

# **DESIGN-BUILD AGREEMENT**

for

**KY 555 Design Build Project**

between

**THE KENTUCKY TRANSPORTATION CABINET**

And

**[NAME OF DBT]**

**Dated as of: [DATE]**

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**LIST OF EXHIBITS**

- Exhibit 1 Abbreviations and Defined Terms
- Exhibit 2 KYTC'S Final Answers to Questions
- Exhibit 3 (Technical Provisions) Technical Provisions
- Exhibit 4 DBT's Proposal Commitments and Clarifications
  - Exhibit 4-1 DBT's Proposal Commitments
  - Exhibit 4-2 DBT's Alternative Technical Concepts
  - Exhibit 4-3 Preliminary Baseline Schedule
  - Exhibit 4-4 Contract Price Breakdown
  - Exhibit 4-5 Equal Employment Opportunity Certification
  - Exhibit 4-6 DBE Assurance & Contract Goal Declaration
  - Exhibit 4-7 Buy America Certification
  - Exhibit 4-8 Certification Regarding Use of Contract Funds for Lobbying
  - Exhibit 4-9 Certification Regarding Ineligible Contractors
- Exhibit 5 Reference Information Documents
- Exhibit 6 Federal Requirements
- Exhibit 7-1 KYTC EEO Requirements
- Exhibit 7-1 DBE Requirements
- Exhibit 8 Notice of Award
- Exhibit 9 Performance Bond
- Exhibit 10 Payment Bond

## DESIGN-BUILD AGREEMENT

This Design-Build Agreement (“Agreement”) is entered into and effective as of [Date of Contract Execution], by and between the Kentucky Transportation Cabinet, a public agency of the Commonwealth of Kentucky (“KYTC”) in accordance with KRS 176.431, and [NAME OF DBT], (“DBT”) (“KYTC” and “DBT,” are collectively referred to herein as the “Parties”).

### RECITALS

- A. KYTC wishes to enter into an agreement with a private sector DBT to design and build the [NAME OF PROJECT] (the “Project”), as further described in Exhibit 3 (Technical Provisions).
- B. On [DATE], KYTC issued a Request for Proposal (as subsequently amended by addenda, the “RFP”) to design and build the Project.
- C. On [DATE], KYTC received [NUMBER] responses to the RFP, including the response of DBT (the “Proposal”).
- D. KYTC determined that DBT was the proposer that best met the selection criteria contained in the RFP and that the Proposal provided the best value to the Commonwealth of Kentucky.
- E. This Agreement and the other Contract Documents (defined in Section 1.2.1) collectively constitute a design-build agreement.
- F. The [AUTHORIZED OFFICIAL] of KYTC has been authorized to enter into this Agreement.
- G. The Parties intend for this Agreement to be a lump-sum design-build agreement obligating DBT to perform all Work by the Completion Deadlines specified herein for payment of the Contract Price, subject to certain exceptions set forth herein. To allow KYTC to budget for and finance the Work and to reduce the risk of cost overruns, this Agreement includes restrictions that affect DBT’s ability to make claims for increases to the Contract Price or extensions of the Completion Deadlines. DBT hereby agrees to accept such responsibilities and risks and has reflected the assumption of such responsibilities and risks in the Contract Price.
- H. If DBT fails to complete the Work by the Completion Deadlines set forth in the Contract Documents, and to comply with certain other deadlines and requirements specified herein, then KYTC and the members of the public represented by KYTC will suffer substantial losses and damages. The Contract Documents provide that DBT shall pay KYTC Liquidated Damages if the completion of the Project and/or other specified events are delayed or unfulfilled in amounts specified in the Contract Documents. The Parties intend that the Liquidated Damages specified in the Contract Documents are a reasonable estimate of and substitute for the

damages sustained, which the Parties recognize are incapable of precise measurement.

NOW, THEREFORE, in consideration of the sums to be paid by KYTC to DBT, the Work to be performed by DBT, the foregoing premises, and the covenants and agreements set forth herein, the Parties hereby agree as follows:



**ARTICLE 1.**  
**DEFINITIONS; CONTRACT DOCUMENTS;**  
**INTERPRETATION OF CONTRACT DOCUMENTS**

**1.1 Definitions**

Definitions for the terms used in this Agreement and the other Contract Documents are contained in Exhibit 1 and in the body of this Agreement.

**1.2 Contract Documents; Order of Precedence**

The term "Contract Documents" shall mean the documents listed in this Section 1.2. Each of the Contract Documents is an essential part of the agreement between the Parties, and a requirement occurring in one is as binding as though occurring in all. The Contract Documents are intended to be complementary and to describe and provide for a complete agreement. Subject to Section 1.2.1, in the event of any conflict among the Contract Documents, the order of precedence, from highest to lowest, shall be as set forth below:

- (a) Change Orders and amendments to this Volume II, and all exhibits and attachments to such amendments;
- (b) KYTC's final responses to questions received from Proposers, attached as Exhibit 2;
- (c) This Volume II (including all exhibits, except Exhibits 3, 4, 4-1 and 4-2);
- (d) DBT's Proposal Commitments set forth in Exhibit 4-1;
- (e) Alternative Technical Concepts (ATCs) set forth in Exhibit 4-2;
- (f) Amendments to Exhibit 3 (*Technical Provisions*), and all exhibits and attachment to such amendments;
- (g) Exhibit 3 (*Technical Provisions*), and all exhibits and attachments;
- (h) Amendments to Exhibit 4 (*DBT Proposal*), and all exhibits and attachments to such amendments;
- (i) Exhibit 4 (*DBT Proposal*), and all exhibits and attachments;
- (j) KYTC Special Notes and Special Provisions;
- (k) KYTC Standard Drawings and Sepias;
- (l) KYTC Department of Highway's Standard Specifications for Road and Bridge Construction and Supplemental Specifications;

- (m) American Association of State Highway and Transportation Officials (AASHTO) design requirements;
- (n) The DBE Utilization Plan;
- (o) Other publications and manuals to the extent incorporated by reference into Exhibit 3 (Technical Provisions).

Notwithstanding the order of precedence among Contract Documents set forth in Section 1.2, in the event and to the extent that Exhibit 4-1 (Proposal Commitments) expressly specifies that it is intended to supersede specific provisions in the Contract Documents, including approved Deviations expressly listed in Exhibit 3 (Technical Provisions), Exhibit 4-1 (Proposal Commitments) shall control over specific provisions of the Contract Documents. Moreover, where there are differing provisions on the same subject matter within the same Contract Document or in Contract Documents with the same level in the order of precedence, the provisions that establish the higher quality, manner or method of performing the Work or use more stringent standards shall prevail.

In the event of a conflict among any standards, criteria, requirements, conditions, procedures, specifications or other provisions applicable to the Project established by reference to a described manual or publication within a Contract Document or set of Contract Documents, the standard, criterion, requirement, condition, procedure, specification or other provision offering higher quality or better performance will apply, unless KYTC, in its sole discretion, approves otherwise in writing; provided, however, that this paragraph shall not supersede the order of precedence stated in Section 1.2.

### **1.2.1 Proposal**

If DBT's Proposal, including DBT's Schematic Design, includes statements, offers, terms, concepts or designs that provide higher quality items than otherwise required by the other Contract Documents or offer to perform services or meet standards in addition to or better than those otherwise required, or otherwise contains terms or designs that are more advantageous to KYTC than the requirements of the other Contract Documents, then DBT's obligations hereunder shall include compliance with all such statements, offers, terms, concepts, and designs, which shall have the priority of DBT's Proposal Commitments.

### **1.2.2 Reference Information Documents**

Certain Reference Information Documents, or portions thereof, are specifically referenced in the Contract Documents for the purpose of defining requirements of the Contract Documents. Reference Information Documents, or portions thereof, that are specifically referenced in the Contract Documents for the purpose of defining specific requirements, shall be deemed incorporated into the Contract Documents only to the extent so referenced and with the same order of precedence as the applicable Contract Document.

## **1.3 Construction and Interpretation of Contract Documents**

### **1.3.1 Interpretation**

The language in all parts of the Contract Documents shall in all cases be construed in light of the Contract Documents as a whole and in accordance with its plain meaning and not strictly for or against any Party. The Parties acknowledge and agree that the Contract Documents are the product of an extensive, thorough, arm's-length exchange of ideas, questions, answers, information, and drafts during the Proposal preparation process, that each Party has been given the opportunity to independently review the Contract Documents with legal counsel, and that each Party has the requisite experience and sophistication to negotiate, understand, interpret, and agree to the particular language of the provisions of the Contract Documents. In the event of an ambiguity in or dispute regarding the interpretation of the Contract Documents, the Contract Documents shall not be interpreted or construed against the Party preparing it, and instead other rules of interpretation and construction shall be utilized.

