IMPERIAL COUNTY
TRANSPORTATION COMMISSION

DESIGN-BUILD CONTRACT
BOOK 1

Calexico East Port of Entry
Bridge Widening

FOR DESIGN AND CONSTRUCTION ADJACENT TO
STATE ROUTE 7 IN IMPERIAL COUNTY

Off System Facility Located in Imperial County
0.7 Mile South of Route 7 Near the US/Mexico Border

ICTC CONTRACT NO. 20-101
11-IMP-007-PM0.0
PROJECT ID: 1118000265

Federal Aid Project BUILD L-6471 (017)

RFP Issue Date: September 17, 2020
Proposal Due Date: December 18, 2020

Potential Proposer Draft Review Document Date: July 8, 2020
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Recitals

a) The Calexico East Port of Entry Bridge Widening Project (Project) is located in Imperial County within the Federal Port of Entry on Federal General Services Administration (GSA) property with the U.S. Customs and Border Patrol (CBP) as the site operator. The site shall remain in full, uninterrupted operations during construction work. The Project will widen the existing structure of the Calexico East Port of Entry (POE) Bridge over the All-American Canal near the USA/Mexico Border to facilitate flow to the existing inspection booths.

b) The Project is funded through a U.S. Department of Transportation (DOT) Building Utilizing Investments to Leverage Development (BUILD) Transportation Development Grant. The Trade Corridor Enhancement Program (TCEP) provided funding for the Project Initiation Documents (PID). ICTC is the lead agency as the recipient of the BUILD funds and subsequent agreement approved by the DOT and Federal Highway Administration (FHWA).

c) Additional governmental agencies who may be consulted regarding the Project development include Caltrans, the GSA, CBP, U.S. Bureau of Reclamation (USBR), and the Imperial Irrigation District (IID). ICTC will lead the selection process. Caltrans may be involved in various roles during the procurement and Project delivery process, as requested by ICTC, including procurement advisory support, design and construction reviews and site inspection during construction, as appropriate. Other stakeholder agencies may have a purely consulting role. ICTC will provide additional information to the Proposers as these agency roles are identified and confirmed.

d) California Public Contract Code, Chapter 6.5 [Transportation Design-Build Program 6820 - 6829] allows a regional transportation agency such as ICTC to utilize the design-build method to design and construct projects on or adjacent to the State Highway System, including related non-highway portions of the Project, and enter into a Cooperative Agreement with the California Department of Transportation (Caltrans) for a Project on or interfacing with the State Highway System. California Streets and Highways Code Section 307 provides that State Route 7 is from the northerly boundary of the Federal Port of Entry near Calexico to Route 8 near El Centro. Through Cooperative Agreement, ICTC collaborated with Caltrans to complete the Project Approval and Environmental Document (PAED).

e) The parties intend for the Contract to be a lump-sum design-build contract obligating Design-Builder to perform all Work necessary to complete the Project by the deadlines specified herein, for the Contract Price, subject only to certain specified limited exceptions. To allow ICTC to budget for the Project and to reduce the risk of cost overruns, the Contract includes restrictions affecting Design-Builder’s ability to make claims for an increase to the Contract Price or an extension of the Completion Deadlines. Design-Builder has agreed in the Contract to assume such responsibilities and risks and has reflected the assumption of such responsibilities and risks in the Contract Price.

f) If Design-Builder fails to complete the Project within the time limitations set forth in the Contract Documents, then ICTC and the public will suffer substantial losses and damages. The Contract Documents therefore provide that Design-Builder shall pay ICTC substantial Liquidated Damages if such completion is delayed.

g) ICTC has provided certain documents to Design-Builder for the purpose of defining certain aspects of the Project, including the Preliminary Engineering Drawings establishing the Basic Configuration. ICTC has also provided Reference Information Documents (RID) to Design-Builder. Design-Builder has no right to rely on the RID except to the extent specifically permitted in the Contract Documents. ICTC and Design-Builder both intend for Design-Builder to assume
full responsibility and liability with respect to the design of the Project, including correction of any Errors in the Basic Configuration or RID, and ICTC and Design-Builder both intend for Design-Builder to indemnify and hold harmless ICTC and others with respect to any defects in the Project which may relate to Errors in the Basic Configuration or RID.

NOW, THEREFORE, in consideration of the sums to be paid to Design-Builder by ICTC, the foregoing premises and the covenants and agreements set forth herein, the parties hereto hereby agree as follows.
1 CONTRACT COMPONENTS; INTERPRETATION OF CONTRACT DOCUMENTS

1.1 Certain Definitions

Exhibit A hereto contains the meaning of various terms used in the Contract Documents.

1.2 Contract Documents

The term “Contract Documents” shall mean the documents listed in Section 1.3, including all exhibits thereto.

1.3 Order of Precedence

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

1. Amendments, including Change Orders, to Book 1 (Design-Build Contract), as executed by ICTC and Design-Builder.
2. Book 1 (Design-Build Contract), as executed by ICTC and Design-Builder.
3. Amendments, including Change Orders, to Book 2 (Project Requirements).
4. Book 2 (Project Requirements), except that Book 2 (Project Requirements) Exhibits have a lower order of precedence as noted below.
6. Amendments, including Change Orders, to Book 3 (Applicable Standards).
8. The Proposal, except if the Proposal includes statements that can reasonably be interpreted as offers to provide higher quality items than otherwise required by the Contract Documents or to perform services in addition to those otherwise required, or otherwise contains terms that are more advantageous to ICTC than the requirements of the Contract Documents, as determined by ICTC, Design-Builder’s obligations hereunder shall include compliance with all such statements, offers and terms.

Notwithstanding the foregoing, in the event of conflicting requirements involving any requirement established by reference contained in the Contract Documents, ICTC shall have the right to determine, in its sole discretion, which requirement applies. Design-Builder shall request ICTC’s determination in writing respecting the order of precedence among conflicting provisions promptly upon becoming aware of any such conflict.

1.4 Interpretations

In the Contract Documents, where appropriate:

a) The singular includes the plural and vice versa.
b) References to statutes or regulations include all statutory or regulatory provisions consolidating, amending, or replacing the statute or regulation referred to.
c) The words “including,” “included,” “includes,” and “include” are deemed to be followed by the words “without limitation.”
d) Unless the context requires otherwise, in phrases involving performance by a Person, the word “shall” indicates a requirement imposed on the Person.

e) Unless otherwise indicated, references to sections, appendices and exhibits are to the document which contains such references.

f) Words such as “herein,” “hereof,” and “hereunder” refer to the entire document in which they are contained and not to any particular provision or section.

g) Words not otherwise defined that have well-known technical or construction industry meanings are used in accordance with such recognized meanings.

h) References to Persons include their respective permitted successors and assigns and, in the case of Governmental Persons, Persons succeeding to their respective functions and capacities.

i) Words of any gender used herein include each other gender where appropriate.

j) All references to law are California Law unless otherwise specified.

References to “engineer” or “Engineer” in the Contract Documents may mean Design-Builder’s Engineer or it may mean an ICTC representative, depending on the context, as determined by ICTC, in its sole discretion.

Unless otherwise specified, lists contained in the Contract Documents defining the Project or the Work shall not be deemed all-inclusive.

Design-Builder acknowledges and agrees that it has independently reviewed the Contract Documents with legal counsel, and that it has the requisite experience and sophistication to understand, interpret and agree to the particular language of the Contract Documents. Accordingly, in the event of an ambiguity in or dispute regarding the interpretation of the Contract Documents, the Contract Documents shall not be construed against the Person who prepared them, and instead other rules of interpretation shall be used.

ICTC’s final answers to the questions posed during the proposal process for the Contract shall in no event be deemed part of the Contract Documents and shall not be relevant in interpreting the Contract Documents except as they may clarify provisions otherwise considered ambiguous.

1.5 Referenced Standards and Specifications

Except as otherwise specified in the Contract Documents or otherwise directed by ICTC, Work specified by the number, symbol, or title of any standard established by reference to a described publication affecting any portion of the Project shall comply with the latest edition or revision thereof and amendments and supplements thereto in effect as of the Request for Proposals (RFP) issue Date unless modified by Addendum or Change Order.

1.6 Omission of Details; Clarification by ICTC

Design-Builder shall not take advantage of any apparent Error in the Contract. Should it appear that the Work to be done or any matter relative thereto is not sufficiently detailed or explained in the Contract Documents, Design-Builder shall apply to ICTC in writing for such further written explanations as may be necessary and shall conform to the explanation provided. Design-Builder shall promptly notify ICTC of all Errors which it may discover in the Contract Documents and shall obtain specific instructions in writing regarding any such Error before proceeding with the Work affected thereby. The fact that the Contract Documents omit or misdescribe any details of any Work which are necessary to carry out the intent of the Contract Documents, or which are customarily performed under similar circumstances, shall not relieve Design-Builder from performing such omitted Work or misdescribed details of the Work, and they shall be performed as if fully and correctly set forth and described in the Contract Documents, without entitlement to a Change Order hereunder except as specifically allowed under Section 13.
1.7 Computation of Periods

References to “days” or “Days” contained in the Contract Documents shall mean Calendar Days unless otherwise specified, provided that if the date to perform any act or give any notice specified in the Contract Documents (including the last date for performance or provision of notice “within” a specified time period) falls on a non-Working Day, such act or notice may be timely performed on the next succeeding day which is a Working Day. Notwithstanding the foregoing, requirements contained in the Contract Documents relating to actions to be taken in the event of an emergency, requirements contained in Section 5.3, and any other requirements for which it is clear that performance is intended to occur on a non-Working Day, shall be required to be performed as specified, even though the date in question may fall on a non-Working Day.

1.8 Standard for Approvals

In all cases where approvals, acceptances, or consents are required to be provided by ICTC or Design-Builder hereunder, such approvals, acceptances, or consents shall not be withheld unreasonably except in cases where a different standard (such as sole discretion) is specified and shall not be unreasonably delayed if no response time is specified. In cases where sole discretion is specified, the decision shall not be subject to dispute resolution or other legal challenge; provided, however, the issue of whether the decision was arbitrary or capricious shall be subject to dispute resolution hereunder.

1.9 Federal Requirements

The Work to be performed under the Contract will be financed in part with federal funds and is therefore subject to federal statutes, rules and regulations applicable to work financed with federal funds, including the requirements set forth in Exhibit D and payment of Federal Prevailing Wages provided in Exhibit F. Notwithstanding anything to the contrary contained herein, in the event of any conflict between any Federal Requirement and the other requirements of the Contract Documents, the Federal Requirements shall prevail, take precedence and be in force over and against any such conflicting provisions.
2 OBLIGATIONS OF DESIGN-BUILDER

2.1 Performance Requirements

2.1.1 Performance of Work
All materials, services and efforts necessary to achieve Substantial Completion and Final Acceptance on or before the applicable Completion Deadline shall be Design-Builder’s sole responsibility, except as otherwise specifically provided in the Contract Documents. Subject to the terms of Section 13, the costs of all such materials, services and efforts are included in the Contract Price.

2.1.2 Performance Standards
Design-Builder shall furnish the design of the Project and shall construct the Project as designed, in accordance with all professional engineering and architectural principles and construction practices generally accepted as standards of the industry in the State (but at least meeting the requirements of the Contract Documents), in a good and workmanlike manner, free from construction defects except to the extent that such defects are inherent in prescriptive specifications included in the Contract Documents unless (a) Design-Builder has actual or constructive knowledge of such defects, and (b) Design-BUILDER fails to request a change thereto by ICTC, and in accordance with the terms and conditions set forth in the Contract Documents.

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

2.2 General Obligations of Design-BUILDER
Design-BUILDER, in addition to performing all other requirements of the Contract Documents, shall:

a) Furnish all design and other services, provide all materials and labor and undertake all efforts necessary or appropriate (excluding only those services, materials and efforts which the Contract Documents specify will be undertaken by other Persons):
   i. To construct the Project and maintain it during construction in accordance with the requirements of the Contract Documents, all Governmental Rules, all Governmental Approvals, and all other applicable safety, environmental, licensing and other requirements, taking into account the Right of Way Requirements Maps and other constraints affecting the Project, so as to achieve Substantial Completion and Final Acceptance by the applicable Completion Deadlines.
   ii. Otherwise to do everything required by and in accordance with the Contract Documents.

b) At all times provide the Project Manager, Approved by ICTC, who will
   i. Have full responsibility for the prosecution of the Work.
   ii. Act as agent and be a single point of contact in all matters on behalf of Design-BUILDER.
   iii. Be present (or its Approved designee will be present) at the Site at all times that Work is performed.
   iv. Have authority to bind Design-BUILDER on all matters relating to the Project.
c) Obtain all Governmental Approvals (other than the Environmental Approvals and certain New Environmental Approvals as provided in Section 6.3, but specifically including any Governmental Approvals required to implement any Approved ATCs incorporated in the Contract Documents).

d) Comply with all conditions imposed by and undertake all actions required by and all actions necessary to maintain in full force and effect all Governmental Approvals, including implementation of all environmental commitments (including avoidance, minimization, and/or mitigation measures) required by the Contract Documents, except to the extent that such responsibility is expressly assigned in the Contract Documents to another Person.

e) Provide such assistance as is reasonably requested by ICTC in dealing with any Person and/or in prosecuting and defending lawsuits in any and all matters relating to, or arising out of the Project, which may include providing information and reports regarding the Project, executing declarations and attending meetings and hearings, maintain insurance in compliance with Contract requirements; indemnify, hold harmless, and defend ICTC in compliance with Contract requirements.

f) Comply with all requirements of all Governmental Rules, including:
   i. The Environmental Laws, including all environmental mitigation and monitoring measures required for the Project, including those set forth in Book 2, Section 7, “Environmental Compliance,” and requirements regarding the handling, generation, treatment, storage, transportation, and disposal of Hazardous Materials.
   ii. The Americans with Disabilities Act of 1990 (ADA), 42 USC § 12101 et seq., including any amendments, and all applicable regulations and guidelines.
   iii. The Federal Requirements.

g) Comply with the Quality Manual requirements in Book 2, Section 5, “Quality Program.”

h) Cooperate with ICTC and Governmental Persons with jurisdiction over the Project in the review and oversight of the Project and other matters relating to the Work.

i) Supervise and be responsible to ICTC for acts and omissions of all Design-Builder-Related Entities, as though all such Persons were directly employed by Design-Builder.

j) Mitigate delay to the Project and mitigate damages due to delay to the extent possible, including by resequencing, reallocating, or redeploying Design-Builder’s forces to other Work, as appropriate.

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

2.3 Representations, Warranties and Covenants

Design-Builder represents, warrants, and covenants for the benefit of ICTC as follows:

2.3.1 Maintenance of Professional Qualifications

Design-Builder and its design Subcontractor(s) have maintained, and throughout the term of the Contract and its design Subcontract(s) shall maintain, all required authority, license status, professional ability, skills and capacity to perform the Work, and shall perform them in accordance with the requirements of the Contract Documents.

2.3.2 Evaluation of Constraints

Design-Builder has evaluated the constraints affecting delivery of the Project, including the Right of Way Requirements Maps, Lane Requirement Charts, Basic Configuration, the conditions of the Environmental Approvals, and has reasonable grounds for believing and does believe that the Project can be delivered within such constraints.
2.3.3 Feasibility of Performance
Design-Builder has evaluated the feasibility of performing the Work within the time specified herein and for the Contract Price and has reasonable grounds for believing and does believe that such performance (including achievement of Substantial Completion and Final Acceptance by the applicable Completion Deadlines, for the Contract Price) is feasible and practicable.

2.3.4 Review of Site Information
Design-Builder has, prior to submitting its Proposal, in accordance with prudent and generally accepted engineering and construction practices, reviewed the preliminary boring logs provided by ICTC in Book 2 and undertaken appropriate activities sufficient to familiarize itself with surface conditions and subsurface conditions discernible from the surface affecting the Project, to the extent Design-Builder deemed necessary or advisable for submission of a Proposal. Said activities have included inspection and examination of the Site and surrounding locations, to the extent possible. Based on its review, inspection, examination and other activities, Design-Builder is familiar with and accepts the physical requirements of the Work, subject to the right to receive a Change Order for Differing Site Conditions as specified herein. Before commencing any Work on a particular aspect of the Project, Design-Builder shall confirm all governing dimensions and conditions at the Site and shall examine all adjoining work which may have an impact on such Work. Design-Builder shall be responsible for ensuring that the Design Documents and Construction Documents accurately depict all governing and adjoining dimensions and conditions.

2.3.5 Governmental Approvals
Design-Builder has no reason to believe that any Governmental Approval required to be obtained by Design-Builder will not be granted in due course and thereafter remain in effect so as to enable the Work to proceed in accordance with the Contract Documents. If any Governmental Approvals required to be obtained by Design-Builder must formally be issued in the name of ICTC, Design-Builder shall undertake all efforts to obtain such approvals, subject to ICTC’s reasonable cooperation with Design-Builder, including execution and delivery of appropriate applications and other documentation in a form Approved by ICTC. Design-Builder shall assist ICTC in obtaining any Governmental Approvals which ICTC may be obligated to obtain, including providing information requested by ICTC and participating in meetings regarding such approvals.

2.3.6 Progression of Work
Design-Builder shall at all times schedule and direct its Work to provide an orderly progression of the Work to achieve Substantial Completion and Final Acceptance by the applicable Completion Deadlines and in accordance with the Project Schedule, including furnishing such employees, materials, facilities and equipment and working such hours (including extra shifts and overtime operations) as may be necessary to achieve such goals, all at Design-Builder’s own expense, except as otherwise specifically provided in Section 13.

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

2.3.8 Organization
Design-Builder is a company duly organized and validly existing under the laws of the State of California, with all requisite power to own its properties and assets and carry on its business as now conducted or proposed to be conducted. Design-Builder is duly qualified to do business, and is in good standing, in the
State, and shall remain in good standing throughout the term of the Contract and for as long thereafter as any obligations remain outstanding under the Contract Documents. [Note to Drafter: If Design-Builder is a joint venture, limited or general partnership, or other similar business structure, executed contract to identify Design-Builder’s members and provide organizational information, qualification to do business, and good standing representations regarding each member.]

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

2.3.10 Legal, Valid and Binding Obligation
The Contract constitutes the legal, valid, and binding obligation of Design-Builder and, if applicable, of each member of Design-Builder, enforceable in accordance with its terms. If applicable, each Guarantor constitutes the legal, valid and binding obligation of Guarantor, enforceable in accordance with its terms.

2.3.11 False or Fraudulent Statements and Claims
Design-Builder recognizes that the requirements of the Program Fraud Civil Remedies Act of 1986, as amended, 31 U.S.C. § 3801 et seq. and the USDOT regulations, “Program Fraud Civil Remedies,” 49 C.F.R. Part 31, apply to its action hereunder. Accordingly, by signing the Contract, Design-Builder certifies or affirms the truthfulness and accuracy of any statement it has made, it makes, or it may make pertaining to the Contract. In addition to other penalties that may be applicable, Design-Builder also acknowledges that if it makes a false, fictitious, or fraudulent claim, statement, submission, or certification, the federal government reserves the right to impose the penalties of the Program Fraud Civil Remedies Act of 1986, as amended, on Design-Builder to the extent the federal government deems appropriate. Design-Builder also recognizes that the California False Claims Act (Government Code §12650 et seq) apply to its action hereunder.

2.4 Design Requirements
2.4.1 Required Approval
Approval by ICTC is required before commencing any Work that would necessitate a modification in the Basic Configuration, regardless of whether the modification is required by a Governmental Approval, is desired by Design-Builder for its benefit or for any other reason. Design-Builder acknowledges and agrees that constraints set forth in the Contract Documents, as well as Site conditions, environmental footprint, the Right of Way Requirements Maps and the requirement to obtain Approval, will impact Design-Builder’s ability to revise the Basic Configuration. ICTC commits to work in good faith with Design-Builder on all reasonable modifications and will not unreasonably withhold Approval of modifications.

2.4.2 Design Review Process; Compliance with Design
2.4.2.1 Design Review Process
Design-Builder shall furnish the Released for Construction Documents and other Design Documents to ICTC in accordance with Book 2, Section 5, “Quality Program”. Design-Builder shall obtain ICTC’s Approval of the Released for Construction Documents in accordance with Book 2, Section 5, “Quality Program,” and, if required, shall obtain ICTC’s acceptance or Approval of the other Design Documents (as applicable) in accordance with Book 2. ICTC shall have the right to review and comment on all Released for Construction Documents and other Design Documents for compliance with the requirements of the Contract Documents in accordance with Book 2, Section 5, “Quality Program”. Design-Builder shall notify
ICTC in writing within 14 Days after receipt of any such comments if Design-Builder believes incorporation of the comments would cause the Released for Construction Documents, other Design Documents or any Contract Documents to contain Errors in any respect or which would otherwise adversely affect in any manner the design or construction of the Project or the Project Schedule, and ICTC shall have the right to modify its comments. Any failure of Design-Builder to so notify ICTC shall constitute Design-Builder’s full acceptance of all responsibility for changes made to the Released for Construction Documents and other Design Documents in response to such ICTC comments and will be treated for all purposes hereunder as if Design-Builder had initiated such changes. Within 14 Days of receipt of comments (including modifications to previous comments) or such longer period as may be allowed by ICTC, Design-Builder shall revise and modify all such documents or materials so as to fully reflect all such comments.

2.4.2.2 Design Reviews Required by Third Parties
Design-Builder, in coordination with ICTC, shall be responsible for giving and obtaining all design reviews required by Utility Owners, Governmental Persons, Railroad owners, and any other Persons other than ICTC, as applicable.

2.4.2.3 Compliance with Contract Documents and Design
Design-Builder shall deliver the Project in accordance with and otherwise meet the requirements of the Contract Documents and Design Documents. To the extent of any conflicts between the Contract Documents and the Design Documents, the Contract Documents shall have precedence over the Design Documents.

2.4.3 Ownership of Design
Released for Construction Documents and other Design Documents become ICTC’s property upon preparation. Other documents prepared or obtained by Design-Builder in connection with the performance of its obligations under the Contract, including Construction Documents, studies, manuals, As-Built Documents, calculations, technical and other reports and the like, become ICTC’s property upon Design-Builder’s preparation or receipt thereof.

2.5 Alternative Technical Concepts
Alternative Technical Concepts (ATCs) were not allowed during the Proposal phase.

2.5.1 Reserved

2.5.2 Reserved

2.5.3 Reserved
3 INFORMATION SUPPLIED TO DESIGN-BUILDER; RESPONSIBILITY FOR DESIGN; DISCLAIMER

3.1 Information Supplied
ICTC has made available to Design-Builder information which is described in the Contract Documents and certain Reference Information Documents (RID) regarding the Project and has allowed Design-Builder access to the Site for purposes of inspection and testing.

3.2 Responsibility for Design
Design-Builder agrees that it has full responsibility for the design of the Project and that Design-Builder shall furnish the design of the Project, regardless of the fact that certain conceptual design work occurred and was provided to Design-Builder before the date of execution of the Contract. Design-Builder specifically acknowledges and agrees that:

a) The Basic Configuration is preliminary and conceptual in nature.

b) Design-Builder is not entitled to rely on and has not relied on (i) the RID or (ii) any other documents or information provided by ICTC, except to the extent specifically permitted in the Contract Documents.

c) Design-Builder is responsible for correcting any Errors in the Basic Configuration through the design and/or construction process as set forth in Book 2 without any increase in the Contract Price or extension of a Completion Deadline.

d) Design-Builder’s Warranties and indemnities hereunder cover Errors in the Project even though they may be related to Errors in the Basic Configuration or RID.

3.3 Reliance of Specified RID Information

3.3.1 No Other Liability Regarding RID
Design-Builder understands and agrees that ICTC shall not be responsible or liable in any respect for any loss, damage, injury, liability, cost or cause of action whatsoever suffered by any Design-Builder-Related Entity by reason of any use of any information contained in the RID or any action or forbearance in reliance thereon, except to the extent that ICTC has specifically agreed herein that Design-Builder shall be entitled to an increase in the Contract Price and/or extension of a Completion Deadline with respect to such matter. Design-Builder further acknowledges and agrees that (a) if and to the extent Design-Builder or anyone on Design-Builder’s behalf uses any of said information in any way, such use is made on the basis that Design-Builder, not ICTC, has approved and is responsible for said information, and (b) Design-Builder is capable of conducting and obligated hereunder to conduct any and all studies, analyses and investigations as it deems advisable to confirm or supplement said information, and that any use of said information is entirely at Design-Builder’s own risk and at its own discretion.

3.3.2 No Representation or Warranty Regarding Basic Configuration and RID
ICTC does not represent or warrant that the information contained in the basic configuration and RID is either complete or accurate or that such information conforms with the requirements of the Contract Documents. The foregoing shall in no way affect ICTC’s agreement herein to issue change orders in accordance with Section 13.
3.4 Professional Licensing Laws

ICTC does not intend to contract for, pay for, or receive any design services which are in violation of any professional licensing laws, and by execution of the Contract, Design-Builder acknowledges that ICTC has no such intent. It is the intent of the parties that Design-Builder is fully responsible for furnishing the design of the Project, although the fully licensed design firm(s) or individuals designated herein will perform the design services required by the Contract Documents. Any references in the Contract Documents to Design-Builder’s responsibilities or obligations to “perform” the design portions of the Work shall be deemed to mean that Design-Builder shall “furnish” the design for the Project. The terms and provisions of this Section 3.4 shall control and supersede every other provision of the Contract Documents with respect to this issue.
4 TIME WITHIN WHICH PROJECT SHALL BE COMPLETED; SCHEDULING

4.1 Time of Essence
Time is of the essence for this Contract.

4.2 Notices to Proceed

4.2.1 Issuance of NTP1
Design-Build shall begin performance of certain limited Work as directed and described in NTP1 issued by ICTC. Limited Work includes design Work and may include non-permanent construction, if specifically authorized in writing by ICTC, such as tree removal, clearing and grubbing, utility coordination, soil borings, and temporary construction. ICTC anticipates that it will issue NTP1 within 14 Days after all the following requirements have been fully satisfied with respect to the Work proposed to be performed:

a) Design-Build has notified ICTC in writing of the Work to be performed and has received ICTC Approval, which may require Released for Construction Documents with ICTC Approval.
b) All insurance policies and bonds required to be delivered to ICTC as set forth in Section 9 of the Contract have been received and Approved by ICTC and remain in full force and effect before the start of the Project.
c) Design-Build has submitted for ICTC Approval a Preliminary Schedule in accordance with Book 2, Section 4, "Project Schedule Management."
d) Approval of the Design Quality Management Plan and Document Management Plan in accordance with Book 2, Section 5, "Quality Program."
e) Acceptance of DBE Performance Plan in accordance with Exhibit E.
f) All Governmental Approvals necessary for construction of such portion of the Project have been obtained and all conditions of such Governmental Approvals that are a prerequisite to start of such construction have been performed.
g) All necessary rights of access for such portion of the Project have been obtained.

4.2.2 Issuance of NTP2
Design-Build shall begin performance of the remainder of the Work as directed and described in NTP2 issued by ICTC. ICTC anticipates that it will issue NTP2 within 14 Days after the occurrence of all of the following requirements have been fully satisfied:

a) Approval of the Baseline Schedule in accordance with Book 2, Section 4, “Project Schedule Management.”
b) Approval of the entire Quality Manual in accordance with Book 2, Section 5, “Quality Program.”
c) Approval of the Environmental Management Plan in accordance with Book 2, Section 7, “Environmental Compliance.”
d) Approval of the Transportation Management Plan in accordance with Book 2, Section 25, “Maintenance of Traffic.”
e) Design-Build has obtained Approval of the Storm Water Pollution Prevention Plan (SWPPP).
f) Design-Build has submitted a Utility Tracking Report.
g) Approval of the Visual Quality Management Plan in accordance with Book 2, Section 15, “Visual Quality Management.”
h) Design-Build has submitted Original Payment Breakdown in Book 2, Section 2.2.3.3 “Original Payment Breakdown.”
4.3 Completion Deadlines

4.3.1 Reserved

4.3.2 Substantial Completion Deadline
Design-Builder shall achieve Substantial Completion not to exceed 360 Working Days after execution of the Contract. Said deadline for Substantial Completion, is referred to herein as the “Substantial Completion Deadline.”

4.3.3 Final Acceptance Deadline
Design-Builder shall achieve Final Acceptance within [Insert Number of Working Days] Working Days following Substantial Completion. See Section 10.2.2 for Highway Planting Establishment requirements and Section 11.3 on Limitations on Payment. Said deadline for Final Acceptance, as it may be extended hereunder, is at ICTC’s sole discretion and is referred to herein as the “Final Acceptance Deadline.”

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

4.4 Project Schedule
Design-Builder shall deliver the Project, including planning, design, construction, management, development, and completion in accordance with the Project Schedule, as described in Book 2, Section 4, “Project Schedule Management.” Such schedule shall also be the basis for determining the amount of monthly progress payments to be made to Design-Builder.

4.5 Prerequisites for Start of Construction
Design-Builder shall not start construction (or recommence construction following any suspension) of any portion of the Project, except Work specifically authorized under NTP1, until all the following events have been fully satisfied with respect to the Work proposed to be constructed:

a) ICTC has issued a Notice to Proceed authorizing such Work.
b) All requirements of the Quality Manual that are a condition to construction have been met.
c) Design-Builder has furnished the Released for Construction Documents to ICTC and has received ICTC’s Approval thereof in accordance with Book 2, Section 5, “Quality Program,” relating to such portion of the Project, unless waived in writing by ICTC.
d) All Governmental Approvals necessary for construction of such portion of the Project have been obtained and all conditions of such Governmental Approvals or the application to the Governmental Persons which allow construction to proceed during the application process, that are a prerequisite to start of such construction have been performed.
e) All insurance policies and bonds required to be delivered to ICTC hereunder have been received and Approved by ICTC as applicable and remain in full force and effect.
f) All necessary rights of access for such portion of the Project have been obtained.
g) ICTC has Approved the Design Builder’s Safety Program.
h) Any additional conditions for construction set forth in the Contract Documents.
5 CONTROL OF WORK

5.1 Control and Coordination of Work

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

5.2 Safety

Design-Builder shall take all reasonable precautions 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 ICTC and its consultants, visitors to the Site, traffic and the public who may be affected by the Work. Design-Builder shall at all times comply with the Safety Management Plan as defined in Book 2, Section 2.4.2.1 “Design-Builder Safety Management Plan. Design-Builder shall immediately notify ICTC if Design-Builder believes that any Contract requirement creates a safety risk. By so doing, Design-Builder is not relieved of responsibility for safety on the Site. Should ICTC point out to Design-Builder a perceived safety hazard or lack of adequate warning devices and protective measures, that action by ICTC shall not relieve Design-Builder from responsibility for public safety. Conformance by Design-Builder with the Safety Management Plan or any other safety provisions in this Contract shall not relieve Design-Builder of its responsibility for safety on the Site.

5.3 Process to be Followed for Discovery of Certain Site Conditions

5.3.1 Notification to ICTC

5.3.1.1 Discovery of Certain Site Conditions

As a condition precedent to Design-Builder’s right to a Change Order, Design-Builder shall immediately notify ICTC via telephone or in person, to be followed immediately by written notification, if Design-Builder becomes aware of any of the following that were not previously identified in the Contract Documents: (a) any on-Site material that Design-Builder believes may contain Hazardous Materials that is required to be removed or treated, (b) any archeological, paleontological, cultural, or biological resources, or (c) any Differing Site Conditions. For situations falling under the scope of clause (a), Design-Builder’s written notice shall specify (i) whether the potential Hazardous Material is HM-1 or HM-2 and (ii) whether the potential Hazardous Material is located with ICTC’s existing Right of Way. Upon any such discovery, Design-Builder shall immediately stop Work in the affected area and secure the affected area pending receipt of direction from ICTC. Design-Builder shall not move or take from the Site any archeological, paleontological, cultural, or biological resources. ICTC will view the location within two (2) Working Days of receipt of such notification and will advise Design-Builder at that time whether Work can be resumed or whether further investigation is required. Any delay resulting from ICTC viewing the location up to two (2) Working Days shall not be considered an ICTC-Caused Delay.

5.3.1.2 Identified Conditions; Alternative Procedure

Notwithstanding the foregoing, Design-Builder shall not be obligated to stop Work upon discovery of any materials, resources, species, or conditions which the Contract Documents indicate are present in the location in question, provided, however, that Design-Builder shall provide prompt notice to ICTC of any such discovery. Furthermore, if any Governmental Approval specifies a procedure to be followed which differs from the procedure set forth herein, Design-Builder shall follow the procedure set forth in the Governmental Approval.
5.3.2 Further Investigation and Mitigation Work
Design-Builder shall promptly conduct such further investigation as ICTC deems appropriate.
If Differing Site Conditions are discovered, Design-Builder shall advise ICTC within one (1) Working Day after the initial notification to ICTC required in Section 5.3.1, of any action recommended to be taken regarding the situation in a written action plan. ICTC then will determine whether Design-Builder’s findings and proposed actions are acceptable within three (3) Working Days of receipt of Design-Builder’s proposed action plan and either Approve, or require modification of, Design-Builder’s proposed action plan.
If Hazardous Materials are involved, see Book 2, Section 7, “Environmental Compliance.”
If archeological, paleontological, cultural, or biological resources are present, ICTC will either perform the necessary Mitigation Work or direct Design-Builder to perform the necessary Mitigation Work pursuant to a Change Order issued under Section 13.

5.3.3 Recomence Work
ICTC shall have the right to require Design-Builder to recommence Work in the area at any time, even though an investigation may still be ongoing (so long as such Work is not in violation of any Governmental Rules or Governmental Approvals). Design-Builder shall promptly recommence Work in the area upon receipt of notification from ICTC to do so. On recommencing Work, Design-Builder shall follow all applicable procedures contained in the Contract Documents and all other Governmental Rules with respect to such Work, consistent with ICTC’s determination or preliminary determination regarding the nature of the material, resources, species, or condition.

5.4 Obligation to Minimize Impacts
Design-Builder shall ensure that all of its activities and the activities of all Design-Builder-Related Entities are undertaken in a manner that will minimize the effect on surrounding property and the public to the maximum extent practicable. Design-Builder and all Design-Builder-Related Entities shall perform Work as to offer the least possible obstruction and inconvenience to the public and shall have under construction no greater length or amount of Work that can be prosecuted properly with due regard to the rights of the public.

5.5 Quality Management
5.5.1 Design-Builder Quality Management
Design-Builder shall perform the quality management necessary for Design-Builder to comply with its obligations under the Contract Documents.

5.5.2 Oversight, Inspection, and Testing by ICTC and Others
All materials and each part or detail of the Work shall also be subject to oversight, inspection, and testing by ICTC and other Persons designated by ICTC. When any Utility Owner is to accept or pay for a portion of the cost of the Work, its respective representatives have the right to oversee, inspect, and test the Work. Such oversight, inspection, and/or testing does not make such Person a party to the Contract nor will it change the rights of the parties hereto. Design-Builder hereby consents to such oversight, inspection, and testing. Upon request from ICTC, 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.

5.5.3 Obligation to Uncover Finished Work
At all times before Final Acceptance, Design-Builder shall remove or uncover such portions of the finished construction Work as directed by ICTC. After examination by ICTC and any other Persons designated by ICTC, Design-Builder shall restore the Work to the standard required by the Contract Documents. If the Work exposed or examined is not in conformance with the requirements of the Contract Documents, then
uncovering, removing, and restoring the Work and recovery of any delay to the Critical Path occasioned thereby shall be at Design-BUILDER’s expense and Design-BUILDER shall not be entitled to a time extension. Furthermore, any Work done or materials used without notice to and opportunity for prior inspection by ICTC as provided in Book 2, Section 5, “Quality Program” may be ordered uncovered, removed, or restored at Design-BUILDER’s expense and without a time extension, even if the Work proves acceptable after uncovering. Except with respect to Work done or materials used as described in the foregoing sentence, if Work exposed or examined under this Section 5.5.3 is in conformance with the requirements of the Contract Documents, then any delay in the Critical Path from uncovering, removing, and restoring Work shall be considered an ICfT-Caused Delay, and Design-BUILDER shall be entitled to a change Order for the cost of such efforts and recovery of any delay to the Critical Path occasioned thereby, subject to the provisions of Section 13.

5.6 Effect of Oversight, Spot Checks, Audits, Tests, Acceptances, and Approvals

5.6.1 Oversight and Acceptance
Design-BUILDER shall not be relieved of its obligation to perform the Work in accordance with the Contract Documents, or any of its other obligations under the Contract Documents, by oversight, spot checks, audits, reviews, tests, inspections, acceptances, or approvals by any Persons, or by any failure of any Person to take such action. The oversight, spot checks, audits, reviews, tests, inspections, acceptances, and approvals by any Person do not constitute Final Acceptance of the particular material or Work, or waiver of any legal or equitable right with respect thereto. ICTC may reject or require Design-BUILDER to remedy any Nonconforming Work and/or identify additional Work which shall be done to bring the Project into compliance with Contract requirements at any time prior to Final Acceptance, whether or not previous oversight, spot checks, audits, reviews, tests, inspections, acceptances, or approvals were conducted by any Person. ICTC’s Approval of Design Documents for construction as described by the Contract Documents shall constitute Approval of the design by ICTC for purposes of Government Code Section 830.6 but shall not be deemed to relieve Design-BUILDER of liability for the design.

5.6.2 No Estoppel
ICTC shall not be precluded or estopped, by any measurement, estimate, or certificate made either before or after Final Acceptance and payment therefor, from showing that any such measurement, estimate, or certificate is incorrectly made or untrue, or from showing the true amount and character of the Work performed and materials furnished by Design-BUILDER, or from showing that the Work or materials do not conform in fact to the requirements of the Contract Documents. Notwithstanding any such measurement, estimate or certificate, or payment made in accordance therewith, ICTC shall not be precluded or estopped from recovering from Design-BUILDER and its Surety(ies) such damages as ICTC may sustain by reason of Design-BUILDER’s failure to comply or to have complied with the terms of the Contract Documents.

5.7 Nonconforming Work

5.7.1 Rejection, Removal and Replacement of Work
Subject to ICTC’s right, in its sole discretion, to accept or reject Nonconforming Work, Design-BUILDER shall remove and replace rejected Nonconforming Work so as to conform with the requirements of the Contract Documents, at Design-BUILDER’s expense and without any time extension; and Design-BUILDER shall promptly stop the Work, submit a written plan for ICTC Approval and take all action necessary to prevent similar deficiencies from occurring in the future. The fact that ICTC may not have discovered the Nonconforming Work shall not constitute an acceptance or Approval of such Nonconforming Work. The Design-BUILDER shall, within five (5) Days of the identification of construction-related Nonconforming Work, propose a resolution for ICTC’s Approval. Following Approval of the proposed resolution, the Design-BUILDER shall notify ICTC 24 hours before implementing the proposed resolution so that ICTC may
witness the implementation, if ICTC so chooses. If Design-Builder fails to correct any Nonconforming Work within 10 Days ICTC’s Approval of the proposed resolution (or, for Nonconforming Work which cannot be corrected within 10 Days, if Design-Builder fails to provide to ICTC a schedule for correcting any such Nonconforming Work Approved by ICTC within such ten Day period, begin correction within such 10 Day period and thereafter diligently prosecute such correction in accordance with such Approved schedule to completion), then ICTC may cause the Nonconforming Work to be remedied or removed and replaced, and may deduct the cost of doing so from any moneys due or to become due Design-Builder and/or obtain reimbursement from Design-Builder for such cost.

5.7.2 Acceptance of Nonconforming Work

ICTC may, in its sole discretion, accept any Nonconforming Work without requiring it to be fully corrected, and shall be entitled to a pay adjustment (or reimbursement of a portion of the Contract Price, if applicable). In certain events, it may not be possible for the Nonconforming Work to be made to conform to the requirements of the Contract Documents, including, without limiting the foregoing, Design-Builder’s failure to perform such items to be paid in equal monthly amounts indicated in Book 2, Section 2.2, “Cost Management,” during a required time period. In general, the pay adjustment (or reimbursement) shall equal, at ICTC’s election, (a) Design-Builder’s cost savings associated with its failure to perform the Work in accordance with the Contract requirements, and/or (b) the amount deemed appropriate by ICTC to provide compensation for impacts to affected parties such as future maintenance and/or other costs relating to the Nonconforming Work. In certain events, ICTC shall be entitled to a pay adjustment (or reimbursement) as expressly set forth elsewhere in the Contract Documents.
6 ACCESS TO SITE; UTILITY RELOCATIONS; ENVIRONMENTAL MITIGATION

6.1 Access to Site

6.1.1 Access to Right of Way Identified on Right of Way Requirements Maps

6.1.1.1 Obligation to Provide Access to Right of Way
ICTC shall provide access to the Right of Way identified on the Right of Way Requirements Map.

6.1.1.2 Right of Way Access Requirements
 Concurrently with review of the Baseline Schedule, Design-Builder and ICTC shall discuss the access requirements for the Right of Way identified on the Right of way Requirements Maps associated with the scheduled activities, mutually determine which parcels are on the Critical Path and establish dates to be included in the Baseline Schedule for activities associated with provision of access. Design-Builder shall be provided access to those parcels identified on the Right of way Requirements Maps that have not been obtained by the Proposal Due Date no later than the deadline specified in Book 2, Section 11, “Right of Way”. For Approval, the Baseline Schedule shall be structured to provide reasonable work-arounds to progress the Project until these parcels become available, and reasonably minimize dependence on these parcels.

6.1.1.3 Delay in Providing Access
If ICTC at any time determines it will be unable to provide access to a particular parcel by the scheduled date (on the Book 2, Exhibit 11B, “Right of Way Status Chart”), ICTC shall notify Design-Builder regarding the revised projected date for delivery of access 45 days before the current scheduled date for delivery of access. Design-Builder shall take appropriate action to minimize any cost and time impact and shall work-around such parcel until access can be provided, including rescheduling and resequencing Work so as to avoid any delay to the Project. Subject to Section 6.1.1.4, to the extent that a delay to the Critical Path cannot be avoided, such delay to the Critical Path shall be considered an ICTC-Caused Delay.

6.1.1.4 Obligation to Provide Written Notice
In addition to the requirements of Section 6.1.1.3, and as a necessary condition for obtaining any increase in the Contract Price or extension of a Completion Deadline related to ICTC’s delivery of access to the parcels identified on the Right of way Requirements Maps, Design-Builder shall provide ICTC with a 30-Day written notice when lack of availability of a given parcel will result in an impact to the cost or schedule.

6.1.2 Access to Right of Way Not Identified on Right of Way Requirements Maps

6.1.2.1 Unidentified Right of Way as a Result of an ICTC-Directed Change
Any Right of Way not identified on the Right of way Requirements Maps that is required as the result of an ICTC-Directed Change will be addressed in the respective Change Order for the ICTC-Directed Change.

6.1.2.2 Right of Way Associated with a Design-Builder Initiated Change Order
The cost of obtaining any Right of Way not identified on the Right of way Requirements Maps associated with a Design-Builder-initiated Change Order under Section 13.3 will be considered in determining the Contract Price adjustment under Section 13.
6.1.2.3 Reimbursement of ICTC Costs
Subject to ICTC Approval, Design-Builder shall reimburse ICTC for any costs (including attorneys’, accountants’, and expert witness fees and costs) of acquiring any real property that is not ICTC’s responsibility under Sections 6.1.1.1, 6.1.2.1 or 6.1.2.2 which Design-Builder determines is necessary or advisable in order to complete the Project, including obtaining any Construction Easements. ICTC may deduct such amounts from payments otherwise owing hereunder or may separately invoice Design-Builder. Design-Builder shall reimburse ICTC for any such amounts paid by ICTC within 10 Days after receipt of an invoice from ICTC therefor.

6.1.2.4 Additional Requirements
Additional requirements applicable to Design-Builder are set forth in Book 2, Section 11, “Right of Way”.

6.2 Utility Relocations
This Section 6.2 describes how the risk of increased costs and delays associated with the Utility Work is allocated between ICTC and Design-Builder through the Change Order process, and contains certain additional terms relating to Utility Work to supplement those set forth in Book 2, Section 12, “Utilities”. Design-Builder agrees that (a) the Contract Price covers all of the Relocations and other Utility Work to be furnished or performed by Design-Builder described in Book 2, Section 12, “Utilities” and in this Section 6.2, and (b) it is feasible to obtain and/or perform all necessary Utility Work within the time deadlines of the Contract Documents. Accordingly, Design-Builder shall be entitled to receive a Change Order for additional costs and delays associated with the Utility Work only as permitted by this Section 6.2 or in circumstances for which such a Change Order is otherwise permitted under Section 13 (such as for ICTC-Directed Changes which increase the Utility Work to be furnished or performed by Design-Builder). A deductive Change Order for reductions in the Utility Work to be furnished or performed by Design-Builder shall be issued only when permitted by this Section 6.2 or in circumstances for which a deductive Change Order is otherwise permitted under Section 13. Notwithstanding the foregoing, Design-Builder’s entitlement to any Change Orders pursuant to Section 13 relating to the Utility Work shall be subject to any applicable limitations and restrictions set forth in this Section 6.2, and Design-Builder’s entitlement to any Change Orders pursuant to this Section 6.2 shall be subject to the limitations, restrictions, and procedures set forth in Section 13, except as otherwise set forth in Section 6.2.8.

6.2.1 Accuracy of Design and Data
6.2.1.1 “Reasonable Accuracy” Defined
6.2.1.1.1 Reasonable Accuracy
For purposes of Sections 6.2.1.1 and 6.2.1.2, a Utility shall be deemed indicated with reasonable accuracy if:

a) With respect to the “Quality Level A” Utility information provided by ICTC (as indicated therein), the Utility’s actual location is within 2 feet of the indicated horizontal and vertical locations at the “xyz” coordinates in the utility plan sheets or pothole matrices showing Verified Utility Information in Book 2, Section 12, “Utilities.”

b) With respect to the “Quality Level B” Utility information provided by ICTC (as indicated therein), the Utility’s actual location is within 2 feet of the indicated horizontal location at the “xy” coordinates in the utility plan sheets or pothole matrices showing Verified Utility Information in Book 2 (with no limitation on vertical location).
6.2.1.2 Inconsistency Among Verification Data Sheets
If there is any inconsistency between any two (2) or more utility plan sheets or pothole matrices showing Verified Utility Information cited in Section 6.2.1.3, the most accurate of the indications will be used for purposes of Section 6.2.1.3.

6.2.1.3 Design-Builder Acknowledgment Regarding RID
Design-Builder acknowledges that statements in the RID as to the extent or nature of the Work required to Relocate any Utility shall have no relevance to the determination of reasonable accuracy and shall not be considered in calculating the amount of the Change Order, if any, to which either party is entitled pursuant to this Section 6.2.1.

6.2.1.2 Inaccuracy Increasing the Work
In general, if any existing underground Utility identified in Book 2, Section 12, “Utilities,” as part of the Work (or any portion of such Utility) is not indicated at all in the utility plan sheets or pothole matrices showing Verified Utility Information provided in Book 2 or is not indicated therein with “reasonable accuracy” (as defined in Section 6.2.1.1) therein, then, upon Design-Builder’s fulfillment of all applicable requirements of Section 13, and subject to the limitations contained therein, ICTC shall be responsible for, and agrees to issue a Change Order to (a) compensate Design-Builder for additional costs of the Utility Work (other than Betterments added to the Work pursuant to Section 6.2.4) to be furnished or performed by Design-Builder which are directly attributable to such lacking or incorrect information and/or (b) to extend the Completion Deadlines as a result of any delay in the Critical Path caused by any such conditions. Notwithstanding the foregoing, Design-Builder shall be responsible for, and no Change Order shall be issued under this Section 6.2.1.2 with respect to:

a) Any Utility (or portion thereof) which a surface inspection of the area would have shown the existence or the likelihood of existence thereof in the correct location and/or size, as applicable, by reason of above-ground facilities such as buildings, meters, junction boxes or identifying markers.

b) Service Lines.

6.2.1.3 Inaccuracy Decreasing the Work
If any existing underground Utility identified in Book 2, Section 12, “Utilities” as part of the Work (or any portion of such Utility) is not indicated with “reasonable accuracy” in the utility plan sheets or pothole matrices showing Verified Utility Information provided in Book 2, then ICTC shall have the right to issue a Change Order reducing the Contract Price and/or Completion Deadlines to reflect the value of any reduction in the costs and/or duration of the Utility Work (other than Betterments added to the Work pursuant to Section 6.2.4) to be furnished or performed by Design-Builder which is directly attributable to the correction of such information. The amount of any such Change Order shall be determined in accordance with Section 13.

