same provision in each Subcontract at all tiers.

25.3 Retention of Records

Except as otherwise required by law, the Design-Builder shall maintain all records and documents relating to the Agreement (including copies of all original documents delivered to the Department) at the DBT's office, 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 Agreement termination date.

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

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

25.4 Public Records Act

Design-Builder acknowledges that all records, documents, drawings, plans, specifications, and other materials in the Department's possession—including those submitted by Design-Builder—are subject to the Nebraska Public Records Act (Neb. Rev. Stat. §§ 84-712 to 84-712.09) (the "Public Records Act").

The Department will endeavor to advise Design-Builder of any request pursuant to the Nebraska Public Records Acts and any other applicable laws for the disclosure of any material properly labeled as proprietary, trade secret, or confidential so as to allow Design-Builder the opportunity to seek a court order to protect such materials from disclosure. Under no circumstances, however, will the Department be responsible or liable to Design-Builder or any other party for the disclosure of any such labeled materials, whether the disclosure is deemed required by law, by an order of court, or occurs through inadvertence, mistake, or negligence on the part of the Department or its officers, employees, contractors, or consultants. The Department will not be required to advise a Design-Builder as to the nature or content of documents entitled to protection from disclosure under the Nebraska Public Records Act, as to the interpretation of the Nebraska Public Records Act, or as to the definition of trade secret. Design-Builder shall be solely responsible for all determinations made by it under applicable laws and for clearly and prominently marking each and every page or sheet of materials in the Submittals with "TRADE SECRET" or "CONFIDENTIAL" as it determines to be appropriate. **Blanket designations that do not identify the specific information or pages shall not be acceptable and may be cause for the Department to treat the entire Submittal as public information.** In the event of litigation concerning the disclosure of any material submitted by Design-Builder, to the extent legally permissible the Department's involvement will be limited to that of a stakeholder retaining the material until otherwise ordered by a court and Design-Builder shall be responsible for otherwise prosecuting or defending any action concerning the materials at its sole expense and risk. Design-Builder shall reimburse the Department for any expenses it incurs in connection with any such litigation.

Nothing in this Section alters the Department's legal obligations under the Public Records Act or any other applicable law, which shall control in the event of a conflict. documentation for all costs and fees, including attorneys' fees and costs the Department incurs in connection with any litigation, proceeding or request for disclosure.

25.5 Ownership of Documents

Except as provided herein, all materials created or collected under this Agreement, including data, sketches, charts, calculations, plans, specifications, electronic files, correspondence, reports, analyses, studies and other documents shall be considered “works made for hire” for which the Department owns the copyright. Design Documents shall become the Department’s property upon preparation; Construction Documents upon delivery to the Department; and other documents prepared or obtained by Design-Builder in connection with the performance of its obligations under the Agreement Documents, including studies, manuals, As-Built Documents, technical and other reports and the like, shall become the property of the Department upon Design-Builder’s preparation or receipt thereof.

Design-Builder shall provide the Department with copies of all Design Documents and Construction Documents upon preparation or receipt thereof by Design-Builder. Design-Builder shall maintain all other documents described herein accordance with the requirements of this Section 25 (Documents and Records) and shall deliver copies to the Department as required by the Agreement Documents or upon request if not otherwise required to be delivered, with an indexed set delivered to the Department as a condition to Final Acceptance.

25.6 Intellectual Property

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

25.7 Assignment of Causes of Action

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

26 MISCELLANEOUS PROVISIONS

26.1 Amendments

This Agreement may be amended only by a written instrument duly executed by the Parties or their respective successors or assigns.

26.2 Waiver

26.2.1 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 Agreement 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.

26.2.2 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 Agreement Document, or to relieve the other Party from the full performance of its obligations under the Agreement. No custom or practice between the Parties in the administration of the terms of the Agreement 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 Agreement.

26.2.3 Waivers Must be in Writing

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

26.3 Independent Design-Builder

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

26.4 Mutual Waiver of Consequential Damages

Notwithstanding anything contrary in the Agreement, the Department and the Design-Builder agree to waive all claims against each other for any consequential or indirect damages that may arise out of or relate to this Agreement. The Design-Builder 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.

26.5 Successors and Assigns

This Agreement shall be binding upon and inure to the benefit of the Department and Design-Builder and their permitted successors, assigns and legal representatives.

26.5.1 Assignment by the Department

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

26.5.2 Assignment by the Design-Builder; Changes of Control; Change of Organization

The Design-Builder shall not otherwise sublet, transfer, assign, or dispose of any portion of this Agreement, 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 Design-Builder of its responsibility for the Work assigned or delegated.

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

26.6 Designation of Authorized Representatives

All Agreement documents requiring Design-Builder signature shall be accompanied by a certification from the Design-Builder affirming that the Person executing the Agreement document is duly authorized to bind the Design-Builder.

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 Design-Builder. Authorized Representatives may be changed in accordance with Section 26.12 (*Notices and Communications*).

26.6.1 Designation of Representatives; Cooperation with Representatives

The Department and Design-Builder shall each designate one or more authorized individuals ("Representatives") empowered to act on their behalf with respect to the Agreement. The initial Representatives are identified in Exhibit 2 and may be changed by Notice under Section 26.12.

The Design-Builder's Representative shall:

1. have full responsibility for prosecuting the Project;
2. serve as the single point of contact on behalf of Design-Builder;
3. implement instructions and directions from the Department; and
4. be available at all times while the Project is in progress.

The designation of Representatives may be changed by a subsequent Notice to the other party in accordance with Section 27.11.

Each Party may also designate technical representatives to investigate, report, and negotiate on Project matters; however, such technical representatives shall not have authority to bind either Party.

Each Party may also designate technical representatives to investigate, report, and negotiate on Project matters; however, such technical representatives shall not have authority to bind either Party.

The Design-Builder shall fully cooperate and coordinate with the Department's Representative in all matters relating to the Work, including providing requested information, attending meetings, and facilitating access to the site, records, and personnel as reasonably required for review, inspection, and administration of the Agreement.