### **1.3.2 Number and Gender**

In the Contract Documents, terms defined in the singular have the corresponding plural meaning when used in the plural and vice versa, and words in one gender include all genders.

### **1.3.3 Headings**

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

### **1.3.4 References to this Agreement**

The words "herein", "hereby", "hereof", "hereto", and "hereunder" and words of similar import refer to this Agreement and the Contract Documents as a whole and not to any particular portion of it. The words "Article", "Section", "paragraph", "sentence", "clause", and "Exhibit" mean and refer to the specified article, section, paragraph, sentence, clause or exhibit of, or to, this Agreement and the Contract Documents. A reference to a subsection or clause "above" or "below" refers to the denoted subsection or clause within the Section in which the reference appears.

### **1.3.5 References to Agreements and Other Documents**

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

### **1.3.6 References to Any Person**

A reference in the Contract Documents to any Person at any time refers to such Person's permitted successors and assigns.

### **1.3.7 Meaning of Including**

In the Contract Documents, the word "including" (or "include" or "includes") means "including without limitation" and shall not be considered to set forth an exhaustive list.

### **1.3.8 Computation of Periods**

If a specified date to perform any act or give any notice in the Contract Documents (including the last date "within" a specified time period) falls on a non-Working Day, such act or notice may be timely performed on the next succeeding Working Day; provided, however, that non-Working Day deadlines contained in the Contract Documents for actions to be taken in the event of an Emergency or other circumstances, where it is clear that performance is intended to occur on a non-Working Day, shall not be extended to the next succeeding Working Day. Unless otherwise noted, where the Contract Documents require notice, submittal, submission, or other provision or exchange of documents or information, "Working Day", "Day" or "day" shall mean 8:00 a.m. to 5:00 p.m. prevailing local time in Springfield, Kentucky; a transmission delivered after 5:00 p.m. shall be considered to have been received on the following Working Day, Day or day, as applicable.

### **1.3.9 Meaning of Promptly**

In the Contract Documents, the word "promptly" means as soon as reasonably practicable in light of then-prevailing circumstances.

### **1.3.10 Trade Meanings**

Unless otherwise defined herein, words or abbreviations that have common trade meanings are used herein in accordance with those meanings; provided, however, that such common trade meaning shall not be construed to reduce the quality of any Work to be performed or delivered under this Agreement.

### **1.3.11 Dimensions**

On Plans, working drawings, and standard plans, calculated dimensions shall prevail over scaled dimensions.

### **1.3.12 Laws**

Unless specified otherwise, a reference to a Law is considered to be a reference to: (a) such Law as it may be amended, modified, supplemented or interpreted by the courts from time to time; (b) all regulations and rules pertaining to or

promulgated pursuant to such Law; (c) the successor to the Law resulting from recodification or similar reorganizing of Laws; and (d) all future Laws pertaining to the same or similar subject matter.

### **1.3.13 Currency**

Unless specified otherwise, all statements of or references to dollar amounts or money in the Contract Documents are to the lawful currency of the United States of America.

### **1.3.14 Time Zones**

Unless specified otherwise, references in the Contract Documents to time or hours shall be to Eastern Time as observed in Springfield, Kentucky.

### **1.3.15 Mandatory Language**

Unless otherwise stated, the words “shall”, “must”, “will”, and other words commonly construed as indicative of a mandatory obligation are to be construed as imposing a mandatory requirement or obligation.

## **1.4 Referenced Manuals, Publications, Standards, Policies, and Specifications**

**1.4.1** References to manuals or other publications governing the Work shall mean the most recent edition or revision thereof and amendments and supplements thereto in effect on the Setting Date.

**1.4.2** Standards and specifications issued by KYTC shall take precedence over other standards and specifications referenced in the Contract Documents.

**1.4.3** In interpreting standards, policies, and specifications referenced in the Exhibit 3 (Technical Provisions), the following apply:

(a) References to the “project owner” shall mean KYTC; and

**1.4.4** References to “plan(s)” shall mean the RFC Plans.

## **1.5 Errors in the Contract Documents**

**1.5.1** DBT acknowledges that prior to the Effective Date, DBT had sufficient opportunity to identify any Errors and potentially unsafe provisions in Exhibit 3 (Technical Provisions) and other Contract Documents, and sufficient opportunity and duty to notify KYTC of such fact and of the changes to the provisions that DBT believed were the minimum necessary to render the provisions correct and safe. DBT shall not take advantage of or benefit from any Error in the Contract Documents that DBT knew of or, through the exercise of reasonable care, had reason to know of prior to the Effective Date.

- 1.5.2** If DBT identifies any Errors in the Contract Documents (including those Reference Information Documents), DBT shall promptly notify KYTC, in writing, of such Errors and obtain specific instructions from KYTC regarding any such Error before proceeding with the affected Work. If DBT fails to notify KYTC of any such Errors or elects to proceed with the affected Work prior to or without informing KYTC, DBT shall be deemed to proceed at its own risk and shall bear any additional costs, and not be entitled to an increase in the Contract Price, a Completion Deadline adjustment or other Claim associated with redoing such affected Work already performed if necessary to bring such Work into compliance with the Contract Documents.
- 1.5.3** If DBT determines that the Contract Documents do not detail or describe sufficiently the Work or any matter relative thereto, DBT shall request further explanation from KYTC and shall comply with any explanation thereafter provided by KYTC. The fact that the Contract Documents omit minor details of any Work that are necessary to carry out the intent of the Contract Documents shall not relieve DBT from performing such omitted Work. Instead, DBT shall be deemed to have known or have had reason to know of such omission prior to the Effective Date, and shall perform such Work as if the details were fully and correctly set forth and described in the Contract Documents without entitlement to an increase in the Contract Price, a Completion Deadline adjustment, or any other Claim or Change Order, except as specifically allowed under Article 13.
- 1.5.4** Errors in the Schematic Design that require Additional Right-of-Way are governed by Section 5.1.1.

## **1.6 Reference Information Documents**

- 1.6.1** KYTC has provided the Reference Information Documents to DBT.
- 1.6.2** DBT acknowledges and agrees that:
- (a) The Reference Information Documents are not mandatory or binding on DBT;
  - (b) DBT is not entitled to rely on the Reference Information Documents as presenting any design or engineering solutions or other direction, or as presenting any means or methods, for complying with the requirements of the Contract Documents, Governmental Approvals or Law;
  - (c) KYTC will not be liable for any causes of action, Claims or Losses suffered by any DBT-Related Entity by reason of any use of information contained in, or any action or forbearance in reliance on, the Reference Information Documents;
  - (d) KYTC has not verified the information in the Reference Information Documents, and does not represent or warrant that the information

contained in the Reference Information Documents is free from Error or that such information is in conformity with the requirements of the Contract Documents, NEPA Approval, other Governmental Approvals or Laws;

- (e) Without limiting clause (d) above, KYTC makes no representations or warranties as to any surveys, data, reports or other information provided by KYTC or other Persons concerning surface conditions and subsurface conditions, including information relating to Utilities, Hazardous Materials, contaminated groundwater, archeological, paleontological, cultural and historic resources, unexploded ordnance, seismic conditions, and Threatened or Endangered Species, affecting the Work, the Site or surrounding locations;
- (f) DBT shall have no right to an increase in the Contract Price, a Completion Deadline adjustment or any other Claim based on any Error in the Reference Information Documents;
- (g) DBT is capable of conducting and obligated hereunder to conduct Reasonable Investigation to verify or supplement the Reference Information Documents; and
- (h) If and to the extent any DBT-Related Entity uses information in the Reference Information Documents, such use is entirely at DBT's own risk and at its own discretion and DBT, not KYTC, is responsible for the use of such information.

**1.6.3** Section 1.6.2 shall not adversely affect the specific relief available to DBT under Article 13 Section 13.1.3 for Relief Events.

## **1.7 Professional Services Licensing Requirements**

KYTC does not intend to contract for, pay for, or receive any Professional Services that are in violation of any professional licensing or registration laws, and by execution of this Agreement, DBT acknowledges that KYTC has no such intent.