6.2.1.4 Partial Inaccuracy
If only a portion of an existing underground Utility identified in Book 2, Section 12, “Utilities” is not indicated at all in the utility plan sheets or pothole matrices showing Verified Utility Information provided in Book 2 or is not indicated with “reasonable accuracy” therein, then a Change Order pursuant to Sections 6.2.1.2 or 6.2.1.3 shall be allowed only for the resulting increased or decreased costs (respectively) of the Utility Work incurred by Design-Builder with respect to that portion of such Utility (subject, in the case of any increase in the Contract Price, to the restrictions set forth in clauses (a), (b), (c), (d), and (e) of Section 6.2.1.2).
6.2.2 Change in Allocation of Responsibility

6.2.2.1 Change in Allocation of Responsibility Increasing the Work
The scope of the Work with respect to Utilities may be increased by reallocating Utility Work from a Utility Owner to Design-Build by Change Order. Upon Design-Build’s fulfillment of all applicable requirements of Section 13, and subject to the limitations contained therein, Design-Build shall be entitled to an increase in the Contract Price to compensate Design-Build for its additional costs directly attributable to any increase in the scope of the Work pursuant to this Section 6.2.2.1; provided, however, that if ICTC determines in its sole discretion that ICTC is entitled to reimbursement by the Utility Owner for the cost of such Relocation, then the amount of such resulting increase in the Contract Price shall instead be determined in the same manner as that provided in Section 6.2.4 for a Betterment, subject to the requirements of any applicable Utility Agreement. Design-Build is responsible for scheduling all Utility Work so as to minimize delays, without regard to whether such Utility Work is performed by Design-Build or the affected Utility Owner.

6.2.2.2 Change in Allocation of Responsibility Decreasing the Work
Any Utility Work initially included in the scope of the Work may be deleted from the scope of the Work pursuant to either of the following:

a) The scope of the Work may be reduced pursuant to Book 2, Section 12.2.3.3, “Changes in Design-Build’s Work.”

b) Upon Approval or direction by ICTC, design and/or construction of Utility Relocations identified in Book 2, Section 12.2.3.3, “Changes in Design-Build’s Work,” or Incidental Utility Work may be removed from the Work.

ICTC shall be entitled to a reduction in the Contract Price to reflect any reduction in the scope of the Work pursuant to this Section 6.2.2.2. The amount of any such deductive Change Order shall be determined in accordance with Section 13. Any reduction in the scope of the Work pursuant to this Section 6.2.2.2 shall not be considered an ICTC-Directed Change.

6.2.3 Added Utility Work
Upon Design-Build’s fulfillment of all applicable requirements of Section 13, and subject to the limitations contained therein, Design-Build shall be entitled to (a) an increase in the Contract Price to compensate Design-Build for its additional costs, and/or (b) an extension of the applicable Completion Deadlines as the result of any delay in the Critical Path directly attributable to any Utility Work added after the Proposal Due Date in accordance with Book 2, Section 12.2.3.3, “Changes in Design-Build’s Work.”

6.2.4 Betterments
Utility Betterments may be added to the Work pursuant to this Section 6.2.4 and Book 2, Section 12.2.3.4, “Betterments.”

6.2.4.1 Procedure
Any Utility Owner may request ICTC to permit Design-Build to perform work relating to Betterments as a part of the Work, at the Utility Owner’s expense. If ICTC Approves any such request, Design-Build will have the obligation to perform such work, with the right to receive additional payment and an extension of any affected Completion Deadline to the extent that any delay in the Critical Path is directly attributable to the Betterment. The price charged by Design-Build for such Betterment shall either be a lump sum amount negotiated with the Utility Owner or determined on a time and materials cost basis as specified below. Any extension of any Completion Deadline(s) or Contract Price increase requested for any Betterment shall be subject to the requirements of Sections 6.2 and 13, as applicable.
6.2.4.1.1 Pricing
If a Utility Owner requests that Design-Builder design and/or construct a Betterment, Design-Builder shall use its best efforts to negotiate a lump sum price or unit prices for such work with the Utility Owner, in good faith. If Design-Builder and the Utility Owner are unable to agree on a lump sum price or unit prices, then ICTC will direct Design-Builder to perform such work on a time and materials basis pursuant to Section 13.7, provided that the conditions set forth in Section 6.2.4.1.3 are satisfied.

6.2.4.1.2 Change Order Increasing the Contract Price
A proposed Betterment will be added to the scope of the Work if Approved by ICTC pursuant to Section 6.2.4.1.3. ICTC agrees to issue a Change Order increasing the Contract Price on account of any Betterment added to the Work pursuant to this Section 6.2.4.1. The amount of any Change Order issued under this Section 6.2.4.1 shall be a direct pass-through of the lump sum price negotiated by Design-Builder and the Utility Owner (with no additional mark-ups) or, if no such price has been negotiated, an amount determined on a time and materials basis pursuant to Section 13.7. Design-Builder shall not request or accept any payment directly from the Utility Owner for any Betterment added to the Work.

6.2.4.1.3 ICTC’s Approval of Betterments
ICTC will Approve the addition of a Betterment to the scope of the Work under this Section 6.2.4.1 only if (a) the Utility Owner has agreed to the addition of such Betterment to the Work, (b) such Betterment is compatible with the Project, (c) the Utility Owner has agreed to reimburse ICTC for all the costs thereof, (d) the Utility Owner has agreed as to the method (e.g., negotiated lump sum amount, unit prices or time and materials cost basis) of pricing such work, and (e) it is feasible to separate the cost/pricing of the Betterment work from that for any related Utility Work being furnished or performed by Design-Builder. Design-Builder shall provide ICTC with such information, analyses, and certificates as may be requested by ICTC in connection with its Approval.

6.2.4.1.4 Change Order Reducing the Contract Price
If any Betterment has been added to the Work and the Contract Price has been increased accordingly by Change Order, but subsequently for any reason the Betterment is deleted from the Work, or the scope of Design-Builder’s Work with regard to such Betterment is materially reduced, then ICTC shall be entitled to issue a Change Order reducing the Contract Price to reflect the value of any reduction in the costs of the Work that is directly attributable to such deletion or reduction. Such Change Order shall be equal to the lump sum amount added to the Contract Price pursuant to Section 6.2.4.1.2, if applicable and if the entire Betterment has been deleted from the Work; otherwise, the amount of such Change Order shall be determined in accordance with Section 13.

6.2.4.1.5 Betterment Not Considered ICTC-Directed Change
Any change in the scope of the Work pursuant to this Section 6.2.4 shall not be considered an ICTC-Directed Change.

6.2.5 Utility Delays
Design-Builder shall give written notice to ICTC of any circumstance which may lead to a claim under this Section 6.2.5 immediately after Design-Builder’s becoming aware that such circumstance has occurred or is likely to occur.

6.2.5.1 Allocation of Risk of Schedule Impacts
Design-Builder shall bear the risk of schedule impacts associated with the first four (4) Days of Utility Delays per Utility Owner for the Project not to exceed forty (40) Days for all Utility Delays by all Utility Owners. Subject to the limitations and conditions set forth herein, if aggregate Utility Delays caused by a particular Utility Owner exceed four (4) Days or if aggregate Utility Delays caused by all Utility Owners exceed forty 40 Days, then any Completion Deadline(s) affected thereby shall be extended for one (1) Day
for every Day of Utility Delay caused by such Utility Owner(s) in excess of these limits identified in this Section 6.2.5.1 so long as the Utility Delay impacts the Project’s Critical Path.

Failure of the parties to reach agreement regarding Design-Builders’ entitlement to an extension due to Utility Delays shall be a Dispute to be resolved in accordance with Section 19. Design-Builders shall not be entitled to any extension of any Completion Deadline on account of any Utility Delay except as provided in this Section 6.2.5.1.

6.2.5.2 Conditions to Extensions for Utility Delays

With respect to each Utility Delay claimed by Design-Builders, Design-Builders shall not be entitled to any extension of any Completion Deadline pursuant to Section 6.2.5.1, and such Utility Delay shall not be counted toward the four (4) Day cap on Design-Builders’ risk per Utility Owner set forth in Section 6.2.5.1, unless all of the following conditions are satisfied:

a) Design-Builders has provided evidence reasonably satisfactory to ICTC that (i) Design-Builders has fulfilled its obligation under the applicable Utility Agreement(s) to coordinate with the Utility Owner to prevent or reduce such delays, and (ii) Design-Builders has otherwise made diligent efforts to obtain the timely cooperation of the Utility Owner but has been unable to obtain such timely cooperation.

b) If Design-Builders is responsible for the Relocation, Design-Builders has provided a reasonable Relocation plan to the Utility Owner and Design-Builders has obtained, or is in a position to timely obtain, all applicable approvals, authorizations, certifications, consents, exemptions, filings, leases, licenses, permits, registrations, options, and/or rulings required by or with any Governmental Person in order to design and construct such Relocation.

c) No circumstances exist which have delayed or are delaying the affected Relocation, other than those which fit within the definition of a Utility Delay.

6.2.5.3 Concurrent Delays

To the extent one or more Utility Delays is or are concurrent with any other delay which is Design-Builders’ responsibility hereunder but which is not a Utility Delay, whether or not such other delay is on the Critical Path, then such Utility Delay(s) shall not be considered in calculating any four (4) Day cap on Design-Builders’ risk pursuant to Section 6.2.5.1. Furthermore, to the extent two (2) or more Utility Delays occur concurrently with each other (whether caused by the same Utility Owner or by different Utility Owners), then only one (1) of such Utility Delays shall be considered in calculating a four (4) Day cap on Design-Builders’ risk pursuant to Section 6.2.5.1 (in selecting between two (2) or more Utility Owners for such purpose, the Utility Delay caused by the Utility Owner with the least amount of accrued Utility Delay shall be selected and applied to the four (4) Day cap on Design-Builders’ risk for such Utility Owner).

6.2.6 Certain Obligations of Design-Builders; Utility-Related Right of Way Costs

6.2.6.1 Multiple Relocations of the Same Utility

Design-Builders shall endeavor to avoid multiple Relocations of the same Utility, whether by the Utility Owner or by Design-Builders. Accordingly, after a Utility has been Relocated once in order to accommodate the Project, Design-Builders shall be responsible for all costs incurred by either Design-Builders or the Utility Owner in order to subsequently Relocate such Utility to accommodate the Project. If the Utility Owner performs such subsequent Relocation at ICTC’s expense, then Design-Builders shall reimburse ICTC for all amounts paid by ICTC to such Utility Owner in reimbursement for such subsequent Relocation. If Design-Builders performs such subsequent Relocation, then Design-Builders shall not receive any extension of any Completion Deadline or increase in the Contract Price on account of the performance of such subsequent Relocation.
6.2.6 Minimizing ICTC’s Reimbursement Obligation
In designing and constructing the Project, Design-Build shall take all reasonable steps to minimize costs to the Utility Owners which will be subject to reimbursement by ICTC, to the extent practicable and otherwise consistent with other requirements of the Contract Documents.

6.2.6.3 Utility-Related Right of Way Costs

6.2.6.3.1 ICTC’s Responsibility
With respect to Utility Easements other than those described in Section 6.2.6.3.2, ICTC shall be responsible for any compensation required to be paid to Utility Owners for relinquishing their Utility Easements.

6.2.6.3.2 Design-Build’s Responsibility
With respect to Utility Easements resulting from a change in Basic Configuration, Design-Build shall be responsible for, and shall reimburse ICTC within 10 Days after receiving an invoice therefor, any compensation which ICTC may be obligated to pay to the Utility Owners for relinquishing such Utility Easements.

6.2.7 Additional Restrictions on Change Orders
In addition to all of the other requirements and limitations contained in this Section 6.2 and in Section 13, the entitlement of Design-Build to any Change Order under this Section 6.2 shall be subject to the restrictions and limitations set forth in this Section 6.2.7.

6.2.7.1 Burden of Proof
Design-Build shall provide adequate support, by documentation acceptable to ICTC, to prove that the amount of any additional costs and/or time incurred by Design-Build are both necessary and reasonable. For Relocations, Design-Build shall also bear the burden of proving that the Relocation cannot reasonably be avoided.

6.2.7.2 Incremental Costs Only
Any Change Order increasing the Contract Price pursuant to this Section 6.2 shall include only the Incremental Costs arising from the circumstances giving rise to such Change Order.

6.2.7.3 Coordination Costs
Design-Build shall not be entitled to an increase in the Contract Price for any costs of coordinating with Utility Owners or for assisting ICTC in coordinating with Utility Owners.

6.2.7.4 Voluntary Action by Design-Build
If Design-Build elects to make payments to Utility Owners or to undertake any other efforts which are not required by the terms of the Contract Documents, Design-Build shall not be entitled to a Change Order in connection therewith. Design-Build shall promptly notify ICTC of the terms of any such arrangements.

6.2.8 Special Provision Regarding Change Orders
Notwithstanding any contrary provision of Section 13, ICTC reserves the right, in its sole discretion, to waive certain of the requirements set forth in Section 13 with respect to any Change Order to be issued pursuant to this Section 6.2.

6.3 Environmental Compliance
In performance of the Work, Design-Build shall comply with all requirements of all applicable Environmental Laws and Governmental Approvals issued thereunder, whether obtained by ICTC or
Design-Build. Design-Build acknowledges and agrees that it shall be responsible for all fines and penalties that may be assessed in connection with any failure to comply with such requirements.

6.3.1 Mitigation Requirements
Design-Build shall perform all environmental commitments (which term shall be deemed to include all avoidance, minimization and/or mitigation measures associated with the approval of the Environmental Document for the Project, including all related requirements of the Environmental Approvals and similar Governmental Approvals, regardless of whether such requirements would be considered to fall within a strict definition of the term) for the Project. The Contract Price includes compensation for Design-Build’s performance of all environmental commitments (avoidance, minimization, and/or mitigation measures) and for performance of all environmental commitments arising from New Environmental Approvals which Section 6.3.2 designates as Design-Build’s responsibility as well as the cost of all activities to be performed by Design-Build as described in Book 2, Section 7, “Environmental Compliance”.

6.3.2 New Environmental Approvals

6.3.2.1 Approvals To Be Obtained by ICTC
ICTC shall be responsible for obtaining any New Environmental Approvals necessitated by an ICTC-Directed Change, ICTC-Caused Delay, change in a Governmental Rule under Section 13.3.1.2(d)(v), or Force Majeure event. Design-Build shall provide support services to ICTC with respect to obtaining any such New Environmental Approval. Any Change Order covering an ICTC-Directed Change, ICTC-Caused Delay, change in a Governmental Rule under Section 13.3.1.2(d)(v), or Force Majeure event may include compensation to Design-Build for any changes in the Work (including performance of additional avoidance, minimization, and/or mitigation measures but excluding performance of such support services) resulting from such New Environmental Approvals, and any time extension necessitated by an ICTC-Directed Change, ICTC-Caused Delay, change in Governmental Rule under Section 13.3.1.2(d)(v), or Force Majeure event, subject to the conditions and limitations contained in Section 13.

6.3.2.2 Approvals To Be Obtained by Design-Build
If a New Environmental Approval becomes necessary for any reason other than those specified in Section 6.3.2.1, Design-Build shall be fully responsible for the cost and delay of obtaining the New Environmental Approval and any other environmental approvals that may be necessary, for all requirements resulting therefrom, and for any litigation arising in connection therewith. ICTC will reasonably assist Design-Build in obtaining any New Environmental Approvals. ICTC will be the implementing agency for any CEQA or NEPA reevaluations or approvals.
7 EQUAL EMPLOYMENT OPPORTUNITY; SUBCONTRACTS; LABOR

7.1 Equal Employment Opportunity

7.1.1 Equal Employment Opportunity Policy
Design-Builder shall comply with the Equal Employment Opportunity (EEO) requirements set forth in Exhibits D and F. Under 49 CFR 26.13(b), Design-Builder and each Subcontractor or Subconsultant shall comply with the following:

The Design-Builder, sub recipient or Subcontractor shall not discriminate on the basis of race, color, national origin, or sex in the performance of this Contract. The Design-Builder shall carry out applicable requirements of 49 CFR part 26 in the award and administration of United States Department of Transportation (DOT)-assisted contracts. Failure by the Design-Builder to carry out these requirements is a material breach of this Contract, which may result in the termination of this Contract or such other remedy as the recipient deems appropriate, which may include:

a) Withholding monthly progress payments.
b) Assessing sanctions.
c) Liquidated damages.
d) Disqualifying the Design-Builder from future bidding as non-responsible.

Design-Builder shall include this language in each Subcontract.

7.1.2 Inclusion in Subcontracts
Design-Builder shall include Section 7.1.1 and Exhibits D and F in every Subcontract over $10,000 (including purchase orders) and shall require that they be included in all Subcontracts over $10,000 at lower tiers, so that such provisions shall be binding upon each Subcontractor.

7.2 Disadvantaged Business Enterprises

7.2.1 Disadvantaged Business Enterprises Policy
Design-Builder shall comply with the requirements set forth in Exhibit E.

7.2.2 Inclusion in Subcontracts
Design-Builder shall include Section 7.2.1 and Exhibit E in every Subcontract (including purchase orders) and shall require that they be included in all Subcontracts at lower tiers, so that such provisions shall be binding upon each Subcontractor.

7.3 Subcontracting Requirements
Design-Builder shall comply with all applicable requirements of the Contract Documents relating to Subcontracts (including Exhibits D, E and F), and shall ensure that its Subcontractors (at all tiers) comply with all applicable requirements of the Contract Documents relating to subcontracting (including Exhibits D, E and F).

7.3.1 Major Participants
Design-Builder shall not add, delete, or change the role of any Major Participant as set forth in its Proposal without the prior Approval of ICTC.
7.3.2 **Assignment of Subcontract Rights**
Each Subcontract shall provide that, pursuant to terms in form and substance satisfactory to ICTC, (a) ICTC is a third party beneficiary of the Subcontract and shall have the right to enforce all terms of the Subcontract for its own benefit, (b) all guarantees and warranties, express and implied, shall inure to the benefit of ICTC, its successors and assigns, as well as Design-Builder, and (c) the rights of Design-Builder under such instrument are assigned to ICTC contingent upon delivery of written request from ICTC following default by Design-Builder or termination or expiration of the Contract, allowing ICTC to assume the benefit of Design-Builder’s rights with liability only for those remaining obligations of Design-Builder accruing after the date of assumption by ICTC, but shall not release or relieve Design-Builder from its obligations or liabilities under the assigned Subcontract.

7.3.3 **Subcontract Terms**
Each Subcontract shall include terms and conditions sufficient to ensure compliance by the Subcontractor with all applicable requirements of the Contract Documents and shall include provisions addressing the following requirements and any other terms that are specifically required by the Contract Documents to be included therein. Each Subcontract shall include terms that are substantially similar to those terms required by Sections 5.1, 5.2, 5.3, 5.4, 7.1 (as appropriate), 7.2, 7.3.1, 7.4.3, 10.1, 13.7, 14, 15, 19, 20.3, and 23.6 and Exhibits D (as appropriate), E, and F (as appropriate), specifically including an agreement by the Subcontractor to be joined in any dispute resolution proceeding pursuant to Section 19 if such joinder is reasonably necessary to resolve the dispute; and each Subcontract other than Subcontracts with Suppliers shall include terms that are substantially similar to those contained in Sections 2.2(e), 2.2(f), 2.2(h), 2.3.1, 21.3, 22.2 (as appropriate), 22.3, and 22.4.

7.3.4 **Subcontract Data**
Design-Builder shall notify ICTC, in writing, of the name and address of, licenses held by, and any insurance documents required pursuant to Section 9 of, each Subcontractor (excluding Suppliers), as soon as the potential Subcontractor has been identified by Design-Builder, but in no event less than fourteen (14) Days before the scheduled initiation of Work by such proposed Subcontractor.

Design-Builder shall provide requests to sublet any portion of the Contract to ICTC on a form provided by ICTC, at least 10 Days in advance of the date on which the Subcontractor intends to start Work. Design-Builder shall allow ICTC access to all Subcontracts and records regarding Subcontracts within seven (7) Days following receipt of ICTC’s request. All Subcontracts shall be in writing and shall include design costs (if applicable).

7.3.5 **Responsibility for Work by Subcontractors**
Notwithstanding any Subcontract or agreement with any Subcontractor, Design-Builder shall be fully responsible for all of the Work. ICTC shall not be bound by any Subcontract, and no Subcontract shall include a provision purporting to bind ICTC. Each Subcontract shall include the following provision:

“Nothing contained herein shall be deemed to create any privity of contract between the Imperial County Transportation Commission (ICTC) through its Executive Director and Subcontractor, nor does it create any duties, obligations or liabilities on the part of ICTC to Subcontractor except those allowed under California law. In the event of any claim or dispute arising under this Subcontract and/or Design-Builder’s Contract with ICTC, Subcontractor shall look only to Design-Builder for any payment, redress, relief or other satisfaction. Subcontractor hereby waives any claim or cause of action against ICTC arising out of this Subcontract or otherwise arising out of or in connection with Subcontractor’s Work.”

7.3.6 **Subcontract Work**
Design-Builder shall coordinate the Work performed by Subcontractors.
7.3.7 Debarred Subcontractors
Design-Builder shall not enter into any Subcontracts with any Person then debarred or suspended from submitting bids by any agency of the State.

7.4 Key Personnel; Character of Workers

7.4.1 Key Personnel
Exhibit G hereto identifies certain key positions for the Project. ICTC shall have the right to review the qualifications and character of each individual to be assigned to a key position (including personnel employed by Subcontractors) and to Approve or disapprove use of such key Person in such key position before the start of any Work by such individual or during the prosecution of the Work. Design-Builder shall notify ICTC in writing of any proposed changes in any Key Personnel and shall not change any Key Personnel without the prior written Approval of ICTC.

7.4.2 Representations, Warranties, and Covenants
Design-Builder acknowledges and agrees that the award of the Contract by ICTC to Design-Builder was based, in large part, on the qualifications and experience of the personnel listed in the Statement of Qualifications, the Proposal, and Design-Builder’s commitment that such individuals would be available to undertake and perform the Work. Design-Builder represents, warrants, and covenants that such individuals are available for and shall fulfill the roles identified for them in the Proposal in connection with the Work. Unless otherwise agreed to by ICTC in writing, individuals filling key personnel roles shall devote a sufficient amount of their time for the applicable role with respect to the prosecution and performance of the Work and Design-Builder shall document such commitment to ICTC’s satisfaction upon ICTC’s request.

7.4.3 Employee Performance Requirements
All individuals performing the Work by or on behalf of Design-Builder shall have the skill and experience and any licenses or certifications required to perform the Work assigned to them. If ICTC determines in its sole discretion that any Person employed by Design-Builder or by any Subcontractor is not performing the Work properly and skillfully, or who is intemperate or disorderly, then, at the written request of ICTC, Design-Builder or such Subcontractor shall remove such Person and such Person shall not be re-employed on the Project without the prior Approval of ICTC in its sole discretion. If Design-Builder or the Subcontractor fails to remove such Person(s) or fails to furnish skilled and experienced personnel for the proper performance of the Work, then ICTC may, in its sole discretion, suspend the affected portion of the Work by delivery of written notice of such suspension to Design-Builder. Such suspension shall in no way relieve Design-Builder of any obligation contained in the Contract Documents or entitle Design-Builder to a Change Order. Once compliance is achieved, Design-Builder shall be entitled to and shall promptly resume the Work.

Surveys performed to progress the construction activities on the Project are covered by the Contract labor requirements. The workers performing the Work shall be paid at a minimum wage based on the most similar trade or occupation as set forth in Exhibit F.

7.5 Labor Code Requirements

7.5.1 General Requirements
Design-Builder shall strictly adhere to the provisions of the Labor Code and implementing regulations, including requirements with respect to prevailing wages, and employment and training of apprentices, as more specifically described in Exhibit B. Design-Builder shall submit all mandated and requested documents/reports to ICTC in a timely manner.
7.5.2 **Nondiscrimination**
Design-Builder shall comply with the applicable provisions of the Labor Code and implementing regulations relating to labor nondiscrimination, and with the applicable federal requirements, including those more specifically set forth in Exhibit D.

7.5.3 **Department of Industrial Relations**
The California Department of Industrial Relations is responsible for monitoring and enforcing prevailing wage requirements of applicable labor laws to ensure that the Design-Builder and all Subcontractors working on the Project are in compliance with State (Division 2, Part 7, Chapter 1 of the Labor Code) and Federal (Code of Federal Regulations 29) prevailing wage statutes and regulations. Accordingly, the Project is subject to the requirements of DIR’s compliance monitoring and enforcement program as set forth in Title 8, Chapter 8, Subchapter 4.5 of the California Code of Regulations, which include, among other requirements, the obligation to furnish payroll records directly to the California Department of Industrial Relations Labor Commissioner.

7.5.4 **Notice**
Design-Builder shall post a notice at the Site containing the following language:

“This public works project is subject to monitoring and investigative activities by the Compliance Monitoring Unit (CMU) of the Division of Labor Standards Enforcement, Department of Industrial Relations, State of California. This Notice is intended to provide information to all workers employed in the execution of the contract for public work and to all contractors and other persons having access to the job site to enable the CMU to ensure compliance with and enforcement of prevailing wage laws on public works projects.

The prevailing wage laws require that all workers be paid at least the minimum hourly wage as determined by the Director of Industrial Relations for the specific classification (or type of work) performed by workers on the Project. These rates are listed on a separate job site posting of minimum prevailing rates required to be maintained by the public entity which awarded the public works contract. Complaints concerning nonpayment of the required minimum wage rates to workers on this Project may be filed with the CMU at any office of the Division of Labor Standards Enforcement (DLSE). Complaints should be filed in writing immediately upon discovery of any violations of the prevailing wage laws due to the short period of time following the completion of the Project that the CMU may take legal action against those responsible.

Complaints should contain details about the violations alleged (for example, wrong rate paid, not all hours paid, overtime rate not paid for hours worked in excess of eight (8) hours per day or forty (40) per week, etc.) as well as the name of the employer, the public entity which awarded the public works contract, and the location and name of the Project.

For general information concerning the prevailing wage laws and how to file a complaint concerning any violation of these prevailing wage laws, you may contact any DLSE office. Complaint forms are also available at the Department of Industrial Relations web site found at: [http://www.dir.ca.gov/Public-Works/PublicWorks.html](http://www.dir.ca.gov/Public-Works/PublicWorks.html)
8 SURETY BONDS

Design-Builder shall provide to ICTC and maintain at all times during the term of the Contract security for performance of the Work as described below (or other assurance satisfactory to ICTC in its sole discretion). Each bond required hereunder shall be provided by a Surety licensed as surety and qualified to do business in the State. The Surety shall have a “Best’s Rating” of A- or better and Financial Size Category of VIII or better by A.M. Best Co.

8.1 Payment and Performance Bonds

Design-Builder has provided to ICTC and shall maintain in full force and effect the Payment Bond in the form of Exhibit L in the amount of 100 percent of the Contract Price and the Performance Bond in the form of Exhibit K in the amount of 100 percent of the Contract Price.

8.2 Warranty Bond

After Final Acceptance has occurred, Design-Builder may obtain a release of the Performance Bond by providing to ICTC and maintaining full force and effect a warranty bond which shall guarantee performance of all obligations of Design-Builder that survive Final Acceptance under the Contract Documents. The warranty bond (a) shall be in an amount equal to four (4) percent of the Contract Price during the first two (2) years following Final Acceptance and shall be in an amount equal to two (2) percent of the Contract Price during the third year following Final Acceptance and (b) shall be in the form set forth in Exhibit M.

8.3 Utility Work

The Utility Work furnished or performed by Design-Builder hereunder will automatically be covered by the Payment and Performance Bonds and any warranty bond or other security to be provided by Design-Builder pursuant to Section 8.2. At their request, Utility Owners whose Utilities are being Relocated by Design-Builder shall be added as additional obligees to the Payment and Performance Bonds (as their interests may appear), and to such replacement bond or other security (as their interests may appear), to the limited extent of the amount of the Utility Work required on behalf of the Utility Owner. The Payment and Performance Bonds shall be provided in their full amount, however, on behalf of ICTC, with no riders that reduce ICTC’s potential of recovery based on the Utility Owner’s limited obligee amounts. Alternatively, Design-Builder may provide separate bonds satisfactory to the Utility Owners. Design-Builder shall provide all information necessary for such coverage to the surety(ies) providing such bonds. All cost estimates required to be provided under the Contract Documents with respect to Utility Work furnished or performed by Design-Builder shall include the cost of bond premiums.

8.4 Guaranty

Design-Builder shall provide to ICTC and shall maintain in full force and effect the Guaranty (if required). Each Guarantor (if any) shall have a credit rating for senior unsecured debt of at least Baal by Moody’s Investors Services or BBB+ by Standard & Poor’s Corporation.

8.5 No Relief of Liability

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

9.1 General Insurance Requirements

9.1.1 Evidence of Insurance
Design-Builder shall provide evidence of insurance as proof of compliance for all insurance requirements contained in this Section 9. Evidence of insurance in the form of copies of insurance policies, Certificates of Insurance, and any self-insurance coverage documentation, including the required “additional insured” endorsements, shall be furnished by Design-Builder to ICTC. The evidence of insurance shall provide that no lapse, cancellation, or reduction of coverage without thirty (30) days’ prior written notice to ICTC. Insurance policies and Certificates of Insurance, furnished as evidence of required insurance, for the General Liability, Umbrella-Excess Liability and Professional Liability (Errors and Omissions) policies shall set forth deductible amounts applicable to each policy and all exclusions which are added by endorsement to each policy. Allowance of any additional exclusions is at the sole discretion of ICTC. Regardless of the allowance of exclusions or deductions by ICTC, Design-Builder shall be responsible for any deductible amount and shall warrant that the coverage provided to ICTC is consistent with the requirements of Section 9 herein.

9.1.2 Submission of Insurance Documentation
Design-Builder shall submit, before starting of Work, the following:

- The Design-Builder’s General Liability Insurance shall be provided under Commercial General Liability policy form No. CG 00 01 as published by the Insurance Services office (ISO), or under a policy form at least as broad as policy form No. CG 00 01 and is not inconsistent with the provisions of Section 9 herein.
- Copy of its commercial general liability policy and its excess policy, including the declarations page, all amendments, riders, endorsements, and other modifications in effect at the time of Contract execution.
- Certificate of Insurance showing all other required coverages, including Professional Liability (Errors and Omissions), auto liability insurance, and workers compensation insurance. Design-Builder shall provide to ICTC, in advance of the start of Work, each policy and all exclusions, amendments, riders, declarations pages, and other modifications in effect at the time of Contract execution.

9.1.3 A.M. Best Rating
All insurance companies providing policies obtained to satisfy the insurance requirements shall have an A.M. Best rating of A- or better, a Financial Size Category of VII or better and be authorized to do business in the State of California.

9.1.4 Full Force and Effect
All policies shall remain in full force and effect throughout the term of the Project and, when there is an extended reporting period, shall remain in effect for the time stipulated. The Design-Builder shall maintain completed operations coverage with a carrier acceptable to ICTC through the expiration of the statute of repose set forth in Code of Civil Procedure Section 337.1.

9.1.5 No Recourse
There shall be no recourse against ICTC for payment of premiums or other amounts with respect to the insurance provided by Design-Builder, or for deductibles under these policies.
9.1.6 Indemnification and Duty to Defend
The insurance coverage provided hereunder shall support, but is not intended to limit, Design-Builder’s indemnification and duty to defend obligations under Section 18.

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

9.1.8 Deductibles
ICTC may expressly allow deductible clauses, which it does not consider excessive, overly broad, or harmful to the interests of ICTC. Regardless of the allowance of exclusions or deductions by ICTC, the Design-Builder is responsible for any deductible amount and shall warrant that the coverage provided to ICTC is in accordance with Section 9.

9.1.9 Self-Insurance
Self-insurance programs and self-insured retentions in insurance policies are subject to separate annual review and Approval by ICTC.

If Design-Builder uses a self-insurance program or self-insured retention, Design-Builder shall provide ICTC with the same protection from liability and defense of suits as would be afforded by first-dollar insurance. Execution of the Contract is the Design-Builder’s acknowledgement that the Design-Builder shall be bound by all laws as if the Design-Builder were an insurer as defined under Insurance Code Section 23 and that the self-insurance program or self-insured retention shall operate as insurance as defined under Insurance Code Section 22.

9.1.10 Enforcement
ICTC may take any steps necessary to assure Design-Builder’s compliance with its insurance obligations. Should any insurance policy lapse or be canceled during the Contract period Design-Builder shall, no less than 30 days before the effective expiration or cancellation date, furnish ICTC with written evidence of renewal or replacement of the policy. Failure to continuously maintain insurance coverage as herein required is a material breach of this Contract. The required insurance shall be subject to the Approval of ICTC, but any acceptance of copies of insurance policies, insurance certificates, and self-insurance documentation by ICTC shall in no way limit or relieve Design-Builder of its duties and responsibilities under this Contract to indemnify, defend, and hold harmless ICTC, its officers, agents, and employees. Insurance coverage in the minimum amounts set forth herein shall not be construed to relieve Design-Builder for liability in excess of such coverage, nor shall it preclude ICTC from taking other actions available to it under any other provision of the Contract or law, including the withholding of funds under this Contract. Failure of ICTC to enforce in a timely manner any of the provisions of Section 9 shall not act as a waiver to enforcement of any of these provisions at a later time.

If Design-Builder fails to maintain any required insurance coverage, ICTC may maintain this coverage and withhold or charge the expense to Design-Builder or terminate the Design-Builder’s control of the Work in accordance with Section 16.

Design-Builder is not relieved of its duties and responsibilities to indemnify, defend, and hold harmless ICTC, its officers, agents, and employees by ICTC’s acceptance of insurance policies and certificates.
Minimum insurance coverage amounts do not relieve Design-Builder for liability in excess of such coverage, nor do they preclude ICTC from taking other actions available to it, including the withholding of funds under this Contract.

9.2 Design-Builder Provided Insurance

Design-Builder shall procure, at its own expense, insurance acceptable to ICTC, as described herein, and shall maintain such insurance, as specified herein, in accordance with the requirements stated in Section 9.1, or as otherwise Approved by ICTC at its sole discretion. Nothing in the Contract is intended to establish a standard of care owed to any member of the public or to extend to the public the status of a third-party beneficiary for any of these insurance specifications.

9.2.1 Worker’s Compensation and Employer’s Liability Coverage

In accordance with Labor Code Section 1860, Design-Builder shall provide Worker’s Compensation coverage in accordance with Labor Code 3700.

In accordance with Labor Code Section 1861, the Design-Builder shall submit to ICTC the following certification before performing the Work:

“I am aware of the provisions of Section 3700 of the Labor Code which require every employer to be insured against liability for workers’ compensation or to undertake self-insurance in accordance with the provisions of that code, and I will comply with such provisions before commencing the performance of the Work of this contract.”

Contract execution constitutes certification submittal.

Design-Builder shall provide Employer’s Liability Insurance in amounts not less than:

a) $1,000,000 for each accident for bodily injury by accident.

b) $1,000,000 policy limit for bodily injury by disease.

c) $1,000,000 for each employee for bodily injury by disease.

If there is an exposure of injury to the Design-Builder’s employees under the U.S. Longshoremen’s and Harbor Workers’ Compensation Act, the Jones Act, or under laws, regulations, or statutes applicable to maritime employees, coverage shall be included for such injuries or claims.

9.2.2 Liability Insurance

Design-Builder shall provide General Liability and Umbrella or Excess Liability Insurance covering all operations by or on behalf of the Design-Builder providing insurance for bodily injury and property damage written on an occurrence form that shall be no less comprehensive or more restrictive than the coverage provided by Insurance Services Office (ISO) form CG0001 or under a policy form at least as broad as policy form No. CG0001.
a) Limits of liability shall be at least the amounts shown in the following table:

<table>
<thead>
<tr>
<th>Total Bid</th>
<th>For Each Occurrence</th>
<th>Aggregate for Products/Completed Operation</th>
<th>General Aggregate</th>
<th>Umbrella or Excess Liability</th>
</tr>
</thead>
<tbody>
<tr>
<td>$\leq$1,000,000</td>
<td>$1,000,000</td>
<td>$2,000,000</td>
<td>$2,000,000</td>
<td>$5,000,000</td>
</tr>
<tr>
<td>&gt;$1,000,000 $\leq$10,000,000</td>
<td>$1,000,000</td>
<td>$2,000,000</td>
<td>$2,000,000</td>
<td>$10,000,000</td>
</tr>
<tr>
<td>&gt;$10,000,000 $\leq$25,000,000</td>
<td>$2,000,000</td>
<td>$2,000,000</td>
<td>$4,000,000</td>
<td>$15,000,000</td>
</tr>
<tr>
<td>&gt;$25,000,000</td>
<td>$2,000,000</td>
<td>$2,000,000</td>
<td>$4,000,000</td>
<td>$25,000,000</td>
</tr>
</tbody>
</table>

1. Combined single limit for bodily injury and property damage.
2. This limit shall apply separately to the Design-Builder's Work under this Contract.
3. The umbrella or excess policy shall contain a clause stating that it takes effect (drops down) in the event the primary limits are impaired or exhausted.

The general aggregate limits shall apply separately to the Project (Endorsement CG-25-03)

b) ICTC, including its officers, directors, agents (excluding agents who are design professionals), and employees, shall be named as additional insureds under the General Liability Policy and Umbrella Liability Policies with respect to liability arising out of or connected with Work or operations performed by or operations performed by or on behalf of the Design-Builder under this Contract.

Coverage for such additional insureds does not extend liability:

i. Arising from any defective or substandard condition of the roadway which existed at or before the time the Design-Builder started Work, unless such condition has been changed by the Work or the scope of the Work requires the Design-Builder to maintain existing roadway facilities and the claim arises from the Design-Builder’s failure to maintain.

ii. For claims occurring after the Work is completed and accepted unless these claims are directly related to alleged acts or omissions of the Design-Builder that occurred during the course of the Work.

iii. To the extent prohibited by Insurance Code Section 11580.04.

Additional insured coverage shall be provided by a policy provision or by an endorsement providing coverage at least as broad as Additional Insured endorsement form CG 2010 and form CG 2037, as published by the Insurance Services Office, or other form designated by ICTC. The policy shall stipulate that the insurance afforded the additional insureds shall apply as primary insurance. Any other insurance or self-insurance maintained by ICTC will be excess only and shall not be called upon to contribute with this insurance. Such additional insured coverage shall be provided by a policy provision or by an endorsement providing coverage at least as broad as Additional Insured (Form B) endorsement form CG 2010, as published by the Insurance Services Office (ISO).

**9.2.3 Automobile Liability Insurance**

Design-Builder shall provide comprehensive automobile liability insurance covering the ownership, maintenance, and use of all owned, non-owned, and hired vehicles used in the performance of Work, both on and off the Site, including loading and unloading.

The following limits of liability and other requirements shall apply:

a) $52 million combined single limit each accident for bodily injury and property damage liability.

b) The policy shall include uninsured and underinsured in compliance with California law.
9.2.4 Pollution/Environmental Impairment Liability Insurance
Design-Build agrees to maintain pollution liability insurance applicable to bodily injury; property damage, including loss of use of damaged property or of property that has not been physically damaged or destroyed; cleanup costs; and defense, including costs, fees and expenses incurred in the investigation, defense, or resolution of claims. Coverage shall apply to sudden and non-sudden pollution conditions. Coverage shall apply to construction activities and to acts, errors, or omissions arising out of or in connection with Design-Build’s scope of Work under this Contract. Coverage may be arranged under the Design-Build’s pollution liability, as part of a professional liability policy, by any combination thereof, or by other insurance, as long as pollution liability coverage is provided for both construction activities and professional services. Coverage shall include transport and disposal of contaminants and shall include liability assumed under Contract. Coverage is preferred by ICTC to be occurrence based; however, if provided on a claims-base, Design-Build warrants that any retroactive date applicable to coverage under the policy precedes the effective date of this Contract; and that continuous coverage shall be maintained or an extended discovery period will be exercised for a period of five (5) years beginning from the time Work under this Contract is completed. Limits shall be no less than $5,000,000 per loss and annual aggregate.

9.2.5 Professional Liability Insurance
Design-Build agrees to maintain, and shall cause to be maintained by other Major Participants who are involved in design Work or other professional services, professional liability insurance specifically designed to protect against acts, errors, or omissions of the Design-Build or other Major Participant as appropriate, and “Professional Services” as designated in any such policy shall specifically include Services performed under this Contract with a retroactive date no later than the date of this Contract execution. The policy limit shall be no less than $2,000,000 per claim and in the aggregate and shall either be in the form of a practice policy or a project specific policy. Design-Build or other Major Participant as appropriate shall maintain this professional liability insurance throughout the term of this Contract and for at least three (3) years after the date of completion and acceptance of the Project whether through terms or endorsements providing for an extended reporting period, or through renewals and replacement coverage with preservation of the retroactive date. All such extended reporting periods, renewals, and replacement coverage are subject to Approval by ICTC.
10  RISK OF LOSS

10.1  Site Security
Design-Builder shall provide appropriate security for the Site, including securing any buildings from entry, and shall take all reasonable precautions and provide protection to prevent damage, injury, or loss to the Work and materials and equipment to be incorporated therein, as well as all other property at the Site, whether owned by Design-Builder, ICTC, or any other Person. Design-Builder shall at all times keep the Site in a neat and clean condition, including performing litter removal, removal of graffiti, and weed control and payment shall be considered included in the Contract Price.

10.2  Maintenance and Repair of Work and On-Site Property

10.2.1  Responsibility of Design-Builder
Design-Builder shall maintain, rebuild, repair, restore, or replace all Work (including Design Documents, Construction Documents, materials, equipment, supplies and maintenance equipment which are purchased for permanent installation in, or for use during construction of, the Project, regardless of whether ICTC has title thereto under the Contract Documents) that is injured or damaged before the date of acceptance of maintenance liability by ICTC or third parties as specified in Section 10.2.3. All such Work shall be at no additional cost to ICTC except to the extent that ICTC is responsible for such costs as provided in Section 13. Additional requirements regarding maintenance of highways during construction are set forth in Book 2, Section 26, “Maintenance During Construction”.

For damage within the Right of Way that ICTC would typically seek compensation from the insurance company of the responsible party, ICTC will subrogate its right to seek said financial reimbursement to Design-Builder. ICTC will provide copies of accident reports, when they exist, to Design-Builder. ICTC makes no guarantee that Design-Builder will be able to obtain any financial reimbursement based on this subrogation of ICTC’s rights.

10.2.2  Highway Planting Establishment
Notwithstanding anything to the contrary in Section 10.2, requirements regarding maintenance of trees, shrubs, vines and perennials furnished under the Contract Documents are set forth in the Caltrans Standard Specifications, Section 20, “Landscape.” Plant Establishment shall be Type 2 with a 250 Working Day duration.

10.2.3  Relief from Liability for Maintenance
Effective as of the date on which Substantial Completion occurs, ICTC shall be considered to have accepted maintenance liability for all elements of the Project which are 100 percent complete as of such date and placed in service. All remaining elements of the Project shall be considered accepted for maintenance purposes as of the date on which Final Acceptance occurs. Notwithstanding the foregoing, all elements of the Work which will be owned by Persons other than ICTC (such as Utility facilities) will be considered accepted for purposes of maintenance responsibility only as of the date of acceptance of maintenance responsibilities by such Persons. However, nothing in this Section 10.2.3 providing for relief from maintenance will be construed as relieving the Design-Builder of full responsibility for making good any defective Work or materials found at any time before the formal written acceptance of the entire Contract by ICTC.

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

10.4 Title

Design-Builder warrants that it owns, or will own, and has, or will have, good and marketable title to all materials, equipment, tools, and supplies furnished, or to be furnished, by it and its Subcontractors that become part of the Project or are purchased for ICTC for the operation, maintenance, or repair thereof, free and clear of all Liens. Title to all of such materials, equipment, tools, and supplies which shall have been delivered to the Site shall pass to ICTC, free and clear of all Liens, upon the sooner of (a) incorporation into the Project, or (b) payment by ICTC to Design-Builder of invoiced amounts pertaining thereto. Notwithstanding any such passage of title, and subject to Section 10.1, Design-Builder shall retain sole care, custody and control of such materials, equipment, tools, and supplies, and shall exercise due care with respect thereto as part of the Work until Final Acceptance or until Design-Builder is removed from the Project.
11 PAYMENT

11.1 Contract Price

11.1.1 Contract Price
As full compensation for the Work and all other obligations to be performed by Design-Builder under the Contract Documents, ICTC shall pay to Design-Builder a lump sum amount of $ [Insert dollar amount from the Proposal Form 9 (Proposal Price), Line 28 of the Executed Contract] (such amount, as it may be adjusted from time to time to account for Change Orders, is referred to herein as the “Contract Price”). The Contract Price shall be increased or decreased only by a Change Order issued in accordance with Section 13, by a Contract amendment or as specifically provided elsewhere in the Contract Documents.

11.1.2 Items Included in Contract Price
Design-Builder acknowledges and agrees that, subject only to Design-Builder’s rights under Section 13, the Contract Price includes:

a) Performance of each and every portion of the Work.
b) All designs, equipment, materials, labor, insurance and bond premiums, home office, jobsite and other overhead, profit, and services relating to Design-Builder’s performance of its obligations under the Contract Documents (including all Work, Warranties, equipment, materials, labor, and services provided by Subcontractors and intellectual property rights necessary to perform the Work).
c) The cost of obtaining all Governmental Approvals (except for approvals which are the responsibility of ICTC, as specifically provided elsewhere in the Contract Documents).
d) All costs of compliance with and maintenance of the Governmental Approvals and compliance with Governmental Rules.
e) Payment of any taxes, duties, and permit and other fees and/or royalties imposed with respect to the Work and any equipment, materials, labor, or services included therein.

11.1.3 Delay in Issuance of NTP1

11.1.3.1 Delays beyond 14 Days
If ICTC has not issued NTP1 on or before 14 Days after satisfaction of all conditions precedent to issuance of NTP1 set forth in Section 4.2.1, to the extent provided in Section 4.2.1, Design-Builder may seek to negotiate a Change Order including an extension in the time allowed to ICTC for issuance of NTP1 and an increase in the Contract Price mutually acceptable to Design-Builder and ICTC. If Design-Builder does not wish to seek a Change Order as provided above or ICTC fails to issue a Change Order acceptable to Design-Builder, then Design-Builder’s sole remedy shall be to terminate the Contract by delivery of notice of termination to ICTC, with the right to receive payment as specified in Section 15.

11.1.3.2 Allocation of Price Increase
Any price increase under this Section 11.1.3 shall be amortized proportionally over all Work remaining to be performed and shall be evidenced by a Change Order.

11.1.4 Asphalt Price Fluctuations

11.1.4.1 General
This section applies to asphalt contained in materials for pavement structural sections and pavement surface treatments such as hot mix asphalt (HMA), tack coat, asphaltic emulsions, bituminous seals, asphalt binders, and modified asphalt binders placed in the Work. This section does not apply if Design-Builder opted out
of payment adjustment for price index fluctuations at the time of Price Proposal. ICTC adjusts payment if the California Statewide Crude Oil Price Index for the month the material is placed is more than five (5) percent higher or lower than the price index at the time of Price Proposal. The California Statewide Crude Oil Price Index is determined each month or about the 1st business day of the month by ICTC using the average of the posted prices in effect for the previous month as posted by Chevron, ExxonMobil, and ConocoPhillips for the Buena Vista, Huntington Beach, and Midway Sunset fields.

If a company discontinues posting its prices for a field, ICTC determines the index from the remaining posted prices. ICTC may include additional fields to determine the index. For the California Statewide Crude Oil Price Index, go to: http://www.dot.ca.gov/hq/construc/crudeoilindex/

If the adjustment is a decrease in payment, ICTC deducts the amount from the monthly progress payment. If Work is not completed within the Contract time, payment adjustments during the overrun period are determined using the California Statewide Crude Oil Price Index in effect for the month in which the overrun period began.

If the price index at the time of placement increases:

a) Fifty (50) percent or more over the price index at Price Proposal opening, notify ICTC.

b) One Hundred (100) percent or more over the price index at Price Proposal opening, do not furnish material containing asphalt until ICTC authorizes Design-Build to proceed with that Work. ICTC may eliminate Work or terminate the Contract.

11.1.4.2 Submittals

Before placing material containing asphalt, submit the current sales and use tax rate in effect in the tax jurisdiction where the material is to be placed. Submit certified weight slips for HMA, tack coat, asphaltic emulsions, and modified asphalt binders. For slurry seals, submit certified weight slips separately for the asphaltic emulsion. The scales used for weighing shall be operated by a weighmaster licensed in conformance with the requirements in the California Business and Professions Code, Division 5, Chapter 7. The Design-Build shall furnish a Public weighmasters certificate or certified daily summary weight sheets. ICTC may, at its discretion, have a representative present to witness the weighing and to check and compile the daily record of the scale weights. When required by ICTC, the operator of each vehicle weighed shall obtain a weight or load slip from the weigher and deliver that slip to ICTC at the point of delivery of the material.