26.7 Gratuities and Conflicts of Interest

26.7.1 Prohibitions on Financial Interest; Lawful Presence

Design-Builder shall comply with all Nebraska conflict-of-interest and eligibility laws and shall not permit any Department officer, official, or employee to hold a prohibited financial interest in the Agreement under Neb. Rev. Stat. §§ 49-1493 to 49-14,104. Design-Builder and its employees shall not contract for services or property with any Person or business barred from doing business with the Department under applicable Governmental Rules. Except as expressly disclosed in Design-Builder's Proposal, Design-Builder represents that no Department officer, official, or

employee has any contractual, financial, or other interest in this Agreement or in Design-Builder's business, and Design-Builder shall promptly disclose any such interest if it becomes known. Design-Builder and its Subcontractors shall not provide compensation or benefits under this Agreement to any person unlawfully present in the United States, as prohibited by Neb. Rev. Stat. § 4-108, and shall use the E-Verify Program (or an equivalent program) to confirm the work-eligibility status of all employees performing Work in the State, consistent with Neb. Rev. Stat. § 4-114(2). Neither Design-Builder nor any of its employees, agents, or representatives shall offer gifts, entertainment, payments, loans, or gratuities to the Department officers, officials, or employees; the Department may terminate this Agreement if such conduct occurs. The Department's rights and remedies for such violations are cumulative of all rights available at law. No Design-Builder-Related Entity may employ any Department employee to perform any part of the Work, nor may any Design-Builder-Related Entity employ a person who was a Department employee within one year prior to Agreement award if that employment is connected to or dependent upon this Agreement or any related Agreement.

26.8 Survival

The dispute resolution provisions contained in Section 23 (Partnering and Dispute Resolution); the indemnification provisions contained in Section 22 (Indemnification); the Design-Builder's obligations post-termination in any release or waiver by or on behalf of any Design-Builder-Related Entity; the Design-Builder's obligations to pay the Department amounts owed hereunder; the Parties' respective rights and obligations under applicable Law as pertains to this Agreement, the Work, or the Project; the mutual waiver of consequential damages contained in Section 26.4 (Mutual Waiver of Consequential Damages); and all other provisions, which by their inherent character should survive termination of this Agreement, shall survive the termination of this Agreement.

26.9 Limitation on Third Party Beneficiaries

It is not intended by any of the provisions of the Agreement to create any Third Party beneficiary hereunder, or to authorize any Person not a Party to this Agreement 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 Agreement with respect to such third persons or parties shall remain as imposed by Law.

26.10 Tort Liability, Personal Liability of the Department Employees

The Department's Representatives are acting solely as agents of the Department in carrying out the provisions of, or exercising rights under, the Agreement Documents, and shall not be liable in their personal capacity or as employees of the Department for any acts or omissions undertaken in the ordinary course of their duties. No agent, consultant, officer, employee, or member of the Department's Board of Directors shall bear any personal liability arising out of or related to the Agreement Documents.

26.11 Governing Law; Venue

The Agreement 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 Agreement shall be State District Court in Douglas County, Nebraska.

26.12 Notices and Communications

Notices and all other communications under the Agreement shall be in writing and shall be delivered by e-mail to the Department's Authorized Representatives identified in Section 26.6 (Designation of Authorized Representatives).

26.12.1 Delivery of Notices

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

26.12.2 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.

26.13 Taxes, Charges and Fees

Design Builder shall pay all applicable taxes, charges and fees before they become delinquent. Design-Builder is solely responsible for determining the applicability of such taxes and shall not be entitled to a Change Order or to any other Claim base on its interpretation of governmental tax rules or incorrect assumptions about tax obligations.

26.14 Further Assurances

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

26.15 Severability

If any clause, provision, section, or part of the Agreement is ruled invalid under Section 23 (Partnering; Dispute Resolution) or otherwise by a court of competent jurisdiction, then the parties will:

1. promptly meet and negotiate a substitute for such clause, provision, section, or part, which will, to the greatest extent legally permissible, effect the original intent of the parties, including an equitable Adjustment to the Agreement Price to account for any change in the Work resulting from such invalidated portion; and
2. if necessary or desirable, apply to the court or other decision maker (as applicable) which declared such invalidity for an interpretation of the invalidated portion to guide the negotiations. The invalidity or unenforceability of any such clause, provision, section, or part will not affect the validity or enforceability of the balance of the Agreement, which will be construed and enforced as if the Agreement did not contain such invalid or unenforceable clause, provision, section, or part.

26.16 Headings

The table of contents and captions of the sections or other similar subdivisions of the Agreement Documents are for convenience only and shall not be deemed part of the Agreement Documents or considered in construing the Agreement Documents.

26.17 Entire Agreement

The Agreement contains the entire understanding of the Parties with respect to the subject matter hereof and supersedes all prior agreements, understandings, statements, representations, and negotiations between the Parties with respect to its subject matter.

26.18 Counterparts

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

26.19 Costs

Except as otherwise provided in the Agreement Documents, each Party performs its obligations in accordance with the Agreement Documents at its own Cost and risk.

26.20 All Payments are Subject to Appropriations

All payments to be made to the Design-Builder are subject to appropriation by the Nebraska State Legislature. The Department's payment obligations exist only to the extent funds are lawfully appropriated for that fiscal year. If no, or insufficient, funds are appropriated, the Department shall have no liability and may withhold payment.

This Agreement does not create a debt or obligation of the State of Nebraska, nor does it pledge the State's full faith and credit or taxing power. The Department is not obligated to expend funds beyond available appropriations. Each year, during the state budgetary cycle, the Department will request legislative funding sufficient to cover anticipated payments under this Agreement and other Department projects.

IN WITNESS WHEREOF, this Agreement has been executed as of [DATE], 202[6].

DESIGN-BUILDER:

By: _____

NDOT:

NEBRASKA DEPARTMENT OF TRANSPORTATION

By: _____

APPROVED AS TO FORM:

By: _____

Date: _____, 202[6]

Request for Industry Feedback

Request for Industry Feedback

Exhibit 1

Initialisms, Abbreviations, and Definitions

[NTD: These definitions do not encompass the entire Technical Provision set of documents and will be modified once those documents are complete]



Unless the context otherwise requires:

1. the following abbreviations, capitalized terms or terms used in both the Agreement and the Design-Build Specifications have the meanings given in this Exhibit 1; and
2. the definitions in this Exhibit 1 that are in lower case also apply to terms that are capitalized.