## **1.8 Federal Requirements**

This is a Federal-Aid Project, and DBT shall comply and require DBT-Related Entities to comply with all Federal Requirements, including those requirements set forth in Exhibit 6. In the event of any conflict between any applicable Federal Requirements and the other requirements of the Contract Documents, the Federal Requirements shall prevail, take precedence, and be in force over and against any such conflicting provisions.

## **1.9 Incorporation of ATCs**

**1.9.1** DBT's use of approved and accepted ATCs shall be at the sole risk of DBT. If the Contract Documents incorporate any ATCs and either (a) DBT does not

comply with one or more KYTC conditions of pre-approval for the ATC, (b) DBT does not obtain any required third-party approval(s) for the ATC, or (c) other conditions arise that render the implementation of an ATC impossible or unfeasible, then DBT shall comply with the requirements in the Contract Documents that would have applied in the absence of such ATC. Such compliance shall be without an increase in the Contract Price, adjustment of the Completion Deadlines) or any other Claim or Change Order.

If the implementation of an approved or conditionally-approved ATC will require further environmental evaluation or re-evaluation, KYTC may withdraw its approval of the ATC, and DBT shall comply with the requirements in the Contract Documents that would have applied in the absence of such ATC. If KYTC allows the DBT to pursue the approved or conditionally-approved ATC, DBT shall be responsible for completing the environmental evaluation or reevaluation including securing all required Governmental Approvals. Such compliance or pursuit shall be without an increase in the Contract Price, or adjustment of the Completion Deadlines.



**ARTICLE 2.**  
**GENERAL OBLIGATIONS OF DBT; REPRESENTATIONS AND WARRANTIES**

**2.1 Term of Agreement**

This Agreement shall take effect on the Effective Date, and shall remain in effect until the earlier to occur of: (a) Final Acceptance; or (b) the date that this Agreement is terminated as provided herein.

**2.2 General Obligations of DBT**

**2.2.1 The Work**

**2.2.1.1** As more fully described in the Contract Documents, DBT shall perform the Work. The Work shall include the development, design, and construction of the Project, conforming to the Basic Project Configuration and otherwise complying with the requirements of the Contract Documents, except as otherwise approved by KYTC in its sole discretion. All materials, services, and efforts necessary to achieve Substantial Completion and Final Acceptance of the Project on or before the applicable Completion Deadline shall be solely DBT's responsibility, except as otherwise specifically provided in the Contract Documents. DBT shall utilize all applicable standards and specifications to complete the Work. DBT shall plan, schedule, and execute all aspects of the Work and shall coordinate its activities with all Persons who are directly impacted by the Work. Subject to the terms of Article 12, the cost of all Work, including such materials, services, and efforts as are necessary to complete the Work are included in the Contract Price.

**2.2.1.2** The Work shall be performed under the laws and regulations of the Commonwealth. The Work shall conform to KYTC, Federal, and AASHTO standards, practices, policies, and guidelines, where applicable. DBT shall perform all work and furnish all materials in accordance with the applicable provisions of KYTC Standard Specifications. In addition, DBT shall utilize all other applicable standards and specifications to complete the Work.

**2.2.2 Utility Services**

**2.2.2.1** DBT shall provide all Utility service facilities (both on the Site and off the Site) required to carry out the Work. The Utility service facilities include those needed for power, gas, communications, water, irrigation, sewage, and drainage. Except for incremental additional costs directly attributable to a Relief Event, and where otherwise provided, DBT is responsible for all costs of such Utility service facilities, including costs of design and construction (both on the Site and off the Site), Governmental Approvals, connection fees, testing, inspection, certification, and Utility service/usage fees and charges required to perform the Work; provided, however, that DBT shall not be required to pay (a) electricity costs for the normal operation of roadway lighting, ITS, irrigation, and traffic

signals, or (b) the cost of water for irrigation, except as provided in Sections 2.2.2.2(a), (b), (c) and (d).

**2.2.2.2** Notwithstanding the foregoing, DBT shall pay for:

- (a) The costs of Utility service/usage fees and charges associated with the Work;
- (b) The costs of Utility service facilities and Utility service/usage fees and charges at any of DBT's Temporary Work Areas or field office locations;
- (c) Water used to water plants in the DBT's nursery for the Project; and
- (d) Water use requirements of the Kentucky Division of Water.

**2.3 Representations, Warranties, and Covenants of DBT**

DBT makes the representations, warranties, and covenants set forth in this Section 2.3.

**2.3.1** During all periods necessary for the performance of the Work, all DBT-Related Entities shall maintain all required authority, licenses, registrations, professional ability, and skills to perform the Work in accordance with the Contract Documents.

**2.3.2** As of the Effective Date, based upon DBT's Reasonable Investigation, DBT has evaluated the constraints affecting design and construction of the Project, including the limits of the Schematic ROW as well as the conditions of the NEPA Approval, and has concluded that the Project can be designed and built within such constraints.

**2.3.3** DBT has evaluated the feasibility of performing the Work within the Completion Deadlines and for the Contract Price, accounting for constraints affecting the Project, and has concluded 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** Prior to the Proposal Due Date, DBT conducted a Reasonable Investigation and as a result of such Reasonable Investigation is familiar with and accepts the requirements of the Work.

**2.3.5** DBT has familiarized itself with the requirements of any and all applicable Laws and the conditions of any required Governmental Approvals prior to entering into this Agreement. DBT shall obtain and maintain each and every Governmental Approval in due course so as to enable the Work to proceed in accordance with the Contract Documents.

- 2.3.6** DBT has familiarized itself with the requirements of the Commonwealth and the County of Washington and the conditions therein prior to entering into this Agreement. DBT shall comply with all such requirements to enable the Work to proceed in accordance with the Contract Documents.
- 2.3.7** All Work furnished by DBT shall be performed by or under the supervision of Persons who hold all necessary and valid licenses to perform the Work in the Commonwealth, by personnel who are careful, skilled, experienced, and competent in their respective trades or professions, who are professionally qualified to perform the Work in accordance with the Contract Documents, and who shall assume professional responsibility for the accuracy and completeness of the Design Documents, Construction Documents, and other documents prepared or checked by them.
- 2.3.8** The standard of care for all Work performed or furnished under this Agreement shall be the care and skill ordinarily used by members of the engineering profession practicing under similar conditions at the same time and locality."
- 2.3.9** As of the Effective Date, DBT is a [FORM OF ORGANIZATION – CORPORATION/JOINT VENTURE/LLC], duly organized and validly existing under the laws of the Commonwealth of Kentucky with all requisite power and all required licenses to carry on its present and proposed obligations under the Contract Documents. DBT has full power, right, and authority to execute and deliver the Contract Documents and the Subcontracts to which DBT is (or will be) a party and to perform each and every obligation of DBT therein.
- 2.3.10** DBT is duly qualified to do business, and is in good standing, in the Commonwealth as of the Effective Date, and will remain in good standing during the Work and for as long thereafter as any obligations remain outstanding under the Contract Documents.
- 2.3.11** The execution, delivery, and performance of the Contract Documents and the Subcontracts to which DBT is (or will be) a party have been (or will be) duly authorized by all necessary corporate action of DBT; each person executing the Contract Documents and the Subcontracts on behalf of DBT has been (or at the time of execution will be) duly authorized to execute and deliver each such document on behalf of DBT; and the Contract Documents and the Subcontracts have been (or will be) duly executed and delivered by DBT.
- 2.3.12** Neither the execution and delivery by DBT of the Contract Documents or the Subcontracts to which DBT is (or will be) a party, nor the consummation of the transactions contemplated hereby or thereby, is (or at the time of execution will be) in conflict with or has resulted or will result in a default under or a violation of the governing instruments or organizational documents of DBT or a breach or default under any indenture or loan or credit agreement or other material agreement or instrument to which DBT is a party or by which its properties and assets may be bound or affected.