11.1.4.3 Payment Adjustments

ICTC includes payment adjustments for price index fluctuations in progress pay estimates. If material containing asphalt is placed within two (2) months during one (1) estimate period, ICTC calculates two (2) separate adjustments. Each adjustment is calculated using the price index for the month in which the quantity of material containing asphalt subject to adjustment is placed in the Work. The sum of the two (2) adjustments is used for increasing or decreasing payment in the progress pay estimate.

ICTC calculates each payment adjustment as follows:

\[ PA = Qt \times A \]

where:

\[ PA = \text{Payment adjustment in dollars for asphalt contained in materials placed in the Work for a given month.} \]

\[ Qt = \text{Sum of all quantities of asphalt-contained materials in pavement structural sections and pavement surface treatments placed (Qh + Qrh + Qmh + Qrap + Qtc + Qe + Qss + Qmab + Qo). (See Exhibit H for quantity calculations).} \]

\[ A = \text{Adjustment in dollars per ton of asphalt used to produce materials placed in the Work rounded to the nearest $0.01.} \]
For US Customary projects, use:

\[ A = \left( \frac{I_u}{I_b} - 1.05 \right) x I_b \times \left[ 1 + \left( \frac{T}{100} \right) \right] \] for an increase in the crude oil price index exceeding 5 percent

\[ A = \left( \frac{I_u}{I_b} - 0.95 \right) x I_b \times \left[ 1 + \left( \frac{T}{100} \right) \right] \] for a decrease in the crude oil price index exceeding 5 percent

\[ I_u = \text{California Statewide Crude Oil Price Index for the month in which the quantity of asphalt subject to adjustment was placed in the Work.} \]

\[ I_b = \text{California Statewide Crude Oil Price Index for the month in which the Price Proposal opening for the project occurred} \]

\[ T = \text{Sales and use tax rate, expressed as a percent, currently in effect in the tax jurisdiction where the material is placed. If the tax rate information is not submitted timely, the statewide sales and use tax rate is used in the payment adjustment calculations until the tax rate information is submitted.} \]

11.1.4.4 Allowance for Asphalt Price Index Fluctuations

The Contract Price includes an allowance of \$ [Insert dollar amount], 80,000 for asphalt price index fluctuations ("Asphalt Price Index Fluctuation Allowance"). A monthly price adjustment will be made as specified in Section 11.1.4.3 to account for significant fluctuations in the cost of asphalt over the course of the Project. The adjustment amount shall be calculated as specified in Section 11.1.4.3. The monthly price adjustment shall be tracked throughout the Project and charged against the Asphalt Price Index Fluctuation Allowance. Any upward adjustment resulting in a payment to the Design-Builder shall be contained in the progress payment and shall be deducted from the Asphalt Price Index Fluctuation Allowance. Any downward adjustment resulting in a credit to ICTC shall be added to the Asphalt Price Index Fluctuation Allowance. In the event the cumulative adjustments exceed the Asphalt Price Index Fluctuation Allowance, Design-Builder shall be entitled to a Change Order for any adjustments in excess of the Asphalt Price Index Fluctuation Allowance. If at the end of the Project any portion of the Asphalt Price Index Fluctuation Allowance remains unused, including any additions based on credits to ICTC, ICTC shall issue a change order decreasing the Contract Price by the remaining amount of the Asphalt Price Index Fluctuation Allowance.

11.1.5 Pavement Smoothness Pay Adjustment

11.1.5.1 General

This section applies to the pavement smoothness pay adjustment of Continuously Reinforced Concrete Pavement placed in the Work. Construction of Continuously Reinforced Concrete Pavement shall comply with all contract requirements, including Book 3, Section 5, “Design-Build Special Provisions,” and the Caltrans Standard Specifications.

ICTC verifies and accepts pavement smoothness based on the results of Design-Builder’s inertial profiler testing per Section 36-3 provided in Book 3, Section 5, “Design-Build Special Provisions.”

11.1.5.2 Pay Adjustments

Pavement smoothness is measured per Book 3, Section 5, “Design-Build Special Provisions” and the Caltrans Standard Specifications. The following table shows the applicable smoothness for continuously reinforced concrete pavement. For segments 0.05 miles to 0.10 miles in length, the pay adjustment will be prorated based on length. A partial section less than 0.05 mi will not receive proportional pay adjustment but must meet ALR thresholds.

<table>
<thead>
<tr>
<th>Target 60 Pavement Smoothness Table</th>
</tr>
</thead>
<tbody>
<tr>
<td>0.1-mi MRI (in/mi)</td>
</tr>
<tr>
<td>= 45.00</td>
</tr>
</tbody>
</table>
ICTC does not pay for mandatory smoothness corrections. Grinding to improve pay to positive pay adjustments is not allowed. Corrective grinding is only allowed to avoid negative pay adjustments. Pavement smoothness pay adjustments are applied in addition to other pay adjustments.

### 11.1.6 Unit Price for Certain Concrete Panel Replacement

<table>
<thead>
<tr>
<th>Payment</th>
<th>45.01 – 55.00</th>
<th>+ ((55 - MRI) x $150)</th>
<th>None</th>
</tr>
</thead>
<tbody>
<tr>
<td>Payment</td>
<td>55.01 – 65.00</td>
<td>0</td>
<td>None</td>
</tr>
<tr>
<td>Payment</td>
<td>65.01 – 80.00</td>
<td>- ((MRI - 65) x $150)</td>
<td>Optional*</td>
</tr>
<tr>
<td>Payment</td>
<td>&gt; 80.00</td>
<td>-</td>
<td>Mandatory*</td>
</tr>
</tbody>
</table>

*Corrective action must not reduce pavement thickness below minimums in section 40-1.01D(8)(c)(v). Applicable to MRI only.

Diamond grinding allowed.

Correction is diamond grinding.

11.1.6 Unit Price for Certain Concrete Panel Replacement

In the event the actual quantity of concrete panel replacements exceed the amount set forth in Book 2, Section 21.4.3.2, Design-Builder shall be entitled to a Unit Price Change Order under Section 13.6.2 for the extra quantity of panels replaced. Payment to Design-Builder for such Work will be made on the basis of the unit price for panel replacement shown in the Price Proposal Line 35 and the actual excess quantities as measured in accordance with Book 2, Section 21.4.3.2. Payment to Design-Builder will be made only for the actual excess quantities and shall be subject to the limitations on increases to the Contract Price set forth in Section 13.5.1.

In the event the actual quantity of panel replacements being replaced is less than the amount set forth in Book 2, Section 21.4.3.2, ICTC shall be entitled to a Change Order reducing the Contract Price for the underrun. The reduction will be made on the basis of the unit prices for panel replacement shown in the Price Proposal Line 35 and the actual underrun quantities as measured in accordance with Book 2, Section 21.4.3.2. The reduction shall be made from progress payments and/or final payment, as deemed appropriate by ICTC.

In all cases, Design-Builder shall keep detailed records of the quantities of panel replacement and shall submit supporting documentation of such quantities with its invoices.

### 11.1.7 Unit Price for Certain Seal Existing Joints

11.1.7 Unit Price for Certain Seal Existing Joints

In the event the actual quantity of seal existing joints exceed the amount set forth in Book 2, Section 21.4.3.3, Design-Builder shall be entitled to a Unit Price Change Order under Section 13.6.2 for the extra quantity of joints sealed. Payment to Design-Builder for such Work will be made on the basis of the unit price for seal existing joints shown in the Price Proposal Line 36 and the actual excess quantities as measured in accordance with Book 2, Section 21.4.3.3. Payment to Design-Builder will be made only for the actual excess quantities and shall be subject to the limitations on increases to the Contract Price set forth in Section 13.5.1.

In the event the actual quantity of joints sealed is less than the amount set forth in Book 2, Section 21.4.3.3, ICTC shall be entitled to a Change Order reducing the Contract Price for the underrun. The reduction will be made on the basis of the unit prices for seal existing joints shown in the Price Proposal Line 36 and the actual underrun quantities as measured in accordance with Book 2, Section 21.4.3.3. The reduction shall be made from progress payments and/or final payment, as deemed appropriate by ICTC.

In all cases, Design-Builder shall keep detailed records of the quantities seal existing joints and shall submit supporting documentation of such quantities with its invoices.
11.2 Invoices and Payment
Requirements relating to invoicing are set forth in Book 2, Section 2.2, “Cost Management”. Within 30 Days after receipt by ICTC of each invoice, ICTC shall pay Design-Builder the amount of the invoice Approved for payment less any amounts which ICTC is entitled to withhold.

11.3 Limitations on Payment
In no event shall ICTC have any obligation to pay Design-Builder any amount which would result in (a) payment for any activity in excess of the value of the activity times the completion percentage of such activity, or (b) aggregate payments hereunder in excess of (i) the overall completion percentage for the Project times the Contract Price or (ii) the payment caps described herein. That portion of price allocated to those activities leading to Final Acceptance is not payable until Final Acceptance is achieved.

11.3.1 Reserved

11.3.2 Maximum Payment Schedule
Payments, including mobilization, but not including payments for Change Order Work not included in the Maximum Payment Schedule, are limited by a cumulative cap on payments as set forth in the Maximum Payment Schedule. In other words, at no time shall Design-Builder’s cumulative total progress payments (exclusive of payments for Change Order Work) exceed the cumulative total expenditure permitted by the Maximum Payment Schedule. Payment of any amounts included in an invoice which are in excess of the maximum aggregate amount payable under the Maximum Payment Schedule shall be deferred until such deferred amounts can be paid without aggregate payments exceeding the Maximum Payment Schedule.

11.3.3 NTP1 Payment Cap
The amount of funds available to pay Design-Builder before issuance of NTP2 is limited to the amount of the NTP1 Payment Cap. ICTC has no obligation to make any payment to Design-Builder in excess of this amount until such time (if any) as NTP2 is issued. If Design-Builder performs any Work in excess of the NTP1 Payment Cap, it does so at its own risk.

11.3.4 Unincorporated Materials (Materials on Hand)
ICTC will not pay for materials associated with a progressed Work Breakdown Structure activity before their incorporation into the Project, except under the circumstances described in this Section 11.3.4.

11.3.4.1 Delivery of Materials
Materials shall be delivered to the Site or delivered to Design-Builder and promptly stored by Design-Builder in storage Approved by ICTC. Materials that have not been delivered to or adjacent to the Site will be eligible for payment only if they were specifically manufactured or produced for the Project, and then only after being irrevocably assigned to ICTC. As a condition to inclusion of such materials in any invoice, Design-Builder shall submit certified bills for such materials with its invoice. Payment will not be made when the invoice value of such materials, as determined by ICTC, amounts to less than $2,000 or if materials are to be stored less than 30 Days.

11.3.4.2 Title to Materials
All such materials so delivered shall become the property of ICTC. Payment for stockpiled materials will not constitute final acceptance of such materials. At ICTC’s request, Design-Builder at its own expense shall promptly execute, acknowledge, and deliver to ICTC actual bills of sale or other instruments in a form acceptable to ICTC, conveying and assuring to ICTC title to such materials included in any invoice, free and clear of all Liens. Design-Builder at its own expense shall conspicuously mark such materials as the
property of ICTC, shall not permit such materials to become commingled with non-ICTC-owned property and shall take such other steps, if any, as ICTC may require or regard as necessary to vest title to such materials in ICTC free and clear of Liens. The required invoice, billing, title, or assignment documents, furnished by Design-Builder, shall contain complete material description and identification data.

11.3.4.3 Deductions
The amount shown in an invoice for material which is subsequently lost, damaged, or unsatisfactory will be deducted from succeeding invoices until the material is repaired or replaced (at Design-Builder’s expense). In case any Supplier claims against Design-Builder remain (for materials so paid for) unsatisfied for more than 30 Days following issuance of payment to Design-Builder, the applicable payment may be canceled on the next invoice.

11.3.4.4 Not to Exceed Amount
Payment for material furnished and delivered as indicated in this Section 11.3.4 will not exceed the amount paid by Design-Builder as evidenced by a bill of sale supported by paid invoice, or 75 percent of the in-place price, whichever is less.

11.3.5 Materials Ineligible for Payment

11.3.5.1 Equipment
ICTC will not pay directly for equipment costs. Payment for equipment, whether new, used, or rented, and to the extent not included in the mobilization payments under Book 2, Section 2.2, “Cost Management,” will be allocated to and paid for as part of the activities with which the equipment is associated, in a manner which is consistent with the requirements of Section 13.7.3.

11.3.5.2 Perishable Materials
ICTC will make no partial payment on living or perishable materials until incorporated as specified in the Contract.

11.3.5.3 Design-Builder’s Election
ICTC will make no payment for materials brought onto the Site at Design-Builder’s election that may be incorporated into the Project such as fuels, supplies, metal decking forms, ties, or supplies used to improve efficiency of operations.

11.3.6 Nonconforming Work
ICTC will make no payment for Nonconforming Work, except as provided under Section 5.7.

11.4 Mobilization and Time-Related Overhead

11.4.1 Mobilization
ICTC makes partial payments for mobilization as follows:
ICTC makes partial payments for the mobilization costs, not to exceed the following:

1. When 5 percent of the original Contract amount is earned, 50 percent of the amount bid for mobilization, or 5 percent of the original Contract amount, whichever is lesser, may be paid.
2. When 10 percent of the original Contract amount is earned, 75 percent of the amount bid for mobilization or 7.5 percent of the original Contract amount, whichever is lesser, may be paid.
3. When 20 percent of the original Contract amount is earned, 95 percent of the amount bid for mobilization, or 9.5 percent of the original Contract amount, whichever is lesser, may be paid.
4. When 50 percent of the original Contract amount is earned, 100 percent of the amount bid for mobilization, or 10 percent of the original Contract amount, whichever is lesser, may be paid.
5. Upon completion of all Work on the Project, payment of any amount bid for mobilization in excess of 10 percent of the original Contract amount shall be paid.

11.4.2 Time Related Overhead

11.4.2.1 General

Time-Related Overhead includes payment for time-related field- and home-office overhead for the time required to complete the Work.

The field office overhead includes time-related expenses associated with the normal and recurring construction activities not directly attributed to the Work, including:

a) Salaries, benefits, and equipment costs of:
   i. Project managers
   ii. General superintendents
   iii. Field office managers
   iv. Field office staff assigned to the Project
b) Rent
c) Utilities
d) Maintenance
e) Security
f) Supplies
g) Office equipment costs for the Project's field office

The home-office overhead includes the fixed general and administrative expenses for operating Design-Builder’s business, including:

a) General administration
b) Insurance
c) Personnel and subcontract administration
d) Purchasing
e) Accounting
f) Project engineering and estimating

Payment for the Time-Related Overhead does not include payment for:

a) Home-office overhead expenses specifically related to:
   i. Design-Builder’s other contracts or other businesses
   ii. Equipment coordination
   iii. Material deliveries
   iv. Consultant and legal fees
b) Non-time-related costs and expenses such as mobilization, licenses, permits, and other charges incurred once during the Contract.
c) Additional overhead involved in incentive/disincentive provisions to satisfy an internal milestone or multiple calendar requirements.
d) Additional overhead involved in performing additional work that is not a controlling activity.
11.4.2.2 Progress Payments
For progress payments, the total work completed for Time-Related Overhead is the number of Working Days for the pay period until the Substantial Completion Deadline.

For progress payments, ICTC pays a unit price equal to the lesser of the following amounts:
   a) Unit price per Working Day as determined by dividing the Time-Related Overhead price (Form 9, Line 6) by the number of Working Days to achieve Substantial Completion.
   b) 20 percent of the Contract Price divided by the number of original Working Days to achieve Substantial Completion.

ICTC pays the balance due for the Time-Related Overhead in the first progress payment after Substantial Completion.

11.5 Deductions and Withholds

11.5.1 Deductions
ICTC may deduct from any amounts otherwise owing to Design-Builder, including each progress payment and the final payment, the following:
   a) Any anticipated or accrued losses, liability, Liquidated Damages, or other damages for which Design-Builder is responsible hereunder.
   b) The estimated cost of remedying any Nonconforming Work or otherwise remedying any breach of Contract by Design-Builder.
   c) Any amounts that ICTC deems advisable, in its sole discretion, to cover any existing or threatened claims, Liens and stop notices by Subcontractors, Suppliers, laborers, Utility Owners, or other third parties relating to the Project.
   d) Any sums expended by ICTC in performing any of Design-Builder’s obligations under the Contract which Design-Builder has failed to perform.
   e) Any other sums which ICTC is entitled to deduct from the Contract Price or to recover from Design-Builder under the terms of the Contract.

Deductions are cumulative and are not retentions under Public Contract Code Section 7107. ICTC’s failure to deduct from a progress payment any amount which ICTC is entitled to recover from Design-Builder under the Contract shall not constitute a waiver of ICTC’s right to such amounts.

11.5.2 Withholds

11.5.2.1 General
ICTC may withhold payment for noncompliance.
ICTC returns the noncompliance withhold in the progress payment following the correction of noncompliance except as specified in Section 11.5.2.3.

Withholds are not retentions under Public Contract Code Section 7107 and do not accrue interest under Public Contract Code Section 10261.5.

Withholds are cumulative and independent of deductions under Section 11.5.1.

Section 11.5.2 does not include all withholds that may be taken; ICTC may withhold other payments as specified.

11.5.2.2 Progress Withholds
ICTC withholds ten (10) percent of a progress payment for noncompliant progress. Noncompliant progress occurs when both occur.
a) Total Working Days elapsed to date exceed 75 percent of the Contract Working Days, and
b) Percent of the Working Days elapsed exceeds the percent of value of the Work completed by more
an than 15 percent.

ICTC determines the percent of the Working Days elapsed by dividing the total Working Days to date by
the revised Contract Working Days and converting the quotient to a percentage.

ICTC determines the percent value of the Work completed by summing payments made to date and the
amount due on the current progress estimate, dividing this sum by the current Contract Price, and converting
the quotient to a percentage. These amounts are shown on the progress payment invoice.

When the percent of the Working Days elapsed minus the percent value of Work completed is less than or
equal to 15 percent, ICTC returns the withhold in the next progress payment.

11.5.2.3 Performance Failure Withholds
During each estimate period Design-Builder fails to comply with a Contract part, including the submittal
of a document as specified, ICTC withholds a part of the progress payment except as specified below for
the failure to submit a document during the last estimate period. These documents include schedules, water
pollution control submittals, quality plans, traffic control plans, and other management plans.

For one (1) performance failure, ICTC withholds 25 percent of the progress payment but does not withhold
more than 10 percent of the total Contract Price.

For multiple performance failures, ICTC withholds 100 percent of the progress payment but does not
withhold more than 10 percent of the total Contract Price.

During the last estimate period, if Design-Builder fails to submit a document as specified, ICTC withholds
$10,000 for each document. ICTC returns the withhold within 30 days after receipt of the document.

11.5.2.4 Stop Notice Withholds
ICTC withholds payments to cover claims filed under Civil Code Section 9000 et seq.

Stop notice information may be obtained from ICTC.

11.5.2.5 Penalty Withholds
Penalties include fines and damages that are proposed, assessed, or levied against Design-Builder or ICTC
by a Governmental Person or private lawsuit. Penalties are also payments made or costs incurred in settling
alleged violations of federal, State, or local laws, regulations, requirements, or PLACs. The cost incurred
may include the amount spent for mitigation or correcting a violation.

If ICTC is assessed a penalty, ICTC may withhold the penalty amount until the penalty disposition has been
resolved. ICTC may withhold penalty amounts without notifying Design-Builder.

Instead of the withhold, Design-Builder may provide a bond equal to the highest estimated liability for any
disputed penalties proposed except Design-Builder may not provide a bond for withholds related to labor
compliance violations.

11.6 Final Payment
Final payment will be made in accordance with this Section 11.6.

11.6.1 Application for Final Payment
On or about the date of delivery of its Affidavit of Final Completion, Design-Builder shall prepare and
submit a proposed Application for Final Payment to ICTC showing the proposed total amount due Design-
Builder. In addition to meeting all other requirements for invoices hereunder, the Application for Final
Payment shall list all outstanding or pending Change Notices and all existing or threatened claims, Liens
and stop notices by Subcontractors, laborers, Utility Owners, or other third parties relating to the Project, including any notices filed or to be filed with the Affidavit of Final Completion, stating the amount at issue associated with each such notice. The Application for Final Payment shall be accompanied by all of the following:

a) Complete and legally effective releases or waivers of Liens and stop notices satisfactory to ICTC, from all Persons legally eligible to file Liens and stop notices in connection with the Work.

b) Consent of Surety(ies) to final payment.

c) The release and affidavit required by Section 11.6.2.

d) Any such other documentation as ICTC may reasonably require.

Prior applications and payments shall be subject to correction in the proposed Application for Final Payment. Change Notices filed concurrently with the Application for Final Payment shall be otherwise timely and meet all requirements under Sections 13 and 19. If a Subcontractor refuses to furnish a release or waiver required by ICTC, Design-Builder may furnish a bond satisfactory to ICTC to indemnify ICTC against such Lien.

ICTC will review Design-Builder’s proposed Application for Final Payment, and changes or corrections will be forwarded to Design-Builder for correction.

11.6.2 Payment

11.6.2.1 Release and Affidavit as Condition to Final Payment

As a condition to its obligation to make payment to Design-Builder based on the Application for Final Payment, ICTC shall have received an executed release from Design-Builder for any and all claims arising from the Work, releasing and waiving any claims against the Indemnified Parties, excluding only those matters identified in any Change Notices listed as outstanding in the Application for Final Payment, and otherwise satisfactory in form and content to ICTC.

The release shall be accompanied by an affidavit from Design-Builder certifying:

a) That it has resolved any claims made by Subcontractors, Utility Owners, and others against Design-Builder or the Project.

b) That it has no reason to believe that any Person has a valid claim against Design-Builder or the Project which has not been communicated in writing by Design-Builder to ICTC as of the date of the certificate.

c) That all guarantees and Warranties are in full force and effect.

The release and the affidavit shall survive final payment. The payment amount will be reduced by any amounts deductible under Section 11.5.

11.6.2.2 Partial Estimates and Payments Subject to Correction

All prior partial estimates and payments shall be subject to correction in the final payment.

11.7 Payments to Subcontractors

Within 10 Days after receipt of payment from ICTC, Design-Builder shall pay each Subcontractor, out of the amount paid to Design-Builder on account of such Subcontractor, all undisputed amounts (less any retainage and any other offsets and deductions provided in the Subcontract or by law) due and owing in accordance with the Subcontract. Within 10 Days after satisfactory completion of all Work to be performed by a Subcontractor, including provision of appropriate releases, certificates and other evidence of the Subcontractor’s compliance with all applicable requirements of the Contract Documents, Design-Builder shall return any moneys withheld in retention from the Subcontractor. Design-Builder shall, by appropriate agreement with each Subcontractor, require each Subcontractor to make payments to its lower tier.
Subcontractors in a similar manner. ICTC shall have no obligation to pay or to see to the payment of money to a Subcontractor, except as may otherwise be required by law.

11.8 Interest on Late Payments

All amounts owing by Design-Builder to ICTC under the Contract shall earn interest from the date on which such amount is owing at the lesser of (a) 10 percent per annum, or (b) the maximum rate allowable under Governmental Rules.

11.9 Disputes

Subject to ICTC’s right to withhold from progress payments any amounts in dispute, and except as expressly stated otherwise in this Section 11, any disagreement between ICTC and Design-Builder relating to this Section 11 shall be subject to Section 19. Failure by ICTC to pay any amount in dispute shall not alleviate, diminish, or modify in any respect Design-Builder’s obligation to perform under the Contract Documents, including Design-Builder’s obligation to achieve Final Acceptance in accordance with the Contract Documents, and Design-Builder shall not cease or slow down its performance under the Contract Documents on account of any such amount in dispute. Design-Builder shall proceed as directed by ICTC pending resolution of the dispute. Upon resolution of any such dispute each party shall promptly pay to the other any amount owing.
12 CONTRACT INCENTIVES

[Include if Contract Incentives are in Contract, if not change title to “Reserved”]

<<ICTC - To verify if any Contract incentives are under consideration.>>

12.1 Reserved

12.2 Other Incentives

[If other than early completion incentives, include a special provision indicating criteria for earning incentive.] See Book 3, Section 5, “Design-Build Special Provisions.”
13 CHANGES IN THE WORK

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

13.1 Circumstances under which Change Orders May Be Issued

13.1.1 Definition of and Requirements Relating to Change Orders

13.1.1.1 Change Orders
The term “Change Order” shall mean a written amendment to the terms and conditions of the Contract Documents issued in accordance with this Section 13. ICTC may issue Unilateral Change Orders as specified in Section 13.2. A Change Order shall not be effective for any purpose unless executed by ICTC, as specified herein. As used herein, execution of a Change Order by ICTC shall mean that the Change Order has been fully executed with all the required signatures by ICTC and any other necessary parties of the State. Change Orders may be requested by Design-Builder only pursuant to Section 13.3. Change Orders may be issued for the following purposes (or combination thereof):

a) To modify the scope of the Work.
b) To revise a Completion Deadline.
c) To revise the Contract Price.
d) To revise other terms and conditions of the Contract Documents.

A Change Order may, at the sole discretion of ICTC, direct Design-Builder to proceed with the Work with the amount of any adjustment of a Completion Deadline or the Contract Price to be determined in the future.

13.1.1.2 Issuance of Directive Letter
ICTC may at any time issue a Directive Letter to Design-Builder in the event of any desired change in the Work or of any Dispute regarding the scope of the Work. The Directive Letter will state that it is issued under this Section 13.1.1.2, will describe the Work in question, and will state the basis for determining compensation, if any. Design-Builder shall proceed immediately with the Work as directed in the letter, pending the execution of a formal Change Order (or, if the letter states that the Work is within the original scope of the Work, Design-Builder shall proceed with the Work as directed but shall have the right pursuant to Section 13.3 to request that ICTC issue a Change Order with respect thereto).

13.1.1.3 Performance of Changed or Extra Work
As a condition precedent to Design-Builder’s right to receive additional payment or an extension of a Completion Deadline for changed or extra Work, Design-Builder shall have received either a Directive Letter from ICTC stating that it is issued pursuant to Section 13.1.1.2 or a Change Order for such Work executed by ICTC. To the extent that Design-Builder undertakes any such Work without receiving a Directive Letter or Change Order executed by ICTC, Design-Builder shall be deemed to have performed such Work voluntarily and shall not be entitled to a Change Order in connection therewith. In addition, Design-Builder may be required to remove or otherwise undo any such Work, at its sole cost.
13.1.2 Directive Letter as Condition Precedent to Claim That an ICTC-Directed Change Has Occurred

In addition to provision of a Change Notice and subsequent Request for Change Order pursuant to Section 13.3.2, receipt of a Directive Letter from ICTC is a condition precedent to Design-Builder’s right to claim that an ICTC-Directed Change has occurred, provided that no Directive Letter shall be required for alleged ICTC-Directed Changes directly attributable to delays caused by bad faith actions, active interference, gross negligence, or comparable tortious conduct by ICTC. The fact that a Directive Letter was issued by ICTC shall not be considered evidence that in fact an ICTC-Directed Change occurred. The determination whether an ICTC-Directed Change in fact occurred shall be based on an analysis of the original Contract requirements and a determination whether the Directive Letter in fact constituted a change in those requirements. The foregoing requirements shall not imply that a Directive Letter would be required in order for Design-Builder to have the right to receive compensation for Work within its original scope for which additional compensation is specifically allowed under this Section 13.

13.1.3 Significant Changes in the Character of Work

If an ICTC-Directed Change significantly changes the character of the Work, whether the alterations or changes included in such direction are in themselves significant changes to the character of the Work or by affecting other Work cause such other Work to become significantly different in character, an adjustment, excluding anticipated profit, will be made to the Contract. The basis for the adjustment shall be agreed upon before performance of such Work. If a basis cannot be agreed upon, then an adjustment will be made either for or against Design-Builder in such amount as ICTC may determine to be fair and equitable, subject to resolving the Dispute in accordance with Section 19. The term “significant change” shall be construed to apply only when (a) the changes materially modify the general definition of the Project or the design-build character of the Work, or (b) ICTC requires Work to be performed that is physically remote from the original Project and not necessary for completion of the original Project. Changes that are specifically contemplated by the Contract shall not be considered significant changes in the character of the Work. If the changes do not significantly change the character of the Work to be performed under the Contract, the altered Work will be paid for as provided elsewhere in the Contract.

13.2 Procedure for ICTC-Initiated Change Orders

This Section 13.2 concerns Change Orders issued by ICTC following a Request for Change Proposal and Change Orders unilaterally issued by ICTC.

13.2.1 Request for Change Proposal

13.2.1.1 Issuance of Request

If ICTC desires to issue an ICTC-Directed Change or to evaluate whether to initiate such a change, then ICTC may, at its discretion, issue a Request for Change Proposal.

13.2.1.2 Initial Consultation

Within two (2) Days after Design-Builder’s receipt of a Request for Change Proposal, ICTC and Design-Builder shall consult to define the proposed scope of the change. Within seven (7) Days after the initial consultation, ICTC and Design-Builder shall consult concerning the estimated cost and time impacts. Design-Builder shall provide data regarding such matters as requested by ICTC.

13.2.1.3 Notification by ICTC

Within seven (7) Days after the second consultation and provision of any data as described in Section 13.2.1.2, ICTC shall notify Design-Builder whether ICTC:

a) Wishes to issue a Change Order.

b) Wishes to request Design-Builder to prepare a Change Order form as discussed at the meeting.
c) No longer wishes to issue a Change Order.

ICTC may at any time, in its sole discretion, require Design-Builder to provide two (2) alternative Change Order forms, one of which shall provide for a time extension and any additional costs permitted hereunder, and the other of which shall show all Acceleration Costs associated with meeting the original Completion Deadlines, and any additional costs permitted hereunder.

13.2.1.4 Submittal of Change Order Form

If so requested, Design-Builder shall, within twenty-one (21) Days after receipt of the notification described in Section 13.2.1.3, prepare and submit to ICTC for review and Approval by ICTC a Change Order form for the requested change, complying with all applicable requirements of Section 13.4, and incorporating and fully reflecting all requests made by ICTC. Design-Builder shall bear the cost of developing the Change Order form, including any modifications thereto requested by ICTC, except that costs of design and engineering Work required for preparation of Plans or exhibits necessary to the Change Order form and preauthorized by ICTC shall be included in the Change Order as reimbursable items. If the Change Order is Approved, the design and engineering costs will be included within the Change Order, otherwise, they shall be separately reimbursed through a separate Change Order.

13.2.1.5 Order To Proceed

If ICTC and Design-Builder agree that a change in the requirements relating to the Work has occurred but disagree as to whether the change justifies additional compensation or time or disagree as to the amount of any change to be made to the Contract Price or a Completion Deadline, ICTC may, in its sole discretion, order Design-Builder to proceed with the performance of the Work in question notwithstanding such disagreement. Such order may, at ICTC’s option, be in the form of either a:

a) Time and Materials Change Order as provided in Section 13.7.

b) Directive Letter as described in Section 13.1.1.2.

13.2.2 Unilateral Change Orders

ICTC may issue a Change Order at any time, regardless of whether it has issued a Request for Change Proposal.

13.2.2.1 Additive and Deductive Change Orders

Additive Unilateral Change Orders shall state that Design-Builder shall be entitled to compensation in accordance with Section 13.7 for the additional Work required thereby. The Change Order may contain a price deduction deemed appropriate by ICTC, and Design-Builder shall have the right to submit the amount of such price deduction to dispute resolution in accordance with Section 19.

13.2.3 Changes in Law

ICTC shall be entitled to a decrease in the Contract Price for any change in Governmental Rules that reduces the cost of the Work, if and to the extent that the change (a) allows a material modification in the design of the Project resulting in a net cost savings or (b) reduces the requirements of complying with environmental approvals.

13.3 Procedure for Design-Builder Initiated Change Orders

13.3.1 Eligible Changes

This section outlines instances whereby Design-Builder shall submit Change Notice and subsequent Request for Change Orders to ICTC.
13.3.1.1 Time Extension
Design-Builder may submit a Request for Change Order to extend a Completion Deadline, subject to certain limitations, only for the following excusable delays changing the duration of the Critical Path:

a) ICTC-Caused Delays.
b) Delays directly attributable to Differing Site Conditions, to the extent permitted by Section 13.8.
c) Delays directly attributable to Force Majeure events.
d) Certain delays relating to Hazardous Materials, as described in Section 13.10, to the extent permitted therein and in Section 5.3.
e) Certain delays relating to Utilities, as described in Section 6.2.

13.3.1.2 Contract Price Increase
Design-Builder may submit a Request for Change Order to increase the Contract Price, subject to certain limitations, including with respect to delay damages, as specified in Section 13.5.2, only for increased costs in the Work as follows:

a) Additional costs directly attributable to additional Work resulting from ICTC-Directed Changes for which ICTC has not submitted a Change Order or a Request for Change Proposal.
b) Additional costs directly attributable to ICTC-Caused Delays.
c) Additional costs directly attributable to Differing Site Conditions, to the extent provided in Section 13.8.
d) Additional costs directly attributable to the following:
   i. An earthquake or tidal wave.
   ii. Any rebellion, war, riot, sabotage, terrorism, or civil commotion.
   iii. The discovery at, near, or on the Site of any paleontological, cultural, or biological resources or any species presently or in the future listed as threatened or endangered under the federal or state endangered species act, provided that the existence of such resources was not disclosed in the RFP documents.
   iv. The suspension, termination, interruption, denial, failure to obtain, nonrenewal, or amendment of any Environmental Approval or New Environmental Approval, except as otherwise provided in Section 6.3.
   v. Any change in a Governmental Rule, change in the judicial interpretation of a Governmental Rule, or adoption of any new Governmental Rule, which is materially inconsistent with Governmental Rules in effect on the Proposal Due Date (excluding any such change or new Governmental Rule which was passed or adopted but not yet effective as of the Proposal Due Date), and which:
      - Requires a material modification in the Project design.
      - Requires Design-Builder to obtain a major State or federal environmental approval not previously required for the Project.
      - Specifically targets the Project or Design-Builder.

e) Certain additional costs relating to Hazardous Materials, as described in Section 13.10, to the extent provided therein and in Section 5.3.
f) Certain additional costs relating to Utility Work, as described in Section 6.2, to the extent provided therein.
g) Additional costs directly attributable to uncovering, removing, and restoring Work, to the extent provided in Section 5.5.3.
h) Certain costs relating to partnering, as described in Section 19.1, to the extent provided therein.
13.3.1.3 Design-Builder Initiated Change Proposal

Design-Builder at any time may submit a Request for Change Order to ICTC that proposes changes to the scope of Work of the Contract. Proposals can include changes to add or reduce the scope of Work or implement changes to the Contract that are “equal to or better” than the existing requirements. Provisions of Section 13.3.2 regarding delivery of Change Notice do not apply to a Design-Builder-initiated change proposal under this Section 13.3.1.3.

13.3.2 Conditions Precedent

The requirements set forth in this Section 13.3.2 constitute conditions precedent to Design-Builder’s entitlement to request and receive a Change Order in all circumstances except those involving a Request for Change Proposal by ICTC or a price increase under Section 11.1.3. Design-Builder agrees that the filing of Change Notices and subsequent filing of Requests for Change Orders with ICTC pursuant to this Section 13.3.2 are necessary in order to begin the administrative process for Design-Builder-initiated Change Orders. Design-Builder understands that it shall be forever barred from recovering against ICTC under this Section 13 if it fails to give notice of any act, or failure to act, by ICTC or any of its representatives or the happening of any event, thing or occurrence pursuant to a proper Change Notice, and thereafter complies with the remaining requirements of this Section 13.3.

13.3.2.1 Delivery of Change Notice

Design-Builder shall deliver to ICTC written Change Notice stating that an event or situation has occurred within the scope of Section 13.3.1.1 and/or 13.3.1.2 and shall state which subsection thereof is applicable. The first notice shall be labeled “Change Notice No. 1” and subsequent notices shall be numbered sequentially.

13.3.2.1.1 Importance of Prompt Delivery

Each Change Notice shall be delivered as promptly as possible after the occurrence of such event or situation. If any Change Notice is delivered later than five (5) Days after Design-Builder first discovered (or should have discovered in the exercise of reasonable prudence) the occurrence which is described therein, Design-Builder shall be deemed to have waived the right to collect any and all costs incurred before the date of delivery of the Change Notice; and shall be deemed to have waived the right to seek an extension of any Completion Deadline with respect to any delay in the Critical Path which accrued before the date of delivery of the written notice. Furthermore, if any Change Notice concerns any condition or material described in Section 5.3, Design-Builder shall be deemed to have waived the right to collect any and all costs incurred in connection therewith to the extent that ICTC is not afforded the opportunity to inspect such material or condition before it is disturbed. Design-Builder’s failure to provide a Change Notice within 30 Days after Design-Builder first discovered (or should have discovered in the exercise of reasonable prudence) the occurrence of a given event or situation shall preclude Design-Builder from any relief, unless Design-Builder can show, based on a preponderance of the evidence, that (a) ICTC was not materially prejudiced by the lack of notice, or (b) ICTC’s designated representative specified in accordance with Section 23.5.1 had actual knowledge (including items (a) through (f) of Section 13.3.2.1.2), before the expiration of the 30-Day period, of the event or situation and that Design-Builder believed it was entitled to a Change Order with respect thereto. A Change Notice shall be deemed delivered only if it fully conforms to the requirements of Section 13.3.2.1.2.

13.3.2.1.2 Contents of Change Notice

The Change Notice shall:

a) State in detail the facts underlying the potential Change Order, the reasons why Design-Builder believes additional compensation or time will or may be due and the date of occurrence.

b) State in detail the basis that the work is not required by the Contract, if applicable.
c) Identify particular elements of Contract performance for which additional compensation may be sought under this Section 13.

d) Identify any potential Critical Path impacts.

e) Provide an estimate of the time within which a response to the notice is required to minimize cost, delay, or disruption of performance.

f) Include a Time Impact Analysis.

13.3.2.1.3 Facts Supporting Objection to Decision
If the Change Notice relates to a decision which the Contract leaves to the discretion of a Person or as to which the Contract provides that such Person’s decision is final, the Change Notice shall set out in detail all facts supporting Design-Builder’s objection to the decision, including all facts supporting any contention that the decision was capricious or arbitrary or is not supported by substantial evidence.

13.3.2.1.4 Notices Under Other Contract Provisions
The written notification under Section 5.3 may also serve as a Change Notice provided it meets the requirements for Change Notices.

13.3.2.1.5 Failure to Provide Information
Any adjustments made to the Contract shall not include increased costs or time extensions for delay resulting from Design-Builder’s failure to provide requested additional information under this Section 13.3.2

13.3.2.2 Delivery of Requests for Change Orders
Design-Builder shall deliver a Request for Change Order to ICTC within thirty (30) Days after delivery of the Change Notice. ICTC may require design and construction costs to be covered by separate Request for Change Orders, in which case Design-Builder shall deliver each such Request for Change Order to ICTC within thirty (30) Days after delivery of the Change Notice. If Design-Builder requests a time extension, then ICTC, in its sole discretion, may require Design-Builder to provide two (2) alternative Request for Change Orders within thirty (30) Days after delivery of the Change Notice, one of which shall provide for a time extension and any additional costs permitted hereunder, and the other of which shall show all Acceleration Costs associated with meeting the original Completion Deadlines, and any additional costs permitted hereunder. If Design-Builder fails to deliver a complete Request for Change Order or incomplete Request for Change Order meeting all the requirements of Section 13.3.2.3 within the appropriate time period, Design-Builder shall be required to provide a new Change Notice before it may submit a Request for Change Order.

13.3.2.3 Incomplete Change Orders
Each Request for Change Order provided under Section 13.3.2.2 shall meet all requirements set forth in Section 13.4; provided that if any such requirements cannot be met due to the nature of the occurrence, Design-Builder shall provide an incomplete Request for Change Order which shall:

a) Comply with all requirements capable of being met.

b) Include a list of requirements which are not fulfilled together with an explanation reasonably satisfactory to ICTC stating why such requirements cannot be met.

c) Provide such information regarding projected impact on the Critical Path as is requested by ICTC.

d) In all events include sufficient detail to ascertain the basis for the proposed Change Order and for any price increase associated therewith, to the extent such amount is then ascertainable.

Design-Builder shall furnish, when requested by ICTC, such further information and details as may be required to determine the facts or contentions involved. Design-Builder agrees that it shall give ICTC access
to any and all of Design-Builder’s books, records and other materials relating to the Work, and shall cause its Subcontractors to do the same, so that ICTC can investigate the basis for such Request for Change Order. Design-Builder shall provide ICTC with a monthly update to all outstanding incomplete Requests for Change Order, describing the status of all previously unfulfilled requirements and stating any changes in projections previously delivered to ICTC, time expenditures to date and time anticipated for completion of the activities for which the time extension is claimed. ICTC may reject Design-Builder’s claim at any point in the process. Once a complete Request for Change Order is provided, ICTC’s failure to respond thereto within 14 Days of delivery of the request shall be deemed a rejection of such request. Although ICTC intends to review incomplete Request for Change Orders for the purposes described in Section 13.3.2.4, ICTC shall have no obligation to review the back-up associated with any Request for Change Order until a complete Request for Change Order is provided.

13.3.2.4 Importance of Timely Delivery
Design-Builder acknowledges and agrees that, due to the limited availability of funds for the Project, timely delivery of notification of such events and situations and Request for Change Orders and updates thereto are of vital importance to ICTC. ICTC is relying on Design-Builder to evaluate, promptly upon the occurrence of any event or situation, whether the event or situation will affect schedule or costs and, if so, whether Design-Builder believes a time extension and/or price increase is required hereunder. If an event or situation occurs which may affect the Contract Price or a Completion Deadline, ICTC will evaluate the situation and determine whether it wishes to make any changes to the definition of the Project so as to bring it within ICTC’s funding and time restraints.

The following matters (among others) shall be considered in determining whether ICTC has been prejudiced by Design-Builder’s failure to provide timely notice:

a) The effect of the delay on alternatives available to ICTC (that is, a comparison of alternatives which are available at the time notice was actually given and alternatives which would have been available had notice been given when required under the Contract),

b) The impact of the delay on ICTC’s ability to obtain and review objective information contemporaneously with the event.

13.3.2.5 Subcontractor Claims
All claims shall be submitted through Design-Builder. Submission of claims directly from Subcontractors shall constitute a waiver of that portion of the claim.

13.3.3 Performance of Disputed Work
If ICTC refuses to issue a Change Order based on Design-Builder’s request, Design-Builder shall nevertheless perform all work as specified in an appropriate Directive Letter, with the right to submit the issue of entitlement to a Change Order to dispute resolution in accordance with Section 19. Design-Builder shall maintain and deliver to ICTC, upon request, contemporaneous records, meeting the requirements of Section 13.7.2, for all work performed which Design-Builder believes constitutes extra work (including non-construction work), until all Disputes regarding entitlement or cost of such work are resolved.

13.4 Contents of Change Orders

13.4.1 Reserved

13.4.2 Scope of Work, Cost Estimate, Delay Analysis, and Information Regarding Change
Design-Builder shall prepare a scope of work, cost estimate, TIA, and other information as required by this Section 13.4.2 for each Request for Change Order.
13.4.2.1 Scope of Work
The scope of work shall describe in detail satisfactory to ICTC all activities associated with the Request for Change Order, including a description of additions, deletions, and modifications to the existing Contract requirements.

13.4.2.2 Cost Estimate
The cost estimate shall set out the estimated costs in such a way that a fair evaluation can be made. It shall include a breakdown for labor, materials, equipment, overhead (which includes all indirect costs) and profit, unless ICTC agrees otherwise. The estimate shall include costs allowable under Section 13.5.2, if any. If the work is to be performed by Subcontractors and if the work is sufficiently defined to obtain Subcontractor quotes, Design-Builder shall obtain quotes (with breakdowns showing cost of labor, materials, equipment, overhead and profit) on the Subcontractor’s stationery and shall include such quotes as back-up for Design-Builder’s estimate. No mark-up shall be allowed in excess of the amounts allowed under Sections 13.5.2 and 13.7. Design-Builder shall identify all conditions with respect to prices or other aspects of the cost estimate, such as pricing contingent on firm orders being made by a certain date or the occurrence or non-occurrence of an event.

13.4.2.3 Time Impact Analysis
If Design-Builder claims that such event, situation, or change affects the Critical Path, it shall provide a TIA indicating all activities represented or affected by the change, with activity numbers, durations, predecessor and successor activities, resources and cost, and with a narrative report, in form satisfactory to ICTC, which compares the proposed new schedule to the Baseline Schedule as appropriate at the time of the event. ICTC has the right to request a TIA. The revision to the Working Schedule associated with the time extension shall not modify the “early and late start cost curves” of the Working Schedule, except with respect to activities which have been impacted by the event which justifies the extension. Design-Builder may reschedule activities not otherwise affected by the event, in order to take advantage of additional Float available as the result of the time extension. Any such rescheduling shall be reflected in the Working Schedule.

13.4.2.4 Other Supporting Documentation
Design-Builder shall provide such other supporting documentation as may be required by ICTC.

13.4.3 Reserved

13.4.4 Design-Builder Representation
Each Change Order (other than Change Orders issued unilaterally by ICTC) shall contain a sworn certification in form acceptable to ICTC by Design-Builder that the amount of time and/or compensation requested includes all known and anticipated impacts or amounts, direct, indirect and consequential, which may be incurred as a result of the event or matter giving rise to such proposed change and that Design-Builder has no reason to believe and does not believe that the factual basis for the Change Order is falsely represented.

13.5 Certain Limitations

13.5.1 Limitation on Contract Price Increases
Any increase in the Contract Price allowed hereunder shall exclude:
   a) Costs caused by the breach of Contract or fault or negligence, or act or failure to act of any Design-Builder-Related Entity.
   b) Costs which could reasonably have been avoided by Design-Builder, including by resequencing, reallocating, or redeploying its forces to other portions of the Work or to other activities unrelated

Changes in the Work
to the Work (including any additional costs reasonably incurred in connection with such reallocation or redeployment).

c) Costs for any rejected Work which failed to meet the requirements of the Contract Documents and any necessary remedial Work.

13.5.2 Limitation on Delay and Disruption Damages

13.5.2.1 Acceleration Costs; Delay and Disruption Damages

Acceleration Costs shall be compensable hereunder only with respect to Change Orders issued by ICTC as an alternative to allowing an extension of a Completion Deadline as contemplated by Sections 13.2.1.3 and 13.3.2.2. Other delay and disruption damages shall be compensable hereunder only in the case of a delay which qualifies as an ICTC-Caused Delay to the extent that it entitles Design-Builder to an extension of a Completion Deadline. Without limiting the generality of the foregoing, costs of rearranging Design-Builder’s work plan to accommodate ICTC-Directed Changes not associated with an extension of a Completion Deadline shall not be compensable hereunder.

13.5.2.2 Other Limitations

Delay and disruption damages shall be limited to direct costs directly attributable to the delays described in Section 13.5.2.1 and mark-ups thereon in accordance with Section 13.7 and any additional field office and job site overhead costs incurred by Design-Builder directly attributable to such delays. In addition, before Design-Builder may obtain any increase in the Contract Price to compensate for extended overhead, Acceleration Costs or other damages relating to delay, Design-Builder shall have demonstrated to ICTC’s satisfaction that:

a) Its schedule which defines the affected Critical Path in fact set forth a reasonable method for completion of the Work.

b) The change in the Work or other event or situation which is the subject of the requested Change Order has caused or will result in an identifiable and measurable disruption of the Work which impacted the Critical Path activity.

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

d) The delay for which compensation is sought is not concurrent with any other delay, whether or not such other delay is on the Critical Path, excluding ICTC-Caused Delays.

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

13.5.3 Limitation on Time Extensions

Any extension of a Completion Deadline allowed hereunder shall exclude any delay to the extent that it:

a) Did not impact the Critical Path;

b) Was due to the fault or negligence, or act or failure to act of any Design-Builder-Related Entity.

c) Could reasonably have been avoided by Design-Builder, including by resequencing, reallocating, or redeploying its forces to other portions of the Work (provided that if the request for extension involves an ICTC-Caused Delay, ICTC shall have agreed, if requested to do so, to reimburse Design-Builder for its costs incurred, if any, in resequencing, reallocating or redeploying its forces).

Design-Builder shall be required to demonstrate to ICTC’s satisfaction that the change in the Work or other event or situation which is the subject of the Request for Change Order seeking a change in a Completion
Deadline has caused or will result in an identifiable and measurable disruption of the Work which has impacted the Critical Path activity.

13.6 Negotiated Price Change Orders

ICTC and Design-Builders (on its own behalf and on behalf of its Subcontractors) shall endeavor to negotiate, in good faith, a reasonable cost for each Change Order, provided that Change Orders issued under Section 13.2.2 are not subject to negotiation. In general, the price of a Change Order shall be negotiated in accordance with this Section 13.6 or shall be based on time and materials records pursuant to Section 13.7.