Abbreviation	Definition
3R	Restoration, Rehabilitation, and Resurfacing
AAN	American Association of Nurserymen.
AASHTO	American Association of State Highway and Transportation Officials.
ACI	American Concrete Institute.
ADA	Americans with Disabilities Act
ADT	Average Daily Traffic
AISC	American Institute of Steel Construction.
ANSI	American National Standards Institute.
ASME	American Society of Mechanical Engineers
ASNT	American Society of Nondestructive Testing
ASTM	American Society for Testing and Materials.
ATC	Alternative Technical Concept
ATSSA	American Traffic Safety Services Association.
AV	Audio Visual
AWG	American Wire Gage.
AWPA	American Wood Preservers Association.
AWS	American Welding Society.
BA	Biological Assessment
BICSI	Building Industry Consulting Services International
BMP	Best Management Practice
BOPP	Bridge Office Policies and Procedures
CADD	Computer Aided Drafting and Design
CCI	Construction Cost Index

CERCLA	Comprehensive Environmental Response Compensation and Liability Act
CFR	Code of Federal Regulations.
CIP	Cast-in-place
CIR	Nebraska Commission of Industrial Relations
CLOMR	Conditional Letter of Map Revision
CO	Change Order
CPL	Contractor's Pollution Liability (insurance)
CPM	critical path method
CPR	Cardiopulmonary Resuscitation
CPT	Cone Penetration Test
CQA	Construction Quality Assurance
CQAP	Construction Quality Assurance Program
CQC	Construction Quality Control
CQCM	Construction Quality Control Manager
CQMP	Construction Quality Management Plan
CSL	crosshole sonic logging
CWI	AWS Certified Welding Inspector
DB	Design-Build
DBE	Disadvantaged Business Enterprises.
DBQAP	Design-Build Quality Assurance Program
DOT	Department of Transportation
dpi	dots per inch
DQA	Design Quality Assurance
DQAM	Design Quality Assurance Manager
DQC	Design Quality Control
DQCM	Design Quality Control Manager
DQMP	Design Quality Management Plan
DSS	Decent, Safe and Sanitary
DVD	Digital Versatile Disc
EBS	Electronic Bidding System.
ECM	Environmental Compliance Manager
ECOD	ECODatabase Tool

ECR	Environmental Commitments Record
EDMS	Electronic Document Management System
EEO	Equal Employment Opportunity.
EM	Engineering Manual
EPD	Escrowed Proposal Documents
ERB	Elkhorn River Bridge
ESA	Environmental Site Assessment
FAA	Federal Aviation Administration.
FEMA	Federal Emergency Management Agency
FHWA	Federal Highway Administration.
GAAP	Generally Accepted Accounting Principles
H&H	hydraulic and hydrologic
HCSS	Heavy Construction Systems Specialist
HM	Hazardous Materials
HMR	Hazardous Materials Report
HVAC	Heating Ventilation and Air Conditioning
ICC	International Code Council
ICEA	Insulated Cable Engineers Association.
IES	Illuminating Engineer Society
IMSA	International Municipal Signal Association.
IP	Internet Protocol
ISO	Insurance Services Office; International Organization for Standardization
IT	Information Technology
ITE	Institute of Transportation Engineers.
ITP	Instructions to Proposers
JPCP	Jointed Plain Concrete Pavement
JRT	Joint Resolution Team
LED	Light Emitting Diode
LIBOR	London Interbank Offered Rate (1 year)
LOC	Limits of Construction
LOMR	Letter of Map Revision

LRFD	Load and Resistance Factor Design
M&R	Materials and Research
MASH	Manual for Assessing Safety Hardware
MAT	Material Acceptance Testing
MB	Megabyte
Mbps	Megabits per Second
MBTA	Migratory Bird Treaty Act
METS	Material Engineering and Testing Services
MOT	Maintenance of Traffic
MRI	Mean Roughness Index
MSE	Mechanically Stabilized Earth
MUTCD	Manual on Uniform Traffic Control Devices.
N&R	New and reconstruction
N-9	Nebraska Highway 9
NAD	North American Datum
NAVD	North American Vertical Datum
NCHRP	National Cooperative Highway Research Program
NCR	Nonconformance Report
NCS	Nebraska Coordinate System
NDEE	Nebraska Department of Environmental and Energy
NDOR/NDR/Department	Nebraska Department of Transportation.
Department	Nebraska Department of Transportation
NDT	nondestructive testing
NEC	National Electrical Code.
NEMA	National Electrical Manufacturers Association.
NEOC	Nebraska Equal Opportunity Commission
NEPA	National Environmental Policy Act
NESC	National Electric Safety Code
NESCA	Nebraska Endangered Species Coordination Act
NFIP	National Flood Insurance Program

NGPC	Nebraska Game and Parks Commission
NHPA	National Historic Preservation Act
NICET	National Institute for Certification in Engineering Technologies
NPDES	National Pollution Discharge Elimination System.
NPSC	Nebraska Public Service Commission
NRCS	National Resources Conservation Service
NREC	Nebraska Real Estate Commission
NRHP	National Register of Historic Places
NSP	Nebraska State Patrol
NTM	Nebraska Test Method
NTP	Notice to Proceed
O&M	Operations and Maintenance
OEM	Original equipment manufacturer
OHW	ordinary high water
OJT	On the Job Training
OPCC	Opinion of Probable Construction Costs
OR	Owner's Representative
OSHA	Occupational Safety and Health Administration
PA	Programmatic Agreement
Pdf	portable document format
PE	Professional Engineer
PGE	Profile Grade Elevation
PGSP	Project General Standard Provision
PMP	Project Management Plan
QA	Quality Assurance
QC	Quality Control
RFC	Release for Construction
RFI	Request For Information
RFP	Request for Proposals
RFQ	Request for Qualifications
ROW	Right-of-Way.