- 2.3.13** Each of the Contract Documents and the Subcontracts to which DBT is (or will be) a party constitutes (or at the time of execution and delivery will constitute) the legal, valid, and binding obligation of DBT, enforceable against DBT, in accordance with its terms, subject only to applicable bankruptcy, insolvency, and similar laws affecting the enforceability of the rights of creditors generally and to general principles of equity.
- 2.3.14** As of the Effective Date, there is no action, suit, proceeding, investigation or litigation pending and served, or of which DBT is otherwise aware, against DBT which challenges DBT's authority to execute, deliver or perform, or the validity or enforceability of, the Contract Documents or the Subcontracts to which DBT is a party, or which challenges the authority of any of DBT's officials that are executing the Contract Documents or the Subcontracts; and DBT has disclosed to KYTC prior to the Effective Date any pending and un-served or threatened action, suit, proceeding, investigation or litigation with respect to such matters of which DBT is aware.
- 2.3.15** As of the Proposal Due Date, DBT disclosed to KYTC in writing all organizational conflicts of interest of DBT and its Subcontractors of which DBT was actually aware; and between the Proposal Due Date and the Effective Date, DBT has not obtained knowledge of any additional organizational conflict of interest, and there have been no organizational changes to DBT or its Subcontractors identified in its Proposal that have not been approved in writing by KYTC. For this purpose, organizational conflict of interest has the meaning set forth in the RFP.
- 2.3.16** To the extent the Lead Contractor is not DBT, DBT represents and warrants, as of the Effective Date of the relevant Subcontract between DBT and the Lead Contractor, as follows:
- (a) The Lead Contractor is duly organized, validly existing, and in good standing under the laws of the Commonwealth of its organization and is duly qualified to do business, and is in good standing, in the Commonwealth;
  - (b) The ownership interests of the Lead Contractor are owned by the Persons whom DBT has set forth in a written certification delivered to KYTC prior to the Effective Date;
  - (c) The Lead Contractor has the power and authority to do all acts and things and execute and deliver all other documents as are required to be done, observed or performed by it in connection with its engagement by DBT;
  - (d) The Lead Contractor has (i) obtained and will maintain all necessary or required registrations, permits, licenses, and approvals required under applicable Law and (ii) the expertise, qualifications, experience,

competence, skills, and know-how to perform the Work in accordance with the Contract Documents;

- (e) The Lead Contractor will comply with all health, safety, and Environmental Laws in the performance of any Work activities for, or on behalf of, DBT for the benefit of KYTC; and
- (f) The Lead Contractor is not in breach of any applicable Law that would have a material adverse effect on any aspect of the Work.

**2.3.17** DBT, on behalf of itself and all DBT-Related Entities, warrants compliance with all federal immigration laws and regulations that relate to their employees. A breach of this warranty shall be deemed a material breach of the Agreement that is subject to penalties up to and including termination of the Agreement. KYTC retains the legal right to inspect the papers of any employee who performs any of the Work hereunder to ensure compliance with this warranty.

**2.3.18** This Agreement shall be subject to available funding, and nothing in this Agreement shall bind the Commonwealth to expenditures in excess of funds appropriated or otherwise allotted for the purposes outlined in this Agreement.

## **2.4 Representations and Warranties of KYTC**

KYTC makes the representations, warranties, and covenants set forth in this Section 2.4.

**2.4.1** As of the Effective Date, KYTC has full power, right, and authority to execute, deliver, and perform its obligations under, in accordance with and subject to the terms and conditions of the Contract Documents to which it is a Party.

**2.4.2** Each Person executing this Agreement on behalf of KYTC and the Contract Documents to which KYTC is a Party, has been or at the time of execution will be duly authorized to execute each such document on behalf of KYTC.

## **2.5 Survival of Representations and Warranties**

The representations and warranties of DBT and KYTC contained herein shall survive expiration or early termination of this Agreement.

**ARTICLE 3.**  
**MANAGEMENT SYSTEMS AND OVERSIGHT**

**3.1 Submittal, Review, and Approval Terms and Procedures**

**3.1.1 General**

This Section 3.1 sets forth uniform terms and procedures that shall govern all Submittals to KYTC pursuant to the Contract Documents. This Section 3.1 governs and controls all Submittals, unless another provision in the Contract Documents expressly provides for a different time period than that stated in this Section 3.1. In the event of an ambiguity, this Section 3.1 shall control.

**3.1.2 Time Periods**

**3.1.2.1** Except as otherwise provided in this Section 3.1.2 or in Section 7.5, whenever KYTC is entitled to review, comment on, review and comment on, or to affirmatively approve or accept, a Submittal, KYTC will have a period of ten Working Days to act after the date KYTC acknowledges receipt of a complete Submittal in conformity with the Contract Documents, together with a completed transmittal form in a form to be mutually agreed by the Parties and all necessary or requested information and documentation concerning the subject matter. If KYTC determines that a Submittal is not complete, KYTC will notify DBT of such determination within ten Working Days of the date KYTC acknowledges receipt of such Submittal. KYTC's review period for DBT's re-submission of a previously submitted Submittal shall be ten Working Days for each such re-submission. The Parties shall agree in good faith upon any necessary extensions of the review-comment-and-approval period to accommodate particularly complex or comprehensive Submittals.

**3.1.2.2** If any other provision of the Contract Documents expressly provides a longer or shorter period for KYTC to act, such period shall control over the time periods set forth in Section 3.1.2.1. If the time period for KYTC to act ends on a non-Working Day, the time period shall automatically be extended to the next succeeding Working Day.

**3.1.2.3** If at any given time KYTC is in receipt of more than twenty (20) concurrent Submittals in the aggregate that are subject to KYTC's review and comment or acceptance, KYTC may extend the applicable review period such that KYTC can reasonably accommodate the Submittals under the circumstances. No such extension shall entitle DBT to an adjustment to the Contract Price or Completion Deadline or form the basis of any other Claim. DBT may establish by written notice to KYTC an order of priority for processing such Submittals; and KYTC will comply with such order of priority. Unless stated otherwise, review comments do not revise the scope or intent of the project and do not constitute a request for changes beyond the current contracted Project Scope of Services. In the event KYTC determines that any required submission is

incomplete, contains inaccuracies which preclude a meaningful review, or does not adhere to Exhibit 3 (Technical Provisions) and the Project Standards, KYTC will advise the DBT of the deficiencies and direct the DBT to revise and resubmit the submittal. No time extension shall be granted as a result of such action. The DBT shall schedule a review meeting or issue review comments as appropriate, or as deemed necessary by KYTC. The DBT shall ensure such meetings are properly attended. In the event the DBT believes that any review comment, or orders issued by KYTC, require a change to the Project Scope of Services, the DBT shall first contact KYTC for clarification and shall, within 10 Working Days of receipt of the comments or orders, provide written notice to KYTC concerning the reasons why the DBT believes the Project Scope of Services has been changed.

**3.1.2.4** All time periods for KYTC to act shall be extended by an equal number of days as any delay caused by delay, act, omission, breach, fault or negligence of any DBT-Related Entity.

### **3.1.3 Submittal Types**

#### **3.1.3.1 Type 1 Submittal**

The DBT may commence or permit the commencement of any Work that is the subject of, governed by or dependent upon a required Type 1 Submittal at or after submission to the KYTC; provided that the DBT shall bear all risk and cost associated with any requirement to resubmit or to remedy any Nonconforming Work following any comment on the Type 1 Submittal.

The KYTC may make comments on the Type 1 Submittal and the DBT shall use reasonable efforts to accommodate the KYTC's comments where accommodation does not materially increase the time or cost (or both) for the DBT performance of the Work with respect to such Type 1 Submittal.

#### **3.1.3.2 Type 2 Submittal**

The DBT shall not commence or permit the commencement of any Work that is the subject of, governed by or dependent upon a Type 2 Submittal until it has submitted the Type 2 Submittal to the KYTC, and:

The KYTC has accepted the Type 2 Submittal; and

Either:

If KYTC makes a Comment on the Type 2 Submittal, any re-submission of the Type 2 Submittal addresses KYTC's Comment and KYTC accepts the resubmitted Type 2 Submittal or the basis for the Comment in the Type 2 Submittal is resolved. This is only true, however, in each case that the DBT shall use commercially reasonable efforts to accommodate KYTC's comments where

accommodation does not materially increase the time or cost (or both) for the DBT's performance of the Work with respect to such Type 2 Submittal; or

If KYTC rejects the Type 2 Submittal (and provided a rejection explanation), the resubmitted Type 2 Submittal fully remedies the rejection explanation and KYTC accepts the resubmitted Type 2 Submittal, or the rejection is otherwise resolved in accordance with PA Section 6.3.6 (Submittals Disputes).

If KYTC does not respond to a Type 2 Submittal within the allowable time period, then the Type 2 Submittal shall be deemed rejected. The KYTC may, but is under no obligation to, provide its rationale for rejection; provided, however, that so long as the DBT meets the requirements within the definition of a Claim, then the DBT may seek relief and compensation with respect to the Work that is the subject of, governed by, or dependent upon, the relevant Submittal provided. However, the DBT shall nevertheless submit a Submittal with or without amendments, as the DBT determines appropriate, regardless of relief or compensation.