13.6.1 Reserved

13.6.2 Unit Price Change Orders

Instead of negotiating the price for a Change Order in accordance with Section 13.6.3, 13.6.4 or 13.6.5, ICTC and Design-Builders may agree to negotiate unit prices for changed Work. Measurement of unit-priced quantities shall be as specified in the Change Order. The unit prices shall be deemed to include all costs for the Work, including labor, material, overhead, markups, and profit, and shall not be subject to change regardless of any change in the estimated quantities. Unit-priced Change Orders shall initially include an estimated increase in the Contract Price based on estimated quantities. The final price of a Change Order may be lump sum or may be based upon a final determination of the quantities.

13.6.3 Added Work

When the Change Order adds Work to Design-Builders’s scope, the increase in the Contract Price shall be negotiated based on estimated costs of labor, material, and equipment, or shall be based on actual costs in accordance with Section 13.7. Mark-ups for profit and overhead shall be as provided in Section 13.7, and risk associated with the Work described in the Change Order shall be addressed through an additional amount agreed to by ICTC and Design-Builders not to exceed eight (8) percent of the total Change Order amount (excluding the amount allocated to risk).

13.6.4 Deleted Work

When the Change Order deletes Work from Design-Builders’s scope (including deletion of any Work contained in the Contract that is found to be unnecessary), the amount of the reduction in the Contract Price shall be based upon a current estimate, including a bill of material, a breakdown of labor and equipment costs and overhead and profit associated with the deleted Work. Credits for mark-up for profit and overhead shall be as provided in Section 13.7. ICTC reserves the right to request a credit for risk up to eight (8) percent of the total Change Order amount (excluding amount allocated to risk). When a deduction is involved, documented cancellation and restocking charges may be included in costs and subtracted from the price deduction.

13.6.5 Work Both Added and Deleted

When the Change Order includes both added and deleted Work, Design-Builders shall prepare separate cost breakdowns for added Work and deleted Work in accordance with Sections 13.6.3 and 13.6.4 and:

a) The cost (or credit) amount of the Change Order shall be the difference between the added Work and deleted Work cost breakdowns.

b) If the change results in a net change of zero, there shall be no change in the Contract Price.

13.7 Time and Materials Change Orders

ICTC may at its discretion issue a Time and Materials Change Order whenever ICTC determines that a Time and Materials Change Order is advisable. The Time and Materials Change Order shall instruct Design-Builders to perform the Work, indicating expressly the intention to treat the items as changes in the Work, and setting forth the kind, character, and limits of the Work as far as they can be ascertained, the
terms under which changes to the Contract Price will be determined and the estimated total change in the Contract Price anticipated thereunder. Upon final determination of the allowable costs, ICTC shall issue a modified Change Order setting forth the final adjustment to the Contract Price. The following costs and mark-ups (and no others) shall be used for calculating the change in the Contract Price. No direct compensation shall be allowed for other miscellaneous costs for which no specific allowance is provided in this Section 13.7.

13.7.1 Determination of Costs
Compensation for Time and Materials Change Orders shall be in accordance with Caltrans Standard Specification, Section 9-1.04, “Force Account,” and this Section 13.7.

13.7.1.1 Non-Construction Labor Costs
The cost of labor for non-construction-related Work (including designers), whether provided by Design-Builder or a Subcontractor, shall equal the sum of the following:

a) Actual unburdened wages (i.e., the base wage paid to the employee exclusive of any fringe benefits).

b) Unless already included in the wage rates paid, the actual ICTC Approved labor-related costs incurred by reason of subsistence and travel allowances.

c) A labor surcharge of 140 percent of actual unburdened wages, which shall constitute full compensation for all State and federal payroll, unemployment and other taxes, insurance and bond premiums, fringe benefits (including health insurance, retirement plans, vacation, sick leave and bonuses) and all other payments made to, or on behalf of, the worker, as well as overhead and profit.

13.7.1.2 Reserved
13.7.1.3 Evidence of Materials Cost
If Design-Builder or any Subcontractor (as applicable) does not furnish satisfactory evidence of the cost of such materials from the actual supplier thereof within 60 Days after the date of delivery of the material, ICTC reserves the right to establish the cost of such materials at the lowest current wholesale prices at which such materials were available, in the quantities needed and delivered to the Site.

13.7.1.4 Permit Fees
Design-Builder will be reimbursed for the cost of any additional permit fees payable as the result of the change in the Work. Back-up documentation supporting each cost item for this category shall be provided by Design-Builder and Approved by ICTC before any payment authorization being granted.

13.7.1.5 Credit Items
Where Design-Builder’s or any Subcontractor’s portion of a change involves credit items, or the proposed change is a net deductive change, Design-Builder shall include all Design-Builder’s and Subcontractor’s overhead and profits in computing the value of the credit.

13.7.2 Time and Materials Records
13.7.2.1 Collection and Maintenance of Data
Design-Builder shall maintain its records in such a manner as to provide a clear distinction between (a) the direct cost of Work for which it is entitled (or for which it believes it is entitled) to an increase in the Contract Price and (b) the costs of other operations. Design-Builder shall contemporaneously collect, record in writing, segregate, and preserve (a) all data necessary to determine the costs described in this Section 13.7 with respect to all Work which is the subject of a Change Order or a requested Change Order,
specifically including costs associated with design Work and Utility Relocations, but specifically excluding all negotiated Change Orders, and (b) all data necessary to show the actual impact (if any) of the change on the Critical Path with respect to all Work which is the subject of a Change Order or a proposed Change Order, if the impact on the Project Schedule is in dispute. Such data shall be provided to ICTC, and its authorized representatives as directed by ICTC, on forms Approved by ICTC. The cost of furnishing such reports is included in Design-Builder’s predetermined overhead and profit mark-ups.

13.7.2.2 Daily Reports
Design-Builder shall furnish daily reports, on forms Approved by ICTC, of Time and Materials Change Order Work. The cost of furnishing such reports shall be included in Design-Builder’s overhead and fee percentages. The reports shall include:

a) Name, classification, date, daily hours, total hours, rate, and extension for each worker (including both construction and non-construction personnel) and foreman.

b) Designation, dates, daily hours, total hours, rental rate, and extension for each unit of machinery and equipment.

c) Quantities of materials, prices and extensions.

d) Transportation costs of materials, machinery, and equipment.

e) Invoices for materials used and for transportation charges.

f) Location and summary of Work completed.

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

13.7.2.3 Reports As Basis for Payment
All Time and Materials Change Order reports shall be signed by the Project Manager. ICTC will compare its records with Design-Builder’s reports, make the necessary adjustments and compile the costs of Time and Materials Change Order Work. When such reports are agreed upon and signed by both parties, they will become the basis of payment, but shall not preclude subsequent adjustment based on a later audit. Design-Builder’s (and each Subcontractor’s) cost records pertaining to Work paid for on a time and materials basis shall be open, during all regular business hours, to inspection or audit by representatives of ICTC during the life of the Contract and for a period of not less than seven (7) years after Final Acceptance, and Design-Builder (and each Subcontractor) shall retain such records for that period. If an audit is to be started more than 60 Days after Final Acceptance, Design-Builder will be given a 20 Day notice of the time when such audit is to begin.

13.7.3 Compliance with the Federal Acquisition Regulation
Reimbursable expenses under Time and Materials Change Orders shall be limited to and comply with the FAR. Expenses excluded by the FAR shall not be reimbursed. If FHWA asserts that any claimed reimbursable expenses are not reimbursable under FAR, ICTC will allow Design-Builder the opportunity to respond to FHWA and defend the allowability of the expenses.

13.8 Differing Site Conditions
13.8.1 Responsibilities of ICTC
Upon Design-Builder’s fulfillment of all applicable requirements of Sections 5.3 and 13, and subject to the limitations contained therein, ICTC shall be responsible for, and agrees to issue Change Orders (a) to compensate Design-Builder for additional costs directly attributable to changes in the scope of the Work arising from Differing Site Conditions in accordance with the Approved action plan under Section 5.3.2, and (b) to extend the Completion Deadlines as the result of any delay in the Critical Path caused by any such conditions.
13.8.2 Burden of Proof

Design-Builder shall bear the burden of proving that a Differing Site Condition exists and that it could not reasonably have worked around the Differing Site Condition so as to avoid additional cost. Each request for a Change Order relating to a Differing Site Condition shall be accompanied by a statement signed by a qualified professional setting forth all relevant assumptions made by Design-Builder with respect to the condition of the Site, justifying the basis for such assumptions, explaining exactly how the existing conditions differ from those assumptions, and stating the efforts undertaken by Design-Builder to find alternative design or construction solutions to eliminate or minimize the problem and the associated costs.

13.9 Certain Events

Upon Design-Builder’s fulfillment of all applicable requirements of Section 13, and subject to the limitations contained therein, ICTC shall be responsible for, and agrees to issue Change Orders (a) to compensate Design-Builder for additional costs directly attributable to the events set forth in Section 13.3.1.2(d), and/or (b) to extend the applicable Completion Deadlines as the result of any delay in the Critical Path caused by a Force Majeure event.

13.10 Hazardous Materials Management

13.10.1 Price Increase

Subject to Section 13.10.3, Design-Builder shall be entitled to payment for Remediation Work (excluding those conditions for which Design-Builder has agreed to be responsible as described in Section 18.1.1(g) and Book 2, Section 7, “Environmental Compliance”) through a Change Order priced in accordance with Section 13.6 or 13.7.

13.10.2 Time Extension

Design-Builder shall be entitled to an extension of the Completion Deadlines to the extent that any delay in the Critical Path is directly attributable to Remediation Work compensable under Section 13.10.1.

13.10.3 Limitations on Change Orders

All Change Orders authorized by this Section 13.10 shall be subject to the restrictions, limitations and procedures set forth in Section 13. Allowable costs shall be limited to the Incremental Costs associated with the fact that Hazardous Materials subject to Remediation Work compensable under Section 13.10.1 are present (deducting any avoided costs such as re-use and/or disposal of non-Hazardous Materials) after completion of the testing process to determine whether Hazardous Materials are present. Design-Builder shall take all reasonable steps to minimize any such costs. In addition, compensation for Remediation Work compensable under Section 13.10.1 shall not be allowed unless Design-Builder demonstrates to ICTC’s satisfaction that (a) the Remediation Work could not have been avoided by reasonable design modifications or construction techniques, and (b) Design-Builder’s plan for the Remediation Work represents the approach which is most beneficial to the Project and the public. Design-Builder shall provide ICTC with such information, analyses, and certificates as may be requested by ICTC in order to enable a determination regarding eligibility for payment.

13.11 Matters Not Eligible for Change Orders

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

a) Errors in the Design Documents and Construction Documents (including Errors directly attributable to Errors in the Basic Configuration or RID).
b) Subject to Sections 13.3.1.2(d)(iv) and (v), any design changes required by ICTC as part of the process of Approving the Design Documents for consistency with the requirements of the Contract Documents, the Governmental Approvals and/or Governmental Rules.

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

d) Action or inaction of Design-Builder’s employees, Suppliers, Subcontractors, or any Design-Builder-Related Entity (unless arising from causes which otherwise give rise to a right to a Change Order).

e) Groundwater levels or subsurface moisture content.

f) Untimely delivery of equipment or material, or unavailability, defectiveness, or increases in costs of material, equipment or products specified by the Contract Documents (except to the extent arising from causes which otherwise give rise to a right to a Change Order).

g) Delays not on the Critical Path.

h) Costs covered by insurance proceeds received by or on behalf of Design-Builder.

i) Correction of Nonconforming Work and oversight and related activities in connection therewith by ICTC (including rejected design submittals).

j) Failure by Design-Builder to comply with Contract requirements.

k) All other events beyond the control of ICTC for which ICTC has not agreed to assume liability hereunder.

l) Any situations (other than Force Majeure events) which, while not within one of the categories delineated above, were or should have been anticipated because such situations are referred to elsewhere in the Contract or arise out of the nature of the Work.

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

13.14 Waiver

DESIGN-BUILDER HEREBY EXPRESSLY WAIVES ALL RIGHTS TO ASSERT ANY AND ALL CLAIMS BASED ON ANY CHANGE IN THE WORK, DELAY OR ACCELERATION (INCLUDING ANY CHANGE, DELAY, SUSPENSION OR ACCELERATION WHICH, BUT FOR THE EXPRESS TERMS OF THE CONTRACT DOCUMENTS, COULD BE INFERRED OR IMPLIED AT LAW) FOR WHICH DESIGN-BUILDER FAILED TO PROVIDE PROPER AND TIMELY NOTICE OR FAILED TO PROVIDE A TIMELY REQUEST FOR CHANGE ORDER, AND AGREES THAT DESIGN-BUILDER SHALL BE ENTITLED TO NO COMPENSATION OR DAMAGES WHATSOEVER IN CONNECTION WITH THE WORK EXCEPT TO THE EXTENT THAT THE CONTRACT DOCUMENTS EXPRESSLY SPECIFY THAT DESIGN-BUILDER IS ENTITLED TO A CHANGE ORDER OR OTHER COMPENSATION OR DAMAGES.

13.15 Disputes

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

13.16 No Release or Waiver

13.16.1 Extension of Time for Performance

No extension of time granted hereunder shall release Design-Build’s Surety or any Guarantor from its obligations. ICTC shall not be deemed to have waived any rights under the Contract (including its right to abrogate the Contract for abandonment or for failure to complete within the time specified, or to impose and deduct damages as may be provided herein) as the result of any grant of an extension of time beyond the date fixed for the completion of any part of the Work, any acceptance of performance of any part of the Work after a Completion Deadline, or the making of any payments to Design-Build after such date.

13.16.2 No Change Order Based on Course of Conduct or Order by Unauthorized Person

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

14.1 Suspension for Convenience
ICTC may, at any time and for any reason, by written notice, order Design-Builders to suspend all or any part of the Work required under the Contract Documents for the period of time that ICTC deems appropriate for the convenience of ICTC. Design-Builders shall promptly comply with any such written suspension order. Design-Builders shall promptly recommence the Work upon receipt of written notice from ICTC directing Design-Builders to resume Work. Suspensions related to seasonal or climatic conditions, or Force Majeure events shall not be considered ICTC-Caused Delays.

14.2 Suspension for Cause
ICTC has the authority by written order to suspend the Work without liability to ICTC wholly or in part for Design-Builders’ failure to do any of the following:

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

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

c) Carry out orders of ICTC duly given.

d) Comply with environmental requirements or requirements for developing and implementing the Quality Manual.

Design-Builders shall promptly comply with any such written suspension order. Design-Builders shall promptly recommence the Work upon receipt of written notice from ICTC directing Design-Builders to resume Work.

14.3 Design-Builders Responsibilities During Suspension
During periods that Work is suspended, Design-Builders 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 Design-Builders provided insurance and bonds and erect necessary temporary structures, signs or other facilities required to maintain the Project and other facilities in the Project vicinity. During any suspension period, unless otherwise directed by ICTC, Design-Builders shall continue to be responsible for maintenance of traffic in accordance with the requirements of the Contract, for plant and landscape maintenance in accordance with Book 2, Section 14, “Landscape”, for stormwater maintenance in accordance with Book 2, Section 8, “Stormwater”, and for maintenance during construction in accordance with Book 2, Section 26, “Maintenance During Construction”. If the suspension is for ICTC’s convenience, the additional work performed by Design-Builders during the suspension period shall be considered ICTC-Directed Changes.
15 TERMINATION FOR CONVENIENCE

15.1 Notice of Termination

ICTC may terminate the Contract and the performance of the Work by Design-Builder in whole or, from time to time, in part, if ICTC determines, in its sole discretion, that a termination is in the best public, State, or national interest to do so. ICTC shall notify Design-Builder of its decision to terminate by delivering to Design-Builder a written Notice of Termination specifying the extent of termination and its effective date. Termination (or partial termination) of the Contract shall not relieve any Surety or Guarantor of its obligation for any claims arising out of the Work performed.

15.2 Design-Builder’s Responsibilities Upon Termination

After receipt of a Notice of Termination, and except as otherwise directed by ICTC, Design-Builder shall immediately proceed as follows, regardless of any delay in determining or adjusting any amounts due under this Section 15.

a) Stop Work as specified in the notice.
b) Communicate such notice to all affected Subcontractors and that their Subcontracts are not to be further performed unless otherwise authorized in writing by ICTC.
c) 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.
d) Terminate all Subcontracts to the extent that they relate to the Work terminated.
e) Assign to ICTC in the manner, at the times, and as and to the extent directed by ICTC, all of the right, title, and interest of Design-Builder under the Subcontracts so terminated, in which case ICTC 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.
f) Subject to the prior Approval of ICTC, settle all outstanding liabilities and claims arising out of such termination of Subcontracts.
g) Provide ICTC 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, and 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 ICTC, and such other information as ICTC may request; and transfer title and deliver to ICTC, in the manner, at the times, and as and to the extent, if any, directed by ICTC (i) fabricated or unfabricated parts, the Work in process, completed Work, supplies and other material produced or acquired for the Work terminated; and (ii) the Design Documents, Construction Documents and all other completed or partially completed drawings (including Plans, elevations, sections, details, and diagrams), specifications, records, samples, information, and other property that would have been required to be furnished to ICTC if the Work had been completed.
h) Complete performance in accordance with the Contract Documents of all Work not terminated.
i) Take all action that may be necessary, or that ICTC may direct, for the safety, protection and preservation of (i) the public, including public and private vehicular movement, (ii) the Work, and (iii) the equipment, machinery, materials, and property related to the Contract Documents that is in the possession of Design-Builder and in which ICTC has or may acquire an interest.
j) As authorized by ICTC in writing, use its best efforts to sell, in a manner, at the times, to the extent, and at the price or prices directed or authorized by ICTC, any property of the types referred to in Section 15.2(g); provided, however, that Design-Builder (i) is not required to extend credit to any purchaser, and (ii) may acquire the property under the conditions prescribed and at prices Approved
by ICTC. The proceeds of any transfer or disposition will be applied to reduce any payments to be made by ICTC under the Contract Documents or paid in any other manner directed by ICTC.

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

l) Take other actions directed by ICTC.

15.3 Responsibility After Notice of Termination

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

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

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

Immediately after ICTC determines that Design-Builder has completed the Work directed to be completed before termination and such other work as may have been ordered to secure the Project for termination, Design-Builder will not be required to provide for continuing safety, security, and maintenance at the Site.

15.4 Negotiated Termination Settlement

15.4.1 Settlement Proposal

After receipt of a Notice of Termination, Design-Builder shall submit a final termination settlement proposal to ICTC in the form and with the certification prescribed by ICTC. Design-Builder shall submit the proposal promptly, but no later than 60 Days from the effective date of termination, unless Design-Builder has requested a time extension in writing within such 60-Day period and ICTC has agreed in writing to allow such an extension. ICTC will then review Design-Builder’s termination settlement proposal and will act upon it, return it with comments, or reject it. If Design-Builder fails to submit the proposal within the time allowed, ICTC may determine, on the basis of information available to it, the amount, if any, due Design-Builder because of the termination and shall pay Design-Builder the amount so determined.

15.4.2 Negotiated Settlement Amount

Design-Builder and ICTC may agree, as provided in Section 15.4.1, upon the whole or any part of the amount or amounts to be paid to Design-Builder by reason of the total or partial termination of Work pursuant to this Section 15. Such negotiated settlement may include a reasonable allowance for profit solely on Work which has been completed as of the termination date and subsequently Approved by ICTC. Such agreed amount(s), exclusive of settlement costs, shall not exceed the total Contract Price as reduced by the amount of payments otherwise made and as further reduced by the Contract Price of Work not terminated.

Upon determination of the settlement amount the Contract will be amended accordingly, and Design-Builder will be paid the agreed amount. Nothing in Section 15.5, prescribing the amount to be paid to Design-Builder in the event that Design-Builder and ICTC fail to agree upon the whole amount to be paid to Design-Builder by reason of the termination of Work pursuant to this Section 15, shall be deemed to limit, restrict or otherwise determine or affect the amount(s) which may be agreed upon to be paid to Design-Builder pursuant to this Section 15.4. ICTC’s execution and delivery of any settlement agreement shall not affect any of its rights under the Contract Documents with respect to completed Work, relieve Design-Builder from its obligations with respect thereto, including Warranties, or affect Design-Builder’s rights under the Payment and Performance Bonds, and payment as to such completed or non-terminated Work.
15.5 Determination of Settlement Amount If Negotiations Fail

If Design-Builder and ICTC fail to agree, as provided in Section 15.4.2, upon the whole amount to be paid to Design-Builder by reason of the termination of Work pursuant to this Section 15, the amount payable (exclusive of interest charges) shall be determined by ICTC in accordance with the following, but without duplication of any amounts agreed upon in accordance with Section 15.4.

15.5.1 Payment Amount

ICTC will pay Design-Builder the sum of the following amounts for Work performed before the effective date of the Notice of Termination, as such amounts are determined by ICTC:

a) Design-Builder’s actual reasonable out-of-pocket cost (without profit and including equipment costs only to the extent permitted by Section 13) for all Work performed, including mobilization, demobilization, and work done to secure the Project for termination, including reasonable overhead and accounting for any refunds payable with respect to insurance premiums, deposits, or similar items, as established to ICTC’s satisfaction. In determining the reasonable cost, deductions will be made for the cost of materials to be retained by Design-Builder, amounts realized by the sale of materials and for other appropriate credits. Deductions will also be made for the cost of damaged materials. When, in the opinion of ICTC, the cost of an item of Work is excessively high due to costs incurred to remedy or replace defective or rejected Work, the reasonable cost to be allowed will be the estimated reasonable cost of performing that Work in compliance with the requirements of the Contract Documents and the excessive actual cost will be disallowed.

b) As profit on clause (a) above, a sum determined by ICTC to be fair and reasonable; provided, however, that if it appears that Design-Builder would have sustained a loss on the entire Contract had it been completed, no profit shall be included or allowed under this Section 15.5.1 and an appropriate adjustment shall be made by reducing the amount of the settlement to reflect the indicated rate of loss.

c) The cost of settling and paying claims arising out of the termination of Work under Subcontracts as provided in Section 5.2(f), exclusive of the amounts paid or payable on account of supplies or materials delivered or services furnished by the Subcontractor before the effective date of the Notice of Termination under the Contract, which amounts shall be included in the cost on account of which payment is made under clause (a) above.

d) The reasonable out-of-pocket cost (including reasonable overhead) of the preservation and protection of property incurred pursuant to Section 15.2(i) and any other reasonable out-of-pocket cost (including overhead) incidental to termination of Work under the Contract, including the reasonable cost to Design-Builder of handling material returned to the vendor, delivered to ICTC or otherwise disposed of as directed by ICTC, and including a reasonable allowance for Design-Builder’s administrative costs in determining the amount due to Design-Builder as the result of the termination of Work under the Contract.

15.5.2 Maximum Compensation

Design-Builder acknowledges and agrees that it shall not be entitled to any compensation in excess of the value of the Work performed (determined as provided in Section 15.5.1) plus its settlement costs, and that items such as lost or anticipated profits, unabsorbed overhead and opportunity costs shall not be recoverable by it upon termination of the Contract. However, the total amount to be paid to Design-Builder, exclusive of costs described in Sections 15.5.1(c), (d) and (e), may not exceed the total Contract Price less the amount of payments previously made and less the Contract Price of any Work not terminated. Furthermore, if any refund is payable with respect to insurance or bond premiums, deposits or similar items which were previously passed through to ICTC by Design-Builder, such refund shall be paid directly to ICTC or otherwise credited to ICTC. [If the Contract includes an NTP1 Payment Cap as described in Section 11.3.3,]
include: “The total amount payable to Design-Builder shall in no event exceed the NTP1 Payment Cap if termination occurs before issuance of NTP2.”]
15.10 Limitation on Payments to Subcontractor
For the purposes of Sections 15.4.2 and 15.5, upon termination under Section 15.2(d) of Work under any Subcontract, Design-Builder shall not be entitled to reimbursement for that portion of the termination settlement with any such Subcontractor which constitutes anticipatory or unearned profit on Work not performed, or which constitutes consequential damages on account of the termination or partial termination.

15.11 No Unearned Profits or Consequential Damages
Under no circumstances shall Design-Builder be entitled to anticipatory or unearned profits or consequential or other damages as a result of a termination or partial termination under this Section 15. The payment to Design-Builder determined in accordance with this Section 15 constitutes Design-Builder’s sole and exclusive remedy for a termination under this Section 15.

15.12 No Waiver
Anything contained in the Contract to the contrary notwithstanding, a termination under this Section 15 shall not waive any right or claim to damages which ICTC may have, and ICTC may pursue any cause of action which it may have at law or in equity or under the Contract.

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

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

15.15 Suspension of Work
In the event of any suspension of Work by ICTC, after issuance of NTP1, for more than 180 consecutive Days, Design-Builder shall have the right to consider the Contract to have been terminated for convenience under this Section 15. Design-Builder shall notify ICTC of such election by delivering to ICTC a written notice of termination due to such suspension specifying its effective date. Upon delivery by Design-Builder to ICTC of a notice of termination due to suspension, the provisions of this Section 15 shall apply.

15.16 Termination Due to Non-Appropriation of Funds
15.16.1 Availability of Funds
The obligation of ICTC to make any payments to Design-Builder hereunder is contingent upon funds being appropriated, budgeted, allocated and otherwise made available by ICTC in amounts to meet its funding obligations for the Contract. Design-Builder is not obligated to perform Work, and correspondingly is not entitled to any compensation for Work performed, in any fiscal year beyond the amount, if any, appropriated and made available by ICTC in amounts to meet its funding obligations for the Contract.

15.16.2 Anticipated Appropriations
ICTC anticipates that sufficient funds will be authorized to allow ICTC to make all payments owing hereunder.

15.16.3 Remedy for Failure To Appropriate
If funds are not budgeted, allocated, or otherwise made available by ICTC or the State or federal Legislature or local agency fails to make an appropriation, resulting in stoppage of Work, Design-Builder agrees to resume performance of the Work without any modification to the terms and conditions hereof, provided
that an appropriation therefor is approved or funds are made available within sixty (60) Days after Design-Build stops Work under Section 15.16.1. Any such Work stoppage shall be considered a suspension for convenience under Section 14.1. If funds are not appropriated or made available before expiration of such 60-Day period, either party may terminate the Contract.
16 DEFAULT

16.1 Default By Design-Builder

16.1.1 Events of Default

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

a) Design-Builder fails to promptly begin the Work under the Contract Documents following issuance of a Notice to Proceed authorizing such Work.

b) Design-Builder does not comply with Public Safety and Public Convenience requirements of this Contract or fails to correct any safety hazards promptly.

c) Design-Builder fails to perform the Work with sufficient resources to ensure the prompt completion thereof (i.e., Design-Builder fails to execute remedial action in accordance with the Quality Manual and Book 2, Section 5, “Quality Program”).

d) Design-Builder fails to perform the Work in accordance with the Contract Documents, refuses to remove and replace rejected materials or Nonconforming or unacceptable Work, or fails to remove and replace workers as directed by ICTC under Section 7.4.3.

e) Design-Builder discontinues or suspends the prosecution of the Work (exclusive of Work stoppage due to (i) termination by ICTC, (ii) a Force Majeure event or suspension by ICTC, or (iii) nonpayment by ICTC not related to a breach by Design-Builder).

f) Design-Builder fails to resume performance of Work which has been suspended or stopped, within a reasonable time after receipt of notice from ICTC to do so or (if applicable) after cessation of the event preventing performance.

g) Design-Builder breaches any other agreement, representation, or Warranty contained in the Contract Documents, or Design-Builder fails to perform any other obligation under the Contract Documents, including EEO and DBE requirements.

h) Design-Builder fails to provide and maintain the required insurance.

i) Design-Builder fails to provide and maintain the required Payment and Performance Bonds, or Design-Builder assigns or transfers the Contract Documents or any right or interest therein, except as expressly permitted under Section 23.4.2.

j) Design-Builder fails, absent a valid dispute, to make payment when due for labor, equipment or materials in accordance with its agreements with Subcontractors and applicable law, fails to comply with any Governmental Rule or Governmental Approval; or fails reasonably to comply with the instructions of ICTC consistent with the Contract Documents.

k) Design-Builder fails to discharge or obtain a stay within 10 Days of any final judgment(s) or order for the payment of money against it in excess of $100,000 in the aggregate arising out of the prosecution of the Work (provided that, for purposes hereof, posting of a bond in the amount of 125 percent of such judgment or order shall be deemed an effective stay).

l) Design-Builder, any Guarantor, or any Major Participant shall have become 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.

m) Insolvency, receivership, reorganization, or bankruptcy proceedings shall have been started by or against Design-Builder, any Guarantor, or any Major Participant and not dismissed within sixty (60) Days.
n) Any representation or warranty made by Design-Builder or any Guarantor in the Contract Documents or in any certificate, schedule, instrument, or other document delivered pursuant to the Contract Documents shall have been false or materially misleading when made.

o) Design-Builder or any Guarantor is a party to fraud.

p) Any Guarantor revokes or attempts to revoke its obligations under the Guaranty, or otherwise takes the position that such instrument is no longer in full force and effect.

16.1.2 Right to Cure
ICTC agrees to allow Design-Builder and Surety fifteen (15) Days notice and opportunity to cure any breach before declaring an Event of Default, provided that the notice and cure period shall only be three (3) days for a breach under Sections 16.1.1(g), (h), (k), (n) and (n) and no such notice and opportunity to cure is required for any breach which by its nature cannot be cured. If a breach for which a fifteen (15)-Day cure period is provided is curable but by its nature cannot be cured within fifteen (15) Days, as determined by ICTC, ICTC agrees not to declare an Event of Default provided that Design-Builder begins such cure within such fifteen (15)-Day period and thereafter diligently prosecutes such cure to completion; provided, however, that in no event shall such cure period exceed sixty (60) Days in total. Design-Builder hereby acknowledges and agrees that the events described in Section 16.1.1 is not curable. For breach of any insurance requirements, the provisions of Section 9 apply. Notwithstanding the foregoing, if ICTC believes a condition affecting the Project poses an immediate and imminent danger to public health or safety, ICTC may, without notice and without awaiting lapse of any cure period, rectify the condition at Design-Builder’s cost, and so long as ICTC undertakes such action in good faith, even if under a mistaken belief in the occurrence of such default, such action shall not expose ICTC to liability to Design-Builder and shall not entitle Design-Builder to any other remedy, it being acknowledged that ICTC has a paramount public interest in providing and maintaining safe public use of and access to the Project. ICTC’s good faith determination of the existence of such danger shall be deemed conclusive in the absence of clear and convincing evidence to the contrary.

16.2 Remedies
16.2.1 Rights of ICTC
If an Event of Default occurs, then, in addition to all other rights and remedies provided by law or equity or available under the Contract or otherwise, including the rights to recover Liquidated Damages and to seek recourse against the surety bonds required hereby, any Guaranty and/or other performance security, ICTC 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 Design-Builder from any obligations, and Design-Builder shall have the following obligations (as applicable):

a) ICTC may order Design-Builder to suspend or discontinue the Work or any portion of the Work.

b) ICTC may terminate the Contract or a portion thereof, in which case, the provisions of Sections 15.2 and 15.3 shall apply.

c) If and as directed by ICTC, 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.

d) Design-Builder shall deliver to ICTC possession of any or all facilities of Design-Builder located on the Site, including any or all Design Documents, Construction Documents, and all other completed or partially completed drawings (including Plans, elevations, sections, details, and diagrams), specifications, records, information, schedules, samples, shop drawings, and other documents, that ICTC deems necessary for completion of the Work.

e) Design-Builder shall confirm the assignment to ICTC of the Subcontracts requested by ICTC, and Design-Builder shall terminate, at its cost, all other Subcontracts.
f) ICTC may deduct from any amounts payable by ICTC to Design-Builder such amounts payable by Design-Builder to ICTC, including Liquidated Damages or other damages payable to ICTC under the Contract Documents.

g) ICTC shall have the right, but not the obligation, to pay such amount and/or perform such act as may then be required.

h) ICTC, without incurring any liability to Design-Builder, shall have the rights (i) to take the performance of all or a portion of the Work from Design-Builder (either with or without the use of Design-Builder’s materials, equipment, tools, and instruments) and enter into an agreement with another Person for the completion of such Work; or (ii) to use such other methods, as in the opinion of ICTC, will be required for the completion of the Project.

i) If ICTC exercises any right to perform any obligations of Design-Builder, in the exercise of such right ICTC may, but is not obligated to, among other things:
   i. Perform or attempt to perform, or cause to be performed, such Work.
   ii. Spend such sums as ICTC deems necessary and reasonable to employ and pay such architects, engineers, consultants, and contractors and obtain materials and equipment as may be required for the purpose of completing such Work.
   iii. Execute all applications, certificates and other documents as may be required for completing the Work.
   iv. Modify or terminate any contractual arrangements.
   v. Take any and all other actions which it may in its sole discretion consider necessary to complete the Work.
   vi. Prosecute and defend any action or proceeding incident to the Work.

16.2.2 Liability of Design-Builder

16.2.2.1 Occurrence of an Event of Default
If an Event of Default has occurred, Design-Builder and Surety shall be jointly and severally liable to ICTC (in addition to any other damages under the Contract Documents other than those costs intended to be covered by Liquidated Damages payable hereunder) for all costs reasonably incurred by ICTC or any party acting on ICTC’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, ICTC shall be entitled to withhold all or any portion of further payments to Design-Builder until such time as ICTC is able to determine how much (if any) remains owing to Design-Builder. Promptly upon such determination, ICTC shall notify Design-Builder in writing of the amount, if any, that Design-Builder shall pay ICTC or that ICTC shall pay Design-Builder with respect thereto. All costs and charges incurred by ICTC, including attorneys’, accountants’, and expert witness fees and costs, together with the cost of completing the Work under the Contract Documents, shall be deducted from any moneys due or which may become due to Design-Builder and its Surety(ies) and any Guarantor shall be liable and shall pay to ICTC the amount of such excess.

16.2.2.2 Assurance of Future Performance
It is recognized that if a default under Section 16.1.1(k), (l), or (m) occurs, such event could impair or frustrate Design-Builder’s performance of the Work. Accordingly, it is agreed that upon the occurrence of any such event, ICTC shall be entitled to request of Design-Builder, or its successor in interest, adequate assurance of future performance in accordance with the terms and conditions hereof. Failure to comply with such request within 10 Days of delivery of the request shall entitle ICTC to terminate the Contract and to the accompanying rights set forth above. Pending receipt of adequate assurance of performance and actual performance in accordance therewith, ICTC 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 ICTC’s payment obligations hereunder. The foregoing shall be in addition to all other rights and remedies provided by law or equity and such rights and remedies as are otherwise available under the Contract, any Guaranty, and Payment and Performance Bonds.

16.2.2.3 Alternative to Terminating the Contract and Completing the Work

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

16.2.2.4 Termination Deemed to Constitute a Termination for Convenience

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

16.2.2.5 Damages Resulting From Design-Builder’s Breach or Failure to Perform

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

16.2.2.6 Cumulative Remedies

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

16.2.2.7 Continued Liability of Design-Builder and Surety

Design-Builder, any Guarantor and Surety shall not be relieved of liability for continuing Liquidated Damages on account of a default by Design-Builder hereunder or by ICTC’s declaration of an Event of Default, or by actions taken by ICTC under this Section 16.2.

16.3 Right to Stop Work If Undisputed Payment Is Not Made

Design-Builder shall have the right to stop Work if ICTC fails to make an undisputed payment due hereunder within 30 Days after receipt of notice of nonpayment. Any such Work stoppage shall be considered a suspension under Section 14.1. Design-Builder shall not have the right to terminate the Contract for default as the result of any failure by ICTC to make an undisputed payment due hereunder, but Design-Builder shall have the right to declare a termination for convenience under Section 15 upon meeting the requirements of Section 15.15.

16.4 Notice and Opportunity to Cure Other Types of ICTC Breaches

In the event of any breach of the Contract by ICTC other than a failure to make payments to Design-Builder, Design-Builder shall provide to ICTC a written notice describing the breach and the opportunity to cure such breach. ICTC shall be entitled to thirty (30) days notice and opportunity to cure any such breach; provided that if such breach is capable of cure but by its nature cannot be cured within 30 days, ICTC shall have such additional period of time as may be reasonably necessary to cure the breach so long as ICTC begins such cure within such 30-day period and thereafter diligently prosecutes such cure to completion. Design-Builder shall have no right to exercise any remedies to which it may be entitled at law or in equity until the foregoing notice is delivered and the foregoing cure period lapses without cure of the breach.
17  DAMAGES

17.1  Liquidated Damages

17.1.1  Failure to Meet Completion Deadlines

Design-Builder understands and agrees that if Design-Builder fails to complete the Work in accordance with the Contract Documents, ICTC will suffer substantial losses and damages. Design-Builder agrees that it shall be liable for all such losses and damages. Design-Builder acknowledges and agrees that because of the unique nature of the Project, the fact that it is an essential part of the California State highway system and the fact that inconvenience to the traveling public will be one of the significant impacts of any completion delay, it is impracticable and extremely difficult to ascertain and determine the actual damages which would accrue to ICTC and the public in the event of Design-Builder’s failure to achieve Substantial Completion, and/or Final Acceptance by the applicable Completion Deadlines. Therefore, Design-Builder and ICTC have agreed to stipulate the amount payable by Design-Builder in the event of its failure to meet a Completion Deadline. Design-Builder acknowledges and agrees that such Liquidated Damages are intended to compensate ICTC solely for Design-Builder’s failure to meet the Completion Deadlines, and shall not excuse Design-Builder from liability from any other breach of Contract requirements, including any failure of the Work to conform to applicable requirements. Collection of Liquidated Damages shall be the ICTC’s sole and exclusive remedy for delay in meeting a Completion Deadline.

If Design-Builder fails to achieve Substantial Completion or Final Acceptance by the applicable Completion Deadline, Design-Builder agrees to pay ICTC Liquidated Damages in the following amounts:

a) $28,500 per Day for Design-Builder’s failure to achieve Substantial Completion by the Substantial Completion Deadline, until the date Design-Builder achieves Substantial Completion.

b) $10,000 per Day for Design-Builder’s failure to achieve Final Acceptance by the Final Acceptance Deadline, until the date Design-Builder achieves Final Acceptance.

17.1.2  Reasonableness of Liquidated Damage Amounts

Design-Builder understands and agrees that any Liquidated Damages payable in accordance with this Section 17.1 are in the nature of liquidated damages and not a penalty and that such sums are reasonable under the circumstances existing as of the date of execution and delivery of the Contract. Design-Builder further acknowledges and agrees that Liquidated Damages may be owing even though no Event of Default has occurred.

17.2  Offset; Waiver

17.2.1  Offset

ICTC shall have the right to deduct any amount owed by Design-Builder to ICTC hereunder from any amounts owed by ICTC to Design-Builder.

17.2.2  Waiver

ICTC may reduce or waive all or any portion of the Liquidated Damages, in its sole discretion, if the Project is in condition for safe and convenient use by the traveling public.

Permitting or requiring Design-Builder to continue and finish the Work or any part thereof after a Completion Deadline shall not act as a waiver of ICTC’s right to receive Liquidated Damages hereunder or any rights or remedies otherwise available to ICTC. Neither the act of taking over the Work nor a
termination of the Contract or default shall forfeit ICTC’s right to recover Liquidated Damages from Design-Builder or Design-Builder’s Sureties.

17.3 Payment of Liquidated Damages

Liquidated Damages, to the extent not paid as provided in Section 17.2, shall be payable by Design-Builder to ICTC within 10 Days after Design-Builder’s receipt of an invoice therefor from ICTC.
18 INDEMNIFICATION

18.1 Indemnifications by Design-Builder

18.1.1 General Indemnities

With the exception that this section shall in no event be construed to require indemnification by the Design-Builder to a greater extent than permitted by law, the Design-Builder shall defend, indemnify, and hold harmless GSA, the State, and ICTC, including its officers, directors, agents, and employees, and each of them (Indemnities) from any and all claims, demands, causes of action, damages, costs, expenses, actual attorneys’ fees, losses or liabilities, in law or in equity, of every kind and nature whatsoever (Claims), arising out of or in connection with the Design-Builder’s performance of this Contract for:

a) Bodily injury, including sickness or disease, emotional injury or death to Persons, including the public, any employees, or agents of the Design-Builder, State, ICTC, or any other contractor.
b) Damage to property of anyone, including loss of use thereof caused or alleged to be caused in whole or in part by any negligent or otherwise legally actionable act or omission of the Design-Builder or its agents, or anyone directly or indirectly employed or retained by the Design-Builder or anyone for whose acts or omissions the Design-Builder may be liable.

Except as otherwise provided by law, the indemnification provisions above shall apply regardless of the existence or degree of fault of Indemnities. The Design-Builder, however, shall not be obligated to indemnify Indemnities for Claims arising from conduct delineated in California Civil Code Section 2782. Further, the Design-Builder’s indemnity obligation shall not extend to Claims to the extent they arise from any defective or substandard condition of the roadway which existed at or before the time the Design-Builder began Work, unless this condition has been changed by the Work or the scope of the Work requires the Design-Builder to maintain existing roadway facilities and the Claim arises from the Design-Builder’s failure to maintain. The Design-Builder’s indemnity obligation shall extend to Claims arising after the Work is completed and accepted only if these Claims are directly related to alleged acts or omissions of the Design-Builder which occurred during the course of the Work. No inspection, oversight, Approval, or acceptance by ICTC, its employees or agents shall be deemed a waiver by ICTC of full compliance with the requirements of this Section 18.

The Design-Builder’s obligation to defend and indemnify shall not be excused because of the Design-Builder’s inability to evaluate liability or because the Design-Builder evaluates liability and determines that the Design-Builder is not liable to the claimant. The Design-Builder shall respond within thirty (30) days to the tender of any claim for defense and indemnity by ICTC, unless this time has been extended by the ICTC. If the Design-Builder fails to accept or reject a tender of defense and indemnity within 30 days, in addition to any other remedy authorized by law, so much of the money due the Design-Builder under and by virtue of this Contract as shall be reasonably necessary by ICTC, may be retained and withheld by ICTC until disposition has been made by the Claim or suit for damages, or until the Design-Builder accepts or rejects the tender of defense, whichever occurs first.

With respect to third party Claims against the Design-Builder, the Design-Builder waives any and all rights of any type to express or implied indemnity against ICTC, its directors, officers, employees, or agents.

Subject to California Civil Code Section 2782, Design-Builder shall release, indemnify, defend, and hold harmless ICTC and its agents and their respective successors and assigns and their respective shareholders, officers, directors, agents, and employees (collectively referred to as the “Indemnities”) from and against any and all 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 attorneys’, accountants’, and expert witness fees and costs, arising out of, relating to or resulting from:
a) The breach or alleged breach of the Contract by any Design-Builder-Related Entity.

b) The failure or alleged failure by any Design-Builder-Related Entity to comply with any applicable Environmental Laws or other Governmental Rules (including Governmental Rules regarding handling, generation, treatment, storage, transportation, and disposal of Hazardous Materials) or Governmental Approvals in performing the Work.

c) Any alleged patent or copyright infringement or other allegedly improper appropriation or use of trade secrets, patents, proprietary information, know-how, copyright rights, or inventions in performance of the Work, or arising out of any use in connection with the Project of methods, processes, designs, information, or other items furnished or communicated to Indemnities pursuant to the Contract; provided that this indemnity shall not apply to any infringement resulting from ICTC’s failure to comply with specific written instructions regarding use provided to ICTC by Design-Builder.

d) The alleged negligent act or omission or willful misconduct of any Design-Builder-Related Entity.

e) Any and all claims by any governmental or taxing authority claiming taxes based on gross receipts, purchases, or sales, or the use of any property or income of 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.

f) Any and all stop notices and/or Liens filed in connection with the Work, including all expenses and attorneys’, accountants’, and expert witness fees and costs incurred in discharging any stop notice or Lien, provided that ICTC is not in default in payments owing to Design-Builder with respect to such Work.

g) Any spill or release or threatened spill or release of a Hazardous Material (i) attributable to the negligence, willful misconduct, or breach of Contract by any Design-Builder-Related Entity, or (ii) which was brought onto the Site by any Design-Builder-Related Entity.

h) 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 Caltrans Standard Specifications, Section 5-1.20, “Coordination with Other Entities,” or failure of any Design-Builder-Related Entity to cooperate reasonably with other contractors in accordance therewith.

18.1.2 Design Defects

Subject to California Civil Code Section 2782, Design-Builder shall release, indemnify, defend, and hold harmless Indemnities from and against any and all 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 attorneys’, accountants’, and expert witness fees and costs, arising out of, relating to or resulting from Errors in the Design Documents, regardless of whether such Errors were also included in the Basic Configuration or RID. Design-Builder agrees that, because the Basic Configuration and RID are subject to review and modification by Design-Builder, it is appropriate for Design-Builder to assume liability for Errors in the completed Project even though they may be related to Errors in the Basic Configuration or RID.

18.1.3 Limitation of Liability

The maximum aggregate liability of the Design-Builder under this Contract, including for default, breach of contract, negligence, any Liquidated Damages, indemnity obligations or otherwise in connection with the Project shall be limited to an amount equal to forty (40)% of the Contract Price. The limitation of liability is not intended to limit or otherwise detract from the obligation of the Design-Builder to perform
the Work for the Contract Price (including cost overruns), and shall not apply to liabilities that arise out of any of the following:

a.) Claims by third parties.

b.) Damage to or destruction of real property or tangible personal property.

c.) Bodily injury or death.

d.) Abandonment, gross negligence, fraud and fraudulent misrepresentations or willful default or willful misconduct of the Design-Builder.

e.) Any sum actually recovered by the Design-Builder through the insurance required by Section 9 of the Contract, or which could have been so recovered if the Design-Builder had maintained the insurance as required in accordance with this Contract.

18.1.4 Consequential Damages

Neither ICTC nor Design-Builder shall be liable to the other for punitive, indirect, incidental, or consequential damages, whether arising out of breach of this Contract, tort (including negligence) or any other theory of liability, and each party hereby releases the other party from any such liability, provided however that this provision shall not apply to:

a.) Losses to the extent (i) the loss is covered by the proceeds of insurance required to be carried under this Contract or for which Design-Builder was required to provide insurance if coverage is not in force, or (ii) the loss is covered by the proceeds of insurance actually carried by or insuring Design-Builder under policies required to be carried pursuant to the Contract Documents.

b.) Losses arising out of fraud, criminal conduct, intentional misconduct, recklessness, bad faith, or gross negligence on the part of Design-Builder.

c.) Design-Builder’s obligation to pay Liquidated Damages in accordance with this Contract.

18.1.5 Reliance on Design-Builder’s Performance

Design-Builder hereby acknowledges and agrees that it is Design-Builder’s obligation to cause the Project to be designed and to construct the Project in accordance with the Contract Documents and that Indemnitees are fully entitled to rely on Design-Builder’s performance of such obligation. Design-Builder further agrees that any review, oversight, inspection, acceptance, and/or approval by ICTC and/or others hereunder shall not relieve Design-Builder of any of its obligations under the Contract Documents or in any way diminish its liability for performance of such obligations or its obligations pursuant to this Contract.

18.2 Responsibility of ICTC for Certain Hazardous Materials

18.2.1 Pre-Existing Site Contamination

It is recognized that ICTC may assert that certain third Persons or parties may rightfully bear the ultimate legal responsibility for any and all Hazardous Materials which may currently be present on the Site. It is further recognized that certain State and federal statutes provide that individuals and firms may be held liable for damages and claims related to Hazardous Materials under such doctrines as joint and several liability and/or strict liability. It is not the intention of the parties that Design-Builder be exposed to any such liability to the extent arising out of (a) pre-existing Site contamination, whether known or unknown, except as otherwise provided in Section 18.1.1(g), (b) the performance not attributable to the negligence, willful misconduct, or breach of Contract by any Design-Builder-Related Entity in the handling of such Hazardous Materials, and/or (c) the activities of any Persons not described in clause (b) above, including ICTC.

Accordingly, to the extent that Design-Builder is required to perform Remediation Work hereunder, ICTC shall compensate Design-Builder for such performance (through payment of the Contract Price, as it may
be increased by Change Order pursuant to Section 13, but specifically excluding those conditions for which Design-Builder has agreed to be responsible as described in Section 18.1.1(g).

18.2.2 Generator Number for Hazardous Waste Remediation
Except for Hazardous Materials for which Design-Builder is responsible as described in Section 18.1.1(g) and without contradiction of any assertion by ICTC of third-party liability:

a) Design-Builder shall not be required to execute any hazardous waste manifests as a “generator”.

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

18.3 No Effect on Other Rights
The foregoing obligations shall not be construed to negate, abridge, or reduce other rights or obligations which would otherwise exist in favor of a party indemnified hereunder.