RP	Reference Post
RQD	Rock Quality Designation
SAE	Society of Automotive Engineers.
SDS	safety data sheet
SF	Square Foot
SHPO	State Historic Preservation Office
SP	Special Provision
SSID	Service Set Identification
SSPC	Steel Structures Painting Council.
STA.	Station
SUE	Subsurface Utility Engineering
SWPPP	Storm Water Pollution Prevention Plan
T&E	threatened and endangered
TCE	Temporary Construction Easement
TCP	Traffic Control Plan
TCS	Traffic Control Supervisor
TIM	Traffic Incident Management
TL	Test Level
TMP	Transportation Management Plan
TMS	Transportation Management System
TP	Technical Provisions
TS&L	Type, Size and Location
U.S.C.	United States Code
UJUA	Utility Joint Use Acknowledgment
UL	Underwriters Laboratories.
UPS	uninterruptable power supply
USACE	United States Army Corps of Engineers.
USB	Universal Serial Bus
USCS	Unified Soil Classification System
USDOT	United States Department of Transportation
USEPA	United States Environmental Protection Agency
USFWS	United States Fish and Wildlife Service

USPAP	Uniform Standards of Professional Appraisal Practice
UTP	unshielded twisted repair
VAC	Voltage Alternating Current
VECP	Value Engineering Change Proposal
WBS	Work Breakdown Structure
WLAN	Wireless Local Area Network
WPC	water pollution control
WPCP	water pollution control program
WSE	Water Surface Elevation

Actual Knowledge means and shall be strictly limited to facts and information actually known to Department, Design-Builder or Department's or Design-Builder's Representative (as applicable), after due consultation with other personnel of such Party directly involved with the Work, as applicable.

Affiliate means (a) any Person that directly or indirectly through one or more intermediaries controls, or is controlled by, or is under common control with, Design-Builder or any of its members, partners, or shareholders holding a 10% or greater interest in Design-Builder; and (b) any Person for which 10% or more of the equity interest in such Person is held directly or indirectly, beneficially, or of record by (i) Design-Builder, (ii) any of Design-Builder's members, partners or 10% or greater shareholders, or (iii) any Affiliate of Design-Builder under clause (a) of this definition. For purposes of this definition the term "control" means the possession, directly or indirectly, of the power to cause the direction of the management of a Person, whether through voting securities, by Agreement, family relationship or otherwise. Work performed by Affiliates shall be deemed performed by Design-Builder.

Agreement Documents means the Agreement and the Technical Provisions, including all exhibits, and the other documents listed in Section 1.2.1(a) and Section 1.2.1(b) (as applicable).

Agreement Price means the total amount payable to the Design-Builder to complete the Project, subject to adjustment only in accordance with the express terms of the Agreement Documents.

Agreement Time means the length of time the Agreement is in effect.

Alternative Technical Concept (ATC) means a Department-approved technical solution or approach that differs from the Base Technical Concept requirements.

Applicable Standards means the standards set forth in the Technical Provisions.

Approve means a formal approval of a Submittal by the Department in accordance with Section 1.8.

As-Built Documents means (a) the final Construction Documents and related documentation revised to show changes made in the field during construction so that they reflect the Project's as-built condition; and (b) the As-Built Schedule and (c) the Utility As-Built Drawings.

Baseline Schedule means the Submittal provided and accepted by Department in accordance with TP Section 4.3.2.

Base Technical Concept means all documents entitled "Base Technical Concept" included in the Reference Documents (i.e., preliminary engineering plans and preliminary bridge TS&L's).

Basic Configuration means the following elements:

1. The Planned ROW Limits;
2. The number of lanes (as set forth in the Base Technical Concept); and
3. The approximate location of intersections (as set forth in the Base Technical Concept).

Betterment As related to Utilities, a Betterment is Utility Work which constitutes upgrading of the adjusted or relocated Utility facility or additional Utility Work that is not required by the Project and is made solely for the Utility Owner's benefit and election or solely for the DBT's benefit and election; however, a betterment does not include an addition or improvement that:

1. consists of replacement devices or materials that meet standards equivalent to what is being replaced;
2. consists of replacement devices or materials that are no longer manufactured;

3. is required to comply with existing government codes; or
4. is required by Utility Owner's current design practices and provides a direct benefit to the Project.

As related to Third Parties, other than Utilities, a Betterment is generally defined as an upgrading of the Third Party's facility or additional work that is not required by the Project and is made solely for the Third Party's benefit.

Bond means each of the Performance Bond or Payment Bond, as the context requires.

Business Day means Any day excluding Saturday, Sunday, and Federal and State Legal Holidays.

Certificate of Final Acceptance means the Notice issued by Department to Design-Builder that Design-Builder has achieved Final Acceptance and all Work has been fully completed in accordance with the Agreement Documents.

Certificate of Substantial Completion means the Notice issued by Department to Design-Builder that Design-Builder has achieved Substantial Completion.

Change in Law means the enactment, adoption, modification, repeal or other change in any Law that occurs after the Agreement Execution Date, including any change in the judicial or administrative interpretation of any Law, or adoption of any new Law, which is materially inconsistent with Laws in effect on the Agreement Execution Date, but excluding:

1. Any change in or new Law which was passed or adopted but not yet effective as of the Agreement Execution Date;
2. A change in the way a Governmental Rule is applied or interpreted as a result of:
 - a. The failure of any Design-Builder-Related Entity to comply with a Law or any Governmental Approval; or
 - b. Any act or omission of any Design-Builder-Related Entity;
3. A change in any Law relating to taxes, including specifically changes to federal tax laws; or
4. A change in federal trade policy.

Change of Control means any assignment, sale, financing, grant of security interest, transfer of interest or other transaction of any type or description, including by or through voting securities, asset transfer, Agreement, merger, acquisition, succession, dissolution, liquidation or otherwise, that results, directly or indirectly, in a change in possession of the power to direct or control or cause the direction or control of the management of Design-Builder or a material aspect of its business. A Change of Control of a shareholder, member, partner or joint venture member of Design-Builder may constitute a Change of Control of Design-Builder if such shareholder, member, partner or joint venture member possesses the power to direct or control or cause the direction or control of the management of Design-Builder.

Notwithstanding the foregoing, the following shall not constitute a Change of Control:

1. A change in possession of the power to direct or control the management of Design-Builder or a material aspect of its business due solely to a bona fide transaction involving beneficial interests in the ultimate parent organization of a shareholder, member, partner or joint venture member of Design-Builder, (but not if the shareholder, member, partner or joint venture member is the ultimate parent organization), unless the transferee in such transaction is at the time of the transaction suspended or

- debarred or subject to a proceeding to suspend or debar from bidding, proposing or contacting with any federal or state department or agency;
2. An upstream reorganization or transfer of direct or indirect interests in Design-Builder so long as no change occurs in the entity with ultimate power to direct or control or cause the direction or control of the management of Design-Builder;
 3. A transfer of interests between managed funds that are under common ownership or control other than a change in the management or control of a fund that manages or controls Design-Builder; or
 4. The exercise of minority veto or voting rights (whether provided by applicable Law, by Design-Builder's organizational documents or by related member or shareholder agreements or similar agreements) over major business decisions of Design-Builder, provided that if such minority veto or voting rights are provided by shareholder or similar agreements, Department has previously received copies of such agreements.