### **3.1.3.3 Type 3 Submittal**

The DBT shall not commence or permit the commencement of any Work that is the subject of, governed by or dependent upon a Type 3 Submittal until it has submitted the Type 3 Submittal to KYTC and KYTC has provided its acceptance (at its sole discretion) of such Type 3 Submittal.

If KYTC does not respond to a Type 3 Submittal within the allowable time period, then the Type 3 Submittal shall be deemed rejected. KYTC may, but is under no obligation to, provide its rejection explanation. If the DBT wishes to proceed with the subject matter of the rejected (or deemed rejected) Type 3 Submittal, the DBT shall amend and resubmit the amended Type 3 Submittal to KYTC.

### **3.1.3.4 Submittals Disputes**

The DBT acknowledges and agrees that (a) the DBT may not Dispute any rejection of a Type 3 Submittal by KYTC and (b) the DBT may not bring a Dispute regarding any Type 3 Submittal under the Dispute Resolution Procedures.

DBT shall notify the KYTC Project Manager within 10 Working Days after receipt of any review comments if additional clarification is required, if there are conflicts between review comments received, or if the DBT believes the comments, or the rejection explanation, received would cause the RFC documents, other Design Documents, or any Contract Documents to contain Errors or omissions in any respect or which would otherwise adversely affect, in any manner, the Work or the Baseline Schedule. In the event of such occurrence, and should KYTC in its sole discretion agree with the DBT's foregoing assertion, the KYTC shall have the right to modify its comments.

Any failure of the DBT to so notify the KYTC within the 10 Working Days after receipt of any review comments shall constitute the DBT's full acceptance of



all responsibility for changes in response to such KYTC comments and will be treated for all purposes hereunder as if the DBT had initiated such changes.

In the event that the DBT disagrees with comments or rejection explanation received from KYTC or with those received from others, the DBT must, within 10 Working Days after receipt of comments provide written disposition to the comments that includes accompanying references applicable to Contract Documents. Disagreement with review comments or the rejection explanation received does not relieve the DBT from meeting the requirements of the Contract Documents and the decision as to whether or not such review comments shall apply to the Contract shall be in KYTC's sole discretion.

In each case where the DBT is entitled to seek, and seeks relief for a submittals dispute, the DBT shall provide Notice to the KYTC that it either (a) will not accommodate the KYTC comments to a Submittal (on the basis that accommodation materially increases the time or cost (or both) of the DBT's performance of the Work with respect to the relevant Submittal), or (b) Disputes the KYTC's rejection explanation, in each case as applicable to KYTC's disposition of a Submittal. For avoidance of doubt, the DBT's recourse to resolution of submittals disputes is conditioned upon affirmative Notice to the KYTC of the submittals dispute.

If the DBT:

- Does not accommodate KYTC comment with respect to the relevant Submittal, and the KYTC asserted initially and reasonably continues to believe that such comment can, by the DBT's exercise of commercially reasonable efforts, be accommodated without material increase in time or cost (or both); or
- Disputes the KYTC's rejection explanation, then, in either case, the KYTC will notify the DBT within five Working Days after receipt of the DBT's Notice that the KYTC continues to reasonably believe: (i) that the KYTC's comment can, by the DBT's exercise of commercially reasonable efforts, be accommodated without material increase in time or cost (or both), or (ii) the rejection explanation is valid.

Following such Notice by KYTC, the Parties shall conduct discussions and negotiations in good faith to resolve the basis for the subject Submittals Dispute. If the Parties fail to reach agreement within 10 Working Days after expiry of such good faith negotiations, as determined by either Party in its reasonable discretion, then either Party may refer the matter for determination in accordance with the Dispute Resolution Procedures.

### **3.1.4 Resolution of KYTC Comments and Objections**

- #### **3.1.4.1**
- If the Submittal is not governed by Section 3.1.3, then KYTC's exception, objection, rejection or disapproval shall be deemed reasonable, valid, and binding if based on any of the following grounds or other grounds set forth elsewhere in the Contract Documents:

- (a) The Submittal or a component thereof fails to comply, or is inconsistent with the Contract Documents;
- (b) The Submittal or subject component thereof does not comply with a standard equal to or better than Good Industry Practice;
- (c) DBT has not provided all content or information required or reasonably requested in respect of the Submittal or a component thereof;
- (d) Adoption of the Submittal or a component thereof, or of any proposed course of action thereunder, would result in a conflict with or violation of any Law or Governmental Approval; or
- (e) In the case of a Submittal that is to be delivered to a Governmental Entity as a proposed Governmental Approval, or to obtain, modify, amend, supplement, renew, extend, waive or carry out a Governmental Approval, it proposes commitments, requirements, actions, terms or conditions that are (i) inconsistent with the Contract Documents, applicable Law, the requirements of Good Industry Practice, or (ii) not usual and customary arrangements that KYTC offers or accepts for addressing similar circumstances affecting its projects.

**3.1.4.2** DBT shall respond in writing to all of KYTC's comments, exceptions, disapprovals, and objections to a Submittal and, except as provided below, make modifications to the Submittal as necessary to resolve all such comments, exceptions, disapprovals, and objections, in accordance with the review processes set forth in this Section 3.1 and Exhibit 3 (Technical Provisions). However, if the Submittal is not governed by Section 3.1.3, the foregoing shall in no way be deemed to obligate DBT to incorporate any comments or resolve exceptions, disapprovals or objections that: (a) are not on any of the grounds set forth in Section 3.1.4 (and not on any other grounds set forth elsewhere in the Contract Documents) and (b) would result in a delay to the Critical Path on the Baseline Schedule, or in Extra Work Costs, except pursuant to an KYTC-Directed Change. If DBT does not resolve any comment, exception, disapproval or objection, DBT shall deliver to KYTC within 10 days after receipt of KYTC's comments, exceptions, disapprovals or objections, a written explanation why modifications based on such comment, exception, disapproval or objection are not required.

**3.1.4.3** After KYTC receives DBT's explanation as to why the modifications are not required as provided in Sections 3.1.5.1, if KYTC disagrees with DBT's explanation, the Parties shall attempt in good faith to informally resolve the dispute. If the Parties are unable to informally resolve the dispute within 15 days of receipt of DBT's explanation, and the Submittal is not one governed by Section 3.1.3.4, the dispute shall be resolved according to the Dispute Resolution Procedures; provided, however, that if KYTC elects to issue a Directive Letter pursuant to Section 14.3 with respect to the matter in dispute,

DBT shall proceed in accordance with such Directive Letter while retaining any Claim as to the matter in dispute.

### **3.1.5** Limitations on DBT's Right to Rely

**3.1.5.1** No review, comment, objection, rejection, approval, disapproval, acceptance, concurrence, certification (including certificates of Substantial Completion and Final Acceptance), or Oversight by or on behalf of KYTC, or lack of any such action by KYTC, shall constitute acceptance by KYTC of materials or Work, or waiver of any legal or equitable right under the Contract Documents, at Law, or in equity. KYTC will be entitled to complete and accurate Submittals, to remedies for unapproved Deviations, Nonconforming Work, and DBT Defaults, and to identify and require additional Work to bring the Work and Project into compliance with requirements of the Contract Documents, regardless of whether previous review, comment, objection, rejection, approval, disapproval, acceptance, concurrence, certification or Oversight, or lack of any of the foregoing, were conducted or provided by KYTC. Without regard to any such activity or failure to conduct any such activity by KYTC, DBT at all times shall have an independent duty and obligation to fulfill the requirements of the Contract Documents. DBT agrees and acknowledges that any such activity or failure to conduct any such activity by KYTC:

- (a) Is solely for the benefit and protection of KYTC;
- (b) Does not relieve DBT of its responsibility for the selection and the competent performance of all DBT-Related Entities;
- (c) Does not create or impose upon KYTC any duty, standard of care or obligation toward DBT to cause it to fulfill the requirements of the Contract Documents or toward any other Person, all of which are hereby expressly disclaimed;
- (d) Shall not be deemed or construed as any form of warranty, express or implied, by KYTC;
- (e) May not be relied upon by DBT or used as evidence in determining whether DBT has fulfilled the requirements of the Contract Documents;
- (f) Shall not be deemed or construed as any assumption of risk by KYTC as to design, construction, performance or quality of Work or materials; and
- (g) May not be asserted by DBT against KYTC as a defense, legal or equitable, to, or as a waiver of or relief from, DBT's obligation to fulfill the requirements of the Contract Documents.