18.4 CERCLA Agreement
Without limiting their generality, the indemnities set forth in Section 18.1.1(g) are intended to operate as agreements pursuant to the Comprehensive Environmental Response, Compensation and Liability Act, 42 USC Section 9607(e), to insure, protect, hold harmless, and indemnify the Indemnified Parties.

18.5 Intent of Indemnity for Breach of Contract
The requirement to provide an indemnity for breach of Contract set forth in Section 18.1.1(a) is intended to provide protection to ICTC with respect to third party claims associated with such breach. It is not intended to provide ICTC with an alternative cause of action for damages incurred directly by ICTC with respect to such breach.
19 PARTNERING, DISPUTE RESOLUTION, FORMAL LEGAL ACTION(S)

19.1 Partnering

19.1.1 General
ICTC strives to work cooperatively with all design-builders; partnering is our way of doing business. ICTC encourages partnering among the Project team, made up of significant contributors from ICTC and the Design-Builder, and their invited stakeholders. Professionally facilitated partnering is required.

In implementing partnering, the Design-Builder and ICTC manage the Contract by:

a) Using early and regular communication with involved individuals and/or entities.
b) Establishing and maintaining a relationship of shared trust, equity, and commitment.
c) Identifying, quantifying, and supporting attainment of mutual goals.
d) Developing strategies for using risk management concepts.
e) Implementing timely communication and decision making.
f) Resolving potential problems at the lowest possible level to avoid negative impacts.
g) Holding periodic partnering meetings and workshops as appropriate to maintain partnering relationships and benefits throughout the life of the Project.
h) Establishing periodic joint evaluations of the partnering process and attainment of mutual goals.

Partnering does not void any Contract part.

The Caltrans Field Guide to Partnering on Caltrans Construction Projects is available to the Project team as reference. This guide provides structure, context, and clarity to the partnering process requirements. This guide is available at the Caltrans Partnering Program Web site: https://dot.ca.gov/programs/construction/partnering

In implementing partnering, the Project team shall:

a) Create a partnering charter that includes:
   i. Mutual goals, including core Project goals and may also include Project-specific goals and mutually supported individual goals.
   ii. Partnering maintenance and close-out plan.
   iii. Dispute resolution plan that includes a dispute resolution ladder and may also include use of facilitated dispute resolution sessions.
   iv. Team commitment statement and signatures.
b) Participate in monthly partnering evaluation surveys to measure progress on mutual goals and may also measure short-term key issues as they arise.
c) Evaluate the partnering facilitator on Forms CEM-5501 and CEM-5502. ICTC provides the evaluation forms to the Project team and collects the results. ICTC will make evaluation results available upon request. Facilitator evaluations shall be completed:
   i. At the end of the initial partnering workshop on Form CEM-5501.
   ii. At the end of the Project close-out partnering workshop on Form CEM-5502.
d) Conduct a Project close-out partnering workshop.
e) Document lessons learned before Final Acceptance.
19.1.2 Partnering Facilitator, Workshops, and Monthly Evaluation Surveys
ICTC sends the Design-Builder a written invitation to enter into a partnering relationship after execution of the Contract. The Design-Builder shall respond within fifteen (15) days to accept the invitation and request the initial and additional partnering workshops. After ICTC receives the request, the Design-Builder and ICTC cooperatively:

a) Select a partnering facilitator that offers the service of a monthly partnering evaluation survey with a 5-point rating and agrees to follow the Caltrans Partnering Facilitator Standards and Expectations available at the Caltrans Partnering Program Web site.
b) Schedule initial partnering workshop.
c) Determine initial workshop site and duration.
d) Agree to other workshop administrative details.

Additional partnering workshops and sessions are encouraged throughout the life of the Project as determined necessary by the Design-Builder and ICTC, at quarterly intervals or as agreed to by both the Design-Builder and ICTC.

19.1.3 Training in Partnering Skills Development
The training in partnering skills development is required.
The Design-Builder and ICTC cooperatively schedule the training session and select a professional trainer, training site, and 1 to 4 topics from the following list to be covered in the training:

a) Active Listening
b) Building Teams
c) Change Management
d) Communication
e) Conflict Resolution
f) Cultural Diversity
g) Dealing with Difficult People
h) Decision Making
i) Effective Escalation Ladders
j) Emotional Intelligence
k) Empathy
l) Ethics
m) Facilitation Skills
n) Leadership
o) Partnering Process and Concepts
p) Project Management
q) Project Organization
r) Problem Solving
s) Running Effective Meetings
t) Time Management
u) Win-Win Negotiation

Before the initial partnering workshop, the trainer conducts a one-day training session in partnering skills development for the Design-Builder's and ICTC's representatives. This training session shall be a separate session from the initial partnering workshop and shall be conducted locally. The training session shall be
consistent with the partnering principles under the Caltrans "Field Guide to Partnering on Caltrans Construction Projects".

Design-Builder shall send at least two (2) representatives to the training session. One of these shall be the designated representative as specified in Section 23.5.1.

19.1.4 Payment

ICTC pays Design-Builder for:

a) Half of partnering workshops and sessions based on facilitator and workshop site cost.

b) Half of monthly partnering evaluation survey service cost.

c) Partnering skills development trainer and training site cost.

ICTC determines the costs based on invoice prices minus any available or offered discounts. ICTC does not pay markups on these costs.

ICTC does not pay for wages, travel expenses, or other costs associated with the partnering workshops and sessions, monthly partnering evaluation surveys, and training in partnering skills development.

19.2 Dispute Resolution Procedures

19.2.1 General Provisions

The Design-Builder shall comply with the requirements of Section 19.2 in order to pursue any legal action against ICTC arising from any Claim or Dispute related to this Contract or the Work associated therewith and arising up to and before Final Acceptance. All Claims or Disputes related to this Contract or the Work associated therewith are subject to the requirements of Section 19.2 unless exempt and/or excluded from these requirements by other provisions in the Contract including those issues, matters and/or decisions which are within the sole discretion of ICTC.

The dispute resolution procedures set forth in Section 19.2 are not a substitute for complying with the other Claim or Dispute related requirements set forth in this Contract including requirements related to the Design-Builder’s provision of notice to ICTC related to any Claim, Dispute, or potential Claim or potential Dispute, such as the provisions of Section 13 (e.g., Section 13.3, “Design-Builder Initiated Change Orders”). Failure to comply with the procedures set forth in Section 19.2 or with the other Claim and/or Dispute related requirements set forth in this Contract is a bar to any legal action against ICTC, for failure to exhaust administrative remedies.

ICTC and the Design-Builder shall use reasonable efforts to resolve Disputes under this Section 19.2 in a timely manner.

Design-Builder shall use the informal dispute resolution process in accordance with Section 19.2.2 for all Disputes.

Once the informal dispute resolution process has been exhausted, Disputes related to Claims arising up to and before Final Acceptance shall be referred to the Dispute Resolution Board (DRB) in accordance with Section 19.2.3.

If ICTC and the Design-Builder are unable to resolve Disputes regarding Claims (other than for tort liability claims arising out of personal injury, wrongful death, property damage, or related third-party claims) arising up to and before Final Acceptance in accordance with Section 19.2, the claiming party may initiate a single legal action to resolve such Claims and/or Disputes after Final Acceptance by filing a civil complaint in Sacramento County Superior Court.

The civil complaint shall be filed no later than 90 days after Final Acceptance, unless a civil complaint involves a Dispute that was timely and properly referred to the DRB prior to Final Acceptance and remains pending at the time of Final Acceptance, in which case the civil complaint must be filed no later than...
ninety (90) days after the conclusion of the DRB proceedings respecting such Dispute. Neither ICTC nor the Design-Builder shall have the right to litigate its Claims and/or Disputes before Final Acceptance or in multiple legal actions. Neither ICTC nor the Design-Builder shall have the right to assert, and both ICTC and the Design-Builder hereby waives the right to assert, the statute of limitations as a defense to any such Claims/Disputes provided such Claims/Disputes are stated in a civil complaint timely filed in Sacramento County Superior Court, as set forth above in this paragraph, after Final Acceptance and the conclusion of all DRB proceedings respecting such Claims and/or Disputes.

19.2.2 Informal Dispute Resolution Process

19.2.2.1 Escalation Ladder

Before referring a Dispute to the DRB, ICTC and the Design-Builder shall attempt to resolve the Dispute by elevating it through the three escalation ladder level reviews by and between ICTC’s Contract Manager and the Design-Builder’s Project Manager, ICTC’s Construction Engineer and the Design-Builder’s equivalent manager, and finally ICTC’s Executive Director and the Design-Builder’s equivalent manager. << ICTC – To verify escalation discussion based on ICTC’s organization. >>

19.2.2.2 Level One Review

ICTC’s Contract Manager or the Design-Builder’s Project Manager shall initiate the process of informal dispute resolution by providing the other party with written notice of a Dispute. The written notice shall provide a clear statement of the Dispute and shall refer to the specific Contract provisions that pertain to the Dispute. The notice shall also include a detailed description of the facts and circumstances relating to the Dispute (including the relevant dates, locations, and items of Work). Within five (5) days of the receipt of the written notice, ICTC’s Contract Manager and the Design-Builder’s Project Manager shall meet and review the Dispute. ICTC’s Contract Manager and the Design-Builder’s Project Manager shall attempt to resolve the Dispute within 10 days of their initial meeting. If the Dispute is resolved, ICTC and the Design-Builder shall create and sign a short description of the facts and the resolution that was agreed upon by ICTC and the Design-Builder.

19.2.2.3 Level Two Review

If the Dispute is not resolved by the tenth day, the Dispute shall be escalated to ICTC’s District Construction Engineer and the Design-Builder’s equivalent manager who shall meet and review the Dispute within five (5) days. ICTC’s District Construction Engineer and the Design-Builder’s equivalent manager shall attempt to resolve the Dispute within 10 days of their initial meeting. If the Dispute is resolved, ICTC and the Design-Builder shall create and sign a short description of the facts and the resolution that was agreed upon by ICTC and the Design-Builder.

19.2.2.4 Level Three Review

If the Dispute is not resolved by the tenth day, ICTC’s Executive Director and the Design-Builder’s equivalent manager shall meet and review the Dispute within five (5) days. ICTC’s Executive Director and the Design-Builder’s equivalent manager shall attempt to resolve the Dispute within 10 days of the initial meeting. If the Dispute is resolved, ICTC and the Design-Builder shall create and sign a short description of the facts and the resolution that was agreed upon by ICTC and the Design-Builder.

19.2.2.5 Unresolved Disputes

If the Dispute is not resolved by the tenth day by ICTC’s Executive Director and the Design-Builder’s equivalent manager, ICTC and the Design-Builder shall proceed with the provisions of Section 19.2.3.

19.2.3 Dispute Resolution Board

Before any DRB proceeding, ICTC and the Design-Builder shall engage in informal dispute resolution, as provided in Section 19.2.2, to resolve the Dispute.
The DRB shall be established by ICTC and the Design-Builder within 45 days after Contract execution. The DRB is a three-member board established jointly by ICTC and Design-Builder to assist in the resolution of Disputes described in Section 19.2.1. A Dispute shall be referred to the DRB by either ICTC or Design-Builder within 10 days after the expiration of the time set forth in Section 19.2.2.4. The party initiating the process shall notify the other party of its intent to convene the DRB.

DRB members shall be knowledgeable in the type of construction and contract documents anticipated by the Contract and shall have completed training through the Dispute Resolution Board Foundation.

No DRB member shall have prior direct involvement in the Contract. No DRB member shall have a financial interest in this Contract; ICTC; the Design-Builder, Design-Builder-Related Entities, or Affiliates; or legal and business service providers to either ICTC and/or the Design-Builder, at any time within 24 months before Contract execution or during the term of the Contract.

DRB members shall fully disclose, and continue to make future disclosures relating to, any and all direct or indirect professional or personal relationships with any and all key members and personnel of ICTC and/or the Design-Builder, including any designated representative as specified in Section 23.5.1.

While both ICTC and Design-Builder should consider the DRB’s recommendation, it is not binding on ICTC nor the Design-Builder.

Design-Builder shall not use or permit use of the DRB for disputes between the Design-Builder and its Subcontractors or Suppliers that have no grounds for a lawsuit against ICTC and/or the Design-Builder.

 Neither ICTC nor the Design-Builder shall bear a greater responsibility for damages or personal injury than is normally provided by Federal or State of California Law.

Notwithstanding the provisions of this Contract that require the Design-Builder to indemnify and hold harmless ICTC, ICTC and the Design-Builder shall jointly indemnify and hold harmless the DRB members from and against all claims, damages, losses, and expenses, including attorneys’ fees, arising out of and resulting from the finding(s), conclusion(s), and/or recommendation(s) of the DRB.

19.2.4 Establishment of the DRB

19.2.4.1 ICTC and Design-Builder Selections

The DRB shall consist of one member selected by ICTC and approved by Design-Builder, one member selected by Design-Builder and Approved by ICTC, and a third member selected by the first two DRB members and approved by both ICTC and Design-Builder. The approval of the third DRB nominee is subject to compliance with Sections 19.2.3.

ICTC and Design-Builder shall provide the other written notification requesting approval of the name of its DRB nominee along with the DRB nominee’s disclosure statement. Disclosure statements shall include a résumé of the DRB nominee’s experience and a declaration statement describing past, present, anticipated, and planned relationships with all parties involved in this Contract. Objections to DRB nominees shall be based on a specific breach or violation of DRB nominee responsibilities or DRB nominee qualifications.

ICTC or Design-Builder may object to the other’s DRB nominee in the event there is a failure on the part of the DRB nominee in making the required disclosure provided in Section 19.2.3. ICTC or the Design-Builder may also, on a one-time basis, object to the other’s nominee without specifying a reason and this nominee shall not be selected for the DRB. Objections to such nomination shall be made within five (5) days of the written notification of the DRB nominee. If ICTC and/or the Design-Builder objects to the other’s DRB nominee, the nominating party shall nominate another DRB nominee within five (5) days of such objection.
19.2.4.2 Selection of Third Member

The two DRB members selected and subsequently approved by ICTC and Design-Builder, respectively, shall proceed with the selection of the third DRB member immediately after receiving written notification from both ICTC and the Design-Builder confirming approval of the first two DRB nominees. The two DRB members shall provide their recommendation simultaneously to ICTC and the Design-Builder within fifteen (15) days of their approval. The third DRB nominee shall provide a disclosure statement to the first two DRB members, ICTC, and Design-Builder. The professional experience of the third DRB member shall complement that of the first two DRB members. The third DRB member shall be subject to the mutual approval of ICTC and Design-Builder.

If the two DRB members do not agree on the third DRB nominee, or if ICTC and Design-Builder cannot mutually approve the third DRB nominee, the two DRB members shall submit a list of nominees, comprised of three names from each DRB member, to ICTC and Design-Builder for final selection and approval.

If ICTC and Design-Builder cannot agree on the third DRB member nomination selected from the list provided pursuant to the immediately preceding paragraph, ICTC and Design-Builder shall each select three names from the current list of arbitrators certified by the Public Works Contract Arbitration Committee established by Public Contract Code Section 10245 et seq. The two DRB members shall then select one of the six names by a blind draw. The selected DRB member shall submit a disclosure in compliance with Sections 19.2.3. The selected DRB member shall be appointed as a third DRB member unless Design-Builder or ICTC object to the nomination based on a failure to disclose as provided in Section 19.2.3, or failure to otherwise comply with Section 19.2.3, no later than five (5) days following written notice of such appointment. If there is an objection against the selection of the third DRB member ICTC and the Design-Builder shall repeat the blind draw until a third DRB member is selected and approved by both ICTC and the Design-Builder

19.2.4.3 DRB Chairperson

If there is no objection from either ICTC or the Design-Builder based on Section 19.2.3, the third DRB member shall become the DRB Chairperson.

19.2.5 Termination, Replacement of DRB Member

19.2.5.1 Termination

A DRB member may be terminated immediately, by either ICTC or the Design-Builder, for failing to comply at all times with all required employment or financial disclosure conditions of DRB membership in conformance with the terms of the DRB Agreement (see Exhibit J), and for violation of Section 19.2.3.

Service of a DRB member may be terminated at any time upon not less than 15 days prior written notice to the DRB members, ICTC, and the Design-Builder, as follows:

a) ICTC may unilaterally terminate service of ICTC-appointed member.
b) Design-Builder may unilaterally terminate service of the Design-Builder-appointed member.
c) Upon the written recommendation of ICTC and Design-Builder appointed members and the mutual written approval of ICTC and the Design-Builder, the appointed DRB members may replace the third member.

Each party shall document the need for the replacement and substantiate the replacement request in writing to the other party and DRB members before the removal of a DRB member.

19.2.5.2 Resignation

A DRB member may resign upon not less than 15 days written notice of resignation to ICTC and Design-Builder.
19.2.5.3 Replacement of DRB Member
When a member of the DRB is replaced, the replacement member shall be appointed in the same manner as the replaced member was appointed. The appointment of a replacement DRB member will begin promptly upon determination of the need for replacement and shall be completed within 15 days.

19.2.6 Role of the DRB
The DRB shall fairly and impartially consider Disputes placed before it and provide recommendations to ICTC and the Design-Builder for resolution of these Disputes. The DRB shall provide recommendations based on the facts related to the Dispute, and the Contract Documents.

Except for those Persons who provide technical services and are directly involved in the Project or who have direct knowledge of the Dispute, only ICTC’s Contract Manager, District Construction Engineer, and Executive Director, and the Design-Builder’s equivalent managers, may present information at the DRB meeting.

The DRB shall govern the conduct of its business and reporting procedures in accordance with the terms and conditions of this Contract and the DRB Agreement. The DRB may establish further operating procedures that conform to the requirements of this Contract and the DRB Agreement.

ICTC will provide conference facilities for DRB meetings at no cost to Design-Builder.

The DRB Chairperson shall schedule DRB meetings and any other DRB activities.

DRB members shall have no claim against ICTC or Design-Builder from any alleged harm arising out of ICTC’s and/or the Design-Builder’s discussions and evaluations of the DRB’s opinions and recommendations.

DRB members shall refrain, at all times, from expressing opinions on the merits of evidence and statements on matters under Dispute, except in the private sessions of the DRB members. Opinions of DRB members expressed in private sessions shall be kept strictly confidential. Individual DRB members shall not meet with or discuss Disputes or other issues under the Contract Documents with the ICC and/or the Design-Builder. Any discussions regarding the Project and/or Disputes, which involve the DRB members and ICTC and/or the Design-Builder shall be in the presence of all three DRB members and both ICTC and the Design-Builder. Individual DRB members shall not undertake independent investigations of any kind pertaining to Disputes, except with the knowledge and approval of both ICTC and the Design-Builder and as expressly directed by the DRB Chairperson. No DRB member shall have any ex parte communication with ICTC, the Design-Builder, or their managers or agents regarding any material issues in Dispute. Any such ex parte communications with either ICTC, the Design-Builder, or their managers or agents shall result in the immediate removal of the DRB member.

19.2.7 DRB Meeting Procedures and Recommendations

19.2.7.1 Referral of Disputes to DRB
If ICTC and the Design-Builder are unable to reach resolution of their Dispute as provided in Section 19.2.2, and consistent with the other provisions of the Contract, the Dispute is governed by Section 19.2, either ICTC or the Design-Builder may submit its Dispute to the DRB. The referring party shall submit a written request for the DRB to consider the Dispute. The party initiating the request for the DRB shall simultaneously make the written request to the DRB Chairperson and the other party.

The written Dispute referral shall describe the Disputed matter in individual discrete segments, so that it will be clear to ICTC, the Design-Builder, and the DRB what discrete elements of the Dispute have been resolved, and which remain unresolved, and shall include an estimate of the impacts on cost of the affected Work and impacts, if any, on controlling items of work, Critical Path and Completion Deadlines.
19.2.7.2 Written Documentation
ICTC and the Design-Builder shall each be afforded an opportunity to be present and to be heard by the DRB, and to offer evidence. Either party furnishing written evidence (primary or additional) or documentation to the DRB shall furnish copies of such information to the other party a minimum of fifteen (15) days before the date the DRB is scheduled to convene the meeting for the Dispute. Either party shall produce such additional evidence as the DRB may deem necessary to reach an understanding and a recommendation regarding the Dispute. The party furnishing additional evidence shall furnish copies of such additional evidence to the other party at the same time the evidence is provided to the DRB. The DRB shall not consider evidence that is not furnished in conformance with the terms specified herein.

19.2.7.3 DRB Meeting
Upon receipt by the DRB of a written referral of a Dispute, the DRB shall convene to review and consider the Dispute. The DRB meeting shall be held no later than 60 days after receipt of the written request unless otherwise agreed to by ICTC and the Design-Builder.

19.2.7.4 Clarification of Written Documentation
The DRB may request clarifying information from either ICTC or the Design-Builder within ten (10) days after the DRB meeting. Requested information shall be submitted to the DRB within ten (10) days of the DRB request, unless extended with the written approval of the DRB and the other party.

19.2.7.5 DRB Report
The DRB shall furnish a written report to ICTC and the Design-Builder with its finding(s), conclusion(s) and recommendation(s). The DRB shall complete its report (DRB Report) (including any minority opinion) and submit it to ICTC and the Design-Builder within 30 days after the DRB meeting, except that time extensions may be granted at the request of the DRB with the written concurrence of ICTC and the Design-Builder. The DRB Report shall summarize the facts considered, and the Contract language reviewed by the DRB as pertinent to the Dispute, and the DRB's interpretation and reasoning in arriving at its finding(s), conclusion(s), and recommendation(s). If appropriate, the DRB Report also may recommend guidelines for determining compensation. The DRB Report shall stand on its own, without attachments or appendices.

19.2.7.6 Response to DRB Report
Within 30 days after receiving the DRB Report, ICTC and the Design-Builder shall respond to the DRB in writing stating whether the Dispute is resolved or remains unresolved. Failure to provide the written response within the time specified, including, a written acceptance of the DRB's recommendation, or a written request that the DRB reconsider its recommendation, shall conclusively indicate that the party and/or parties failing to respond reject(s) the DRB recommendation. Immediately after responses have been received from ICTC and/or the Design-Builder, the DRB shall provide copies of the responses to ICTC and the Design-Builder simultaneously.

19.2.7.7 Clarifications of DRB Report
Either ICTC or the Design-Builder may request clarification of elements of the DRB Report from the DRB before responding to the DRB Report. The DRB shall consider any clarification request only if submitted within 10 days after receipt of the DRB Report, and if submitted simultaneously in writing to both the DRB and the other party. Each party may submit only one (1) request for clarification for any individual DRB Report. The DRB shall respond, in writing, to requests for clarification within 10 days of receipt of such requests.

19.2.7.8 Reconsideration
Either ICTC or the Design-Builder may seek a reconsideration of the DRB's recommendation. The DRB shall only grant reconsideration if the party seeking the reconsideration submits new evidence and if the
request is submitted within the thirty (30) day time limit specified in Section 19.2.7.6 for response to the DRB Report. Each party may submit only one (1) request for reconsideration regarding an individual DRB Report. Any such request must be simultaneously transmitted to the DRB and the other party.

19.2.7.9 Resolution of Dispute
If ICTC and the Design-Builder are able to resolve their Dispute with the aid of the DRB Report, they shall promptly accept and implement the terms and conditions of the resolution. If ICTC and the Design-Builder cannot agree on compensation within 60 days of the acceptance by both ICTC and the Design-Builder of the resolution, either ICTC or the Design-Builder may request that the DRB provide written guidance regarding compensation.

19.2.8 Payment of DRB Members and DRB Costs

19.2.8.1 DRB Member Compensation
Each DRB member shall be compensated at an agreed rate of $2,000 per day for each in-person, approved DRB meeting (and shall not include meetings attended via telephone or other remote communication method). A member serving on more than one ICTC DRB or as an ICTC dispute resolution advisor (regardless of the number of meetings per day) shall not be paid more than the agreed rate per day. The agreed rate shall be considered full compensation for on-site time, travel expenses, transportation, lodging, time for travel, and incidentals for each day or portion thereof that the DRB member attends (in person) an authorized DRB meeting.

No additional compensation will be made for time spent by DRB members in regard to review and research activities outside the official DRB meetings unless that time (such as time spent evaluating evidence and preparing recommendations and a DRB Report on Disputes presented to the DRB) has been specifically agreed upon in writing by ICTC and Design-Builder in advance, in which case, time away from the Project, which has been specifically agreed upon by ICTC and Design-Builder in advance, will be compensated at an agreed rate of $200 per hour. The agreed amount of $200 per hour shall include all incidentals, including expenses for telephone, fax, and computer services. From time to time ICTC and the Design-Builder may reconsider and mutually revise the agreed rate, in which case they shall document the revised agreed rate in writing.

DRB members may submit invoices to ICTC and Design-Builder for payment for work performed and services rendered for their participation in authorized meetings not more often than once per month. The invoices shall be in a format approved by ICTC and the Design-Builder and accompanied by a general description of activities performed during that billing period. Payment for hourly fees, at the agreed rate, shall not be paid to a DRB member until the amount and extent of those fees are mutually approved by ICTC and Design-Builder.

19.2.8.2 Technical Services
If the DRB needs outside technical services, these technical services shall be preapproved by both ICTC and Design-Builder. The cost of the preapproved technical services shall be borne equally by ICTC and Design-Builder.

19.2.8.3 Cost Sharing
ICTC and Design-Builder shall equally bear the costs and expenses of the DRB. There shall be no markups applied to expenses connected with the DRB.

Regardless of the DRB recommendation, neither party shall be entitled to reimbursement of DRB costs from the other party.
19.2.9 Confidentiality
ICTC and the Design-Builder agree that all documents and records provided by ICTC and/or the Design-Builder to the DRB that are marked “Confidential - for use by the DRB only” related to the Dispute shall be kept in confidence and used only for the purpose of resolution of the Dispute, and for assisting in development of DRB findings and recommendations; and that such documents and records shall not be utilized or revealed to others, except to officials of ICTC and the Design-Builder who are authorized to act on the subject Disputes, for any purposes, during the life of the DRB Agreement. The foregoing shall not apply, however, to documents and records that before submission to the DRB were already subject to the Public Records Act. Upon termination of the DRB Agreement, such confidential documents and records, and all copies thereof (whether in hardcopy or electronic form), shall be returned to the respective parties who furnished them to the DRB.

However, ICTC and the Design-Builder understand that such documents may be subsequently discoverable and admissible in legal proceedings to the extent provided by law.

Notwithstanding the foregoing, the FHWA shall have the right to review the work of the DRB in progress (except for private meetings or deliberations of the DRB that do not become part of the Project records).

19.2.10 Continuance of Work During Dispute
During the course of any and all dispute resolution procedures/processes, Design-Builder shall proceed with the performance of the Work, including Disputed Work, unless otherwise specified or directed by ICTC in accordance with the Contract Documents. Throughout the Disputed Work, Design-Builder shall maintain records that provide a clear distinction between the incurred direct costs of Disputed Work and that of undisputed Work. The Design-Builder shall allow ICTC access to Design-Builder's Project records on an open book basis as ICTC desires to evaluate the Dispute.

19.3 Formal Legal Action(s)
19.3.1 Right to Litigate Dispute
ICTC and Design-Builder agree that the Design-Builder’s submission of a Dispute to the informal dispute resolution process and/or the DRB procedures/processes (as applicable) under Section 19.2 is a condition precedent to the Design-Builder’s right to file a formal legal action with respect to the Dispute.

ICTC and Design-Builder further agree that Design-Builder’s failure to comply with the other Claim and/or Dispute related requirements set forth in this Contract is a bar to any legal action against ICTC, for failure to exhaust administrative remedies. This specifically includes the other Claim and/or Dispute related requirements set forth in this Contract, such as requirements related to the Design-Builder’s provision of notice to ICTC pertaining to any Claim, Dispute, or potential Claim or potential Dispute, for example, the requirements of Section 13 (see, e.g., Section 13.3, “Design-Builder Initiated Change Orders”).

ICTC and Design-Builder shall not call DRB members who served on the DRB for this Contract as witness in litigation proceedings which may arise from this Contract, and all documents created by the DRB shall be inadmissible as evidence in such proceedings; except the DRB’s final written reports on each issue brought before it, to the extent otherwise provided by law.

19.3.2 Jurisdiction and Venue
ICTC and the Design-Builder agree to exclusive jurisdiction and venue in the Sacramento County Superior Court in any action by or against ICTC or its successors and assigns arising out of the Contract, the Contract Documents, the Project, or the Work.
20  ACCEPTANCE OF PROJECT

20.1  Reserved

20.2  Substantial Completion

20.2.1  Notice by Design-Build

Design-Build shall provide written notice to ICTC when all of the following have occurred with respect to the Project:

a)  Design-Build has completed all Work (except for Punch List items, maintenance, final cleanup, and other items only included in the requirements for Final Acceptance).

b)  Design-Build has ensured that the Work has been performed in accordance with the requirements of the Contract Documents.

c)  Design-Build has received all applicable Governmental Approvals required for Project use.

d)  Design-Build has furnished to ICTC certifications from its Design Manager, in form and substance satisfactory to ICTC, certifying conformity of the Design Documents with the requirements of the Contract Documents.

e)  Design-Build has furnished to ICTC certifications from the Project Manager, in form and substance satisfactory to ICTC, certifying conformity of the construction with the Design Documents.

f)  Design-Build has furnished to ICTC certifications from its Construction Quality Validation Manager, in form and substance satisfactory to ICTC, certifying that there are no outstanding nonconformances other than those identified on the Punch List.

g)  Design-Build has ensured that the Project may be used without damage to the Project or any other property on or off the Site, and without injury to any Person.

h)  Design-Build has obtained all applicable third-party approvals relating to the Work (including Utility Owners as required under any applicable Utility Agreements and Book 2, Section 12, “Utilities”), and all third parties have completed all work that involves obligations by Design-Build (including Utility Owners under any Utility Agreements and Book 2, Section 12, “Utilities”).

i)  The Project is fully opened to traffic and Design-Build has ensured that no further work is required which would involve any lane or shoulder closure.

j)  Quality Manager certifies the Work is completed in accordance with the Contract Documents.

20.2.2  Correction of Defects

Upon receipt of Design-Build’s notice under Section 20.2.1, ICTC will conduct such inspections, surveys, and/or testing as ICTC deems desirable. If such inspections, surveys, and/or tests disclose that any Work does not meet the requirements of the Contract Documents, ICTC will promptly advise Design-Build as to Nonconforming Work (including incomplete Work) necessary to be corrected as a condition to Substantial Completion. Nonconforming Work (including incomplete Work) which may be corrected as Punch List items and/or whether Design-Build shall reassess the accuracy and completeness of its notice. Upon correction of the Nonconforming Work (including incomplete Work) identified as a prerequisite to Substantial Completion, Design-Build shall provide written notification to ICTC and ICTC will conduct additional inspections, surveys, and/or tests as ICTC deems desirable. This procedure shall be repeated until ICTC finds that all prerequisites to Substantial Completion have been met.
20.2.3 Notice of Substantial Completion

ICTC will issue a Notice of Substantial Completion at such time as:

a) ICTC determines that all conditions set forth in Section 20.2.1 have been satisfied.
b) ICTC determines that all Nonconforming Work (including incomplete Work) identified as prerequisites to Substantial Completion has been corrected.
c) Design-Builder prepared and ICTC Approved a Punch List.

20.3 Final Acceptance

20.3.1 Conditions to Final Acceptance

20.3.1.1 Performance of Work after Substantial Completion

Promptly after Substantial Completion has occurred, Design-Builder shall perform all Work, if any, which was deferred for purposes of Substantial Completion, and shall satisfy all of its other obligations under the Contract Documents, including ensuring that the Project has been completed and all components have been properly adjusted and tested.

20.3.1.2 Conditions to Affidavit of Final Completion

Design-Builder shall provide to ICTC an executed sworn Affidavit of Final Completion in accordance with Section 20.3.1.3 when all of the following have occurred:

a) All requirements for Substantial Completion have been fully satisfied.
b) ICTC has received all Released for Construction Documents, Design Documents, As-Built Documents, right-of-way record maps, surveys, material certifications, test data, and other deliverables required under the Contract Documents.
c) ICTC has received and Approved the Final Acceptance Submittal in accordance with Book 2, Section 6.5.3, “Final Acceptance Submittal.”
d) All special tools, equipment, furnishings and supplies purchased by and/or used by Design-Builder as provided in the Contract Documents have been delivered to ICTC and all replacement spare parts have been purchased and delivered to ICTC free and clear of Liens.
e) All of Design-Builder’s and Subcontractors’ personnel, supplies, equipment, waste materials, rubbish, and temporary facilities have been removed from the Site, Design-Builder has restored and repaired all damage or injury arising from such removal to the satisfaction of ICTC and the Site is in good working order and condition.
f) Design-Builder has furnished to ICTC certifications from its Design Manager, in form and substance satisfactory to ICTC, certifying conformity of the Design Documents with the requirements of the Contract Documents.
g) Design-Builder has furnished to ICTC certifications from the Project Manager, in form and substance satisfactory to ICTC, certifying conformity of the construction with the Design Documents.
h) Design-Builder has furnished to ICTC certifications from its Construction Quality Validation Manager, in form and substance satisfactory to ICTC, certifying that there are no outstanding nonconformances.
i) Design-Builder has delivered to ICTC a notice of completion for the Project in recordable form and meeting all statutory requirements.
j) The Punch List items have been completed to the satisfaction of ICTC.
k) All of Design-Builder’s other obligations under the Contract Documents (other than obligations which by their nature are required to be performed after Final Acceptance as determined by ICTC) have been satisfied in full or waived in writing by ICTC.

l) Design-Builder has identified a single point of contact to address the Warranty requirements of Section 21 throughout the duration of the Project Warranty term.

20.3.1.3 Requirements of Affidavit of Final Completion

The Affidavit of Final Completion referred to in Section 20.3.1.2 shall include the following statement:

“To the best of Design-Builder’s knowledge and belief, the Work under the Contract has been completed in strict accordance with the Contract Documents, no lawful debts for labor or materials are outstanding and no federal excise tax has been included in the Contract Price; all requests for funds for undisputed Work under the Contract, including changes in the Work, and under all billings of whatsoever nature are accurate, complete, and final and no additional compensation over and above the final payment will be requested or is due under the Contract or under any adjustment issued thereunder for said undisputed Work; there are no outstanding claims, Liens, or stop notices relating to the Project, including claims by Utility Owners; there is no existing default by Design-Builder under any Utility Agreement, and no event has occurred which, with the passing of time or giving of notice or both, would lead to a claim relating to the Work or Event of Default under any Utility Agreement; and upon receipt of final payment, Design-Builder and Subcontractors acknowledge that ICTC and any and all employees of ICTC and their authorized representatives will thereby be released, discharged and acquitted from any and all claims or liability for additional sums on account of undisputed Work performed under the Contract.”

If Design-Builder is unable to provide the affidavit in the above form, the affidavit shall certify that all such outstanding matters are set forth in an attached list which shall describe the outstanding matters in such detail as may be requested by ICTC. The affidavit shall include a representation of Design-Builder that it is diligently and in good faith contesting all such matters by appropriate legal proceedings and shall provide a status report regarding the same including an estimate of the maximum payable with respect to each such matter.

20.3.2 Inspection and Issuance of Notice of Final Acceptance

Upon ICTC’s receipt of the Affidavit of Final Completion, ICTC will make final inspection with As-Built Documents in hand and ICTC will either issue a Notice of Final Acceptance or notify Design-Builder regarding any Work remaining to be performed. If ICTC fails to issue a Notice of Final Acceptance, Design-Builder shall promptly remedy the defective and/or uncompleted portions of the Work. Thereafter, Design-Builder shall provide to ICTC a revised Affidavit of Final Completion with a new date based on when the defective and/or uncompleted portions of the Work were corrected. The foregoing procedure shall apply successively thereafter until ICTC has issued a Notice of Final Acceptance.

20.3.3 Overpayments; No Relief from Continuing Obligations

Final Acceptance shall not prevent ICTC from correcting any measurement, estimate, or certificate made before or after completion of the Work, or from recovering from Design-Builder, the Surety(ies), and/or any Guarantor, the amount of any overpayment sustained due to failure of Design-Builder to fulfill the obligations under the Contract. A waiver on the part of ICTC of any breach by Design-Builder shall not be held to be a waiver of any other or subsequent breach. Final Acceptance shall not relieve Design-Builder from any of its continuing obligations hereunder or constitute any assumption of liability by ICTC.
20.4 Opening of Sections of Project to Traffic

20.4.1 Plan for Opening to Traffic
The Project Schedule shall set forth Design-Builder’s plan for completing sections of the Project and opening them to traffic. ICTC may request that Design-Builder expedite certain sections of the Project, and Design-Builder shall accommodate such requests to the extent that it can do so without significant disruption to its schedule or a significant increase in its costs. Notwithstanding the foregoing, if ICTC orders Design-Builder to open portions of the Project which cannot be accommodated without significant disruption to Design-Builder’s schedule or a significant increase in Design-Builder’s costs, such direction shall be considered an ICTC-Directed Change.

20.4.2 Direction to Open Following Design-Builder Failure to Perform
If Design-Builder is delinquent in completing shoulders, drainage structures, or other features of the Work, ICTC may, but is not obligated to, order all or a portion of the Project opened to traffic notwithstanding such incomplete elements. Design-Builder shall then conduct the remainder of the construction operations, minimizing obstruction to traffic. Except as provided in Section 20.4.1, Design-Builder shall not receive any added compensation due to the added costs attributable to the opening of the Project to traffic. Should ICTC open the Project to traffic, Design-Builder is not relieved of any responsibility for ensuring public safety and public convenience, nor is Design-Builder relieved from any insurance or indemnification obligations pursuant to this Contract. ICTC’s decision to open the road following Design-Builder’s failure to perform shall not be construed as a waiver of any of ICTC’s rights under this Contract.

20.4.3 No Waiver
Opening of portions of the Project before Final Acceptance does not constitute acceptance of the Work or a waiver of any provisions of the Contract Documents.

20.5 Assignment of Causes of Action
Design-Builder hereby offers and agrees to assign to ICTC all rights, title, and interest in and to all causes of action it may have under Section 4 of the Clayton Act (15 USC Section 15), arising from purchases of goods, services or materials pursuant to the Contract or any Subcontract. This assignment shall be made and become effective at the time ICTC tenders final payment to Design-Builder, without further acknowledgment by the parties.
21 WARRANTIES

21.1 Warranties by Design-Builder

21.1.1 Project Warranties

Design-Builder warrants that:

a) All design Work furnished pursuant to the Contract Documents shall conform to all professional engineering principles generally accepted as standards of the industry in the State.

b) The Project shall be free of defects (except to the extent that such defects are inherent in prescriptive specifications included in the Contract Documents, unless (i) Design-Builder has actual or constructive knowledge of such defects, and (ii) Design-Builder fails to request a change thereto by ICTC).

c) Materials and equipment furnished under the Contract Documents shall be of good quality and, when installed, shall be new.

d) The Work shall meet all of the requirements of the Contract Documents.

e) The specifications and/or drawings selected or prepared for use during construction are appropriate for their intended use.

f) The Project shall be fit for use for the intended function pursuant to and in accordance with the specifications of the Contract Documents.

21.1.2 Project Warranty Term

The Warranty term shall begin upon Substantial Completion or, if earlier, upon final acceptance of specific elements of the Project by a third-party owner. Subject to extension under Section 21.2 and notwithstanding any shorter Warranty term for specific Project elements that may be set forth elsewhere in the Contract Documents, the Warranties regarding structures and pavements of the Project shall remain in effect until three (3) years after Substantial Completion. The Warranties regarding all other elements of the Project shall remain in effect until two (2) years after Final Acceptance.

If ICTC determines that any of the Work has not met the standards set forth in this Section 21.1 at any time within the Warranty period, then Design-Builder shall correct such Work as specified below, even if the performance of such corrective Work extends beyond the stated Warranty period.

21.1.3 Reserved

21.1.4 Corrective Work

ICTC and Design-Builder shall conduct a walkthrough of the Site together at least one (1) time per year before the expiration of the Warranty period. On each walkthrough, ICTC will produce a punch list of items requiring Warranty Work. In addition, ICTC reserves the right at any time during the Warranty period to identify Work that fails to meet the Warranty.

Design-Builder may also monitor the Site using non-destructive testing for any Warranty Work required during the Warranty period. Design-Builder shall provide advance notification to ICTC of all monitoring dates and times.

ICTC will notify Design-Builder of any failure of any of the Work that is Design-Builder’s, or any Subcontractor’s, responsibility to correct under the terms of the Warranty. Design-Builder shall correct any areas which exceed the Warranty threshold limits established for the Project. ICTC may require corrective actions at any time within the Warranty period or defer corrective action until the end of the initial Warranty period.
For all corrective actions required, Design-Build shall provide a written proposal for performing Warranty Work within 10 Working Days from receiving notification from ICTC that corrective Work is required. Design-Build shall also provide a written proposal for performing the corrective Work if Design-Build elects to perform this Work based on Design-Build’s assessment of the Site.

The proposal shall include, as a minimum:
   a) The proposed construction remedy.
   b) The proposed schedule for prosecution and completion of the Work.
   c) The proposed Transportation Management Plan.

ICTC shall respond as to the adequacy and suitability of the proposal within 10 Working Days of the date of Design-Build’s submittal. ICTC may agree to accept Nonconforming Work in accordance with Section 5.7.2.

During the Warranty period, Design-Build will not be held responsible for distresses caused by identifiable factors unrelated to materials and workmanship. Upon written request from Design-Build and on a case-by-case basis, ICTC will consider other factors that appear to be beyond the control of Design-Build and may relieve Design-Build from its Warranty obligations with respect thereto.

Design-Build will begin corrective action Work within 30 Calendar Days after notice by ICTC of acceptance of the written plan for Warranty correction. If the Work cannot be started then because of seasonal limitations, Design-Build shall so notify ICTC and submit (for ICTC Approval) a schedule for completion of the corrective action Work. If Design-Build does not use its best efforts to proceed to effectuate that corrective action Work within the agreed time, or if Design-Build and ICTC fail to reach such an agreement, ICTC, after notice to Design-Build, shall have the right to perform or have performed by third parties the necessary remedy, and the costs thereof shall be borne by Design-Build. Design-Build shall be responsible for the inspection and testing of the Warranty Work.

If ICTC determines that emergency repairs are necessary for public safety, ICTC may perform the corrective Work. Any such emergency repairs will be authorized by ICTC’s Contract Manager, or his/her representative. Before making the emergency repairs, ICTC will document the basis for the emergency action, and will preserve evidence, such as photographs or videotapes, of the defective condition. Emergency repairs will be coordinated with Design-Build when possible. All costs associated with the emergency repairs that are covered by the Warranty Work shall be borne by Design-Build.

21.1.5 Costs of Correction of Work
All costs of correcting such rejected Work, including additional testing and inspections, shall be deemed included in the Contract Price. Design-Build shall reimburse ICTC and pay ICTC’s expenses made necessary thereby within ten (10) Days after Design-Build’s receipt of invoice therefor. Design-Build shall be responsible for obtaining any required Governmental Approvals or other consents from any other Person in connection with the Warranty Work.

21.2 Warranty of Corrected Work
The Warranties shall apply to all Work redone, repaired, corrected, or replaced pursuant to the terms of the Contract. The Warranties as to each redone, repaired, corrected, or replaced element of the Work shall extend beyond the original Warranty period if necessary, to provide at least a one-year Warranty period following acceptance thereof by ICTC or acceptance thereof by the appropriate Person who will own such element.
21.3 Subcontractor Warranties

21.3.1 Assignment
Without in any way derogating Design-Builder’s own representations and warranties (including the Warranties) and other obligations with respect to all of the Work, Design-Builder shall obtain from all Subcontractors and cause to be extended to ICTC, appropriate representations, warranties, guarantees, and obligations with respect to the design, materials, workmanship, equipment, tools, and supplies furnished by such Subcontractors, including all such representations, warranties, guarantees, and obligations required to be furnished by Subcontractors under Book 2. All representations, warranties, guarantees, and obligations of Subcontractors (a) shall be written so as to survive all ICTC and Design-Builder inspections, tests and approvals, and (b) shall run directly to and be enforceable by Design-Builder and/or ICTC and their respective successors and assigns. Design-Builder hereby assigns to ICTC all of Design-Builder’s rights and interest in all extended warranties for periods exceeding the applicable Warranty period which are received by Design-Builder from any of its Subcontractors.

21.3.2 Enforcement
Upon receipt from ICTC of notice of a failure of any of the Work to satisfy any Subcontractor warranty, representation, guarantee, or obligation, Design-Builder shall enforce or perform any such representation, warranty, guarantee, or obligation, in addition to Design-Builder’s other obligations hereunder. ICTC’s rights under this Section 21.3.2 shall begin at the time such representation, warranty, guarantee, or obligation is furnished, and shall continue until the expiration of Design-Builder’s relevant Warranty (including extensions thereof under Section 21.2). Until such expiration, Design-Builder shall be responsible for the cost of any equipment, material, labor (including re-engineering), or shipping, and Design-Builder shall be required to replace or repair defective equipment, material, or workmanship furnished by any Subcontractor.

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

21.5 Warranty Beneficiaries
In addition to benefiting ICTC and its successors and assigns, the Warranties and Subcontractor warranties provided under this Section 21 shall inure to the benefit of, and shall be directly enforceable by, any local agencies and Utility Owners with respect to those portions of the Work owned or controlled by each such Person.

21.6 Remedies for Breach of Warranty
In addition to ICTC’s other rights and remedies hereunder, at law or in equity, Design-Builder shall be liable for actual damages resulting from any breach of an express or implied Warranty or any defect in the Work.

21.7 Disputes
Any disagreement between ICTC and Design-Builder relating to this Section 21 shall be subject to the dispute resolution provisions contained in Section 19, provided that Design-Builder shall proceed as directed by ICTC pending resolution of the dispute.
22 DOCUMENTS AND RECORDS

22.1 Escrowed Proposal Documents

Design-Builder shall submit the Escrowed Proposal Documents (EPD) to ICTC in a container suitable for sealing no later than 10 Calendar Days following award of the Contract by ICTC.

The container shall be clearly marked “Price Proposal Documentation” and shall have entered on the face of the container, Design-Builder's name, the date of submittal, and the ICTC, Contract No, Project ID, and Federal Aid Project Number. Failure to submit the EPD may result in cancellation of the award, in which case ICTC will retain the Proposal Bond.

Upon receipt of the EPD, authorized representatives of ICTC and Design-Builder will review the EPD for accuracy and completeness. Should a discrepancy exist, Design-Builder shall furnish ICTC with any other needed Price Proposal documentation within three (3) Working Days. ICTC, upon determining that the EPD appear to be complete, will immediately place the EPD and affidavit in the container in the presence of Design-Builder's representative, and seal it.

ICTC will retain the EPD for placement in a safety deposit box, vault or other secure accommodation. The cost of accommodation will be borne by ICTC. Payment for compilation of the data, container, cost of verification of the EPD, or any other costs that may be incurred by Design-Builder in fulfilling these requirements shall be considered incidental to the Contract. The EPD will be returned to Design-Builder following Final Acceptance.

22.1.1 Review of EPD

The EPD shall be available during business hours for joint review by Design-Builder and ICTC in connection with the resolution of Disputes, an audit under Section 22.3.5 (if the EPD are the subject of an audit) and as described in Section 22.1.6. Subject to Section 22.1.7, ICTC shall be entitled to review all or any part of the EPD in order to satisfy itself regarding the applicability of the individual documents to the matter at issue and shall be entitled to make and retain copies of such documents as it deems appropriate in connection with any such matters. The foregoing shall in no way be deemed a limitation on ICTC’s discovery rights with respect to such documents.

22.1.2 Property of Design-Builder

The EPD are, and shall always remain, the property of Design-Builder, and shall be considered to be in Design-Builder’s possession, subject to ICTC’s right to review the EPD as provided herein. ICTC acknowledges that Design-Builder considers that the EPD constitute trade secrets or proprietary information. This acknowledgment is based upon ICTC’s understanding that the information contained in the EPD are not known outside Design-Builder’s business, is known only to a limited extent and by a limited number of employees of Design-Builder, is safeguarded while in Design-Builder’s possession, and may be valuable to Design-Builder’s business strategies, assumptions and intended means, methods, and techniques. ICTC further acknowledges that Design-Builder expended money in developing the information included in the EPD and further acknowledges that it would be difficult for a competitor to replicate the information contained therein. ICTC acknowledges that the EPD and the information contained therein are being provided to ICTC only because it is an express prerequisite to award of the Contract.