Change Order means a written amendment to the terms and conditions of the Agreement Documents issued by Department to Design-Builder with respect to a Change or Relief Event in accordance with Section 17 (Relief Events/Change Orders).

Claim means any disagreement between the Department and the Design-Builder arising out of or relating to the Agreement Documents, the Work, or the Project.

Completion Deadline means the Substantial Completion Deadline and Final Acceptance Deadline, or either of them, as the context requires.

Completion Milestone means Substantial Completion or Final Acceptance, or both, as the context requires.

Construction means the labor, materials, equipment, and work necessary to construct the Project as defined in the Agreement Documents.

Construction Documents means all shop drawings, working drawings, fabrication plans, material and hardware descriptions, specifications, construction quality control reports, field modifications, including any of the foregoing with respect to Utility Adjustments, and, as may be required by Department, construction quality assurance reports and samples necessary for construction of the Project in accordance with the Agreement Documents.

Critical Path means each critical path on the Project Schedule which ends on the applicable Completion Deadline, as applicable (i.e., the term shall apply only following consumption of all available Float in the schedule for a Completion Milestone, as applicable). The lower case term "critical path" means the longest continuous chain of activities for the Project that has the least amount of total float of all chains.

Critical Path Method means a method of planning and scheduling for a project where Activities are arranged based on Activity relationships (i.e., a network-based planning technique using Activity durations and relationships between Activities to calculate a schedule for the entire project). This process determines which Activities are "critical" (i.e., on the longest path) and which have "total float" (i.e., can be delayed without making the project longer).

Day or day means calendar day. References to "working day" or "business day" means Monday through Friday, excluding weekends and Holidays.

Department has the meaning given in the Preamble to this Agreement.

Department's Engineer means Department's State Construction Engineer or his or her designee.

Design-Builder has the meaning given in the Recitals to this Agreement.

Design-Builder-Related Entity means (a) Design-Builder, (b) any Affiliate of Design-Builder, (c) Subcontractors (including Suppliers), (d) any other Persons performing any of the Work, (e) any other Persons for whom Design-Builder may be legally or contractually responsible and (f) the employees, agents, officers, directors, representatives, consultants, successors and assigns of any of the foregoing.

Design Acceptance has the meaning given in TP Section 5.2.6, and which means generally Department's program to provide confidence that the Design Quality Management Plan objectives and results meet the requirements of the Agreement Documents.

Design-Build Quality Assurance Program (DBQAP) means the program, included in the Reference Documents, established by Department to ensure that materials and workmanship incorporated into the Project are in reasonable conformance with the approved plans and specifications, including any approved changes.

Design-Builder has the meaning given in the Recitals to this Agreement.

Design Documents means all drawings (including plans, elevations, sections, details and diagrams), specifications, reports, calculations, records and other Submittals necessary for design of the Project in accordance with the Agreement Documents, following approval thereof by Department and others as required by the Agreement Documents.

Design Quality Assurance or Design QA (DQA) means independent assurance checks performed by Design-Builder. DQA shall include separate processes and reviews from the Design Quality Control program with reviews performed by staff independent of the production staff.

Differing Site Condition means (a) subsurface or latent physical conditions that are encountered at or near the Site that differ materially from those reasonably assumed by Design-Builder due to incorrect Boring Data provided by Department, to the extent that correct Boring Data would have resulted in accurate assumptions, or (b) physical conditions of an unusual nature, differing materially from those ordinarily encountered in the area and generally recognized as inherent in the type of work provided for in the Agreement including:

1. The discovery at, near or on the Site of any archaeological, paleontological, biological or cultural resource; provided that the existence of such resource was not disclosed in the RFP Documents, was not otherwise known to Design-Builder prior to the Effective Date of the Agreement and would not have become known to Design-Builder by undertaking reasonable investigation prior to the Effective Date; and
2. The discovery at, near or on the Site of any species listed as threatened or endangered under the federal or State Endangered Species Act, except to the extent that Department-Provided Approvals provide for mitigation measures to be undertaken with respect thereto (regardless of whether the species is listed as threatened or endangered as of the Effective Date).

The definition of Differing Site Condition excludes Utilities, Hazardous Materials and any differences in groundwater depth from the depths noted in the Reference Documents or otherwise.

Directive Letter means a Notice issued by Department under Section 16.3.

Effective Date has the meaning given in the Recitals to this Agreement.

Eligible Surety means a Surety licensed or authorized to do business in the State, listed on the U.S. Department of the Treasury's "Listing and Approved Sureties" (found at

www.fms.treas.gov/c570/c570.html), rated "A" or higher by at least two Rating Agencies or rated at least A-, X or higher according to A.M. Best's Financial Strength Rating and Financial Size.

Engineer means a Licensed Professional Civil Engineer in the State of Nebraska authorized by Design- Builder to perform or furnish professional services in connection with the Work.

Environmental Laws means (a) all Law applicable to the Project or the Work now or hereafter in effect regulating, relating to, or imposing liability or standards of conduct concerning the environment or to emissions, discharges, releases or threatened releases of Hazardous Materials into the environment including into the air, surface water or ground water or onto land, and (b) any requirements and standards that pertain to the protection of the environment, or to the management of Hazardous Materials or emissions, discharges, releases or threatened releases of Hazardous Materials into the environment, contamination of any type whatsoever, or health and safety matters with respect to Hazardous Materials, set forth in any Governmental Approval, or other criteria and guidelines promulgated, pursuant to Law applicable to the Project or the Work, as each of the foregoing have been or are amended, modified, or supplemented from time to time (including any present and future amendments thereto and reauthorizations thereof), including those relating to:

1. The manufacture, processing, distribution, use, re-use, treatment, storage, disposal, transport or handling of Hazardous Materials;
2. The protection of public health, public welfare, public safety or the environment (including protection of nonhuman forms of life, land, surface water, groundwater and air);
3. Air, soil, surface and subsurface strata, stream sediments, surface water, and groundwater;
4. Releases of Hazardous Materials;
5. Protection of wildlife, endangered, threatened, and sensitive species, wetlands, water courses and water bodies, parks and recreation lands, cultural, historical, archaeological, and paleontological resources and natural resources;
6. The operation and closure of underground or aboveground storage tanks;
7. Health and safety of employees and other persons with respect to Hazardous Materials; and
8. Notification, documentation and record keeping requirements relating to the foregoing.
9. Without limiting the above, the term "Environmental Laws" shall also include the following (all as amended):
 - a. The Comprehensive Environmental Response, Compensation and Liability Act, 42
 - b. U.S.C. §§ 9601, et seq. ("CERCLA");
 - c. The Resource Conservation and Recovery Act, 42 U.S.C. §§ 6901, et seq. ("RCRA");
 - d. The Emergency Planning and Community Right to Know Act of 1986, 42 U.S.C.
 - e. §§ 11001, et seq.;
 - f. The Toxic Substances Control Act, 15 U.S.C. §§ 2601, et seq.;

- g. The National Environmental Policy Act, 42 U.S.C. §§ 4321, et seq.;
- h. The Occupational Safety and Health Act, 29 U.S.C. §§ 651, et seq.;
- i. The Hazardous Materials Transportation Act, 49 U.S.C. §§ 1801, et seq.;
- j. The Endangered Species Act, 16 U.S.C. §§ 1531, et seq.;
- k. The Clean Water Act, 33 U.S.C. §§ 1251, et seq.;
- l. The Clean Air Act, 42 U.S.C. §§ 7401, et seq.;
- m. The Federal Water Pollution Control Act, as amended by the Clean Water Act, 33
- n. U.S.C. §§ 1251, et seq.;
- o. The Oil Pollution Act, 33 U.S.C. §§ 2701, et seq.;
- p. The Federal Insecticide, Fungicide and Rodenticide Act, 7 U.S.C. §§ 136, et seq.;
- q. The Federal Safe Drinking Water Act, 42 U.S.C. §§ 300, et seq.;
- r. The Federal Radon and Indoor Air Quality Research Act, 42 U.S.C. §§ 7401, et seq.;
- s. The Fish and Wildlife Coordination Act, 16 U.S.C. §§ 661, et seq.;
- t. The Rivers and Harbors Act of 1899, 33 U.S.C. §§ 401 et seq.;
- u. The Migratory Bird Treaty Act, 16 U.S.C. §§ 703, et seq.;
- v. The Marine Mammal Protection Act, 16 U.S.C. §§ 1361, et seq.;
- w. Section 4f of the Department of Transportation Act, 49 U.S.C. § 303;
- x. The National Historic Preservation Act, 16 U.S.C. § 470;
- y. 33 CFR §§ 114 and 125;
- z. Neb. Admin. Code, Title 128 – Rules and Regulations Governing Hazardous Waste Management in Nebraska;
- aa. Neb. Admin. Code, Title 117 – Nebraska Surface Water Quality Standards;
- bb. Neb. Admin. Code, Title 118 – Nebraska Groundwater Quality Standards and Use Classification; and
- cc. Local watershed district or water management organization requirements applicable to the Work or the Project.

Error means an error, omission, fault, inconsistency, inaccuracy, deficiency, or other defect.

Event of Default means an occurrence defined in Section 19.1.1.

Final Acceptance means the stage in the Work where the requirements in Design-Build Specification Section 105.15 have been satisfied by Design-Builder.

Final Acceptance Date means the date on which Final Acceptance occurs.

Final Acceptance Deadline means 90 days after the Substantial Completion Date, as such deadline may be extended under this Agreement.

Final Payment means payment by Department of the final installment of the Agreement Price.

Float means the amount of time that any given Activity or logically connected sequence of Activities shown on the Project Schedule may be delayed before it will affect Design-Builder's ability to achieve a Completion Milestone by its applicable Completion Deadline. "Float" generally means the difference between early completion times and late completion times for Activities as shown on the Project Schedule, and shall include any float contained within an Activity as well as any period containing an artificial Activity (that is, one which is not encompassed within the meaning of the word "Work").

Force Account Work means work ordered on a construction project without an existing agreement on its cost, and performed with the understanding that the Design-Builder will bill the owner according to the cost of labor, materials, and equipment, plus a certain percentage for overhead and profit.

Force Majeure Event means any of the events listed in below, which materially and adversely directly affects Design-Builder's obligations:

1. Any earthquake, tornado, hurricane, or other natural disaster that causes direct physical damage to the Project;
2. Natural phenomena when these phenomena are of such magnitude they result in the Governor issuing a Disaster Declaration;
3. Any epidemic in the Douglas County, Nebraska area;
4. Any blockade, rebellion, war, riot, act of sabotage or civil commotion that causes direct physical damage to the Project;
5. Issuance of a temporary restraining order or other form of injunction by a court that prohibits prosecution of a material portion of the Work; and

Good Industry Practice means the exercise of the degree of skill, diligence, prudence, and foresight which would reasonably and ordinarily be expected from a skilled and experienced designer, engineer, constructor, supplier or other contractor seeking in good faith to comply with its obligations, complying with all applicable Law and Governmental Approvals and engaged in the same type of undertaking under circumstances and conditions similar to those within the same geographic area as the Project.

Governmental Approval means any permit, license, consent, concession, grant, franchise, authorization, waiver, certification, exemption, filing, lease, registration or ruling, variance or other approval, guidance, protocol, mitigation agreement, agreement or memoranda of agreement/understanding, and any revision, modification, amendment, supplement, renewal or extension of any of the foregoing, required by or with any Governmental Entity in order to perform the Work or any Adjustment work being performed by a Utility Owner, but excluding (a) any such approvals relating to the work to be performed by other contractors as specifically described in the Agreement Documents and (b) any such approvals required by or with a Governmental Entity in its capacity as a Utility Owner. Governmental Approvals include Environmental Approvals.