**3.1.5.2** DBT shall not be relieved or entitled to reduction of its obligations to perform the Work in accordance with the Contract Documents, or any of its other

liabilities and obligations, including its indemnity obligations, as the result of any activity identified in Section 3.1.8.1 or failure to conduct any such activity by KYTC. Such activity or failure to conduct such activity by KYTC will not relieve DBT from liability for, and responsibility to cure and correct, without the right to an increase in the Contract Price, a Completion Deadline adjustment or any other Claim, any unapproved Deviations, Nonconforming Work or DBT Defaults.

**3.1.5.3** To the maximum extent permitted by Law, DBT hereby releases and discharges KYTC from any and all duty and obligation to cause the Work, the Submittals, or the Project to comply with or satisfy the standards and requirements of the Contract Documents.

**3.1.5.4** Notwithstanding the provisions of Sections 3.1.5.1, 3.1.5.2, and 3.1.5.3:

- (a) The DBT shall be entitled to rely on written approvals and acceptances from KYTC (i) for the limited purpose of establishing that the approval or acceptance occurred, or (ii) that are within KYTC's sole discretion or absolute discretion, but only to the extent that DBT is prejudiced by a subsequent decision of KYTC to rescind such approval or acceptance;
- (b) DBT shall be entitled to rely on specific written Deviations KYTC approves under Section 6.2.4, subject to any conditions therein;
- (c) DBT shall be entitled to rely on the certificates of Substantial Completion and Final Acceptance from KYTC for the limited purpose of establishing that Substantial Completion and Final Acceptance, as applicable, have occurred, and the respective dates thereof, without prejudice to any rights and remedies available to KYTC respecting unapproved Deviations, Nonconforming Work, and DBT Defaults;
- (d) KYTC is not relieved from any liability arising out of a knowing and intentional material misrepresentation under any written statement KYTC delivers to DBT; and
- (e) KYTC is not relieved from performance of its express responsibilities under the Contract Documents in accordance with all standards applicable thereto.

### **3.2 Role of KYTC Consultants**

KYTC may retain other consultants to assist in the management and the oversight of the Project, including administration of the Contract Documents. DBT shall cooperate with the General Engineering Consultant and other KYTC consultants, to the same extent DBT shall cooperate with KYTC, in the exercise of their respective duties and responsibilities in connection with the Project.

### **3.3 Role of and Cooperation with FHWA**

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

### **3.4 Oversight, Inspection, and Testing**

**3.4.1** KYTC will have the right at all times to conduct Oversight to: (a) comply with FHWA or other applicable federal agency requirements; and (b) verify DBT's compliance with the Contract Documents, , and any applicable Law. KYTC may designate any Person or Persons, including its consultants and independent auditors, to carry out any Oversight on KYTC's behalf. KYTC will conduct Oversight in accordance with DBT's safety procedures and manuals, and in a manner that does not unreasonably interfere with normal Project construction activity. The foregoing shall not be construed to limit KYTC's Oversight or prevent KYTC from conducting any Oversight that KYTC, in its sole discretion, deems necessary.

**3.4.2** KYTC's Oversight rights shall include, but not be limited to, the following:

- (a) Monitoring and auditing DBT, DBT-Related Entities, and the Books and Records of the foregoing as more particularly set forth in Section 21.5;
- (b) Conducting periodic reviews of Project documentation and files;
- (c) Conducting material tests, according to KYTC's test methods, to verify:
  - (i) DBT's compliance with all testing frequencies and requirements, including performance and acceptance testing set forth in the Contract Documents,
  - (ii) the accuracy of the tests, inspections, and audits performed by or on behalf of DBT pursuant to the Quality Management Plan, and
  - (iii) compliance of materials incorporated into the Project with the applicable requirements, conditions, and standards of the Contract Documents, Governmental Approvals, and Law;
- (d) Reviewing and commenting on Submittals;
- (e) Reviewing records and conducting interviews as necessary to verify compliance with federal, Commonwealth, and local laws and regulations;
- (f) Participating in meetings to discuss design progress, construction progress, DBT's quality control processes, audit activities, and other issues;
- (g) Accompanying DBT on Inspections, conducting its own inspections in addition to the Inspections, assessing DBT's records of Inspections and Project conditions, and assessing the condition of Elements;

- (h) Attending and witnessing DBT's other tests and inspections;
- (i) Reviewing DBT's certification of Record Drawings and surveys and schedule; and
- (j) Investigating and confirming DBT's compliance with the Safety Management Plan.

**3.4.3** KYTC will have the right to conduct formal reviews of every Design Document and Construction Document.

**3.4.4** Nothing in the Contract Documents shall preclude, and DBT shall not interfere with, any review, inspection or oversight of Submittals or of Work that KYTC desires to conduct, or that the FHWA or any regulatory agency with jurisdiction may desire to conduct.

### **3.5 Rights of Cooperation and Access**

**3.5.1** DBT at all times shall coordinate and cooperate, and require its Subcontractors and DBT-Related Entities to coordinate and cooperate, with KYTC, its Authorized Representative, and its designees to facilitate KYTC Oversight activities. DBT shall cause its representatives to be available during normal Business Hours and at all other reasonable times for consultation with KYTC and its designees.

**3.5.2** Without limiting the foregoing, KYTC, its Authorized Representative, and its designees shall have the right to, and DBT shall afford them: (a) safe and unrestricted access to the Project at all times, (b) safe access during normal Business Hours to DBT's Project offices, if applicable, and operations buildings and those of its Subcontractors, and (c) unrestricted access to data respecting the Project design, construction, and the Utility Adjustment Work.

### **3.6 Testing and Test Results**

KYTC, its Authorized Representatives, and its designees shall have the right to attend and witness any tests and verifications to be conducted pursuant to the Contract Documents. DBT shall provide to KYTC all test results and reports (which may be provided in electronic format in accordance with the Exhibit 3 (Technical Provisions)) within the applicable time period set forth in Exhibit 3 (Technical Provisions).

### **3.7 Software Compatibility**

**3.7.1** Unless otherwise specifically stated in the Contract Documents, all software that DBT uses for any aspect of the Project shall be compatible with software used by KYTC. Prior to using any software or version of software not then in use by KYTC or compatible with software then in use by KYTC, DBT must obtain approval from KYTC. In addition, DBT shall provide to KYTC staff, at DBT's cost, working electronic copies of the software and any training

reasonably necessary to ensure that KYTC is able to use the same or compatible software as DBT.

- 3.7.2** DBT shall submit all documents, correspondence, and Submittals to KYTC through the system implemented by the DBT, in accordance with Exhibit 3 (Technical Provisions).

**ARTICLE 4.**  
**PROJECT PLANNING, GOVERNMENTAL APPROVALS;**  
**ENVIRONMENTAL COMPLIANCE; PUBLIC INFORMATION**

**4.1 Planning and Engineering Activities**

- 4.1.1** DBT, through the qualified and licensed design professionals shall perform or cause to be performed all Professional Services necessary to develop the Project and the Utility Adjustments included in the Work in accordance with the Contract Documents and Good Industry Practice.
- 4.1.2** Before commencing any Work on any portion or aspect of the Project, DBT shall verify all governing dimensions of the Site and shall examine and account for all Related Transportation Facilities and adjoining work (including Adjacent Work) that may have an impact on such Work. DBT shall ensure that any Design Documents and Construction Documents furnished as part of the Work accurately depict all governing and adjoining dimensions.

**4.2 Site Conditions**

- 4.2.1** DBT shall bear the risk of any incorrect or incomplete review in its Reasonable Investigation of the Site and surrounding locations. DBT shall bear the risk of any incorrect or incomplete information resulting from preliminary engineering activities conducted by DBT, KYTC or any other Person.
- 4.2.2** DBT shall bear the risk of changes in surface topography, variations in subsurface moisture content, and variations in groundwater levels.
- 4.2.3** The provisions of this Section 4.2 do not apply to, and shall not adversely affect, the specific relief available to DBT under Article 13 for Relief Events under clauses (g), (h), (j), (k), (l) and (p) of the definition of Relief Event.

**4.3 Governmental Approvals**

- 4.3.1** KYTC is in the process of obtaining for the Project the NEPA Approval, based on the Schematic Design.
- 4.3.2** DBT hereby assumes responsibility for, and shall obtain:
- (a) All Environmental Approvals, other than the NEPA Approval, required in connection with DBT's Schematic Design or Final Design, the Project, the Project ROW, DBT ROW, the Work or a Relief Event;
  - (b) All reevaluations, amendments, and supplements of the NEPA Approval required in connection with DBT's Schematic Design or Final Design, the Project, the Project ROW, DBT ROW, the Work or a Relief Event; and



- (c) All other Governmental Approvals required in connection with DBT's Schematic Design or Final Design, the Project, the Project ROW, DBT ROW, or the Work.