22.1.3 Representation and Warranty

Design-Builder represents and warrants that the EPD provided concurrently with the Proposal constitute all of the information used in the preparation of its Proposal and agrees that no other Proposal preparation information will be considered in resolving Disputes or Claims. Design-Builder also agrees that the EPD are not part of the Contract and that nothing in the EPD shall change or modify the Contract.
22.1.4 Contents of EPD

The EPD provided with the Proposal shall, at a minimum, clearly detail how the components of the Proposal Price were determined and shall be adequate to enable a complete understanding and interpretation of how Design-Builder arrived at the Proposal Price. The EPD provided in connection with quotations and Change Orders shall, at a minimum, clearly detail how the total price and individual components of that price were determined and shall be adequate to enable a complete understanding and interpretation of how Design-Builder arrives at its quotation and/or Change Order price. All Work shall be separated into subitems as required to present a complete and detailed estimate of all costs. Crews, equipment, quantities, and rates of production shall be detailed. Estimates of costs shall be further divided into Design-Builder’s usual cost categories such as direct labor, repair labor, equipment ownership and operation, expendable materials, permanent materials, and subcontract costs as appropriate. Plant and equipment and indirect costs shall also be detailed in Design-Builder’s usual format. Design-Builder’s allocation of plant and equipment, indirect costs, contingencies, mark-up, and other items to each direct cost item shall be clearly identified. The EPD shall itemize the estimated costs of the Payment and Performance Bonds and the insurance premiums for each coverage required to be provided by Design-Builder under Section 9. The EPD shall include all assumptions, quantity takeoffs, rates of production, Design-Builder internal equipment rental rates and progress calculations, quotes from Subcontractors (including Suppliers), memoranda, narratives, and all other information used by Design-Builder to arrive at the Proposal Price or Change Order price, as applicable. For each item of Work the EPD shall itemize any related amounts not included in the stated price for such item such as any amount allocated for contingency.

22.1.5 Format of EPD

Design-Builder shall submit the EPD in the format actually used by Design-Builder in preparing its Proposal. It is not intended that Design-Builder perform any significant extra work in the preparation of these documents. However, Design-Builder represents and warrants that the EPD related to the Proposal have been personally examined before delivery to ICTC by an authorized officer of Design-Builder and that they meet the requirements of Section 22.1.4 and are adequate to enable a complete understanding and interpretation of how Design-Builder arrived at its Proposal Price. Design-Builder further represents, warrants, and covenants that the EPD related to each Change Order will be personally examined before delivery to escrow by an authorized officer of Design-Builder and that they meet the requirements of Section 22.1.4 and will be adequate to enable a complete understanding and interpretation of how Design-Builder arrived at its Change Order price.

22.1.6 Review by ICTC

ICTC may, at any time, conduct a review of the EPD to determine whether it is complete. If ICTC determines that the EPD are incomplete, ICTC may request Design-Builder to supply data to make the EPD complete. Design-Builder shall provide all such data within three (3) Working Days of the request, and at that time it will be date stamped, labeled to identify it as supplementary EPD information, and added to the EPD. Design-Builder shall have no right to add documents to the EPD except upon ICTC’s request. At ICTC’s option, which may be exercised at any time, the EPD associated with any Change Order or Contract amendment shall be reviewed, organized and indexed as described in Instructions to Proposers.

22.1.7 Confidentiality Agreement

Confidentiality agreements will be executed by all ICTC employees or agents who review or have access to the EPD.

22.2 Subcontractor Pricing Documents

Design-Builder shall require each Subcontractor of a Subcontract over 1/2 of 1 percent of the Contract Price to submit to Design-Builder a copy of all documentary information used in determining its Subcontract price, immediately before executing the Subcontract or change orders or amendments thereto, to be held in
the same manner as the EPD and which shall be accessible by Design-Builder, ICTC, and other dispute resolvers, on terms substantially similar to those contained herein. Each such Subcontract shall include a representation and warranty from the Subcontractor stating that its EPD constitutes all the documentary information used in establishing its Subcontract price. Each Subcontract that is not subject to the foregoing requirement shall include a provision that requires the Subcontractor to preserve all documentary information used in establishing its Subcontract price and to provide such documentation to Design-Builder and/or ICTC in connection with any claim made by such Subcontractor.

22.3 Project Records

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

22.3.2 Audit and Inspection Rights
Design-Builder grants to ICTC, FHWA, the U.S. Comptroller General and Utility Owners, and their respective authorized representatives, such audit and inspection rights and allows such Persons such access to and the right to copy such books and records (including all tax returns and supporting documentation filed with any Governmental Persons) as such Persons may request from time to time in connection with the issuance of Change Orders, the resolution of disputes, and such other matters as such Persons reasonably deems necessary for purposes of complying or verifying compliance with the Contract and Governmental Rules.

22.3.3 Audit of Time and Materials Work
Where the payment method for any Work is on a time and materials basis, such examination and audit rights shall include all books, records, documents, and other evidence and accounting principles and practices sufficient to reflect properly all direct and indirect costs of whatever nature claimed to have been incurred and anticipated to be incurred for the performance of such Work. If an audit indicates Design-Builder has been over credited under a previous progress report or progress payment, that over credit will be credited against current progress reports or payments.

22.3.4 Change Order Pricing Data
For cost and pricing data submitted in connection with pricing Change Orders, unless such pricing is based on adequate price competition, established catalog, or market prices of commercial items sold in substantial quantities to the public, or prices set by law or regulation, such Persons and their representatives have the right to examine all books, records, documents, and other data of Design-Builder related to the negotiation of or performance of Work under such Change Orders for the purpose of evaluating the accuracy, completeness, and currency of the cost or pricing data submitted. The right of examination shall extend to all documents deemed necessary by such Persons to permit adequate evaluation of the cost or pricing data submitted, along with the computations and projections used therein.

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

a) Daily time sheets and supervisor’s daily reports.
b) Union agreements.
c) Insurance, welfare, and benefits records.
d) Payroll registers.
e) Earnings records.
f) Payroll tax forms.
g) Material invoices and requisitions.
h) Material cost distribution worksheet.
i) Equipment records (list of company equipment, rates, etc.).
j) Subcontractors’ (including Suppliers) and agents’ invoices.
k) Subcontractors’ and agents’ payment certificates.
l) Canceled checks (payroll and Suppliers).
m) Job cost report.
n) Job payroll ledger.
o) General ledger.
p) Cash disbursements journal.
q) E-mail, letters and correspondence.
r) Network servers, data storage devices, backup media.
s) All documents that relate to each and every Claim together with all documents that support the amount of damages as to each Claim.
t) Work sheets used to prepare the Claim establishing the cost components for items of the Claim, including labor, benefits and insurance, materials, equipment, Subcontractors, all documents that establish the time periods, individuals involved, the hours for the individuals, and the rates for the individuals.

Full compliance by Design-Builders with the provisions of this Section 22.3.5 is a contractual condition precedent to Design-Builders’ right to seek relief under Section 19. Design-Builders represent and warrant the completeness and accuracy of all information it or its agents provides in connection with this Section 22.3.

22.4 Retention of Records

Design-Builders shall maintain all records and documents relating to the Contract (including copies of all original documents delivered to ICTC) at the Project Manager’s office in the State until seven (7) years after the earlier to occur of (a) the date Final Acceptance is achieved, or (b) the termination date. If Approved by ICTC, photographs, microphotographs, or other authentic reproductions may be maintained instead of original records and documents. Design-Builders shall notify ICTC 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 such actions and Claims have been finally resolved. Records to be retained include all books and other evidence bearing on Design-Builders’ costs and expenses under the Contract Documents. Design-Builders shall make these records and documents available for audit and inspection to ICTC, at Design-Builders’ office, at all reasonable times, without charge, and shall allow such Persons to make copies of such documents (at no expense to Design-Builders).
22.5 California Public Records Act

22.5.1 Applicability of Act
Design-Builder acknowledges and agrees that all records, documents, drawings, Plans, specifications, and other materials in ICTC’s possession or those to which ICTC is entitled to access, including materials submitted by Design-Builder, are subject to the provisions of the California Public Records Act. Design-Builder shall be solely responsible for all determinations made by it under such act and for clearly and prominently marking each and every page or sheet of its materials with “trade secret” or “non-public” as it determines to be appropriate. Design-Builder is advised to contact legal counsel concerning such act and its application to Design-Builder.

22.5.2 Confidential Materials
If any of the materials submitted by Design-Builder to ICTC are clearly and prominently labeled “trade secret” or “non-public” by Design-Builder, ICTC will endeavor to advise Design-Builder of any request for the disclosure of such materials before making any such disclosure. Under no circumstances, however, will ICTC be responsible or liable to Design-Builder or any other Person for the disclosure of any such labeled materials, whether the disclosure is required by law, by court order, or occurs through inadvertence, mistake, or negligence on the part of ICTC, except for any disclosure of trade secrets or proprietary information in violation of the confidentiality agreement described in Section 22.1.7.

22.5.3 Design-Builder to Defend Against Disclosure Request
In the event of litigation concerning the disclosure of any material submitted by Design-Builder to ICTC, ICTC’s sole involvement will be as a stakeholder retaining the material until otherwise ordered by a court, and Design-Builder shall be fully responsible for otherwise prosecuting or defending any action concerning the materials at its sole cost and risk.
23 MISCELLANEOUS PROVISIONS

23.1 Amendments
The Contract may be amended only by a written instrument duly executed by the parties or their respective successors or assigns.

23.2 Waiver

23.2.1 No Waiver of Subsequent Rights
Either party’s waiver of any breach or failure to enforce any of the terms, covenants, conditions, or other provisions of the Contract Documents at any time (including any agreement by ICTC to accept Nonconforming Work under Section 5.7.2) shall not in any way limit or waive that party’s right thereafter to enforce or compel strict compliance with every term, covenant, condition, or other provision, any course of dealing or custom of the trade notwithstanding. Furthermore, if the parties make and implement any interpretation of the Contract Documents without documenting such interpretation by an instrument in writing signed by both parties, such interpretation and implementation thereof shall not be binding in the event of any future Disputes. The consent by one party to any act by the other party requiring such consent shall not be deemed to render unnecessary the obtaining of consent to any subsequent act for which consent is required, regardless of whether similar to the act for which consent is given.

23.2.2 Custom Does not Constitute Waiver
No act, delay, or omission done, suffered or permitted by one party or its agents shall be deemed to waive, exhaust, or impair any right, remedy or power of such party under any Contract Document, or to relieve the other party from the full performance of its obligations under the Contract Documents. No custom or practice between the parties in the administration of the terms of the Contract Documents shall be construed to waive or lessen the right of a party to insist upon performance by the other party in strict compliance with the terms of the Contract Documents.

23.2.3 Waivers Shall Be in Writing
No waiver of any term, covenant, or condition of the Contract Documents shall be valid unless in writing and signed by the party providing the waiver.

23.3 Independent Contractor
Design-Builder is an independent contractor, and nothing contained in the Contract Documents shall be construed as constituting any relationship with ICTC other than that of Project owner and independent contractor. In no event shall the relationship between ICTC and Design-Builder be construed as creating any relationship whatsoever between ICTC and any of Design-Builder’s employees. Neither Design-Builder nor any of its employees is or shall be deemed to be an employee of ICTC. Except as otherwise specified in the Contract Documents, Design-Builder has sole authority and responsibility to employ, discharge, and otherwise control its employees and has complete and sole responsibility as a principal for its agents, for all Subcontractors, and for all other Persons that Design-Builder or any Subcontractor hires or engages to perform or assist in performing the Work.

23.4 Successors and Assigns
The Contract Documents shall be binding upon and inure to the benefit of ICTC and Design-Builder and their permitted successors, assigns, and legal representatives.
23.4.1 Assignment by ICTC
ICTC may assign all or part of its right, title, and interest in and to the Contract, including rights with respect to the Payment and Performance Bonds, any Guaranty, and any other performance security provided, to any Person with the prior written approval of Design-Builder.

23.4.2 Assignment by Design-Builder
Design-Builder may collaterally assign its rights to receive payment under the Contract Documents and may subcontract Work in compliance with the requirements of the Contract Documents. Design-Builder shall not otherwise sublet, transfer, assign, or dispose of any portion of the Contract, or delegate any of its duties hereunder, except with ICTC’s prior Approval. Design-Builder’s assignment or delegation of any of its Work under the Contract Documents shall be ineffective to relieve Design-Builder of its responsibility for the Work assigned or delegated, unless ICTC, in its sole discretion, has Approved such relief from responsibility. Any assignment of money shall be subject to all proper set-offs and withholdings in favor of ICTC and to all deductions provided for in the Contract. No partner, joint venturer, member, or shareholder of Design-Builder may assign, convey, transfer, pledge, mortgage, or otherwise encumber its ownership interest in Design-Builder without the prior Approval of ICTC, in ICTC’s sole discretion.

23.5 Designation of and Cooperation with Representatives

23.5.1 Designation of Representatives
ICTC and Design-Builder shall each designate an individual or individuals who shall be authorized to make decisions and bind the parties on matters relating to the Contract Documents. Such designations may be changed by a subsequent writing delivered to the other party in accordance with Section 23.10. The parties may also designate technical representatives who shall be authorized to investigate and report on matters relating to the construction of the Project and negotiate on behalf of each of the parties but who do not have authority to bind ICTC or Design-Builder.

23.5.2 Cooperation
Design-Builder shall cooperate with ICTC and all representatives of ICTC designated as described above.

23.6 Officials not to Benefit
Without prior written consent of State or ICTC, as applicable, Design-Builder shall not employ any professional or technical personnel to provide services under the Contract who are or have been at any time during the time period of the Contract in the employ of State or ICTC, except retired State or ICTC employees, without written consent from State or ICTC, as applicable.

Design-Builder warrants that it has not employed or retained any company or person, other than a bona fide employee working solely for Design-Builder, to solicit or secure the Contract, and that Design-Builder has not paid or agreed to pay any company or person, other than a bona fide employee working for Design-Builder, any fee, commissions, percentage, brokerage fee, gifts, or any other consideration, contingent upon or resulting from the award of making of the Contract.

The rights and remedies of ICTC specified in this Section 23.6 are not exclusive and are in addition to any other rights and remedies allowed by law.

23.7 Survival
Design-Builder’s representations and warranties, the dispute resolution provisions contained in Section 19, and all other provisions which by their inherent character should survive termination of the Contract, shall survive the termination of the Contract.
23.8 Limitation on Third-Party Beneficiaries

It is not intended by any of the provisions of the Contract Documents to create any third-party beneficiary hereunder; or to authorize anyone not a party hereto to maintain a suit for personal injury or property damage pursuant to the terms or provisions hereof, except to the extent that specific provisions (such as the warranty and indemnity provisions) identify third parties (such as Utility Owners) and state that they are entitled to benefits hereunder. Except as otherwise provided in this Section 23.8, the duties, obligations, and responsibilities of the parties to the Contract Documents with respect to third parties shall remain as imposed by law. The Contract Documents shall not be construed to create a contractual relationship of any kind between ICTC and a Subcontractor or any other Person except Design-Builder.

23.9 No Personal Liability

ICTC’s authorized representatives are acting solely as agents and representatives of ICTC when carrying out the provisions of or exercising the power or authority granted to them under the Contract Documents. They shall not be liable either personally or as employees of ICTC for actions in their ordinary course of employment. No agent, consultant, officer, or employee of ICTC shall be personally responsible for any liability arising under the Contract.

23.10 Notices and Communications

23.10.1 Delivery of Notices

Notices under the Contract Documents shall be in writing and (a) delivered personally, (b) sent by certified mail, return receipt requested, (c) sent by a recognized overnight mail or courier service, with delivery receipt requested, or (d) sent by via telephone communication followed by a hardcopy or with receipt confirmed by telephone, to the addresses below (or to such other address as may from time to time be specified in writing by such Person).

All correspondence with Design-Builder shall be sent to the Project Manager or as otherwise directed by such Project Manager. The address for such communications shall be:

[Insert company name]
[Insert company address]
[Insert company city, state, zip code]
Attn.: [Insert name]
Telephone: (###) ###-#### [Insert telephone number]
FAX: (###) ###-#### [Insert FAX number]

In addition, copies of all notices to proceed and suspension, termination, and default notices shall be delivered to the following persons:

[Insert company name]
[Insert company address]
[Insert company city, state, zip code]
Attn.: [Insert name]
Telephone: (###) ###-#### [Insert telephone number]
FAX: (###) ###-#### [Insert FAX number]

All communications to ICTC shall be marked with ICTC’s Contract and Project identification number and shall be delivered to ICTC’s Project Manager, with copies to such additional Persons as may be designated by ICTC’s Project Manager, at the address set forth below:

Imperial County Transportation Commission
1503 North Imperial Avenue; Suite 104
El Centro, California 92243
Attention: Ms. Virginia Mendoza, Program Manager  
e-mail: VirginiaMendoza@imperialctc.org  
Telephone: (760) 592-4494

In addition, copies of all notices regarding disputes, termination, and default notices shall be delivered to the following persons:

Imperial County Transportation Commission  
1503 North Imperial Avenue; Suite 104  
El Centro, California 92243  
Attention: Mr. Mark Baza, Executive Director  
e-mail: MarkBaza@imperialctc.org  
Telephone: (760) 592-4494

23.10.2 Receipt of Notices
Notices shall be deemed received when actually received in the office of the addressee (or by the addressee if personally delivered) or when delivery is refused, as shown on the receipt of the U. S. Postal Service, private carrier or other Person making the delivery. Notwithstanding the foregoing, notices sent by telefacsimile after 4:00 p.m. Pacific Time and all other notices received after 5:00 p.m. Pacific Time shall be deemed received on the first Working Day following delivery (that is, in order for a fax to be deemed received on the same day, at least the first page of the fax shall be received before 4:00 p.m.).

23.10.3 Copies of Correspondence to ICTC
Design-Builder shall copy ICTC on all written correspondence pertaining to the Contract between Design-Builder and any Person other than Design-Builder’s Subcontractors, consultants, and attorneys.

23.10.4 Notification of Third Party Claims
ICTC and Design-Builder shall each provide timely written notification to the other party of the receipt of any third-party claim relating to, arising out of, or connected with Work, operations or responsibilities performed by or on behalf of Design-Builder under this Contract.

23.11 Further Assurances
Design-Builder shall promptly execute and deliver to ICTC all such instruments and other documents and assurances as are reasonably requested by ICTC to further evidence the obligations of Design-Builder hereunder, including assurances regarding assignments of Subcontractors contained herein.

23.12 Severability
If any clause, provision, section, or part of the Contract is ruled invalid under Section 19 or otherwise by a court of competent jurisdiction, then the parties shall: (a) promptly meet and negotiate a substitute for such clause, provision, section or part, which shall, to the greatest extent legally permissible, effect the original intent of the parties, including an equitable adjustment to the Contract Price to account for any change in the Work resulting from such invalidated portion; and (b) if necessary or desirable, apply to the court or other decision maker (as applicable) which declared such invalidity for an interpretation of the invalidated portion to guide the negotiations. The invalidity or unenforceability of any such clause, provision, section, or part shall not affect the validity or enforceability of the balance of the Contract, which shall be construed and enforced as if the Contract did not contain such invalid or unenforceable clause, provision, section, or part.

23.13 Headings
The captions of the sections of the Contract Documents are for convenience only and shall not be deemed part of the Contract or considered in construing the Contract.
23.14 Governing Law
The Contract Documents shall be governed by and construed in accordance with the law of the State, without regard to conflict of law principles.

23.15 Limit of Liability
Notwithstanding anything to the contrary contained herein, ICTC’s liability for payment extends only to the amount actually appropriated for the purpose of the Project.

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

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

23.18 Laws to be Observed
Design-Builder shall keep fully informed of all existing and future state and federal laws and county, and municipal ordinances and regulations which in any manner affect those engaged or employed in the Work, the materials used in the Work, or which in any way affect the conduct of the Work, and of all such orders and decrees of bodies or tribunals having any jurisdiction or authority over the same as applicable. The Design-Builder shall at all times observe and comply with and shall cause all agents and employees to observe and comply with all such existing and future laws, ordinances, regulations, orders, and decrees of bodies or tribunals having any jurisdiction or authority over the Contract Documents. If any discrepancy or inconsistency is discovered in the Contract Documents for the Work in relation to any such law, ordinance, regulation, order, or decree, the Design-Builder shall immediately report the same to the ICTC’s Contract Manager in writing.

23.19 Specific Legal References
Any reference to specific statutes, regulations or other legal authority in Contract Documents shall not relieve the Design-Builder from the responsibility of complying with all existing and future laws, ordinances, regulations, orders, and decrees of bodies or tribunals having any jurisdiction or authority over the Contract Documents.
IN WITNESS WHEREOF, the parties have executed the Contract as of the last date set forth next to signatures of the parties, below.

**IMPERIAL COUNTY TRANSPORTATION COMMISSION**

<table>
<thead>
<tr>
<th>EXECUTIVE DIRECTOR:</th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>By: __________________</td>
<td></td>
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<tr>
<td>_____________________</td>
<td></td>
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<tr>
<td>Authorized Signature</td>
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<tr>
<td>Date: __________________, 20[Insert year]</td>
<td></td>
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</tbody>
</table>

<table>
<thead>
<tr>
<th>APPROVED AS TO FORM AND EXECUTION:</th>
<th></th>
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<tbody>
<tr>
<td>By: __________________</td>
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<td>_____________________</td>
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</tr>
<tr>
<td>Date: __________________, 20[Insert year]</td>
<td></td>
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</tbody>
</table>

**DESIGN-BUILDER**

<table>
<thead>
<tr>
<th>[Insert Design-Builders in all capital letters]</th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>By: __________________</td>
<td></td>
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<tr>
<td>_____________________</td>
<td></td>
</tr>
<tr>
<td>Name: [Insert Name]</td>
<td></td>
</tr>
<tr>
<td>Title: [Insert Title]</td>
<td></td>
</tr>
<tr>
<td>Date: __________________, 20[Insert year]</td>
<td></td>
</tr>
</tbody>
</table>

Contractor’s License No.: [Insert Design-Builders Contractor’s Number]
EXHIBIT A – ABBREVIATIONS AND DEFINITIONS

A1 Abbreviations
A2 Definitions
As used in the Design-Build Contract to which this Exhibit is attached and in the other Contract Documents (unless otherwise specified therein), the following abbreviations and terms shall have the meanings set forth below (unless the context requires otherwise).

### A1 Abbreviations

<table>
<thead>
<tr>
<th>Abbreviation</th>
<th>Definition</th>
</tr>
</thead>
<tbody>
<tr>
<td>AADT</td>
<td>Annual Average Daily Traffic</td>
</tr>
<tr>
<td>AASHTO</td>
<td>American Association of State Highway and Transportation Officials</td>
</tr>
<tr>
<td>ACI</td>
<td>American Concrete Institute</td>
</tr>
<tr>
<td>ADA</td>
<td>Americans with Disabilities Act</td>
</tr>
<tr>
<td>ALR</td>
<td>Area of Localized Roughness</td>
</tr>
<tr>
<td>AMRL</td>
<td>AASHTO Materials Reference Laboratory</td>
</tr>
<tr>
<td>ANSI</td>
<td>American National Standards Institute</td>
</tr>
<tr>
<td>ASCE</td>
<td>American Society of Civil Engineers</td>
</tr>
<tr>
<td>ASTM</td>
<td>American Society of Testing and Materials</td>
</tr>
<tr>
<td>ATC</td>
<td>Alternative Technical Concept</td>
</tr>
<tr>
<td>AWG</td>
<td>American Wire Gauge</td>
</tr>
<tr>
<td>BMP</td>
<td>Best Management Practice</td>
</tr>
<tr>
<td>Cal/OSHA</td>
<td>California Division of Occupational Safety and Health Administration</td>
</tr>
<tr>
<td>CEQA</td>
<td>California Environmental Quality Act</td>
</tr>
<tr>
<td>CERCLA</td>
<td>Comprehensive Environmental Response, Compensation and Liability Act</td>
</tr>
<tr>
<td>CFR</td>
<td>Code of Federal Regulations</td>
</tr>
<tr>
<td>CMS</td>
<td>Changeable Message Sign</td>
</tr>
<tr>
<td>CPM</td>
<td>Critical Path Method</td>
</tr>
<tr>
<td>DBE</td>
<td>Disadvantaged Business Enterprise</td>
</tr>
<tr>
<td>DCS</td>
<td>Document Control System</td>
</tr>
<tr>
<td>DGN</td>
<td>MicroStation drawing file extension</td>
</tr>
<tr>
<td>DRB</td>
<td>Dispute Resolution Board</td>
</tr>
<tr>
<td>EEO</td>
<td>Equal Employment Opportunity</td>
</tr>
<tr>
<td>EIA</td>
<td>Electronic Industries Alliance</td>
</tr>
<tr>
<td>EPA</td>
<td>(U.S.) Environmental Protection Agency</td>
</tr>
<tr>
<td>EPD</td>
<td>Escrowed Proposal Documents-</td>
</tr>
<tr>
<td>ERS</td>
<td>Earth Retaining System</td>
</tr>
<tr>
<td>FAR</td>
<td>Federal Acquisition Regulation</td>
</tr>
<tr>
<td>FEMA</td>
<td>Federal Emergency Management Agency</td>
</tr>
<tr>
<td>FHWA</td>
<td>Federal Highway Administration</td>
</tr>
<tr>
<td>HMA</td>
<td>Hot Mix Asphalt</td>
</tr>
<tr>
<td>HOV</td>
<td>High-Occupancy Vehicle</td>
</tr>
<tr>
<td>IES</td>
<td>Illumination Engineering Society</td>
</tr>
<tr>
<td>ITE</td>
<td>Institute of Transportation Engineering</td>
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<tr>
<td>ITS</td>
<td>Intelligent Transportation Systems</td>
</tr>
<tr>
<td>MOT</td>
<td>Maintenance of Traffic</td>
</tr>
<tr>
<td>Abbreviation</td>
<td>Definition</td>
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<tr>
<td>MSE</td>
<td>Mechanically Stabilized Embankment</td>
</tr>
<tr>
<td>MUTCD</td>
<td><em>Manual on Uniform Traffic Control Devices</em></td>
</tr>
<tr>
<td>NCHRP</td>
<td>National Cooperative Highway Research Program</td>
</tr>
<tr>
<td>NEMA</td>
<td>National Electrical Manufacturers Association</td>
</tr>
<tr>
<td>NEPA</td>
<td>National Environmental Policy Act</td>
</tr>
<tr>
<td>NESHAP</td>
<td>National Emissions Standards for Hazardous Air Pollutants</td>
</tr>
<tr>
<td>NPDES</td>
<td>National Pollutant Discharge Elimination System</td>
</tr>
<tr>
<td>NSSP</td>
<td>Nonstandard Special Provision</td>
</tr>
<tr>
<td>NTO</td>
<td>Notice to Owner</td>
</tr>
<tr>
<td>NTP1</td>
<td>Notice to Proceed 1</td>
</tr>
<tr>
<td>NTP2</td>
<td>Notice to Proceed 2</td>
</tr>
<tr>
<td>OSHA</td>
<td>Occupational Safety &amp; Health Administration</td>
</tr>
<tr>
<td>PCCP</td>
<td>Portland Cement Concrete Pavement</td>
</tr>
<tr>
<td>PCI</td>
<td>Prestressed Concrete Institute</td>
</tr>
<tr>
<td>PLAC</td>
<td>Permit, License, Agreement, Certification, or any combination of these.</td>
</tr>
<tr>
<td>QC</td>
<td>Quality Control</td>
</tr>
<tr>
<td>QV</td>
<td>Quality Validation</td>
</tr>
<tr>
<td>RFC</td>
<td>Released for Construction</td>
</tr>
<tr>
<td>RFI</td>
<td>Request for Information</td>
</tr>
<tr>
<td>RFP</td>
<td>Request for Proposals</td>
</tr>
<tr>
<td>RFQ</td>
<td>Request for Qualifications</td>
</tr>
<tr>
<td>RID</td>
<td>Reference Information Documents</td>
</tr>
<tr>
<td>R/W</td>
<td>Right of Way</td>
</tr>
<tr>
<td>RWQCB</td>
<td>Regional Water Quality Control Board</td>
</tr>
<tr>
<td>SHPO</td>
<td>State Historic Preservation Officer</td>
</tr>
<tr>
<td>STAA</td>
<td>Surface Transportation Assistance Act of 1982</td>
</tr>
<tr>
<td>SWPPP</td>
<td>Stormwater Pollution Prevention Plan</td>
</tr>
<tr>
<td>TCE</td>
<td>Temporary Construction Easement</td>
</tr>
<tr>
<td>TIA</td>
<td>Telecommunications Industry Association, Time Impact Analysis</td>
</tr>
<tr>
<td>UA</td>
<td>Utility Agreement</td>
</tr>
<tr>
<td>UL</td>
<td>Underwriters Laboratories, Inc.</td>
</tr>
<tr>
<td>USACE</td>
<td>United States Army Corps of Engineers</td>
</tr>
<tr>
<td>USC</td>
<td>United States Code</td>
</tr>
<tr>
<td>USDOT</td>
<td>United States Department of Transportation</td>
</tr>
<tr>
<td>USFWS</td>
<td>U.S. Fish and Wildlife Service</td>
</tr>
</tbody>
</table>
A-2 Definitions

Acceleration Costs Those fully documented increased costs reasonably incurred by Design-Builder (i.e., costs over and above what Design-Builder would otherwise have incurred) which are directly attributable to increasing the performance level of the Work in an attempt to complete necessary activities of the Work earlier than otherwise anticipated, such as for additional equipment, additional crews, lost productivity, overtime and shift premiums, increased supervision, and any unexpected movement of materials, equipment, or crews necessary for resequencing in connection with acceleration efforts.

Addendum Supplemental additions, deletions, and modifications to the provisions of the RFP after release of the RFP.

Additional Properties Needed right of way identified by the Design-Builder that is not identified on Right of Way Requirements Maps.

Affidavit of Final Completion Sworn statement by the Design-Builder that all Work performed under Contract complies with the requirements of the Contract and that no lawful debts for labor or materials are outstanding.

Affiliate

a) Any Person which directly or indirectly through one or more intermediaries' controls, or is controlled by, or is under common control with, Design-Builder or any Major Participant.

b) Any Person for which 10 percent or more of the equity interest in such Person is held directly or indirectly, beneficially, or of record by, (i) Design-Builder, (ii) any Major Participant, 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 contract, family relation, or otherwise.

Alternative Technical Concept Alternative Technical Concepts (ATCs) were not allowed during the Proposal phase.

Applicable Standards Standards, including but not limited to those identified in Book 3, that apply to design and construction of Project.

Application for Final Payment Request by Design-Builder to ICTC for proposed total amount due Design-Builder.

Approve, Approved, or Approval Formal conditional determination in writing by ICTC that a particular matter or item is satisfactory for the Project.

As-Built Documents Documents including Plans developed by the Design-Builder that depict the final completed Project.

Auxiliary Lane The portion of the roadway for weaving, truck climbing, speed change, or for other purposes supplementary to through movement.

Baseline Schedule The first Approved Preliminary Schedule, which incorporates activities developed in the Preliminary Schedule and fully includes the entire scope of Work from NTP1 to Final Acceptance. This schedule shows no completed work to date and no negative float or negative lag to any activity.

Basic Configuration The elements defining the Project as set forth in Book 2, Section 1, “General,” subject to any permitted modifications thereto contained in the Proposal.
<table>
<thead>
<tr>
<th>Abbreviation</th>
<th>Definition</th>
</tr>
</thead>
<tbody>
<tr>
<td>Betterment</td>
<td>With respect to a particular Utility, the definition (if any) set forth in the applicable Utility Agreement(s). Where there is no such definition, the upgrading (e.g., increase in capacity) of a Utility being Relocated that is not attributable to the construction of the Project or is made solely for the benefit of and at the election of the Utility Owner (not including a technological improvement which can be implemented at a cost equal to or less than the cost of a “like for like” replacement or Relocation). The use of new materials or compliance with current standards in the performance of the Utility Work is not considered a Betterment.</td>
</tr>
<tr>
<td>Book 1</td>
<td>The Contract Document designated as the Design-Build Contract (Book 1).</td>
</tr>
<tr>
<td>Book 2</td>
<td>The Contract Document designated as the Project Requirements (Book 2).</td>
</tr>
<tr>
<td>Book 3</td>
<td>The Contract Document designated as the Applicable Standards (Book 3).</td>
</tr>
<tr>
<td>Business Day</td>
<td>Day on which ICTC is officially open for business.</td>
</tr>
<tr>
<td>California Environmental Policy Act</td>
<td>California Environmental Quality Act, as set forth in § 21000 et seq of the California Public Resources Code.</td>
</tr>
<tr>
<td>Caltrans</td>
<td>The California Department of Transportation as defined in Streets &amp; Highway Code § 20 and authorized in St &amp; Hwy Code § 90; its authorized representatives.</td>
</tr>
<tr>
<td>Certificate of Compliance</td>
<td>A certification provided by a manufacturer, producer, or Supplier of a material that the material, as furnished to Design-Builder, complies with the pertinent specification or Contract requirements. The certification shall be signed by a Person who is authorized to bind the company supplying the material covered by the certification.</td>
</tr>
<tr>
<td>Change Notice</td>
<td>A written notification and subsequent notices initiated by Design-Builder which record or authorize the administrative process for a Design-Builder–initiated Change Order.</td>
</tr>
<tr>
<td>Change Order</td>
<td>A Contract modification signed by both parties to the Contract, and FHWA, as applicable, issued after the execution of a Contract, which adds to, deletes from, or otherwise revises the requirements, scope of Work, and/or the Contract terms and conditions.</td>
</tr>
<tr>
<td>Claim</td>
<td>A separate demand by Design-Builder for (a) a time extension which is disputed by ICTC, or (b) payment of money or damages arising from Work done by or on behalf of Design-Builder in connection with the Contract which is disputed by ICTC. A Claim will cease to be a Claim upon resolution thereof, including resolution by delivery of a Change Order or Contract amendment signed by all parties.</td>
</tr>
<tr>
<td>Completion Deadline</td>
<td>Each Substantial Completion Deadline and/or Final Acceptance Deadline, depending on the context.</td>
</tr>
<tr>
<td>Conceptual Design</td>
<td>An in-progress set of Design Documents engineered to approximately 30% level of completeness and Structure Type Selection Reports that are submitted by the Design-Builder as a design development milestone and formally reviewed by the ICTC.</td>
</tr>
<tr>
<td>Construction Documents</td>
<td>All Working Drawings and other documents necessary for construction of the Project in accordance with the Contract Documents.</td>
</tr>
<tr>
<td>Abbreviation</td>
<td>Definition</td>
</tr>
<tr>
<td>------------------------------</td>
<td>----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------</td>
</tr>
<tr>
<td>Construction Easement</td>
<td>Non-permanent easement, other than those provided by ICTC in accordance with the Right of Way Requirements Maps that Design-Builder determines are desirable to perform the Work.</td>
</tr>
<tr>
<td>Construction Quality Validation Manager</td>
<td>The Person designated by Design-Builder to perform the roles and responsibilities of the Construction Quality Validation Manager and who meets the minimum requirements as required in the Contract Documents.</td>
</tr>
<tr>
<td>Contaminated Groundwater</td>
<td>Extracted, pumped and/or ponded groundwater including contaminants above legally-permitted discharge levels so as to require treatment prior to re-use or disposal. Contaminated groundwater which may legally be re-used without treatment, including use for dust control, or which merely requires dilution prior to re-use or disposal, shall specifically be excluded from the definition.</td>
</tr>
<tr>
<td>Contract</td>
<td>Depending on the context, (a) the Design-Build Contract, or (b) collectively, the Contract Documents.</td>
</tr>
<tr>
<td>Contract Documents</td>
<td>Written documents (Book 1, Book 2, Book 3) that define the roles, responsibilities, and Work under the Contract, and are legally binding on the parties (ICTC and Design-Builder).</td>
</tr>
<tr>
<td>Contract Price</td>
<td>Full compensation for the Work and all other obligations to be performed by Design-Builder under the Contract Documents.</td>
</tr>
<tr>
<td>Critical Path</td>
<td>Longest continuous chain of activities for the project that has the least amount of total float of all chains. In general, a delay on the Critical Path extends the scheduled completion date.</td>
</tr>
<tr>
<td>Critical Path Method</td>
<td>Network-based planning technique using activity durations and relationships between activities to calculate a schedule for the entire Project.</td>
</tr>
<tr>
<td>Data Date</td>
<td>Day after the date through which a schedule is current. Everything occurring earlier than the data date is as-built and everything on or after the data date is planned.</td>
</tr>
<tr>
<td>Day or day</td>
<td>Calendar Day unless otherwise specified.</td>
</tr>
<tr>
<td>DBE Certification</td>
<td>Design-Builder’s commitment to meet or make good faith efforts to meet Project participation goals as set forth in Form 17.</td>
</tr>
<tr>
<td>DBE Performance Plan</td>
<td>Proposer’s plan to include firms designated as DBE in the Work and to meet Project participation goals.</td>
</tr>
<tr>
<td>ICTC-Caused Delays</td>
<td>Unavoidable delays, to the extent that they affect the Critical Path, arising from the following matters and no others:</td>
</tr>
<tr>
<td></td>
<td>a) A suspension order pursuant to Section 14.1 to the extent provided therein.</td>
</tr>
<tr>
<td></td>
<td>b) ICTC-Directed Changes.</td>
</tr>
<tr>
<td></td>
<td>c) Failure or inability of ICTC to provide Design-Builder with access to Right of Way identified on the Right of Way Requirements Maps that has not been obtained prior to the Proposal Due Date on or before the deadline for such access, to the extent provided in Section 6.1.</td>
</tr>
<tr>
<td></td>
<td>d) Material Errors in the Right of Way Requirements Maps.</td>
</tr>
<tr>
<td></td>
<td>e) Failure or inability of ICTC to provide responses to proposed schedules, design submittals and other submittals and matters for</td>
</tr>
</tbody>
</table>
which response by ICTC is required, within the time periods indicated in the Contract Documents.

f) Uncovering, removing, and restoring Work, to the extent provided in Section 5.5.3.

g) Any improper action by ICTC’s designated representative with binding authority, as specified in Section 23.5.1, or improper failure to act by ICTC within a reasonable time after delivery of notice by Design-Builder to ICTC requesting such action.

h) Issuance of a temporary restraining order or other form of injunction by a court that prohibits prosecution of a material portion of the Work, except if (i) such risk has been assumed by Design-Builder under Section 6.3.2, or (ii) arising out of, related to, or caused by the negligent or improper act, failure to act or omission, willful misconduct, recklessness, or breach of contract or Governmental Rule by any Design-Builder–Related Entity.

ICTC-Directed Changes

Any changes in the Work which ICTC has directed Design-Builder to perform as described in Section 13.

ICTC’s Contract Manager

The Person designated by ICTC, on ICTC’s behalf, to direct the Project and to receive delivery of notices to ICTC per Section 23.10.1.

Design-Build Contract

That certain Design-Build Contract (Book 1), as executed by ICTC and Design-Builder (to which this Exhibit A is attached), and any and all amendments thereto.

Design-Builder

[Insert company who will execute the Design-Build Contract]

Design-Builder–Related Entity(ies)

Design-Builder, Major Participants, Subcontractors, their employees, agents and officers and all other Persons for whom Design-Builder may be legally or contractually responsible.

Design Documents

All drawings, specifications, reports, calculations, records, or submittals at any stage of development or revision relating to the Project.

Design Manager

Design-Builder’s principal engineer in charge of the Project. The Design Manager shall initially be the individual designated in the Proposal and is considered a Key Personnel for the Project.

Detour

Temporary route for traffic around a closed road part. A passageway through a job site is not a detour.

Differing Site Conditions

a) Subsurface or latent physical conditions that differ from those reasonably assumed by Design-Builder based on incorrect boring logs provided in Book 2, Section 16, "Geotechnical," to the extent that correct boring logs would have resulted in accurate assumptions, or

b) Physical conditions of an unusual nature, differing materially from those ordinarily encountered at the Site and generally recognized as inherent in the Work provided for in the Contract, provided in all cases that Design-Builder had no actual or constructive knowledge of such conditions as of the Proposal Due Date.

The foregoing definition shall not apply to Utilities, or Force Majeure events, nor shall it include any differences in groundwater depth or subsurface moisture content from that identified in the RFP. Clause (a) of this definition...
shall specifically exclude situations in which accurately reported boring data does not represent prevailing conditions in the area.

**Directive Letter**
The letter described in Section 13.1.1.2.

**Disadvantaged Business Enterprise**
A for profit small business concern as defined in 49 CFR Part 26.

**Dispute**
The meaning set forth in Section 19.

**Effective Date**
The date of execution of the Contract by ICTC.

**Environmental Approval(s)**
The Governmental Approvals listed in Book 2, Section 7.2.3, "Permits, Licenses, Agreements, and Certifications," that are identified as being ICTC's responsibility to obtain.

**Environmental Document**

**Environmental Laws**
Means

a) All Governmental Rules and laws applicable to the Project or the Work regulating or imposing liability or standards of conduct that pertains to the environment Hazardous Materials, contamination of any type whatsoever, or health and safety matters.

b) Any requirements and standards that pertain to the protection of the environment, or to the management or release of Hazardous Materials, contamination of any type whatsoever, or health and safety matters with respect to Hazardous Materials, set forth in any Governmental Approval, permits, licenses, plans, rules, regulations or ordinances adopted, or other criteria and guidelines promulgated, pursuant to Governmental Rules and laws 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:

i. The manufacture, processing, distribution, use, re-use, treatment, storage, disposal, generation, and transportation or handling of Hazardous Materials.

ii. The protection of public health, public welfare or the environment (including protection of nonhuman forms of life, land, surface water, groundwater and air).

iii. Air, soil, surface, and subsurface strata, stream sediments, surface water, and groundwater.


v. Protection of wildlife; endangered, threatened, and sensitive species; wetlands, water courses, and water bodies; parks and recreation lands; cultural, historical, archeological, and paleontological resources; and natural resources.

vi. The operation and closure of underground or aboveground storage tanks.

viii. Notification, documentation and record keeping requirements relating to the foregoing.

Without limiting the above, the term “Environmental Laws” shall also include the following (all as amended):

a) The National Environmental Policy Act (42 USC § 4321 et seq.).
b) The Comprehensive Environmental Response, Compensation, and Liability Act (42 USC § 9601 et seq.).
c) The Resource Conservation and Recovery Act, amending the Solid Waste Disposal Act (42 USC § 6901 et seq.).
d) The Emergency Planning and Community Right to Know Act of 1986 (42 USC § 11001 et seq.).
e) The Clean Air Act (42 USC § 7401 et seq.).
f) The Federal Water Pollution Control Act, as amended by the Clean Water Act (33 USC § 1251 et seq.).
g) The Toxic Substances Control Act (15 USC § 2601 et seq.).
i) The Oil Pollution Act (33 USC § 2701, et. seq.).
j) The Federal Insecticide, Fungicide and Rodenticide Act (7 USC § 136 et seq.).
l) The Federal Radon and Indoor Air Quality Research Act (42 USC § 7401 et seq.).
m) The Occupational Safety and Health Act (29 USC § 651 et seq.).
n) The Endangered Species Act (16 USC § 1531 et seq.).
o) The Fish and Wildlife Coordination Act (16 USC § 661 et seq.).
p) The Coastal Zone Management Act (16 USC § 1451 et seq.).
q) The Rivers and Harbors Act of 1899 (33 USC § 400 et seq.).
r) The Migratory Bird Treaty Act (16 USC § 703 et seq.).
s) The Marine Mammal Protection Act (16 USC § 1361 et seq.).
t) Section 4f of the Department of Transportation Act (49 USC § 303).
v) 33 CFR § 114 and 125.
x) The California Public Resources Code §5024 (Title 14 CCR, Section 4852).
y) California State Health and Safety Code Section 7050.5.
z) California Public Resources Code §5097.98.
gg) Chapter 6.5 of Division 20 of the California Health and Safety Code (§ 25100 et seq.).
hh) The California Fish and Game Code § 1600 et seq.

Error
An error, omission, inconsistency, inaccuracy, deficiency, or other defect.

Escrowed Proposal Documents
All documentary information used in preparation of the Proposal Price.

Event of Default
A default as described in Section 16.1.1, following notice and opportunity to cure to the extent permitted by Section 16.1.2, and issuance by ICTC of notice to Design-Builder and Surety that an Event of Default has occurred.

Executive Director
The Executive Director of the Imperial County Transportation Commission.

Extra Maintenance Work
Definition from Ray Tritt/Caltrans Headquarters when used.

Federal Requirements
All Governmental Rules applicable to work financed with federal funds and the provisions required to be included in contracts therefor, including the provisions set forth in Book 1, Exhibits D, E, and F.

Final Acceptance
Acceptance of the Project as described in Section 20.3.

Final Acceptance Deadline
The meaning set forth in Section 4.3.3.

Final Design
A 100% complete set of Design Documents that is submitted by the Design-Builder as a design development milestone and formally reviewed by the ICTC with the intention of reaching ICTC Approval prior to RFC.

Float
Difference between the earliest and latest allowable start or finish times for an activity.

Force Majeure
An event beyond the control of Design-Builder, not due to an act or omission of any Design-Builder–Related Entity, which materially and adversely affects Design-Builder’s ability to meet its obligations under the Contract, to the extent that the event (or the effects of which event) could not have been avoided or prevented by due diligence and use of reasonable efforts by Design-Builder. Notwithstanding the foregoing, the term “Force Majeure” shall not include normal weather, Differing Site Conditions, ICTC-Directed Changes, Utility Delays, or any other matter for which the Contract Documents specify how liability or risk is to be allocated between ICTC and Design-Builder, regardless of whether such matter is beyond Design-Builder’s control.

Governmental Approval
Any approval, authorization, certification, consent, decision, exemption, filing, lease, license, permit, agreement, concession, grant, franchise, registration, or ruling required by or with any Governmental Person (other than a Governmental Person in its capacity as a Utility Owner) in order to perform the Work.

Governmental Person
Any federal, State, local, or foreign government and any political subdivision or any governmental, quasi-governmental, judicial, public, or statutory instrumentality, administrative agency, authority, body, or entity. The term includes the State and agencies and subdivisions thereof, other than ICTC.
Governmental Rule
All applicable federal, State, and local laws, codes, ordinances, rules, regulations, judgments, decrees, directives, guidelines, policy requirements, orders, and decrees of any Governmental Person having jurisdiction over the Project or Site, the practices involved in the Project or Site, any Work, or any Utility Work being performed by a Utility Owner. The term “Governmental Rule” does not include Governmental Approvals.

Guarantor
Each entity (if any) providing a Guaranty.

Guaranty
Each guaranty of Design-Builder’s obligations under the Contract Documents (if any), provided on Proposal Form 16.

Hazardous Materials
a) Any substance, product, waste, or other material of any nature whatsoever that is or becomes listed, regulated, or addressed pursuant to any Environmental Law.
b) Any substance, product, waste, or other material of any nature whatsoever that exceeds maximum allowable concentrations for elemental metals, organic compounds, or inorganic compounds, as defined by any Governmental Rule.
c) Any substance, product, waste, or other material of any nature whatsoever which may give rise to liability under clause (b) or under any statutory or common law theory based on negligence, trespass, intentional tort, nuisance, or strict liability or under any reported decisions of a State or federal court.
d) Petroleum hydrocarbons excluding petroleum hydrocarbon products contained within regularly operated motor vehicles.
e) Asbestos, asbestos-containing materials in structures and/or other improvements on or in the Site (other than mineral asbestos naturally occurring in the ground), or a substance reasonably believed to be asbestos as defined in Labor Code Section 6501.7.
f) Lead or lead-containing materials in structures and/or other improvements on or in the Site.
g) A hazardous substance as defined in Health & Safety Code Section 25316 and Section 25317.

The term “Hazardous Materials” includes Hazardous Waste.

Hazardous Waste
Waste as defined in 40 CFR 261 et seq.
Holiday

Holidays shown in the following table:

<table>
<thead>
<tr>
<th>Holiday</th>
<th>Date Observed</th>
</tr>
</thead>
<tbody>
<tr>
<td>Every Sunday</td>
<td>Every Sunday</td>
</tr>
<tr>
<td>New Year's Day</td>
<td>January 1st</td>
</tr>
<tr>
<td>Birthday of Martin Luther King, Jr.</td>
<td>3rd Monday in January</td>
</tr>
<tr>
<td>Lincoln's Birthday</td>
<td>February 12th</td>
</tr>
<tr>
<td>Washington's Birthday</td>
<td>3rd Monday in February</td>
</tr>
<tr>
<td>Cesar Chavez Day</td>
<td>March 31st</td>
</tr>
<tr>
<td>Memorial Day</td>
<td>Last Monday in May</td>
</tr>
<tr>
<td>Independence Day</td>
<td>July 4th</td>
</tr>
<tr>
<td>Labor Day</td>
<td>1st Monday in September</td>
</tr>
<tr>
<td>Columbus Day</td>
<td>2nd Monday in October</td>
</tr>
<tr>
<td>Veterans Day</td>
<td>November 11th</td>
</tr>
<tr>
<td>Thanksgiving Day</td>
<td>4th Thursday in November</td>
</tr>
<tr>
<td>Day after Thanksgiving Day</td>
<td>Day after Thanksgiving Day</td>
</tr>
<tr>
<td>Christmas Day</td>
<td>December 25th</td>
</tr>
</tbody>
</table>

If January 1st, February 12th, March 31st, 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.