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

Hazardous Materials means any element, chemical, compound, mixture, substance, product, waste or other material, whether solid, liquid or gaseous, which is or becomes defined, listed, classified, regulated, or addressed in any way under any Environmental Laws, or any other substances or conditions (including mold and other mycotoxins, fungi or fecal matter) which may create any unsafe or hazardous condition or pose any threat or harm to the environment or human health and safety. "Hazardous Materials" includes the following:

1. Any substance, product, waste or other material of any nature whatsoever which may give rise to liability under any Environmental Law or common law theory based on negligence, trespass, intentional tort, nuisance or strict liability or under any reported decisions of a state or federal court;
2. "hazardous waste" as defined in 128 Neb. Admin. Code, Chapter 2
3. hazardous substances, hazardous constituents, and toxic substances, ignitable, corrosive and reactive substances or related materials, whether solid, liquid or gas, including substances defined as or included in the definition of "hazardous substance," "extremely hazardous waste," "acutely hazardous waste," "radioactive waste," "radioactive materials," "bio-hazardous waste," "pollutant," "toxic pollutant," "contaminant," "restricted hazardous waste," "infectious waste," "toxic substance," "toxic waste," "toxic material," or any other term or expression intended to define, list or classify substances by reason of properties harmful to health, safety or the indoor or outdoor environment;
4. Any petroleum or crude oil and any fraction thereof, including any refined petroleum product or any additive thereto or fraction thereof, and any waste oil or waste petroleum byproduct or fraction thereof or additive thereto, but excluding petroleum and petroleum products contained within regularly operated motor vehicles;
5. Any solvent, solvent waste, including any refined solvent product, and any waste solvent or waste solvent byproduct, including any additive, byproduct or fraction of any of the foregoing;
6. Any drilling fluids, produced waters and other wastes associated with the exploration, development or production of crude oil, natural gas or geothermal resources;
7. Any flammable substances or explosives, including unexploded ordnance;
8. Any radioactive materials;
9. Any asbestos or asbestos-containing materials in structures and or other improvements on or in the Site (other than mineral asbestos naturally occurring in the ground);
10. Silica;
11. Any lead, cadmium, or lead-based paint or any other heavy metal-based paint or material, or any metal listed in or regulated by the Resource Conservation and Recovery Act (42 U.S.C. §§ 6901, et seq.);
12. Any radon or radon gas;
13. Any methane gas or similar or regulated gaseous materials;
14. Any urea formaldehyde foam insulation;
15. Electrical equipment and components which contain any oil or dielectric fluid containing polychlorinated biphenyls;
16. Pesticides, herbicides or fungicides;
17. Any other chemical, material or substance, exposure to which is prohibited, limited or regulated by any Governmental Entity or which may or could pose a hazard to the health and safety of any Persons in the vicinity of the Project or to the environment; and

18. Soil, surface water or groundwater containing any of the Hazardous Materials as defined above.

Hold Point has the meaning given in TP Section 2.3.1.1.

Holiday means any holiday shown in the following table:

Holiday	Date observed
Every Sunday	Every Sunday
New Year's Day	January 1st
Birthday of Martin Luther King, Jr.	3rd Monday in January
Presidents' Day	3rd Monday in February
Arbor Day	Last Friday in April
Memorial Day	Last Monday in May
Independence Day	July 4th
Labor Day	1st Monday in September
Columbus Day	2nd Monday in October
Veterans Day	November 11th
Thanksgiving Day	4th Thursday in November
Day after Thanksgiving Day	Day after Thanksgiving Day
Christmas Day	December 25th

If January 1st, July 4th, November 11th, or December 25th falls on a Sunday, the Monday following is a holiday. If November 11th falls on a Saturday, the preceding Friday is a holiday.

Indemnified Parties means Department, the Department Representative, the Owner's Representative, and each of their respective officers, directors, board members, employees, consultants, representatives and agents, or each of them as the context requires.

Intellectual Property means all current and future legal and/or equitable rights and interests in know- how, patents (including applications), copyrights (including moral rights), trade marks (registered and unregistered), service marks, trade names, trade dress, trade secrets and trade secret rights, designs (registered and unregistered) and design rights, Utility models, circuit layouts, plant varieties, business and domain names, inventions, solutions embodied in technology, and other intellectual activity, and applications of or for any of the foregoing, subsisting in or relating to the Project, Project design data or Project traffic data. Intellectual Property includes traffic management algorithms, and software used in connection with the Project (including software used for management of traffic on the Project), and Source Code. Intellectual Property is distinguished from physical construction and equipment itself and from data, sketches, charts, calculations, drawings, plans, depictions, specifications, layouts, depictions, manuals, electronic files, artwork, correspondence, other Submittals and other documentation that disclose Intellectual Property.

Key Personnel means positions identified in TP Section 2.1.1 or positions otherwise advised by Department to Design-Builder from time to time.

Nebraska Rules of the Road means Neb. Rev. Stat. Sections 60-601 to 60-6,383, as amended.

New Approval means any of the following: (a) a new Governmental Approval of the same type as Department-Provided Approvals; and (b) a revision, modification, or amendment to one or more of Department- Provided Approvals.

Nonconformance Report has the meaning given in TP Section 5.3.11.

Nonconforming Work means any Work, material, equipment, document, or deliverable that does not comply with the Agreement Documents (including the Technical Provisions), approved submittals, Laws, or applicable standards.

Notice has the meaning given in Section 26.12.

Notice to Proceed 1 (NTP1) has the meaning given in Section 4.2.1.

NTP1 Deliverable Schedule means a schedule of when all of the requirements of NTP1 will be complete.

NTP1 Submittals means all documents, reports, and other Submittals required to be generated by the Design-Builder during NTP1.

Notice to Proceed 2 (NTP2) has the meaning given in Section 4.2.2.

NTP2 Submittals means all documents, reports, and other Submittals required to be generated by the Design-Builder during NTP2.

Party means Design-Builder or Department, as the context may require, and “Parties” means Design-Builder and Department, collectively.

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

Progress Report means a narrative summary of the previous month’s Work activities.

Progress Schedule means a forwarding looking description of the upcoming Work activities.

Project means the I-80 project generally described in the Recitals. The “Project” consists in the design and construction of civil infrastructure as described in TP Section 1.1.

Project Standards means those standards listed in TP Attachment 1-1, together with any additional standards and specifications applicable to the Work and established by express reference contained in one of the documents listed in TP Attachment 1-1 or the Agreement Documents.

Proposal Commitments means the table in Exhibit 2.