**4.3.3** DBT shall deliver to KYTC true and complete copies of all new or amended Governmental Approvals, including reevaluations, amendments, and supplements of the NEPA Approval.

**4.3.4** DBT shall be responsible for all necessary actions, and DBT shall bear all risk of delay and all risk of increased cost, attributable to, resulting from or arising out of: (1) any differences between DBT's Final Design for any portion of the Project and the Schematic Design or DBT's Schematic Design, including differences due to any Alternative Technical Concepts set forth in Exhibit 4-2, but excluding any differences due to an KYTC-Directed Change; or (2) differences between the construction means and methods (including temporary works) DBT chooses for any portion of the Project and those set forth, referred to or contemplated in the NEPA Approval, excluding any differences due to an KYTC-Directed Change. Such actions and risks that DBT assumes shall include:

- (a) Any costs or schedule impacts associated with change in the Project location due to DBT's design;
- (b) Conducting all necessary environmental studies and re-evaluations and preparing all necessary environmental documents in compliance with applicable Environmental Laws;
- (c) Obtaining and complying with all necessary new Governmental Approvals;
- (d) Obtaining and complying with all necessary modifications, renewals, and extensions of the NEPA Approval or other existing Governmental Approvals; and
- (e) All risk and cost of litigation by Persons other than KYTC.

**4.3.5** If DBT is unable to obtain any of the items described in Sections 4.3.4(c) or 4.3.4(d), then DBT shall be obligated to design and construct the Project based on the Schematic Design (with changes as necessary to comply with Exhibit 3 (Technical Provisions)) and the construction means and methods (including temporary works) set forth, referred to or contemplated in the NEPA Approval, or such other design or means and methods for which DBT is able to obtain Governmental Approvals and that comply with the Contract Documents. None of the foregoing circumstances described in this Section 4.3.6 shall: (a) constitute an KYTC-Caused Delay or KYTC-Directed Change, Relief Event or other basis for an increase in the Contract Price, a Completion Deadline adjustment or any other Claim; or (b) result in any representation or warranty

by KYTC as to the feasibility, accuracy or completeness of, or absence of errors in, the Schematic Design.

**4.3.6** If DBT acquires any DBT ROW or pursues any other modification of or Deviation from any Governmental Approvals, including the NEPA Approval, DBT shall first comply with, and obtain any consent or waiver required pursuant to then-existing agreements between KYTC and other Governmental Entities.

**4.3.7** Certain Governmental Entities may require that Governmental Approvals be applied for or issued in KYTC's name, or that KYTC directly coordinate with such Governmental Entities in connection with obtaining the Governmental Approvals. In such event, DBT at its expense shall provide all necessary support and efforts to apply for and obtain the Governmental Approvals in KYTC's name. Such support by DBT shall include conducting necessary field investigations, preparing mitigation analyses and studies and plans, preparing surveys, and preparing any required reports, applications, and other documents in the form approved by KYTC. Such support also may include joint coordination and joint discussions and attendance at meetings with the applicable Governmental Entity.

**4.3.8** DBT shall be solely responsible for compliance with all applicable Laws in relation to DBT's Temporary Work Areas and for obtaining any Environmental Approval or other Governmental Approval required in connection with DBT's Temporary Work Areas.

**4.3.9** KYTC shall pay for and secure in-lieu fee credits for the Section 404 Permit for the Work; provided, however, that DBT shall be responsible for paying the cost of and securing any additional in-lieu fee credits necessary due to DBT's means and methods and for any permanent impacts that may result from DBT's temporary construction activities.

#### **4.4 Environmental Compliance**

**4.4.1** Except as provided otherwise in Section 4.4.2, KYTC delegates to DBT, and DBT accepts, all KYTC obligations, commitments, and responsibilities under all Environmental Approvals. Except as provided otherwise in Section 4.4.2, DBT shall, at its sole cost and expense:

- (a) Comply with all Environmental Laws;
- (b) Comply with all conditions and requirements imposed by all Environmental Approvals;
- (c) Perform all commitments and mitigation measures set forth in all Environmental Approvals; and
- (d) Undertake all actions required by, or necessary to maintain in full force and effect, all Environmental Approvals.

- 4.4.2** KYTC retains sole responsibility for payment and performance of the environmental obligations, commitments, and responsibilities expressly identified as not delegated to DBT in the DBT's Environmental Commitments.
- 4.4.3** DBT shall perform or cause to be performed all environmental mitigation measures required under the Contract Documents, including those set forth in Exhibit 3 (Technical Provisions).
- 4.4.4** DBT shall comply with the provisions, requirements, and obligations regarding environmental compliance set forth in Exhibit 3 (Technical Provisions).

**ARTICLE 5.**  
**RIGHT OF WAY; UTILITY ADJUSTMENTS; USE OF KYTC PROPERTY**

**5.1 Right of Way**

**5.1.1 Schematic ROW**

**5.1.1.1** KYTC will or has acquired all Schematic ROW. The project has sufficient right of way to perpetually maintain the permanent features of the proposed project as shown on the RFP plans. KYTC will be responsible for the clearance/demolition of buildings that are within any right of way purchased by KYTC.

**5.1.1.2** The DBT shall be responsible for determining actual Right-of-Way needs to accommodate the project design (including easements for drainage, erosion control, utility relocations, and Maintenance of Traffic).

**5.1.1.3** DBT shall be responsible for Hazardous Materials Management on each parcel of Schematic ROW once such parcel is made available for DBT's access and use for the Project. DBT's responsibility to perform Hazardous Materials Management on Schematic ROW parcels shall not affect DBT's rights under clauses (h) or (i) of the definition of Relief Event.

**5.1.2 Additional ROW**

**5.1.2.1** The project has sufficient right of way to perpetually maintain the permanent features of the proposed project as shown on the RFP plans. KYTC does not intend for the Project to require Additional ROW, except as provided under Section 5.1.2.4.

**5.1.2.2** The DBT shall make KYTC aware of any Additional ROW need immediately upon DBT's identification of such a need. KYTC, in its sole discretion, will determine if the need for Additional ROW is necessary. If necessary, KYTC will acquire Additional ROW.

**5.1.2.3** If Additional ROW for temporary access or working room is necessary for the DBT to construct the project, as determined by KYTC in its sole discretion, the DBT shall first pursue a consent and release from the respective property owner for such Additional ROW. If a Consent and Release cannot be obtained, the DBT shall follow the Right of Way Procedures as outlined in the following sections.

**5.1.2.4** KYTC will acquire Additional ROW required for purposes of the Long Lick Bridge widening. Such Additional ROW has been identified by the DBT in Exhibit 4-1 (Proposal Commitments), and has been determined by KYTC as necessary for the Project. KYTC shall permit DBT access to such Additional ROW by January 02, 2024.

Any ROW not identified by DBT in its Proposal and subsequently identified as necessary for purposes of the Long Lick Bridge widening shall be considered DBT ROW in accordance with Section 5.1.3.

### **5.1.3 DBT ROW**

**5.1.3.1** The DBT shall be responsible for cost and schedule implications due to the acquisition of DBT ROW. The DBT shall be responsible for all acquisition services costs to acquire DBT ROW, including those accrued by KYTC. KYTC will deduct cost of services performed by KYTC for DBT ROW acquisition from the Contract Price.

**5.1.3.2** KYTC will not make payment to the DBT for ROW acquisition-related activities greater than the amount identified in the Price

**5.1.3.3** For the avoidance of doubt, the DBT shall be responsible for acquisition costs and schedule implications, including purchase and relocation costs, of DBT ROW not identified in the Price Proposal.

**5.1.3.4** KYTC reserves the right to withhold posting court awards if the cost of acquiring a parcel is greater than 200% of the appraised value.

**5.1.3.5** The DBT shall perform Right-of-Way acquisition and clearance in accordance with the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, as amended, and the KYTC Right-of-Way Guidance Manual, Appraisal Guidelines Manual and Relocation Assistance Manual. KYTC will submit a Right-of-Way certification in accordance with 23 CFR 635.309(p) when requesting FHWA's authorization.