Incidental Utility Work

All of the following Work that is necessary or determined by Design-Builder to be convenient for the construction and/or accommodation of the Project:

a) Protection of Existing Utilities.

b) Abandonment of Public Utilities.

c) Removal of Utilities.


Incremental Costs

Those costs, if any, which Design-Builder incurs as a result of a particular circumstance which Design-Builder would not have incurred but for the circumstance. In determining such costs, one would determine the total cost which Design-Builder would have incurred had the circumstance not occurred and subtract such amount from the costs actually incurred; the difference is the "increment." (For example, if Design-Builder originally has to Relocate three water lines, and a fourth water line is discovered in the same general area which can be Relocated by the same crew, then if Design-Builder is entitled (pursuant to Section 6.2.1.1) to a Change Order increasing the Contract Price on account of such newly discovered water line, ICTC will be charged with only the costs of keeping the crew working the additional time to Relocate the fourth water line, and will not be charged any portion of the expense of moving the crew to the Site in the first place.)

Indemnified Parties

The meaning set forth in Section 18.1.1.

Industry Standard

An acknowledged and acceptable measure of quantitative or qualitative value or an established procedure to be followed for a given operation within the

Abbreviations and Definitions

Exhibit A-11
given industry. This will generally be in the form of a written code, standard, or specification by a creditable association.

**Inspection**
Observation, examination, testing, or gauging/measurement to determine whether an item or activity conforms to specified requirements.

**Inspector**
Design-Builder’s authorized and qualified representative assigned to make detailed Inspection of Contract performance.

**Instructions to Proposers**
The RFP document identified as Instructions to Proposers.

**Intermediate Design**
An in-progress set of Design Documents engineered to approximately 65% level of completeness that is submitted by the Design-Builder as a design development milestone and formally reviewed by ICTC.

**Key Personnel**
The Persons listed on Exhibit G, subject to revision in accordance with the Contract.

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

**Liquidated Damages**
The damages described in Section 17.1.

**Major Participant**
Any of the following entities: all general partners or joint venture members of Proposer; any Subcontractor that will perform Work valued at 15 percent or more of the overall Contract amount; the lead engineering/design firm(s); and each engineering/design Subconsultant that will perform 20 percent or more of the design Work. Notwithstanding the foregoing, references to a Major Participant’s experience refer to the experience of the entity and not to any individuals working for such entity.

**Milestone**
Event activity that has zero duration and is typically used to represent the start or end of a certain stage of the Project.

**National Environmental Policy Act**
National Environmental Policy Act, 42 USC §4321 et seq., as amended and as it may be amended from time to time.

**New Environmental Approval**
Any of the following:

a) A new Governmental Approval of the same type as an Environmental Approval; and

b) A revision, modification or amendment to one or more of the Environmental Approvals.

**Nonconforming Work**
Work performed that does not meet requirements of the Contract Documents.

**Notice of Final Acceptance**
The written notice issued by ICTC to Design-Builder under Section 20.3.2.

**Notice of Substantial Completion**
The written notice issued by ICTC to Design-Builder under Section 20.2.3.

**Notice of Termination**
A written notice issued by ICTC to terminate the Contract and the performance of the Work by Design-Builder, either in whole or in part, pursuant to Section 15.
| **Notice to Owner** | A formal notice issued to a Utility Owner to perform work on their Utility to accommodate ICTC Work, or notice of work being performed by others, as required by Streets & Highways Code Sections 673, 680 and 720. Work may include Relocation, removal, abandonment, or protection in place. The Notice to Owner also sets forth a schedule and statement of cost liability for the work. |
| **Notice to Proceed 1** | A first written notice issued by ICTC to Design-Builder to proceed with certain limited Work as specified therein on the date specified therein. |
| **Notice to Proceed 2** | A written notice issued by ICTC to Design-Builder to proceed with the remainder of the Work on the date specified therein. |
| **Owner Verification** | ICTC’s act of reviewing, inspecting, observing, sampling, testing, checking, auditing, or otherwise determining and documenting whether items, processes, services, or documents comply with specified requirements. |
| **Payment Bond** | The payment bond described in Section 8.1. |
| **Performance Bond** | The performance bond described in Section 8.1. |
| **Person** | Any individual, corporation, company, voluntary association, partnership, trust, unincorporated organization, or Governmental Person, including ICTC. |
| **Plan** | A drawing, such as layout, profile, typical cross-section, and supplemental drawings, that shows the locations, character, dimensions, and details of the Work to be done. |
| **Preliminary Engineering Drawings** | The documents entitled “Preliminary Engineering Drawings” included in the Reference Information Documents. |
| **Preliminary Schedule** | The schedule submitted as parties work toward Baseline Schedule Approval. |
| **Private Utility** | A Utility that is owned by a Private Utility Owner. |
| **Private Utility Owner** | Any owner or operator of a Utility which is not a Public Utility Owner. |
| **Project** | The [Insert Project Name] Project, as more specifically described in Book 2, Section 1, "General," and all other Work product to be provided by Design-Builder as a condition to Final Acceptance in accordance with the Contract Documents. |
| **Project Manager** | The Person designated by Design-Builder to supervise the Project and to receive delivery of notices to Design-Builder per Section 23.10.1. |
| **Project Requirements** | Book 2 of the Contract Documents as such provisions may be changed, added to, or replaced pursuant to the Contract, together with such documents as may be incorporated into Book 2 by reference therein. |
| **Project Schedule** | Approved schedule governing Design-Builder’s delivery of the Project, including planning, design, construction, management, development, and completion and serving as basis for determining the amount of monthly progress payments. Project Schedule can refer to the Preliminary Schedule, Baseline Schedule, or Working Schedule, depending on the context. |
| **Proposal** | Those documents constituting Design-Builder’s response to the RFP, including any supplements to Proposals as may have been requested by ICTC. |
| **Proposal Due Date** | The date the Proposal was due as specified in the Instructions to Proposers. |
Proposal Price
The “Proposal Price” offered for the Work set forth in Form 9 (Proposal Price).

Proposer
An individual, firm, partnership, corporation, joint venture, or combination thereof that was pre-qualified under ICTC’s RFQ and that submits a Proposal in response to the RFP.

Public Records Act
The California Public Records Act (California Government Code §6250 et seq.)

Public Utility
A Utility that is owned by a Public Utility Owner.

Public Utility Owner
An owner or operator of a Utility which is a municipality, county, or other political subdivision of the State.

Punch List
The list of Work items with respect to the Project which remain to be completed after achievement of Substantial Completion, as applicable, generally limited to minor incidental items of Work which have no adverse effect on the safety or operability of the Project and which can be performed without shutting down a traffic lane or shoulder.

Quality Control
All Design-Builder/Subcontractor/Supplier/vendor operational techniques and activities (process controls) that are performed or conducted to fulfill the Contract requirements.

Quality Manager
The Person designated by Design-Builder to perform the roles and responsibilities of Quality Manager and who meets the minimum requirements as required in the Contract Documents.

Quality Manual
The quality manual provided by Design-Builder and Approved by ICTC as described in Book 2, Section 5, “Quality Program.”

Quality Program
The quality policy, quality objectives, Design and Construction Quality Management Plans, procedures, Work instructions, and records to ensure the quality of the Project.

Quality Validation
All systematic monitoring and evaluation by the Design-Builder of various aspects of the Project to ensure that standards of quality are being met, thereby providing confidence that all Work complies with the Contract and that all materials incorporated in the Work, all equipment, and all elements of the Work will perform satisfactorily for the purpose intended. Quality Validation activities are performed concurrently, but independent of and in addition to the Quality Control activities.

Railroad
Depending on the context, either the right of way, tracks, and systems used for rail traffic in the vicinity of the Project, or the owners and/or operators of such rail systems.

Reference Information Documents
The documents designated as Reference Information Documents in the RFP.

Released for Construction Documents
Design-Builder’s Design Documents issued for the purpose of construction which have been reviewed and Approved by ICTC authorizing construction.

Relocation or Relocate
As related to Utilities, each removal, transfer of location, abandonment, and/or protection of Utilities (including provision of temporary services as necessary) of any and all Utilities that is necessary or advisable in order to accommodate or permit construction of the Project.
<table>
<thead>
<tr>
<th>Term</th>
<th>Definition</th>
</tr>
</thead>
<tbody>
<tr>
<td>Remediation Work</td>
<td>Investigating, monitoring, characterizing, testing, sampling, stock-piling, storage, backfilling in place, recycling, treatment, and/or off-Site disposal of Hazardous Materials and materials containing Hazardous Materials, as Approved by ICTC and in accordance with the Environmental Management Plan and Book 2, Section 7, “Environmental Compliance.”</td>
</tr>
<tr>
<td>Request for Change Proposal</td>
<td>A proposal issued by ICTC under Section 13.2.1.</td>
</tr>
<tr>
<td>Request for Proposals</td>
<td>The Request for Proposals for the Project issued by ICTC, including all addenda and clarifications thereto.</td>
</tr>
<tr>
<td>Request for Qualifications</td>
<td>The Request for Qualifications for the Project issued by ICTC, including all addenda thereto.</td>
</tr>
<tr>
<td>Revised Baseline Schedule</td>
<td>The meaning set forth in Book 2, Section 4, “Project Schedule Management.”</td>
</tr>
<tr>
<td>Right of Way</td>
<td>The real property (which term is inclusive of all estates and interests in real property, as well as licenses and permits authorizing occupancy) that is necessary for ownership and operation of the Project. The term specifically excludes any Construction Easements. The term “Right of Way” is sometimes used to indicate Right of Way and is sometimes used to indicate rights of way for other facilities.</td>
</tr>
<tr>
<td>Right of Way Commitment Dates</td>
<td>Dates listed in the Right of Way Status Chart in Book 2, Exhibit 11B, which represent the date by which ICTC has committed to providing Design-Builder access to the parcels identified in the Right of Way Requirements Maps or the earliest date that a TCE is available for use by the Design-Builder.</td>
</tr>
<tr>
<td>Right of Way Requirements Maps</td>
<td>The maps included in Book 2, Section 11, Exhibit 11A, “Right of Way Requirements Maps,” identifying the R/W currently owned by ICTC and the R/W to be acquired by ICTC.</td>
</tr>
<tr>
<td>Service Line</td>
<td>A Utility line; the function of which is to connect an individual service location (e.g., a single-family residence or an industrial warehouse) to another Utility line which other Utility line connects more than one such individual line to a larger system. The term “Service Line” also includes any Utility on public or private property that services structures located on such property.</td>
</tr>
<tr>
<td>Site</td>
<td>The parcels of Right of Way identified on the Right of Way Requirements Maps or on which the Project is to be constructed and installed as well as all other areas in the vicinity used by Design-Builder for construction Work.</td>
</tr>
<tr>
<td>State</td>
<td>State of California, including its agencies, departments, or divisions whose conduct or action is related to the Work, or the State of California in the geographic sense, depending on the context.</td>
</tr>
<tr>
<td>Subcontract</td>
<td>Any contract to perform any part of the Work or provide any materials, equipment or supplies for any part of the Work between Design-Builder and a Subcontractor, or between any Subcontractor and its lower tier Subcontractor, at any tier.</td>
</tr>
<tr>
<td><strong>Subcontractor or Subconsultant</strong></td>
<td>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.</td>
</tr>
<tr>
<td><strong>Substantial Completion</strong></td>
<td>Completion of the Project as described in Section 20.2.</td>
</tr>
<tr>
<td><strong>Substantial Completion Deadline</strong></td>
<td>The meaning set forth in Section 4.3.2.</td>
</tr>
<tr>
<td><strong>Supplier</strong></td>
<td>Any Person other than employees of Design-Builder not performing Work at the Site that supplies machinery, equipment, materials, or systems to Design-Builder or any Subcontractor in connection with the performance of the Work; Persons who merely transport, pick up, deliver, or carry materials, personnel, parts, equipment, or any other items or Persons to or from the Site shall not be deemed to be performing Work at the Site.</td>
</tr>
<tr>
<td><strong>Surety</strong></td>
<td>Each properly licensed surety company Approved by ICTC which has issued the Payment and Performance Bonds.</td>
</tr>
<tr>
<td><strong>Temporary Construction Easement</strong></td>
<td>Any temporary Construction Easement identified in the Right of Way Requirements Maps.</td>
</tr>
<tr>
<td><strong>Time and Materials Change Order</strong></td>
<td>A Change Order issued under Section 13.7.</td>
</tr>
<tr>
<td><strong>Time Impact Analysis</strong></td>
<td>Analysis using a CPM schedule developed specifically to demonstrate the effect a proposed or past change or delay has on the current scheduled completion date.</td>
</tr>
<tr>
<td><strong>Total Float</strong></td>
<td>Amount of time that an activity or chain of activities can be delayed before extending the scheduled completion date.</td>
</tr>
<tr>
<td><strong>Traveled Way</strong></td>
<td>Portion of the roadway for the movement of vehicles and bicycles, exclusive of the shoulders, berms, sidewalks, and parking lanes.</td>
</tr>
<tr>
<td><strong>Unilateral Change Order</strong></td>
<td>Change Order as defined in Section 13.2.2.</td>
</tr>
<tr>
<td><strong>Utility</strong></td>
<td>A privately, publicly, or cooperatively owned line, facility and/or system for supplying power, light, gas, telecommunications, telegraph, telephone, water, pipeline, or sewer service if such lines, facilities, or systems are authorized by law to use public highways for the location of their facilities. The necessary appurtenances to each Utility facility shall be considered part of such Utility. Without limitation, any Service Line connecting directly to a Utility shall be considered an appurtenance to that Utility, regardless of the ownership of such Service Line. The term “Utility” is sometimes also used to refer to a “Utility Owner.” The term “Utility” shall specifically exclude existing storm water facilities connected with drainage of the roadway and ICTC-owned facilities. Sometimes the term “facility” is used synonymously with “Utility” as can be determined from the context.</td>
</tr>
<tr>
<td><strong>Utility Agreement</strong></td>
<td>An agreement made between ICTC and a Utility Owner for addressing one or more Utility conflicts associated with the Project. ICTC and Utility Owner must enter into a Utility Agreement whenever ICTC is paying or receiving payment for all or a portion of the cost of a Utility, regardless of who performs the work.</td>
</tr>
<tr>
<td>Abbreviation/Definition</td>
<td>Description</td>
</tr>
<tr>
<td>-------------------------</td>
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</tr>
<tr>
<td><strong>Utility Conflict Maps</strong></td>
<td>Plan sheets to be prepared by Design-Builder that will document the existing conditions of a Utility and location of conflict. These Plan sheets will be signed by Design-Builder.</td>
</tr>
<tr>
<td><strong>Utility Delay</strong></td>
<td>Any failure by a Utility Owner to meet any time parameters for performance by such Utility Owner which are set forth in the applicable Utility Design Sheet or schedule agreed to pursuant to a Notice to Owner, which failure by the Utility Owner delays the Critical Path so as to impair Design-Builder’s ability to meet a Completion Deadline.</td>
</tr>
<tr>
<td><strong>Utility Easements</strong></td>
<td>All permanent easements, Consent to Common Use Agreements, Joint Use Agreements, and/or other permanent interests in real property owned by Utility Owners in connection with existing Utilities.</td>
</tr>
<tr>
<td><strong>Utility Owner</strong></td>
<td>The owner or operator of any Utility.</td>
</tr>
<tr>
<td><strong>Utility Permit</strong></td>
<td>All appropriate approvals, exemptions, filings, licenses, permits, and registrations and any other Governmental Approvals required by or with any Governmental Person or Utility Owner necessary for any Utility Relocation.</td>
</tr>
<tr>
<td><strong>Utility Relocation Plans</strong></td>
<td>The design plans for Relocation of a Utility impacted by the Project to be prepared by Design-Builder or the Utility Owner.</td>
</tr>
<tr>
<td><strong>Utility Tracking Report</strong></td>
<td>The report regarding Utilities likely to be impacted by the Project which Design-Builder shall maintain on a current basis and which Design-Builder shall periodically submit to ICTC, as more particularly described in Book 2 Section 6, “Utilities.”</td>
</tr>
</tbody>
</table>
| **Utility Work** | a) The work associated with Relocation of Utilities, including the design, construction, installation, manufacture, supply, testing and Inspection, adjustments (including manholes and valves), and otherwise required by the Contract Documents, including all labor, materials, equipment, supplies, Utilities, and subcontracted services provided or to be provided by Design-Builder and/or the Utility Owners.  

b) Any Betterments added to the Work pursuant to Book 2, Section 12.2.3.4, “Betterments,” and Section 6.2.4. The term also includes any reimbursement of Utility Owners that is the Design-Builder’s responsibility pursuant to Section 6.2. Any Utility Work furnished or performed by Design-Builder is part of the Work; any Utility work furnished or performed by a Utility Owner is not part of the Work. |
| **Warranty** | Any warranty made by Design-Builder in Section 21. |
| **Work Breakdown Structure** | A deliverable-oriented grouping of Project components that organizes and defines the total scope of the Project. |
Work Order
An ordering agreement (as the same may be amended from time to time) among ICTC, a Utility Owner, and Design-Builder, providing detailed information and terms relating to the Relocation of a particular Utility, and authorizing that Relocation, which is executed pursuant to a UA.

Working Day
Any Calendar Day except Saturday, Holidays, or a day when the Design-Builder cannot perform Work on the controlling activity for at least 50 percent of the day with at least 50 percent of the normal labor and equipment due to adverse weather-related conditions or suspension of a controlling activity that the Design-Builder and ICTC agree benefits both parties.

Working Drawings
Stress sheets, shop drawings, structural steel fabrication plans, erection plans, falsework plans, framework plans, cofferdam plans, bending diagrams for reinforcing steel, or any other supplementary plans or similar data which illustrate the construction of the Work.

Working Schedule
The current Approved schedule developed from the Approved Baseline Schedule and any subsequent Approved Working Schedules through regular monthly review to incorporate actual past progress.
EXHIBIT B – LABOR CODE REQUIREMENT
A. Worker’s Compensation

Design-Builder shall comply with the provisions of Section 3700 of the California Labor Code which require every employer to be insured against liability for workers’ compensation or to undertake self-insurance in accordance with the provisions of that Code.

B. Applicable Caltrans Standard Specifications

Refer to Section 7-1.02 of Caltrans Standard Specifications for information regarding State prevailing wage rate, work hours, apprenticeship, nondiscrimination and other requirements of the Labor Code applicable to the Contract.

C. Additional Provisions

1. Prevailing Wages.

The holiday wage rate listed shall be applicable to all holidays recognized in the collective bargaining agreement of the particular craft, classification or type of worker concerned; provided that if the prevailing wage rate is not based on a collectively bargained rate, the holidays upon which the prevailing rate shall be paid shall be as provided in Section 6700 of the California Government Code. Copies of the prevailing rates of wages will be furnished to Design-Build and other interested parties on request. For crafts or classifications not shown on the prevailing wage determinations, Design-Build may be required to pay the wage rate of the most closely related craft or classification shown in such determinations for design-build Work.

If there is a difference between the minimum wage rates predetermined by the Secretary of Labor and the general prevailing wage rates determined by the Director of the Department of Industrial Relations (DIR) for similar classifications of labor, Design-Build shall pay and cause its Subcontractors to pay not less than the higher wage rate. The DIR will not accept lower State wage rates not specifically included in the Federal minimum wage determinations. Where Federal wage rate determinations do not contain the State wage rate determination otherwise available for use by Design-Build and Subcontractors, the Design-Build shall pay and cause its subcontractors to pay not less than the Federal minimum wage rate which most closely approximates the duties of the employees in question.

2. Labor Code Section 1777.5

1777.5. (a) (1) This chapter does not prevent the employment upon public works of properly registered apprentices who are active participants in an approved apprenticeship program.

(2) For purposes of this chapter, “apprenticeship program” means a program under the jurisdiction of the California Apprenticeship Council established pursuant to Section 3070.

(b) (1) Every apprentice employed upon public works shall be paid the prevailing rate of per diem wages for apprentices in the trade to which he or she is registered and shall be employed only at the work of the craft or trade to which he or she is registered.

(2) Unless otherwise provided by a collective bargaining agreement, when a contractor requests the dispatch of an apprentice pursuant to this section to perform work on a public works project and requires the apprentice to fill out an application or undergo testing, training, an examination, or other preemployment process as a
condition of employment, the apprentice shall be paid for the time spent on the required preemployment activity, including travel time to and from the required activity, if any, at the prevailing rate of per diem wages for apprentices in the trade to which he or she is registered. Unless otherwise provided by a collective bargaining agreement, a contractor is not required to compensate an apprentice for the time spent on preemployment activities if the apprentice is required to take a preemployment drug or alcohol test and he or she fails to pass that test.

(c) Only apprentices, as defined in Section 3077, who are in training under apprenticeship standards that have been approved by the Chief of the Division of Apprenticeship Standards and who are parties to written apprentice agreements under Chapter 4 (commencing with Section 3070) of Division 3 are eligible to be employed at the apprentice wage rate on public works. The employment and training of each apprentice shall be in accordance with either of the following:

(1) The apprenticeship standards and apprentice agreements under which he or she is training.

(2) The rules and regulations of the California Apprenticeship Council.

(d) If the contractor to whom the contract is awarded by the state or any political subdivision, in performing any of the work under the contract, employs workers in any apprenticeable craft or trade, the contractor shall employ apprentices in at least the ratio set forth in this Section and may apply to any apprenticeship program in the craft or trade that can provide apprentices to the site of the public work for a certificate approving the contractor under the apprenticeship standards for the employment and training of apprentices in the area or industry affected. However, the decision of the apprenticeship program to approve or deny a certificate shall be subject to review by the Administrator of Apprenticeship. The apprenticeship program or programs, upon approving the contractor, shall arrange for the dispatch of apprentices to the contractor. A contractor covered by an apprenticeship program's standards shall not be required to submit any additional application in order to include additional public works contracts under that program. “Apprenticeable craft or trade,” as used in this section, means a craft or trade determined as an apprenticeable occupation in accordance with rules and regulations prescribed by the California Apprenticeship Council. As used in this section, “contractor” includes any subcontractor under a contractor who performs any public works not excluded by subdivision (o).

(e) Before commencing work on a contract for public works, every contractor shall submit contract award information to an applicable apprenticeship program that can supply apprentices to the site of the public work. The information submitted shall include an estimate of journeyman hours to be performed under the contract, the number of apprentices proposed to be employed, and the approximate dates the apprentices would be employed. A copy of this information shall also be submitted to the awarding body if requested by the awarding body. Within 60 days after concluding work on the contract, each contractor and subcontractor shall submit to the awarding body, if requested, and to the apprenticeship program a verified statement of the journeyman and apprentice hours performed on the contract. The information under this subdivision shall be public. The apprenticeship programs shall retain this information for 12 months.

(f) The apprenticeship program that can supply apprentices to the area of the site of the public work shall ensure equal employment and affirmative action in apprenticeship for women and minorities.
(g) The ratio of work performed by apprentices to journeymen employed in a particular craft or trade on the public work may be no higher than the ratio stipulated in the apprenticeship standards under which the apprenticeship program operates where the contractor agrees to be bound by those standards, but, except as otherwise provided in this section, in no case shall the ratio be less than one hour of apprentice work for every five hours of journeyman work.

(h) This ratio of apprentice work to journeyman work shall apply during any day or portion of a day when any journeyman is employed at the jobsite and shall be computed on the basis of the hours worked during the day by journeymen so employed. Any work performed by a journeyman in excess of eight hours per day or 40 hours per week shall not be used to calculate the ratio. The contractor shall employ apprentices for the number of hours computed as above before the end of the contract or, in the case of a subcontractor, before the end of the subcontract. However, the contractor shall endeavor, to the greatest extent possible, to employ apprentices during the same time period that the journeymen in the same craft or trade are employed at the jobsite. When an hourly apprenticeship ratio is not feasible for a particular craft or trade, the Administrator of Apprenticeship, upon application of an apprenticeship program, may order a minimum ratio of not less than one apprentice for each five journeymen in a craft or trade classification.

(i) A contractor covered by this Section that has agreed to be covered by an apprenticeship program’s standards upon the issuance of the approval certificate, or that has been previously approved for an apprenticeship program in the craft or trade, shall employ the number of apprentices or the ratio of apprentices to journeymen stipulated in the applicable apprenticeship standards, but in no event less than the 1-to-5 ratio required by subdivision (g).

(j) Upon proper showing by a contractor that he or she employs apprentices in a particular craft or trade in the state on all of his or her contracts on an annual average of not less than one hour of apprentice work for every five hours of labor performed by journeymen, the Administrator of Apprenticeship may grant a certificate exempting the contractor from the 1-to-5 hourly ratio, as set forth in this Section for that craft or trade.

(k) An apprenticeship program has the discretion to grant to a participating contractor or contractor association a certificate, which shall be subject to the approval of the Administrator of Apprenticeship, exempting the contractor from the 1-to-5 ratio set forth in this Section when it finds that any one of the following conditions is met:

1. Unemployment for the previous three-month period in the area exceeds an average of 15 percent.

2. The number of apprentices in training in the area exceeds a ratio of 1 to 5.

3. There is a showing that the apprenticable craft or trade is replacing at least one-thirtieth of its journeymen annually through apprenticeship training, either on a statewide basis or on a local basis.

4. Assignment of an apprentice to any work performed under a public works contract would create a condition that would jeopardize his or her life or the life, safety, or property of fellow employees or the public at large, or the specific task to which the apprentice is to be assigned is of a nature that training cannot be provided by a journeyman.
(l) If an exemption is granted pursuant to subdivision (k) to an organization that represents contractors in a specific trade from the 1-to-5 ratio on a local or statewide basis, the member contractors shall not be required to submit individual applications for approval to local joint apprenticeship committees, if they are already covered by the local apprenticeship standards.

(m) (1) A contractor to whom a contract is awarded, who, in performing any of the work under the contract, employs journeymen or apprentices in any apprenticeable craft or trade shall contribute to the California Apprenticeship Council the same amount that the director determines is the prevailing amount of apprenticeship training contributions in the area of the public works site. A contractor may take as a credit for payments to the council any amounts paid by the contractor to an approved apprenticeship program that can supply apprentices to the site of the public works project. The contractor may add the amount of the contributions in computing his or her bid for the contract.

(2) (A) At the conclusion of the 2002-03 fiscal year and each fiscal year thereafter, the California Apprenticeship Council shall distribute training contributions received by the council under this subdivision, less the expenses of the Division of Apprenticeship Standards for administering this subdivision, by making grants to approved apprenticeship programs for the purpose of training apprentices. The funds shall be distributed as follows:

(i) If there is an approved multiemployer apprenticeship program serving the same craft or trade and geographic area for which the training contributions were made to the council, a grant to that program shall be made.

(ii) If there are two or more approved multiemployer apprenticeship programs serving the same craft or trade and geographic area for which the training contributions were made to the council, the grant shall be divided among those programs based on the number of apprentices registered in each program.

(iii) All training contributions not distributed under clauses (i) and (ii) shall be used to defray the future expenses of the Department of Industrial Relations for the administration and enforcement of apprenticeship and preapprenticeship standards and requirements under this code.

(B) An apprenticeship program shall only be eligible to receive grant funds pursuant to this subdivision if the apprenticeship program agrees, prior to the receipt of any grant funds, to keep adequate records that document the expenditure of grant funds and to make all records available to the Department of Industrial Relations so that the Department of Industrial Relations is able to verify that grant funds were used solely for training apprentices. For purposes of this subparagraph, adequate records include, but are not limited to, invoices, receipts, and canceled checks that account for the expenditure of grant funds. This subparagraph shall not be deemed to require an apprenticeship program to provide the Department of Industrial Relations with more documentation than is necessary to verify the appropriate expenditure of grant funds made pursuant to this subdivision.

(C) The Department of Industrial Relations shall verify that grants made pursuant to this subdivision are used solely to fund training apprentices. If an
apprenticeship program is unable to demonstrate how grant funds are expended or if an apprenticeship program is found to be using grant funds for purposes other than training apprentices, then the apprenticeship program shall not be eligible to receive any future grant pursuant to this subdivision and the Department of Industrial Relations may initiate the process to rescind the registration of the apprenticeship program.

(3) All training contributions received pursuant to this subdivision shall be deposited in the Apprenticeship Training Contribution Fund, which is hereby created in the State Treasury. Upon appropriation by the Legislature, all moneys in the Apprenticeship Training Contribution Fund shall be used for the purpose of carrying out this subdivision and to pay the expenses of the Department of Industrial Relations.

(n) The body awarding the contract shall cause to be inserted in the contract stipulations to effectuate this section. The stipulations shall fix the responsibility of compliance with this Section for all apprenticeable occupations with the prime contractor.

(o) This Section does not apply to contracts of general contractors or to contracts of specialty contractors not bidding for work through a general or prime contractor when the contracts of general contractors or those specialty contractors involve less than thirty thousand dollars ($30,000).

(p) An awarding body that implements an approved labor compliance program in accordance with subdivision (b) of Section 1771.5 may, with the approval of the director, assist in the enforcement of this section under the terms and conditions prescribed by the director.
EXHIBIT C – RESERVED
EXHIBIT D – FEDERAL LAWS FOR FEDERAL-AID PROJECTS

D1  General
D2  FHWA-1273
D1 General


Form FHWA-1273 is included in this Exhibit D, "FHWA-1273." Some Contract terms on the form are different than those used in other contract parts as shown in the following table:

<table>
<thead>
<tr>
<th>FHWA-1273 Term</th>
<th>Equivalent Term Used in Other Contract Parts</th>
</tr>
</thead>
<tbody>
<tr>
<td>SHA</td>
<td>ICTC</td>
</tr>
<tr>
<td>SHA contracting officer</td>
<td>ICTC</td>
</tr>
<tr>
<td>SHA resident engineer</td>
<td>ICTC</td>
</tr>
</tbody>
</table>

[Note to drafter: Insert copy of FHWA-1273]
EXHIBIT E – DISADVANTAGED BUSINESS ENTERPRISE (DBE) SPECIAL PROVISIONS FOR DESIGN-BUILD PROJECTS
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Disadvantage Business Enterprise (DBE) Special Provisions for Design Build Projects

Exhibit E-1
E1 POLICY STATEMENT

It is the policy of ICTC to encourage the participation of DBE, women-owned business enterprises and minority business enterprises in all facets of its business activities, consistent with applicable laws and regulations. Pursuant to the provisions of 49 CFR Part 26, ICTC has adopted rules to provide certified DBEs opportunities to participate in the business activities of ICTC as service providers, vendors, contractors, subcontractors, advisors, and consultants. To ensure there is equal participation of the DBE groups specified in 49 CFR §26.5, ICTC specifies a goal for DBEs.

The DBE goal applies to all of ICTC’s contracts and purchases paid with funds received from the US Department of Transportation through FHWA, the Federal Transit Administration, and the Federal Aviation Administration. Because ICTC has programmed federally-sourced funds for the Project, the DBE goal will apply to the Project and Design-Builder is obligated to comply with applicable federal laws and regulations related to DBEs.

The Design-Builder and its Subcontractors, Subconsultants, Suppliers, and service providers shall take all necessary and reasonable steps in accordance with 49 CFR Part 26 to ensure that DBEs have the maximum opportunity to compete for and perform on this Contract.

E2 CONTRACT ASSURANCE

The Design-Builder, and its Subcontractors, Subconsultants, Suppliers, and service providers shall not discriminate on the basis of race, color, national origin, or sex in the performance of this Contract. The Design-Builder shall carry out applicable requirements of 49 CFR Part 26 in the award and administration of federally funded contracts. Failure by the Design-Builder to carry out these requirements is a material breach of this Contract, which may result in the termination of this Contract or such other remedy, as ICTC deems appropriate.

E3 DBE GOAL

The DBE goal established for this Contract is as shown on the DBE Certification (Form 17).

The Design-Builder shall establish individual DBE goals for each Subcontract and for each Subconsultant, Supplier, and service provider agreement in amounts to ensure the Contract DBE goal is met. ICTC will monitor the Design-Builder’s activities to ensure they are conducted in a manner consistent with the requirements of 49 CFR Part 26.

Only DBE participation will count toward the DBE goal. DBE participation will count toward the ICTC's federally mandated statewide overall DBE goal.

Credit for materials or supplies purchased from DBEs counts toward the DBE goal in the following manner:

a) 100 percent counts if the materials or supplies are obtained from a DBE manufacturer.

b) 60 percent counts if the materials or supplies are obtained from a DBE regular dealer.

c) Only fees, commissions, and charges for assistance in the procurement and delivery of materials or supplies count if obtained from a DBE that is neither a manufacturer nor regular dealer. 49 CFR §26.55 defines “manufacturer” and “regular dealer.”

Credit toward the DBE goal will be received if employing a DBE trucking company that performs a commercially useful function as defined in 49 CFR 26.55(d)(1)-(4), (6), (7).

E4 DBE PERFORMANCE PLAN

Design-Builder shall prepare a Disadvantaged Business Enterprise Performance Plan (“DBE Performance Plan”) that complies with all applicable laws and Governmental Approvals, is consistent with the Contract Documents, and includes the following elements:
a) A policy statement, signed by Design-Builder’s authorized representative, which expresses Design-Builder’s commitment to utilize DBEs in all aspects of the Work, outlines the various levels of responsibility, and states the objectives of the DBE Performance Plan. Design-Builder shall obtain the written commitment of all Design-Builder-Related Entities to comply with and advance the intent of the policy statement.

b) [Depending on the Project, choose one of the following paragraphs:

[Use the following if DBE Subconsultant is required] Design-Builder shall hire a Subconsultant responsible for the DBE Performance Plan (the “Liaison Officer”), and supply support staff necessary and proper to administer the program and a description of the authority, responsibility, and duties of the Liaison Officer and support staff. The Liaison Officer and staff are responsible for developing, managing, and implementing the DBE Performance Plan on a day-to-day basis, for providing technical assistance to DBEs, and for disseminating information on available business opportunities so that DBEs are provided an equitable opportunity to engage in Work as Subcontractors or Subconsultants. The Liaison Officer shall work in close coordination with ICTC and shall report quarterly on Design-Builder’s success in attaining the established DBE goals during the design Work and the Construction period.

[Use the following if the Design-Builder can manage on their own] Design-Builder’s designation of a Person responsible for the DBE Performance Plan (the “Liaison Officer”), and support staff necessary and proper to administer the program and a description of the authority, responsibility, and duties of the Liaison Officer and support staff. The Liaison Officer and staff are responsible for developing, managing, and implementing the DBE Performance Plan on a day-to-day basis, for providing technical assistance to DBEs, and for disseminating information on available business opportunities so that DBEs are provided an equitable opportunity to engage in Work as Subcontractors or Subconsultants. The Liaison Officer shall work in close coordination with ICTC and shall report quarterly on Design-Builder’s success in attaining the established DBE goal during the design Work and the Construction period.

c) A description of proposed actions to facilitate DBE engagement in Work as Subcontractors and Subconsultants, such as:

i. On-going quarterly strategic planning sessions with ICTC to establish DBE goals for specific Work item groups by reviewing the Work, available firms, strategies, anticipated obstacles and means to overcome obstacles.

ii. Conduct Work-item specific outreach meetings in coordination with ICTC for DBE firms to highlight current and upcoming appropriate subcontracting opportunities.

iii. Solicit statements of qualification, proposals, and/or price quotations from qualified DBE firms and arrange a time for the review of qualifications, plans, quantities, specifications, and delivery schedules, and for the preparation and presentation of proposals and/or price quotations.

iv. Provide assistance, in coordination with ICTC, to DBEs so that these may overcome barriers such as the inability to obtain bonding, insurance, financing, or technical assistance.

v. Develop and conduct information and communication programs or workshops, in coordination with ICTC, on contracting procedures and specific contracting opportunities in a timely manner.

vi. Encourage eligible DBEs to apply for certification with ICTC.

vii. Contact local/regional disadvantaged, underutilized, trade-specific contractor associations and appropriate city agencies with programs for disadvantaged individuals for assistance in recruiting and encouraging eligible DBE contractors to apply for certification with ICTC.
E5 SUBMITTAL OF DOCUMENTATION

With the submission of the initial Proposal and for all Subcontracts subsequently awarded where DBE goals are set, regardless of contract size, the Design-Builder, Subcontractor, Subconsultant, Supplier and service provider shall be required to (a) propose the participation of specific DBEs to meet the DBE goal, or (b) demonstrate good faith efforts to meet the DBE goal. A Design-Builder, Subcontractor, Subconsultant, Supplier, and service provider shall provide justification if it rejects bids, quotes, or proposals from properly certified, qualified DBE firms.

In order to fulfill a DBE goal, the firms utilized as DBE Subcontractors, Subconsultants, Suppliers, or service providers shall be certified as DBEs by the California Unified Certification Program before the submittal of the Proposal, and/or subsequent to the award of the Contract, the advertisement of bids, or the selection of any new Subcontractors, Subconsultants, Suppliers, or service providers during the Project. For a list of DBEs certified by the California Unified Certification Program, go to: https://dot.ca.gov/programs/civil-rights/dbe-search

The Design-Builder shall submit the following documents to ICTC. These documents shall be submitted with the initial Proposal:

a) Design-Builder's good faith efforts documentation.
b) Design-Build Bidders List.
c) Supporting documentation to verify good faith efforts, including a copy of the signed agreements with each DBE to be utilized by the Design-Builder, Subcontractor, Subconsultant, Supplier, or service provider.
d) DBE Goal Certification Form (Form 17).

The Design-Builder shall submit a Design-Build Bidder's List regardless of whether or not it has indicated sufficient DBE participation to meet the DBE goal. The completed Design-Build Bidders List shall include information on:

a) All DBE and non-DBE firms that submitted a bid/proposal for the Project.
b) The proposed firms to be used on the Project as Subcontractors/Subconsultants/Suppliers/service providers.
c) A description of the Work.
d) Bid dollar amount.
e) Years the company has been in business.
f) The firm's average annual gross receipts for the past three (3) years.

The Design-Builder shall also submit additional information which supports its good faith efforts such as those typical good faith efforts listed in this Exhibit E and summaries of the Design-Builder’s discussions and/or solicitation efforts of DBE firms (including the firm names, addresses and contact Persons). This information may include copies of solicitation letters and/or faxes to DBE firms.

The Design Builder's Subcontractors, Subconsultants, Suppliers, and services providers, including DBE and non-DBE firms, that subcontract part of their Work or purchase supplies from other firms are also required to demonstrate that they made good faith efforts to provide opportunities for DBE firms to participate on this Project.

E6 GOOD FAITH EFFORTS DETERMINATION

ICTC will determine whether a Design-Builder made sufficient good faith efforts to meet the DBE goal, in accordance with 49 CFR §26.53 and Appendix A thereto. The Design-Builder shall show that it took all
necessary and reasonable steps to achieve the DBE goal or other requirement of 49 CFR Part 26, which, by its scope, intensity, and appropriateness to the objective, could reasonably be expected to obtain sufficient DBE participation, even if it were not fully successful. Mere pro forma efforts are not good faith efforts to meet the DBE goal. Compliance will be determined on a case-by-case, based on a review of documentation of the following types of activities:

a) Soliciting, through all reasonable and available means (e.g., attendance at pre-proposal/pre-letting meetings, advertising, and/or written notices), the interest of all certified DBEs who have the capability to perform the Work of the Contract. The Design-Builder shall solicit this interest within sufficient time to allow the DBEs to respond to the solicitation. The Design-Builder shall determine with certainty if the DBEs are interested by taking appropriate steps to follow up on the initial solicitations.

b) Selecting portions of the Work to be performed by DBEs in order to increase the likelihood that the DBE goal will be achieved. This includes, where appropriate, breaking out Work items into economically feasible units to facilitate DBE participation even when the Design-Builder might otherwise prefer to perform these Work items with its own forces.

c) Providing interested DBEs with adequate information about the Plans, specifications, and requirements of the Contract in a timely manner to assist them in responding to a solicitation.

d) Negotiating in good faith with interested DBEs. The Design-Builder has the responsibility to make a portion of the Work available to DBE Subcontractors, Subconsultants, Suppliers, and service providers, to select those portions of the Work or material needs consistent with the available DBE Subcontractors, Subconsultants, Suppliers, and service providers so as to facilitate DBE participation. Evidence of such negotiation includes the names, addresses, and telephone numbers of the DBEs that were considered; a description of information provided regarding the Plans and specifications for the Work selected for contracting; and evidence as to why additional agreements could not be reached for DBEs to perform the Work.

e) Using good business judgment considering a number of factors in negotiating with Subcontractors, Subconsultants, Suppliers, and service providers including those who are DBEs, and taking a firm’s price and capabilities, and DBE goal into consideration. However, the fact that there may be some additional costs involved in finding and using DBEs is not in itself sufficient reason for Design-Builder’s failure to meet the DBE goal, as long as such costs are reasonable. Also, the ability or desire of the Design-Builder to perform the Work with its own organization does not relieve the Design-Builder of the responsibility to make good faith efforts. The Design-Builder is not, however, required to accept higher quotes from DBEs if the price difference is excessive or unreasonable.

f) Not rejecting DBEs as being unqualified without sound reasons based on a thorough investigation of their capabilities. The Design-Builder’s standing within its industry, membership in specific groups, organizations, or associations and political or social affiliations (for example union vs. non-union employee status) are not legitimate causes for rejection or non-solicitation of proposals/bids in the Design-Builder’s efforts to meet the DBE goal.

g) Making efforts to assist interested DBEs in obtaining bonding, lines of credit, or insurance as required by ICTC or Design-Builder.

h) Making efforts to assist interested DBEs in obtaining necessary equipment, supplies, materials or related assistance or services.

i) Effectively using the services of available minority/women community organizations; minority/women contractors’ groups; local, state, and Federal offices of minority/women business assistance; and other organizations, as allowed on a case-by-case basis, to provide assistance in the recruitment and placement of DBEs.

E7 COUNTING DBE PARTICIPATION

Disadvantage Business Enterprise (DBE) Special Provisions for Design Build Projects

Exhibit E-5
In accordance with 49 CFR §26.55, ICTC will utilize the following guidelines in determining the percentage of DBE participation that will be counted toward the overall DBE goal:

a) If a firm is not currently certified as a DBE, in accordance with the standards of Subpart D of the regulations (49 CFR §26.55(f)), at the time of execution of its contract with the Design-Builder, the firm’s participation toward any DBE goals will not be counted, except as provided for in 49 CFR §26.87(i).

b) The dollar value of the Work performed under a Subcontract with a firm after it has ceased to be certified will not be counted toward the overall DBE goal.

c) The participation of a DBE Subcontractor/Subconsultant/Supplier/service provider toward the Design-Builder’s DBE achievements or the overall DBE goal will not be counted until the amount being counted toward the DBE goal has been paid to the DBE.

d) When a DBE participates in the Subcontract, the value of the Work actually performed will be counted as follows:

i. The entire amount of the Subcontract (or other contract not covered by paragraph 49 CFR §26.55) that is performed by the DBE’s own forces, including the cost of supplies and materials obtained by the DBE for the Work of the Subcontract, and including supplies purchased or equipment leased by the DBE (except that supplies, and equipment the DBE Subcontractor purchases or leases from the Design-Builder or its affiliate(s) will not be counted).

ii. The entire amount of fees or commissions charged by a DBE firm for providing a bona fide service, such as professional, technical, consultant, or managerial services, or for providing bonds or insurance specifically required for the performance of a DOT-assisted contract, count toward DBE goals, provided that ICTC determines the fee to be reasonable and not excessive as compared with fees customarily allowed for similar services.

iii. When a DBE subcontracts part of the Work of its Subcontract to another firm, the value of the Subcontracted Work may be counted toward DBE goals only if the DBE’s Subcontractor is itself a DBE, Work that a DBE subcontracts to a non-DBE firm will not count toward the DBE goal.

iv. When a DBE performs as a participant in a joint venture, ICTC will count a portion of the total dollar value of the Subcontract equal to the distinct, clearly defined portion of the Work of the Subcontract that the DBE performs with its own forces toward DBE goals.

e) ICTC will count expenditures of a DBE Subcontractor, Subconsultant, Supplier, or service provider toward DBE goals only if the DBE is performing a commercially useful function on that Subcontract in accordance with 49 CFR §26.55.

E8 CONTINUING GOOD FAITH EFFORTS

During the term of the Contract, the Design-Builder shall make good faith efforts to ensure that DBEs have maximum opportunity to successfully perform on the Contract, and that the Design-Builder meets its DBE goal. These efforts shall include, but not be limited to, the following:

a) Negotiating in good faith to attempt to finalize a Subcontract/Subconsultant/Supplier/service provider agreement with DBEs committed to before Contract award.

b) Continuing to provide assistance to DBE Subcontractors/Subconsultants/Suppliers/service providers in obtaining bonding, lines of credit, etc., if required by the Contract.

c) Notifying a DBE in writing of any potential problem and attempting to resolve the problem before formally requesting ICTC’s statement of no objection to substitute the DBE.

d) As with all Subcontractors/Subconsultants/Suppliers/service providers, timely payment of all monies due and owing to DBE Subcontractors/Subconsultants/Suppliers/service providers.
e) Timely submittal of good faith efforts information and documentation to ICTC throughout the Contract, as Subcontracts are let and new vendors, Subcontractors, Subconsultants, Suppliers, and service providers are selected.
f) Informing ICTC in a timely manner of any problems anticipated in attaining the DBE goal committed to in the Proposal.
g) If the Design-Builder or any of its Subcontractors/Subconsultants/Suppliers/service providers requests a substitution of a DBE firm, the Design-Builder or its Subcontractors/Subconsultants/Suppliers/service providers shall exert good faith efforts to replace the DBE firm with another DBE firm, subject to ICTC’s statement of no objection.

E9 APPLICABILITY TO DBE BIDDERS/PROPOSERS
These good faith efforts requirements also apply to DBE bidders/proposers for contracts. The Work proposed to be performed with its own work force and Work committed to DBE Subcontractors, Subconsultants, Suppliers, and service providers will count toward the DBE goal.

E10 DBE CONTRACTS
Whenever a DBE is selected as a Subcontractor/Subconsultant/Supplier/service provider and it has not been previously reported, the Design-Builder or designated Liaison Officer shall promptly provide ICTC with the following information regarding the Subcontract:

a) The name of the Subcontractor/Subconsultant/Supplier/service provider.
b) The total dollar amount of the Subcontract, Subconsultant, or Supplier/service provider agreement.
c) The specific Work items covered by the Subcontract or the Subconsultant/Supplier/service provider agreement.
d) Estimated quantities of each Work item.
e) Individual unit prices (if applicable).

E11 TERMINATION OF DBE CONTRACTS
ICTC requires that the Design-Builder, and its Subcontractors, Subconsultants, Suppliers, and service providers not terminate for convenience a DBE Subcontractor/Subconsultant/Supplier/service provider listed on the List of Proposed DBEs (or an Approved substitute DBE) and then perform the Work of the terminated Subcontract with its own forces or those of an affiliate, without prior written consent of ICTC. The request for removal shall be made in writing to ICTC.

If a DBE Subcontractor/Subconsultant/Supplier/service provider is terminated or fails to complete its Work on a Subcontract for any reason, the Design-Builder shall make good faith efforts to find another DBE Subcontractor/Subconsultant/Supplier/service provider to substitute for the original DBE. These good faith efforts shall be directed at finding another DBE to perform at least the same amount of Work under the Contract as the DBE that was terminated, to the extent needed to meet the DBE goal.

E12 BIDDER’S LIST
A Design-Builder Bidder’s List shall be submitted with the Proposal, and the successful Design-Builder shall maintain a Bidder’s List throughout the life of the Project. The Bidder's List shall be created and maintained in accordance with 49 CFR §26.11(c), and all firms quoting or bidding on Subcontracts and Subconsultant or Supplier/service provider agreements for this Contract shall be identified. For every firm quoting or bidding on Subcontracts, and Subconsultant or Supplier/service provider agreements for this Contract, the following shall be obtained:

a) The firm’s name.
b) The firm’s address.
c) The firm’s status as a DBE or non-DBE.
d) The age of the firm.
e) The annual gross receipts of the firm.

E13  EFFECT OF SUPPLEMENTAL AGREEMENTS

The dollar amount of any supplemental agreement or any other Contract modification that increases the dollar amounts of the Contract or any Subcontract or Subconsultant agreement will be subject to the DBE goal established for this Project, and the Design-Builder and its Subcontractors and Subconsultants shall solicit DBE participation for such increases. Revised total Contract dollar values shall be reflected in the Design-Builder Payment and Subcontract Award Monthly Progress Reports submitted to ICTC.