Punch List means the list of Work that remains to be completed (a) after achievement of Substantial Completion or (b) as a condition of Substantial Completion or Final Acceptance, as applicable, and shall be limited to minor incidental items of Work necessary to correct imperfections which if not completed, will not, individually or collectively, have an adverse effect on the safety, use or operability of the Project.

Punch List Work means that portion of the Work consisting in completion of the Punch List. Work required to comply with all applicable Law or Governmental Approvals is not “Punch List Work.”

Quality Assurance means all those planned and systematic actions necessary to provide adequate confidence that an item of Work is in conformance with established requirements and will satisfy given needs. The activity of providing the evidence needed to establish confidence that quality functions are being performed adequately. Quality Assurance is a management tool.

Quality Control means those functions that provide a means to control and measure characteristics, as related to established system design requirements. It shall also mean the

techniques and activities that sustain the quality of an item to satisfy given needs; also the use of such techniques and activities. Quality Control is a production tool.

Quality Management Plan means, collectively, the Design Quality Management Plan and the Construction Quality Management Plan included in the Project Management Plan and more fully described in Technical Provisions.

Quality Management Program means all of the quality programs identified, collectively, in the Technical Provisions.

Re-Baselined Schedule means the Baseline Schedule that has been modified subject to the Approval of the Department.

Recovery Schedule means a schedule that demonstrates Design-Builder's proposed plan to regain lost schedule progress and achieve the Completion Milestone by the applicable Completion Deadline and which complies with the requirements of the Technical Provisions.

Reference Documents means the documents and information contained in Exhibit 3.

Release for Construction means, for any portion of the Project's design, the designation indicating that such portion may be constructed as shown.

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

Relief Event has the meaning described in Section 17.2.

Schedule of Values means a detailed schedule apportioning the Agreement Price among activities associated with the NTP2 Work.

Site means those areas designated in writing by Department for performance of the Work and such additional areas as may, from time to time, be designated in writing by Department for Design-Builder's use in performance of the Work. For purposes of insurance (subject to any notification and other requirements imposed by the insurer(s) for approval), indemnification, safety and security requirements, the prevailing wage requirements, and payment for use of equipment, the term "Site" shall also include (a) the field office sites, (b) any property used for bonded storage of material for the Project, (c) staging areas dedicated to the Project, and areas where activities incidental to the Project are being performed by Design-Builder or Subcontractors covered by the worker's compensation policy included in the insurance but excluding any permanent locations of Design-Builder or such covered Subcontractors.

Standard Specifications means Department's "Standard Specifications for Highway Construction, 2017 Edition," as may be amended from time to time.

State means the State of Nebraska, including its agencies, departments or divisions whose conduct or action is related to the Work.

Subcontract means an agreement between Design-Builder and one or more third parties providing for such third party to perform any part of the Work or provide any materials, equipment, labor or supplies for any part of the Work, or any such agreement between a Subcontractor and its lower tier Subcontractor or a Supplier and its lower tier Supplier, at any tier.

Subcontractor means any Person with whom Design-Builder has entered into any Subcontract and any other Person with whom any Subcontractor has further subcontracted any part of the Work, at any tier.

Submittal means any document, work product, or other written or electronic end product or item required under the Agreement Documents to be prepared by Design-Builder and delivered or submitted to Department.

Substantial Completion means the stage in the Work when the following requirements have been satisfied by Design-Builder:

Substantial Completion Deadline the date that is XXX days after the effective date of NTP1 as such date may be extended under this Agreement.

Supplier means any Subcontractor that supplies machinery, equipment, materials or systems to Design-Builder or any Subcontractor in connection with the performance of the Work and that does not perform Work at the Site. Persons who merely transport, pick up, deliver or carry materials, personnel, parts or equipment or any other items or persons to or from the Site shall not be deemed to be performing Work at the Site. The term “Supplier” includes fabricators and material dealers.

Surety means each properly licensed surety company, insurance company or other Person approved by the Nebraska State Insurance Commissioner to do business in the State and approved by Department, which has issued the Payment Bond or the Performance Bond in accordance with the Agreement Documents.

Technical Provisions the part of the Agreement identified as Technical Provisions.

Termination Date means the date of termination specified in the Notice for Termination for Convenience or Termination for Cause Notice (as applicable).

Termination for Convenience means a termination of the Agreement pursuant to Section 19.4.1.

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

TP Attachments means those documents annexed to the Technical Provisions and identified as “Attachments.”

Transportation Management Plan means the plan developed by Design-Builder for maintenance of traffic during construction in accordance with the Technical Provisions.

Utility or utility means a privately, publicly, or cooperatively owned line, facility or system (including municipal and/or government lines, facilities and systems) for transmitting or distributing communications, cable television, power, electricity, gas, oil, crude products, water, steam, waste, or any other similar commodity, including any irrigation system and any fire or police signal system as well as streetlights. However, when used in the context of the Adjustment of facilities to accommodate the Project, the term “Utility” or “utility” excludes (a) storm water facilities that provide drainage solely for the Project ROW, and (b) traffic signals, ramp or intersection metering systems, flashing beacon systems, and lighting systems for the Project. The necessary appurtenances to each Utility facility (including fire hydrants as appurtenances to water lines) shall be considered part of such Utility. Without limitation, any Service Line connecting directly to a Utility shall be considered an appurtenance to that Utility, regardless of the ownership of such Service Line.

Utility Disposition Documents means the document developed by the Department that documents all known Utilities within the Project Site and as further described in Section 10.4.1.

Utility Owner means The owner or operator of any Utility.

Utility Protection Plan has the mean described in the Technical Provisions.

Utility Relocation Schedule has the definition in the Technical Provisions.

Work (or work) means all of the resources required to be provided by Design-Builder, including administrative, design, support services, procurement, professional, manufacturing, supply, installation, integration testing, commissioning, construction, supervision, management, labor, materials, equipment (including Department-furnished materials), maintenance, documentation and other duties and services to be provided and provided by Design-Builder under the Agreement Documents, including all efforts necessary or appropriate to achieve the Completion Milestones by the Completion Deadlines, except for those efforts which the Agreement Documents expressly specifies will be performed by Persons other than the Design-Build-Related Entities.

Work Breakdown Structure has the meaning given in the Technical Provisions.

[END OF DEFINITIONS]