E14  PROMPT PAYMENT

The Design-Builder agrees to pay each Subcontractor, Subconsultant, Supplier, or service provider under this Contract within 10 days of the Design-Builder’s receipt of payment from ICTC for undisputed services provided by the Subcontractor, Subconsultant, Supplier, or service provider. The Design-Builder shall pay interest of 1-1/2 percent per month or any part of a month to the Subcontractor, Subconsultant, Supplier, or service provider on any undisputed amount not paid on time to the Subcontractor, Subconsultant, Supplier, or service provider. This clause applies to both DBE and non-DBE firms working on this Contract.

E15  CONSEQUENCES OF NONCOMPLIANCE

E15.1  Breach of Contract
Failure to carry out the DBE requirements specified in the Contract Documents constitutes a breach of Contract. ICTC will notify the Design-Builder and the USDOT of such breach, including notification that the breach may result in termination of the Contract by ICTC or imposition of other appropriate sanctions. This notice is given pursuant to 49 CFR Part 26. For purposes of this section, timely submittal means received by ICTC by the close of business on the 10th of the following month.

E15.2  Notice
If the Design-Builder or any Subcontractor, Subconsultant, Supplier, or service provider is deemed to be in non-compliance, the Design-Builder will be informed in writing, by certified mail by ICTC that sanctions will be imposed for failure to meet DBE goals and/or submit documentation of good faith efforts. The notice will state the specific sanction to be imposed.

E16  SANCTIONS
If it is determined that the Design-Builder’s failure to meet all or part of the DBE goal is due to the Design-Builder’s inadequate good faith efforts throughout the life of the Contract, including failure to submit required good faith efforts information and documentation, the Design-Builder may be subject to Contract termination.

E17  DBE LIQUIDATED DAMAGES
As defined in 49 CFR Part 26, if it is determined that the Design-Builder’s failure to meet all or part of the DBE goal is due to the Design-Builder’s inadequate good faith efforts, the Design-Builder may be required to pay DBE liquidated damages equal to the amount of the unmet DBE goal.

E18  REPORTING

E18.1  DBE Records
The Design-Builder shall maintain records and shall require its Subcontractors/Subconsultants/Suppliers/service providers that are utilizing DBE firms in such Subcontracts to maintain records to verify DBE participation as set forth in the Proposal and as modified during the course of the Contract. Such records shall show name and business address of each DBE participating in the Subcontract and Subconsultant or Supplier/service provider agreement and the total dollar amount actually paid to each DBE and the date of payment.

E18.2 Reporting Requirements and ICTC Review
The Design-Builder shall submit ongoing progress reports to ICTC on its payments to all its Subcontractors/Suppliers/service providers, regardless of their tier or DBE status, within 10 days after receiving payment from ICTC until final payment is made. The Design-Builder shall submit these progress reports on its payments to Subcontractors/Subconsultants/Suppliers/service providers on the Subcontractor Payment Form developed by the Design-Builder and Approved by ICTC. The Design-Builder shall submit a copy of each Subcontractor Payment Reports to ICTC.

A summary of Subcontracts, Subconsultant, and Supplier/service provider agreements awarded shall be submitted to ICTC on a monthly basis, which shall include the firm name, address, phone number, contact Person, amount of the Subcontract, Subconsultant or Supplier/service provider agreement, description of Work and length of the Subcontract, Subconsultant or Supplier/service provider agreement.

ICTC will review the Summary of Subcontract, Subconsultant, and Supplier/Service Provider Agreements Awarded Monthly Progress Report to monitor and determine whether the utilization of DBE firms is consistent with the commitment of the Design-Builder, as stated in its Proposal.

If it is determined that the Design-Builder's DBE utilization during performance of the Contract is not consistent with the commitment thereto, the Design-Builder will be requested, in writing, to submit evidence of its good faith efforts to meet the DBE goal. The Design-Builder shall be given 10 Working Days to submit this documentation. Failure to respond shall place the Design-Builder in noncompliance, subject to sanctions as provided in this Contract herein.

E18.3 Summary of Subcontracts Awarded and Paid Report
As indicated in Sections E18.1 and E18.2 the Design-Builder is required to submit a summary of Subcontracts awarded on a monthly basis; by no later 10 days after receiving payment from ICTC.

ICTC reserves the right to withhold progress payment until the required reports have been furnished.

E18.4 Quarterly Review/DBE Work and Payment Schedule
A review of the Design-Builder’s compliance with the DBE goal will be conducted on a quarterly basis as outlined below.

No later than 30 days following the Notice to Proceed 1, the Design-Builder shall submit a DBE Work and Payment Schedule to ICTC. This schedule shall indicate, for the entire Contract period, a listing on a per month basis of the DBE firms which the Design-Builder expects to utilize, the amount of payments expected to be made to DBEs, and the percentage of each DBE firm’s Subcontract that shall be completed on each month. The DBE Work and Payment Schedule shall be updated every 60 days to be consistent with the updates to the Project Schedule.

During the 60 days following Design-Builder’s submittal of the DBE Work and Payment Schedule, ICTC will review the Monthly Disadvantaged Business Enterprises (DBE) Payment Form to determine if the Design-Builder is meeting the DBE Work and Payment Schedule requirements. If the Design-Builder has not met the DBE Work and Payment Schedule, requirements ICTC will notify the Design-Builder of the need for correction of DBE participation levels to meet the DBE Work and Payment Schedule by the next quarter.
ICTC will evaluate whether the Design-Builder has corrected DBE participation deficiencies to meet the DBE Work and Payment Schedule requirements 60 days following the above-mentioned notice. If such deficiencies are not corrected and the level of DBE participation remains below that provided in the DBE Work and Payment Schedule, and the Design-Builder is unable to show it made good faith efforts to do so, ICTC may impose liquidated damages in accordance with the Contract herein.

**E18.5 DBE Final Report**

A DBE Final Report shall be submitted with the Request for Final Payment. The DBE Final Report shall consist of:

a) A report listing all Subcontractors, Subconsultants, Suppliers, and service providers and DBE activity (Work performed) on the Contract.

b) A summary of good faith efforts, covering the entire Contract period if the DBE goal has not been met for the Contract.

ICTC shall evaluate the Design-Builder’s DBE Final Report and determine if the Design-builder made good faith efforts to meet the DBE goal. ICTC shall issue a final report with its determination on the Design-Builder’s good faith efforts no later than 60 days following the Design-Builder’s submission of its DBE Final Report.
EXHIBIT F – FEDERAL AND STATE PREVAILING WAGE REQUIREMENTS
FEDERAL AND STATE PREVAILING WAGE REQUIREMENTS

The federal minimum wage rates for this Contract as determined by the United States Secretary of Labor are contained in this Exhibit F.

If the minimum wage rates as determined by the United States Secretary of Labor differs from the general prevailing wage rates determined by the Director of the California Department of Industrial Relations for similar classifications of labor, the Design-Builder and Subcontractors shall not pay less than the higher wage rate. ICTC does not accept lower State wage rates not specifically included in the Federal minimum wage determinations. This includes helper, or other classifications based on hours of experience, or any other classification not appearing in the Federal wage determinations. Where Federal wage determinations do not contain the State wage rate determination otherwise available for use by the Design-Builder and Subcontractors, the Design-Builder and Subcontractors shall not pay less than the Federal minimum wage rate that most closely approximates the duties of the employees in question.

EXHIBIT H – ASPHALT QUANTITY CALCULATIONS FOR ASPHALT INDEX FLUCTUATIONS
ASPHALT QUANTITY CALCULATIONS FOR ASPHALT INDEX FLUCTUATIONS

Hot Mix Asphalt
ICTC calculates the quantity of asphalt in HMA using the following formula:

\[ Q_h = H\text{MATT} \times X_a \]

where:

- \( Q_h \) = quantity in tons of asphalt used in HMA
- \( H\text{MATT} \) = HMA total tons placed
- \( X_a \) = theoretical asphalt content from job mix formula expressed as percentage of the total weight of HMA

Rubberized Hot Mix Asphalt
ICTC calculates the quantity of asphalt in rubberized HMA (RHMA) using the following formula:

\[ Q_{rh} = R\text{HMATT} \times 0.80 \times X_{arb} \]

where:

- \( Q_{rh} \) = quantity in tons of asphalt rubber binder used in RHMA
- \( R\text{HMATT} \) = RHMA total tons placed
- \( X_{arb} \) = theoretical asphalt rubber binder content from the job mix formula expressed as percentage of the total weight of rubberized HMA

Hot Mix Asphalt with Modified Asphalt Binder
ICTC calculates the quantity of asphalt in HMA with modified asphalt binder using the following formula:

\[ Q_{mh} = M\text{HMATT} \times \left( \frac{(100 - X_{am})}{100} \right) \times X_{mab} \]

where:

- \( Q_{mh} \) = quantity in tons of asphalt in modified asphalt binder used in HMA
- \( M\text{HMATT} \) = modified asphalt binder HMA total tons placed
- \( X_{am} \) = specified percentage of asphalt modifier
- \( X_{mab} \) = theoretical modified asphalt binder content from the job mix formula expressed as percentage of the total weight of HMA

Hot Mix Asphalt Containing Reclaimed Asphalt Pavement (RAP)
ICTC calculates the quantity of asphalt in HMA containing RAP using the following formulas:

\[ Q_{rap} = HMATT \times X_{aa} \]

where:

\[ X_{aa} = X_{ta} - \left(100 - X_{new}\right) \times \left(X_{ra} / 100\right) \]

and

\[ Q_{rap} = \text{quantity in tons of asphalt used in HMA containing RAP} \]
\[ HMATT = \text{HMA total tons placed} \]
\[ X_{aa} = \text{asphalt content of HMA adjusted to account for the asphalt content in RAP expressed as percentage of the total weight of HMA} \]
\[ X_{ta} = \text{total asphalt content of HMA expressed as percentage of the total weight of HMA} \]
\[ X_{new} = \text{theoretical percentage of new aggregate in the HMA containing RAP determined from RAP percentage in the job mix formula} \]
\[ X_{ra} = \text{asphalt content of RAP expressed as percentage} \]

**Tack Coat**

ICTC calculates the quantity of asphalt in tack coat (Qtc) as either of the following:

1. Asphalt binder using the asphalt binder total tons placed as tack coat
2. Asphaltic emulsion by applying the formula in "Asphaltic Emulsion" to the asphaltic emulsion total tons placed as tack coat

**Asphaltic Emulsion**

ICTC calculates the quantity of asphalt in asphaltic emulsions, including fog seals and tack coat, using the following formula:

\[ Q_e = AETT \times \left(X_e / 100\right) \]

where:

\[ Q_e = \text{quantity in tons of asphalt used in asphaltic emulsions} \]
\[ AETT = \text{undiluted asphaltic emulsions total tons placed} \]
\[ X_e = \text{minimum percent residue specified in Section 94, "Asphaltic Emulsions," of the Caltrans Standard Specifications based on the type of emulsion used} \]

Design-Build may determine "Xe" by submitting daily test results for asphalt residue for the asphaltic emulsion used. If Design-Build chooses this option, Design-Build shall:
1. Take 1 sample every 200 tons but not less than 1 sample per day in the presence of ICTC from the delivery truck, at midload from a sampling tap or thief, and in the following order:
   1.1. Draw and discard the 1st gallon
   1.2. Take two separate 1/2-gallon samples
2. Submit 1st sample at the time of sampling
3. Provide 2nd sample within three (3) Business Days of sampling to an authorized laboratory that participates in the AASHTO Proficiency Sample Program
4. Submit test results from the laboratory within 10 Business Days of the sample date

**Slurry Seal**
ICTC calculates the quantity of asphalt in slurry seals (Qss) by applying the formula in "Asphaltic Emulsion" to the quantity of asphaltic emulsion used in producing the slurry seal mix.

**Modified Asphalt Binder**
ICTC calculates the quantity of asphalt in modified asphalt binder using the following formula:

\[
Q_{\text{mab}} = M_{\text{ABTT}} \times \left( \frac{100 - X_{\text{am}}}{100} \right)
\]

where:
- \( Q_{\text{mab}} \) = quantity in tons of asphalt used in modified asphalt binder
- \( M_{\text{ABTT}} \) = modified asphalt binder total tons placed
- \( X_{\text{am}} \) = specified percentage of asphalt modifier

The quantity of extender oil is included in the quantity of asphalt.

**Other Materials**
For other materials containing asphalt not covered above, ICTC determines the method for calculating the quantity of asphalt (Qo).
EXHIBIT I – RESERVED
DISPUTE RESOLUTION BOARD AGREEMENT

Project Name: Calexico East Port of Entry Design-Build Project
Contract No. ICTC Contract No. 20-101

THIS Dispute Resolution Board Agreement ("Agreement") is made and entered into this ______ day of ____________________, 20____, between the Imperial County Transportation Commission (ICTC) and __________________________ ("Design-Builder") and the Dispute Resolution Board ("DRB"), consisting of the following members ("DRB Members"):  

______________________________  
(DRB Member)

______________________________  
(DRB Member)

______________________________  
(DRB Member - Chairperson)

RECITALS

WHEREAS, ICTC and the Design-Builder have executed a Contract for the Project referenced above; and

WHEREAS, Book 1, Section 19.2 of the above referenced Contract provides for the establishment and operation of the DRB to assist in resolving Disputes; and

WHEREAS, the DRB is composed of three members, one selected by ICTC and approved by the Design-Builder, one selected by the Design-Builder and approved by ICTC, and the third member selected by the other two members and approved by ICTC and the Design-Builder; and

NOW THEREFORE, in consideration of the terms, conditions, covenants, and performance contained herein, or attached and incorporated and made a part hereof, ICTC, the Design-Builder, and the DRB Members hereto agree as follows:
SECTION I: DEFINITIONS AND DESCRIPTION OF WORK

A. DEFINITIONS

All terms defined in the Contract, including but not limited to Book 1, Exhibit A, “Abbreviations and Definitions,” shall have the same definitions in this Agreement as are set forth in the Contract, except as may otherwise be noted in this Agreement.

ICTC and the Design-Builder, for purposes of this Agreement, shall hereinafter be referred to in the singular as a “Party” and/or collectively as the “Parties.”

B. DESCRIPTION OF THE WORK

In addition to Book 1, Section 19.2 of the Contract, the Parties and the DRB must comply with the provisions of this Agreement and use the DRB as a mandatory part of the dispute resolution process. To the extent there is any conflict between the terms and conditions of the Contract and this Agreement, the terms and conditions of the Contract shall control.

The DRB must fairly and impartially consider Disputes placed before it and provide recommendations to ICTC and the Design-Builder for resolution of these Disputes.

The DRB shall perform the services necessary to participate in the DRB’s actions as provided in Book 1, Section 19.2 of the Contract and as designated in this Agreement at Section III, “Scope of Work.” The Parties shall perform all actions necessary to assist the DRB in performing its scope of work.

The DRB Members agree, that notwithstanding any other provision in this Agreement, the DRB Members shall abide by the four Canons of the March 2018, Dispute Resolution Board Foundation’s Code of Ethical Conduct, as slightly modified to comport with the terms of the Contract, and as are provided below:

Canon 1 – Conflict of Interest and Disclosure

DRB Members must avoid the appearance of, or any actual, conflict of interest during the term of the Dispute Board. DRB Members must disclose, before their appointment, any interest, past or present relationship, or association that could reasonably be considered by a Party as likely to affect that member’s independence or impartiality. If, during the term of a Dispute Board, a DRB Member becomes aware of any fact or circumstance that might reasonably be considered by a Party as likely to affect that DRB Member’s independence or impartiality, the DRB Member must inform the other DRB Members and disclose the matter to the Parties.

Canon 2 – Confidentiality

DRB Members must ensure that information acquired during the term of the Dispute Board remains confidential and must not be disclosed, unless such information is already in the public domain. Any such confidential information may only be disclosed if approved by the Parties or if compelled by law. DRB Members must not use such confidential information for any purpose beyond the activities of the Dispute Board.

Canon 3 – Board Conduct and Communications

DRB Members must conduct all Board activities in an expeditious, diligent, orderly and impartial manner. DRB Members must act honestly, with integrity and without bias. There must be no unilateral
communications between a DRB Member and a Party.

Canon 4 – Board Procedures

All Board meetings and/or hearings must be conducted in accordance with the applicable Contract provisions and operating procedures, in a manner that provides procedural fairness to the Parties. Dispute Board recommendations and decisions must be made expeditiously on the basis of the provisions of the Contract, and the information, facts and circumstances submitted by the Parties.

SECTION II: DRB QUALIFICATIONS

A. DRB Members shall be knowledgeable in the type of construction and construction documents anticipated by the Contract and shall have completed training through, and be in good standing with, the Dispute Resolution Board Foundation. DRB Members shall have substantial experience in or directly related to public works heavy highway construction projects with or on behalf of federal, state, or local government agencies. Experience shall be a minimum of ten (10) years in any combination of the following:

1. Supervisor, manager, engineer or executive in public works heavy highway construction contracts with emphasis in resolution of disputes arising out of said contracts.

2. Attorney representing parties in litigating or arbitrating public works heavy highway construction contract claims.

3. Judge or arbitrator adjudicating or otherwise resolving public works heavy highway construction contract claims.

B. No DRB Member shall have prior direct involvement in the Contract. No DRB Member shall have a financial interest in this Contract or the Parties, including but not limited to the Design-Builder, Design-Builder Related Entities, Affiliates, Subcontractors, Suppliers, and Subconsultants; and legal and business service providers to either Party, at any time within 24 months before Contract execution or during the term of this Agreement. Exceptions to above are compensation for services on this or other DRBs, as a Dispute Resolution Advisor (DRA), or retirement payments or pensions received from ICTC, GSA, or Caltrans, Design-Builder or Design-Builder Related Entity that are not tied to, dependent on or affected by the net worth of ICTC, GSA, or Caltrans, Design-Builder or Design-Builder Related Entity.

C. DRB Members shall, at all times during the term of this Agreement, fully disclose, and continue to make future disclosures relating to, any and all direct or indirect professional or personal relationships with any and all key members and personnel of ICTC, GSA, or Caltrans, and/or the Design-Builder, including any designated representative as specified in Book 1, Section 23.5.1 of the Contract.

D. DRB Members shall ensure that they have availability to perform the services under this Agreement at all times, including attending DRB progress meetings, holding timely informal and traditional dispute meetings when requested by the Parties, and issuing timely recommendations on Disputes.

SECTION III: SCOPE OF WORK

The scope of work of the DRB includes, but is not limited to, the following:
A. Operating Procedures

1. The DRB shall establish operating procedures that will govern the conduct of its business and reporting procedures, consistent with, and in conformance with, the requirements of the Contract and the terms of this Agreement. The operating procedures shall be implemented upon approval of the Parties and the DRB no later than the initial DRB progress meeting.

2. The DRB Chairperson shall schedule progress and dispute meetings and any other DRB activities. The Chairperson shall submit the following documents to the Parties and to the Department’s Alternative Dispute Resolution Engineer, Division of Construction, MS 44, P.O. Box 942874, Sacramento, CA 94274:

   - Department Form CEM 6202 – DRB Establishment Report (Due once the Board is established)
   - Department Form CEM 6204 – DRB Dispute Meeting Report (Due within 35 days of dispute meeting)

3. DRB members shall refrain, at all times, from expressing opinions on the merits of evidence and statements on matters under Dispute, except in the private sessions of the DRB members. Opinions of DRB members expressed in private sessions shall be kept strictly confidential. Individual DRB members shall not meet with, or discuss Disputes or other issues under the Contract Documents with ICTC, GSA, Caltrans, and/or the Design-Builder. Any discussions regarding the Project and/or Disputes, which involve the DRB members and ICTC, GSA, Caltrans, and/or the Design-Builder shall be in the presence of all three DRB members and both ICTC and the Design-Builder. Individual DRB members shall not undertake independent investigations of any kind pertaining to Disputes, except with the knowledge and approval of both ICTC and the Design-Builder and as expressly directed by the DRB Chairperson. No DRB member shall have any ex parte communication with ICTC, GSA, Caltrans, the Design-Builder, or their managers or agents regarding any material issues in Dispute. Any such ex parte communications with ICTC, GSA, Caltrans, the Design-Builder, or their managers or agents shall result in the immediate removal of the DRB member.

B. Progress Meetings

1. DRB Members shall visit the Project site and meet with representatives of ICTC and Design-Builder to keep abreast of construction activities and to develop familiarity with the Work in progress. Scheduled progress meetings shall be held at or near the Project site. The DRB shall meet at least once at the start of the Project, and at least once every three (3) months thereafter. The frequency, exact time, and duration of additional site visits and progress meetings shall be as recommended by the DRB and approved by the Parties consistent with the activities or matters under consideration. Scheduled progress meetings may be waived if the Parties and DRB are in agreement, when the only Work remaining is plant establishment work.

2. Each meeting shall consist of a round table discussion and a field inspection of the Work being performed on the Contract. Each meeting and field inspection shall be attended by representatives of ICTC and Design-Builder. The agenda shall generally be as follows:

   a) Meeting opened by the DRB Chairperson.

   b) Remarks by the ICTC’s representative.
c) A description by the Design-Builder’s representative of Work accomplished since the last meeting; the current schedule status of the Work; and a forecast for the coming period.

3. An outline by ICTC’s representative of the status of the Work as ICTC views it.

4. An outline by the Design-Builder’s representative of potential problems and a description of proposed solutions.

5. A brief description by the Design-Builder’s and ICTC’s representative of potential Claims and Disputes that have surfaced since the last meeting.

6. A summary by ICTC’s representative, the Design-Builder’s representative and/or the DRB of the status of past potential Claims and/or Disputes.

7. The DRB Chairperson will prepare a summary of DRB progress meetings and circulate them for revision and approval by all concerned within 10 days of the meeting.

C. Dispute Meeting: General

1. The term “Dispute Meeting” as used in this subsection (Subsection III (C) of this Agreement) shall refer to both the informal and traditional dispute meeting processes, unless otherwise noted.

2. Either Party may request a Dispute Meeting with the DRB. The requesting Party shall simultaneously notify the other Party of each Dispute Meeting request. Upon being notified of the need for a Dispute Meeting, the DRB shall review and consider the Dispute. The DRB shall determine the time of the Dispute Meeting with due consideration for the needs and preferences of the Parties, while recognizing the importance of a speedy resolution to the Dispute.

3. Dispute Meetings shall be conducted at any location that would be convenient and provide required facilities and access to necessary documentation.

4. Only the following persons will be permitted to attend and present at the Dispute meeting: ICTC’s Construction Engineer, Resident Engineer, Structure Representative, or Senior Bridge Engineer; the Design-Builder’s Project Manager, Construction Manager, Design Manager; or any other person who is an employee, or consultant, of ICTC or Design-Builder, and who also has direct knowledge of the Dispute and direct involvement in the Project.

5. The following persons will not be permitted to attend the Dispute Meeting: attorneys, claims consultants, or technical experts who do not meet the criteria of Paragraph 4, directly above.

6. The DRB may request that either Party provide technical services necessary for the DRB to adequately review the Disputes presented, including audit, geotechnical, schedule analysis and other services. ICTC’s and/or Design-Builder’s technical staff may supply those services as appropriate.

7. At the Dispute Meeting the DRB may ask questions, seek clarification, and request further clarification of data presented by either ICTC or Design-Builder as may be necessary to assist in making a fully informed recommendation. However, the DRB shall refrain from expressing opinions on the merits of statements on matters under Dispute during ICTC’s or Design-Builder’s presentations.

8. The Party who referred the Dispute to the DRB shall discuss the Dispute, followed by the other Party. Each Party shall then be allowed one or more rebuttals at the meeting until all aspects of the Dispute
are thoroughly covered. Each Party will be given ample time to fully present its position, make rebuttals, provide relevant documents, and respond to DRB questions and requests.

9. There shall be no testimony under oath or cross-examination during Dispute Meetings. There shall be no reporting or recording of the procedures by a shorthand reporter, by electronic means, or by any other means. Documents and verbal statements shall be received by the DRB in conformance with the operating procedures.

10. After Dispute Meetings are concluded, the DRB shall meet in private and reach a recommendation supported by two or more DRB Members. The DRB shall not in its recommendations ignore or re-write the terms of the Contract or propose what the DRB believes is a compromise outcome of the Dispute.

11. The DRB shall make every effort to reach a unanimous recommendation; if the DRB is not unanimous in any part of the recommendation, the dissenting member may write a minority recommendation.

D. Traditional Dispute Meeting: Procedure

The following procedure shall be used for the traditional dispute meeting:

1. In compliance with Book 1, Sections 19.2.2, 19.2.3 and 19.2.7 of the Contract: if the Parties are unable to reach a resolution of their Dispute as provided in Book 1, Section 19.2.2 of the Contract; and if, consistent with the other provisions of the Contract, the Dispute is governed by Section 19.2 of the Contract, then either Party may refer its Dispute to the DRB. Pursuant to Book 1, Sections 19.2.2.4, 19.2.2.5 and 19.2.3, if a Dispute is not resolved (under a Level Three Review) within ten days of the initial meeting between ICTC’s Executive Director and the Design-Builder’s equivalent manager, the Parties shall then have an additional ten-day period within which to refer the matter to the DRB. The referring Party shall make the referral in writing to the DRB, simultaneously copied to the other Party. The written Dispute referral shall describe the disputed matter in individual discrete segments, so that it will be clear to ICTC, the Design Builder, and the DRB what discrete elements of the Dispute have been resolved, and which remain unresolved, and shall include an estimate of the cost of the affected Work and impacts, if any, on controlling items of work, Critical Path, and Completion Deadlines.

2. ICTC and Design-Builder shall each be afforded an opportunity to be present and to be heard by the DRB, and to offer evidence. ICTC and/or Design-builder must furnish copies of any written evidence or documentation to the DRB Chairperson a minimum of 15 days prior to the date the DRB is scheduled to convene the dispute meeting. A copy of all evidence and documentation shall be simultaneously submitted to the other Party.

3. ICTC and/or Design-Builder shall produce such additional evidence as the DRB may deem necessary to reach an understanding and a determination of the Dispute. Any additional evidence shall be furnished to the other Party at the same time the evidence is provided to the DRB. The DRB shall not consider evidence (primary or additional) not furnished in conformance with the Contact and the terms specified herein.

4. Upon receipt by the DRB of a written referral of a Dispute, which has complied with the provisions of the Contract governing proper referral to the DRB, the DRB shall convene to review and consider the Dispute. The dispute meeting shall be held no earlier than 30 days and no later than 60 days after receipt of the written referral unless otherwise agreed to by the Parties.
5. The DRB may request clarifying information of ICTC and/or Design-Builder within 10 days after the dispute meeting. Requested information, shall be specific to this Contract and shall be submitted to the DRB within 10 days of the DRB request, and simultaneously submitted to the other Party.

6. The DRB shall furnish a written report to ICTC and Design-Builder with its finding(s), conclusion(s) and recommendation(s). The DRB shall complete its report, including any minority report/recommendation, and submit it to ICTC and Design-Builder within 30 days after the dispute meeting, except that time extensions may be granted at the request of the DRB with the written concurrence of the Parties. The report shall summarize the facts considered, the specific Contract Documents/provisions relied upon by the DRB as pertinent to the Dispute, and the DRB’s interpretation and reasoning in arriving at its conclusion(s) and recommendation(s) and, if requested, recommend guidelines for determining adjustments, if any. The DRB’s report shall stand on its own, without attachments or appendices. The DRB Chairperson shall furnish a copy of the written report to the Caltrans Alternative Dispute Resolution Engineer, Division of Construction, MS 44, P.O. Box 942874, Sacramento, CA 94274.

7. Within 30 days after receiving the DRB’s report, ICTC and Design-Builder shall endeavor to respond to the DRB in writing (with a copy sent simultaneously to the other Party) signifying that the Dispute is either resolved or remains unresolved. The response shall be specific as to the reason(s) why the Dispute remains unresolved, if any. Failure to provide the written response within the time specified, shall conclusively indicate that the Party failing to respond rejects the DRB recommendation. While both Parties should consider the DRB’s recommendation, it is not binding on either Party.

8. Either Party may request clarification of elements of the DRB’s report from the DRB prior to responding to the DRB’s report. The DRB shall consider any clarification request only if submitted within 10 days after receipt of the DRB’s report, and if submitted simultaneously in writing to both the DRB and the other Party. Each Party may submit only one request for clarification for any individual DRB report. The DRB shall respond, in writing, to requests for clarification within 10 days of receipt of such requests.

9. Either Party may seek a reconsideration of the DRB's recommendation. The DRB shall only grant reconsideration based upon submission of new evidence and if the request is submitted within the 30 day time limit specified for response to the DRB's written report. Each Party may submit only one request for reconsideration regarding an individual DRB recommendation. The DRB shall respond, in writing, to requests for reconsideration within 10 days of receipt of such requests.

10. If ICTC and Design-Builder are able to resolve their Dispute with the aid of the DRB's report, ICTC and the Design-Builder shall promptly accept and implement the resolution. If the Parties cannot agree on the time or payment adjustment, if any, within 60 days of the acceptance of the recommendation, either Party may request that the DRB recommend an adjustment, if applicable.

E. Informal Dispute Meeting

An informal dispute meeting shall be convened only if the Parties agree that this dispute resolution process is appropriate to resolve the Dispute. The following procedure shall be used for the informal dispute meeting:

1. ICTC and Design-Builder shall furnish the DRB with a one-page position paper and any pertinent documents requested by the DRB that are or may become necessary for the DRB to perform its function. The Party furnishing documents shall furnish such documents to the other Party at the same time the documents are provided to the DRB.
2. After the dispute meeting has concluded, the DRB Members shall deliberate in private the same day until a response, including a recommendation with findings, to ICTC and Design-Builder is reached or as otherwise agreed to by the Parties and the DRB.

3. The DRB shall then verbally deliver its recommendation with findings, including any minority recommendation with findings, to the Parties.

4. After the verbal recommendation(s) with findings are presented, ICTC and/or Design-Builder may ask for clarifications.

5. Within 5 business days of the informal dispute meeting, the DRB must write a one-page report that includes the recommendation(s) on the Dispute. The report must be sent to the Parties and to the Caltrans Alternative Dispute Resolution Engineer, Division of Construction, MS 44, P.O. Box 942874, Sacramento, CA 94274.

6. Occasionally the DRB may be unable to formulate a recommendation based on the information given at an informal dispute meeting. However, the DRB may provide the Parties with feedback on strengths and weaknesses of their respective positions, to assist the Parties in reaching resolution.

7. If ICTC and Design-Builder are able to resolve their Dispute with the aid of the DRB's recommendation, ICTC and the Design-Builder shall promptly accept and implement the resolution as agreed.

8. ICTC and Design-Builder will endeavor to notify the DRB Members within 5 business days if the Dispute remains unresolved. While both Parties should consider the DRB’s recommendation, it is not binding on either Party.

9. The DRB will not be bound by its verbal or written recommendation in the event that an informal Dispute is later heard by the DRB in a traditional dispute meeting.

10. Unless the Dispute is resolved, use of the informal dispute meeting does not relieve the Parties of their responsibilities under Book 1, Section 19.2, "Dispute Resolution Procedures," of the Contract or subsection III(D), "Traditional Dispute Meeting," of this Agreement. There will be no extension of time allowed for the process to permit the use of the informal dispute meeting, unless otherwise agreed to by the Parties.

SECTION IV: TIME FOR BEGINNING AND COMPLETION

DRB Members shall not begin work under the terms of this Agreement until authorized in writing by ICTC. Once established, the DRB shall be in operation until ICTC notifies the DRB Members that the DRB has completed its service(s) and is dissolved. If the Contract is terminated in accordance with Book 1, Section 15 “Termination for Convenience” of the Contract, the DRB will be dissolved.

SECTION V: PAYMENT

Each DRB Member shall be compensated at an agreed rate of $2,000 per day for each in-person, approved DRB meeting (and shall not include meetings attended via telephone or other remote communication method). A member serving on more than one ICTC DRB or DRA (regardless of the number of meetings per day) shall not be paid more than the agreed rate per day. The agreed rate shall be considered full compensation for on-site time, travel expenses, transportation, lodging, time for travel, and incidentals for each day or portion thereof that the DRB Member attends (in person) an authorized DRB meeting.
No additional compensation will be made for time spent by DRB Members in regard to review and research activities outside the official DRB meetings unless that time (such as time spent evaluating evidence and preparing recommendations and a DRB report on Disputes presented to the DRB) has been specifically agreed upon in writing by the Parties in advance, in which case, time away from the Project, which has been specifically agreed upon by the Parties in advance, will be compensated at an agreed rate of $200 per hour. The agreed amount of $200 per hour shall include all incidentals, including expenses for telephone, fax, and computer services. From time to time the Parties may reconsider and mutually revise the agreed rate, in which case they shall document the revised agreed rate in writing. ICTC will provide administrative services such as conference facilities to the DRB.

If the DRB needs outside technical services, these technical services shall be preapproved by both Parties. The cost of the preapproved technical services shall be borne equally by the Parties.

A. Payment Processing

1. The Parties shall make direct payments to each DRB Member for their participation in authorized meetings and approved hourly rate charges, from invoices submitted by each DRB Member, and technical services.

2. DRB Members may submit invoices to ICTC and Design-Builder for payment for work performed and services rendered for their participation in authorized meetings not more often than once per month. The invoices shall be in a format approved by the Parties and accompanied by a general description of activities performed during that billing period. Payment for hourly fees, at the agreed rate, shall not be paid to a DRB Member until the amount and extent of those fees are mutually approved by ICTC and Design-Builder.

B. Inspection of Costs Records

DRB Members and the Design-Builder shall keep available for inspection by representatives of ICTC and the United States federal government, for a period of 3 years after final payment, the cost records and accounts pertaining to this Agreement. If any litigation, claim, or audit arising out of, in connection with, or related to this Agreement is initiated before the expiration of the 3-year period, the cost records and accounts shall be retained until such litigation, claim, or audit involving the records is completed.

SECTION VI: ASSIGNMENT OF TASKS OF WORK

DRB Members shall not assign the work of this Agreement.

SECTION VII: REPLACEMENT OF A DRB MEMBER

A. Service of a DRB Member may end at any time with not less than 15 days’ notice as follows:

1. Upon resignation of a member.

2. ICTC may replace its selected member.

3. The Design-Builder may replace its selected member.

4. The Parties’ selected members may replace the 3rd member with mutual written approval of ICTC and Design-Builder.
5. ICTC and/or Design-Builder may replace any member who fails to comply with specified employment contemplated in this Agreement, the financial disclosure conditions of DRB Membership, or the four Canons of the March 2018, Dispute Resolution Board Foundation’s Code of Ethical Conduct.

B. When a member of the DRB is replaced, the replacement member shall be selected in the same manner as the replaced member was selected. The selection of a replacement DRB Member will begin promptly upon determination of the need for replacement and shall be completed within 15 days. Changes in either of the DRB Members chosen by the two Parties will not require re-selection of the third member, unless both Parties agree to such re-selection in writing. This Agreement shall be amended to reflect the change of a DRB Member.

C. Each Party shall document the need for replacement and substantiate the replacement request in writing to the other Party and DRB Members.

SECTION VIII: LEGAL RELATIONS

A. The Parties hereto mutually understand and agree that each DRB Member in the performance of duties is acting in the capacity of an independent agent and not as an employee of either Party.

B. Neither Party shall bear a greater responsibility for damages or personal injury than is normally provided by Federal or State of California Law.

C. The Parties shall not call any of the DRB Members, who served on the Contract and/or the Project, as a witness in any legal proceedings that may arise from the Contract.

D. DRB Members waive any and all claims against ICTC and/or the Design-Builder from any alleged harm arising out of or resulting from the DRB’s services in connection with this Agreement.

E. Notwithstanding the provisions of the Contract that require the Design-Builder to indemnify and hold harmless ICTC, the Parties shall jointly indemnify and hold harmless the DRB Members from and against all claims, damages, losses, and expenses, including but not limited to attorneys’ fees, arising out of and resulting from the finding(s), conclusion(s), and/or recommendation(s) of the DRB.

SECTION IX: CONFIDENTIALITY

The Parties and the DRB, mutually understand and agree that all documents and records provided by the Parties in reference to issues brought before the DRB, which documents and records are marked “Confidential - for use by the DRB only,” shall be kept in confidence and used only for the purpose of resolution of subject Disputes, and for assisting in development of DRB finding(s) and recommendation(s); that such documents and records will not be utilized or revealed to others, except to officials of the Parties who are authorized to act on the subject Disputes, for any purposes, during the life of this Agreement. The foregoing shall not apply, however, to documents or records that before submission to the DRB were already subject to the Public Records Act. Upon termination of this Agreement, said confidential documents and records, and all copies thereof, shall be returned to the Party who furnished them to the DRB. However, the Parties understand that such documents may be subsequently discoverable and admissible in legal proceedings to the extent provided by law.
SECTION X: DISPUTES

Disputes between the DRB and either Party, which cannot be resolved by negotiation and mutual concurrence, shall be resolved in the appropriate legal forum. In the event that ICTC, Design-Builder, or any of the DRB Member(s) deem it necessary to institute legal proceedings to enforce any right or obligation under this Agreement, the Parties and the DRB Members, agree that if such action involves ICTC it shall be initiated in the Office of Administrative Hearings of the State of California. However, if such action does not involve ICTC, it may be initiated in the Sacramento County Superior Court, or any other court of competent jurisdiction agreed to between the Design-Builder and DRB Member(s). The Parties and the DRB Members agree that all questions shall be resolved by application of California law and that the parties to any such legal proceeding shall have the right of appeal from such decisions in conformance with the laws of the State of California.

SECTION XI: FEDERAL REVIEW AND REQUIREMENTS

A. On Federal-Aid contracts, the Federal Highway Administration shall have the right to review the work of the DRB in progress, except for private meetings or deliberations of the DRB that do not become part of the Project records.

B. Other Federal requirements in this Agreement shall only apply to Federal-Aid contracts.

SECTION XII: CERTIFICATION OF DESIGN-BUILDER, DRB, and ICTC

IN WITNESS WHEREOF, the signatories hereto have executed this Agreement as of the day and year first above written.

SIGNATURES TO FOLLOW
Dispute Resolution Agreement

DRB MEMBER

By: __________________________
   [insert name]

Title: _________________________

By: __________________________
   [insert name]

Title: _________________________

DRB MEMBER

By: __________________________
   [insert name]

Title: _________________________

DRB CHAIRPERSON

By: ______________________________
   [insert name]

Title: __________________________

DESIGN-BUILDER [insert name] IMPERIAL COUNTY TRANSPORTATION COMMISSION

By: __________________________
   [insert name]

Title: __________________________

By: __________________________
   [insert name]

Title: __________________________
EXHIBIT K – FORM OF PERFORMANCE BOND

Form of Performance Bond
IMPERIAL COUNTY TRANSPORTATION COMMISSION

PERFORMANCE BOND FOR DESIGN-BUILD CONTRACTS  Contract No. ICTC 20-101

(To Accompany a Design-Build Contract)

[Public Contract Code § 6825]  Bond No. _______________________

(REV. 4/2019)

KNOW ALL PERSONS BY THESE PRESENTS,

THAT WHEREAS, The Imperial County Transportation Commission (ICTC) has awarded to (Principal), a design-build contract (Contract) for the design and construction work described as follows:

Calexico East Port of Entry Bridge Replacement Design-Build Project.

AND WHEREAS, The Principal is required by Section 6825 of the Public Contract Code to furnish a bond in connection with said Contract guaranteeing the faithful performance of its obligations under the Contract thereof:

NOW THEREFORE, We the undersigned Principal and __________________________ (Surety) are held and firmly bound unto ICTC, in the sum of_________________________ Dollars ($______________), to be paid to ICTC or its certain attorney, its successors and assigns, for which payment, well and truly to be made, we bind ourselves, our heirs, executors and administrators, successors and assigns, jointly and severally, firmly by these presents.

THE CONDITION OF THIS OBLIGATION IS SUCH:

1. That if the above bound Principal, or its heirs, executors, administrators, successors or assigns, shall in all things stand to and abide by, and well and truly keep and perform the covenants, conditions and agreements in the foregoing Contract, including any and all amendments, supplements, and alterations thereto made as therein provided, on his/her or their part to be kept and performed at the time and in the manner therein specified, and in all respects according to their true intent and meaning, and shall indemnify and save harmless ICTC, GSA, and the State, its officers and agents, as therein stipulated, then this obligation shall become and be null and void; otherwise, it shall be and remain in full force and virtue.

2. This Bond shall cover the cost to complete the said design and construction work, but shall not cover any damages of the type specified to be covered by the Principal’s errors and omissions insurance for the design elements of the work required pursuant to the Contract and Section 6825 of the Public Contract Code or by any professional liability insurance, whether or not such insurance is provided in an amount sufficient to cover such damages.

3. The said Surety agrees that no change, extension of time, alterations, additions, omissions or other modifications of the terms of the Contract, or in the Work to be performed with respect to the Project, or in the specifications or Plans, or any change or modification of any terms of payment or extension of time for any payment pertaining or relating to the Contract, or any rescission or attempted rescission of the Contract, or this Bond, or any conditions precedent or subsequent in this Bond attempting to limit the right of recovery of claimants otherwise entitled to recover under this Bond, or any fraud practiced by any other person other than the claimant seeking to recover from this Bond, shall in any way affect its obligations on this Bond, and it does hereby waive notice of such changes, extension of time, alterations, additions, omissions or other modifications. The Surety agrees that payments made to contractors and suppliers to
satisfy claims on the payment bond do not reduce the Surety’s legal obligations under this Bond. Payments made to contractors or suppliers under any agreement where the Surety has arranged for completion of the work to satisfy this Bond will not be considered payment bond claims.

WITNESS WHEREOF, We have hereunto set our hands and seals on this _____ day of ____, 20___.

Correspondence or claims relating to this Bond should be sent to the Surety at the following address:

(Principal’s name, title, and signature)

Surety

By ______________________________

Attorney-in-Fact

NOTE: Signatures of those executing for the Surety must be properly acknowledged/notarized, and a Power of Attorney attached.

ADA Notice: For individuals with sensory disabilities, this document is available in alternate formats. For alternate format information, contact or write to:

Imperial County Transportation Commission
1503 North Imperial Avenue; Suite 104
El Centro, California 92243
Attention: Ms. Virginia Mendoza, Project Manager
Telephone: (760) 592-4494

Form of Performance Bond

Exhibit K-2
EXHIBIT L – FORM OF PAYMENT BOND
IMPERIAL COUNTY TRANSPORTATION COMMISSION

PAYMENT BOND FOR DESIGN-BUILD CONTRACTS

Contract No. ICTC 20-101

[Public Contract Code § 6825]  Bond No.________________________

(REV. 4/2019)

KNOW ALL PERSONS BY THESE PRESENTS,

THAT WHEREAS, The Imperial County Transportation Commission (ICTC) has awarded to ________________________________________________ (Principal), a design-build contract (Contract) for the design and construction described as follows:

Calexico East Port of Entry Bridge Replacement Design-Build Project.

AND WHEREAS, The Principal is required by Section 6825 of the Public Contract Code to furnish a payment bond (Bond) in connection with said Contract to secure the payment of claims of laborers, mechanics, material men, and other persons as provided by law.

NOW THEREFORE, We the undersigned Principal and ____________________________________________ (Surety) are held and firmly bound unto ICTC, in the sum of _____________________________________________ Dollars ($________________), to be paid to ICTC or its certain attorney, its successors and assigns, for which payment, well and truly to be made, we bind ourselves, our heirs, executors and administrators, successors and assigns, jointly and severally firmly by these presents.

THE CONDITION OF THIS OBLIGATION IS SUCH:

1. That if said Principal, or its heirs, executors, administrators successors or assigns or subcontractors, shall fail to pay any of the persons named in California Civil Code Section 9100, or anyone required to be paid by law, or amounts due under the Unemployment Insurance Code with respect to work or labor performed by such claimant, or any amounts required to be deducted, withheld, and paid over to the Franchise Tax Board from the wages of employees of the Principal and his subcontractors pursuant to Revenue and Taxation Code Section 18662 et seq. with respect to such work and labor, that the Surety herein will pay for the same in an amount not exceeding the sum specified in this Bond, otherwise the above obligation shall be null and void. In case suit is brought upon this Bond, the Surety will pay reasonable attorney's fee to be fixed by the court.

2. This Bond shall inure to the benefit of any of the persons named in Civil Code Section 9100 or anyone required to be paid by law under said Contract so as to give a right of action to such persons or their assigns in any suit brought upon this Bond.

3. The said Surety agrees that no change, extension of time, alterations, additions, omissions or other modifications of the terms of the Contract, or in the Work to be performed with respect to the Project, or in the specifications or Plans, or any change or modification of any terms of payment or extension of time for any payment pertaining or relating to the Contract, or any rescission or attempted rescission of the Contract, or this Bond, or any conditions precedent or subsequent in this Bond attempting to limit the right of recovery of claimants otherwise entitled to recover under this Bond, or any fraud practiced by any other person other than the claimant seeking to recover this Bond, shall in any way affect its obligations on this Bond, and it does hereby waive notice of such changes, extension of time, alterations, additions, omissions or other modifications.

4. When this Bond had been furnished to comply with a statutory or other legal requirement in the location where the construction is to be performed, any provision in this Bond conflicting with said statutory or legal requirement shall be deemed deleted herefrom and provisions conforming to such
statutory or other legal requirement shall be deemed incorporated herein. The intent is that this Bond shall be construed as a statutory bond and not a common law bond.

5. This Bond shall cover all payment obligations for the said design-build work, including warranty payment obligations unless a separate warranty bond is provided by the Principal, but shall not cover any payment obligations covered by the Principal’s errors and omissions insurance for the design elements of the work required pursuant to the contract or by Section 6825 of the Public Contract Code or by any professional liability insurance whether or not such insurance is provided in an amount sufficient to cover such damages.

WITNESS WHEREOF, We have hereunto set our hands and seals on this ______day of ___, 20___.
KNOW ALL PERSONS BY THESE PRESENTS,

THAT WHEREAS, The Imperial County Transportation Commission (ICTC) has awarded to___________________________________________________________ (Principal), a design-build contract (Contract) for the design and construction work described as follows:

Calexico East Port of Entry Bridge Replacement Design-Build Project.

NOW THEREFORE, We the undersigned Principal and ____________________________ (Surety) are held and firmly bound unto ICTC, in the sum of______________________________________________ Dollars ($____________), an amount equal to four percent of the Contract Price during the first two years following Substantial Completion and shall be in the sum of __________________________________________ Dollars ($____________), an amount equal to two percent of the Contract Price during the third year following Substantial Completion to be paid to ICTC or its certain attorney, its successors and assigns, for which payment, well and truly to be made, we bind ourselves, our heirs, executors and administrators, successors and assigns, jointly and severally, firmly by these presents.

THE CONDITION OF THIS OBLIGATION IS SUCH:

1. That if the above bound Principal, or its heirs, executors, administrators, successors or assigns, shall faithfully carry out an perform the said guarantee, and shall, on due notice, repair and make good at its own expense, or shall pay over, make good and reimburse to ICTC all loss and damage which said ICTC may sustain by reason of failure or default of the above bound Principal so to do, and shall indemnify and save harmless ICTC, GSA, the State, its officers and agents, as therein stipulated, then this obligation shall become and be null and void; otherwise, it shall be and remain in full force and virtue.
WITNESS WHEREOF, We have hereunto set our hands and seals on this _____ day of _____, 20____.

Correspondence or claims relating to this Bond should be sent to the Surety at the following address:
________________________________________
________________________________________
________________________________________
________________________________________
________________________________________
________________________________________
________________________________________
________________________________________

(Principal’s name, title, and signature)
________________________________________

Surety
By ________________________________
Attorney-in-Fact

NOTE: Signatures of those executing for the surety must be properly acknowledged/notarized, and a Power of Attorney attached.

ADA Notice For individuals with sensory disabilities, this document is available in alternate formats. For alternate format information, contact or write to:

Imperial County Transportation Commission
1503 North Imperial Avenue; Suite 104
El Centro, California 92243
Attention: Ms. Virginia Mendoza, Project Manager
Telephone: (760) 592-4494
### EXHIBIT N – DESIGN-BUILDER’S PROPOSAL COMMITMENTS

<table>
<thead>
<tr>
<th>N</th>
<th>Form</th>
<th>Description</th>
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<tbody>
<tr>
<td>N-1</td>
<td>Form 1B</td>
<td>Design-Build Price Proposal Letter</td>
</tr>
<tr>
<td>N-2</td>
<td>Form 3</td>
<td>Non-Collusion Affidavit</td>
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<tr>
<td>N-3</td>
<td>Form 4</td>
<td>Conflict of Interest Disclosure Statement</td>
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Exhibit N-1 Form 1  Design-Build Price Proposal Letter
Exhibit N-2  Form 3  Non-Collusion Affidavit
Exhibit N-6    Form 7  Certification Regarding Use of Contract Funds for Lobbying
N-8       Form 9       Proposal Price
Exhibit N-13  Construction Phasing/Sequencing Plan
Exhibit N-21  Right-of-Way Coordination
Exhibit N-23  Transportation Management Plan