**5.1.3.6** The DBT shall perform acquisition activities in accordance with the Kentucky Transportation Cabinet Division of Right-of-Way and Utilities Right-of-Way Guidance Manual, the Uniform Act and Regulation in 49 CFR part 24 and comply with the Civil Rights act (Title IV) and all other pertinent Federal and State rules and regulation with regard to Right-of-Way activities. The DBT shall assist KYTC in responding to FHWA or State inquiries or citations. Only a pre-qualified ROW consultant firm shall conduct ROW services.

**5.1.3.7** All elements of the Right-of-Way Process performed by the DBT shall be performed with discretion and confidentiality. The acquisition of private property for public use is a serious matter. Those in government charged with managing and implementing property acquisition programs have the responsibility to the government body and to the public to ensure that such Right-of-Way programs are executed professionally and fairly. All Right-of-Way documents, including the appraisal report, offer letter, and relocation assistance shall not be shown to, read to, permitted to be read by, or lent to a person other than those DBT Right-of-Way Team in discharge of the official business of the Division of Right-of-Way and Utilities. The DBT shall not disclose or discuss confidential information about any parcel or owner(s) of a parcel. The DBT Right-of-Way

- Team shall be the only persons to discuss confidential information and then shall only discuss with KYTC Personnel.
- 5.1.3.8** KYTC will monitor any such real property acquisition activities to assure compliance with Commonwealth and Federal law and requirements as is responsible for informing the DBT of all such requirements and for imposing sanctions in cases of material non-compliance. (23 CFR 710.201 Subpart B).
- 5.1.3.9** DBT shall be responsible for all demolition and clearance of DBT ROW. DBT shall be responsible for all Utility Adjustment Work for Utilities located in, on or under DBT ROW and shall not be entitled to an increase to the Contract Price, a Completion Deadline adjustment or any other Claim due to such Utility Adjustment Work in, on or under DBT ROW.
- 5.1.3.10** DBT shall be responsible for Hazardous Materials Management of DBT ROW. Except for a Relief Event under clause (g) of the definition of Relief Event, DBT shall not be entitled to an increase in the Contract Price, a Completion Deadline adjustment or any other Claim arising out of or in connection with Hazardous Materials Management in, on or under DBT ROW.
- 5.1.3.11** DBT shall not be entitled to an increase in the Contract Price, a Completion Deadline adjustment, or any other Claim as a result of any delay associated with DBT's acquisition of DBT ROW, except that, where such delay constitutes an KYTC-Caused Delay under clause (c) of the definition thereof, DBT may be entitled to a Completion Deadline adjustment and such adjustment of a Completion Deadline shall constitute DBT's sole remedy due to such delay. DBT shall not be entitled to Extra Work Costs, or any other Claim due to an KYTC-Caused Delay under clause (c) of the definition thereof.
- 5.1.3.12** Except as required as a direct result of an KYTC-Directed Change or Additional ROW, property outside of the Schematic ROW that is acquired for drainage easements hereunder shall be treated as DBT ROW.
- 5.1.3.13** All appraisals and appraisal reviews shall be completed by the DBT in accordance with the Uniform Act and KYTC's Division of Right-of-Way and Utilities Appraisal Guidelines Manual. The DBT shall select appraisers from KYTC's list of approved fee appraisers and review appraisers.
- 5.1.3.14** All relocations/property management shall be completed by the DBT in accordance to the Uniform Act and KYTC's Division of Right-of-Way and Utilities Relocation Assistance Manual and Right-of-Way Guidance Manual
- 5.1.3.15** Prior to acquisition of any DBT ROW, DBT shall submit to KYTC for its approval in its good faith discretion a delineation of the ROW that DBT seeks to acquire, and KYTC shall respond to DBT's request within 20 days after receipt of a complete submission from DBT. KYTC's response may consist of rejection, unconditional approval, or approval subject to certain conditions that KYTC may require in its good faith discretion. DBT shall not acquire any DBT ROW

that is not approved by KYTC and DBT shall comply with any conditions required by KYTC for the acquisition of DBT ROW.

**5.1.3.16** The DBT shall ensure that all DBT ROW is acquired in fee simple absolute or easement interest, free and clear of any and all liens and encumbrances.

**5.1.3.17** DBT ROW that DBT acquires for permanent incorporation into the Project shall be acquired in the name of the Commonwealth of Kentucky, for the benefit and use of KYTC.

#### **5.1.4** Condemnation Procedures

**5.1.4.1** With the exception of DBT's Temporary Work Areas, if DBT is unable to acquire a parcel outside the Schematic ROW for use as DBT ROW through commercially reasonable means, and DBT demonstrates to KYTC's satisfaction that such parcel is reasonably necessary for DBT's Work or the Project, DBT may request that KYTC exercise its power of eminent domain to acquire the parcel. If KYTC elects to exercise eminent domain, DBT shall, without the right to an increase in the Contract Price, a Completion Deadline adjustment, or any other Claim, provide such information and assistance as is necessary for KYTC to carry out the process. DBT shall not be permitted to commence any condemnation action through statutory procedure without the express written consent of KYTC Division of Right-of-Way and Utilities. Consent may be withheld by KYTC at KYTC's sole and absolute discretion.

**5.1.4.2** KYTC's determination of whether to exercise its power of eminent domain shall be subject to KYTC's sole discretion. Grounds for KYTC to decline to exercise eminent domain shall include the following:

- (a) The acquisition would require changes to the environmental documents, including the Environmental Approvals, such as the need for a supplemental environmental assessment;
- (b) The acquisition would require a public hearing regarding environmental impacts;
- (c) KYTC lacks the power of eminent domain to acquire the parcel;
- (d) DBT has not demonstrated that it has exhausted commercially reasonable means to acquire the parcel; or
- (e) DBT has not demonstrated that the parcel is reasonably necessary for the Project.

**5.1.4.3** DBT shall submit a delineation of the DBT ROW sought, as well as a detailed statement (i) explaining why DBT requests KYTC to exercise eminent domain, including the necessity of the parcel for the Project and (ii) providing a detailed

- account of all efforts by DBT to acquire the parcel. KYTC shall have 20 days from receipt of a complete submission from DBT to respond to DBT's request.
- 5.1.4.4** DBT shall be responsible for all costs of DBT ROW acquired by KYTC, including the purchase price, closing costs, severance damages (including cost-to-cure damages), relocation assistance payments (if any) and title insurance premiums, any uneconomic remnants that result from KYTC's acquisition of such real properties, and any other costs in accordance with the Uniform Act and KYTC's Division of Right-of-Way and Utilities Guidance Manual. KYTC shall have the option of invoicing DBT for such costs, or shall deduct such costs from DBT's progress payments until KYTC is fully reimbursed.
- 5.1.4.5** If KYTC elects to exercise its power of eminent domain, DBT shall be responsible for all costs incurred by KYTC associated with the process therewith. KYTC shall have the option of invoicing DBT for such costs, or shall deduct such costs from DBT's progress payments until KYTC is fully reimbursed.
- 5.1.4.6** All DBT ROW acquired using KYTC's power of eminent domain shall be considered to have been acquired by DBT for purposes of DBT's obligations and rights hereunder with respect to the acquired parcels. The fact that KYTC elects to exercise its power of eminent domain shall not alter or otherwise affect DBT's responsibilities, obligations, or rights to relief hereunder for such DBT ROW, including for the costs of the ROW, acquisition costs, Hazardous Materials Management, Differing Site Conditions, the presence of Utilities or the accuracy of Utility Information, other Site conditions, or demolition and clearing of any such ROW.
- 5.1.4.7** DBT shall not be entitled to an increase in the Contract Price, a Completion Deadline adjustment, or any other Claim associated with KYTC's exercise of its power of eminent domain, or KYTC's determination in its sole discretion not to exercise such power of eminent domain.

Except for Additional ROW, DBT's inability to acquire any property outside the Schematic ROW, including where KYTC either declines to exercise eminent domain or is unable to acquire a parcel on DBT's behalf through the exercise of eminent domain, shall not entitle DBT to an increase in the Contract Price, a Completion Deadline adjustment, or any other Claim.

**5.1.5** DBT's Temporary Work Areas

- 5.1.5.1** DBT shall acquire, or cause to be acquired, all of DBT's Temporary Work Areas in its own name. DBT shall comply with all applicable Governmental Approvals and Laws in acquiring, maintaining or disposing of any of DBT's Temporary Work Areas. KYTC will not exercise its power of eminent domain in connection with DBT's acquisition of any such property right or interest for DBT's



- Temporary Work Areas. KYTC will have no obligations or liabilities with respect to the acquisition, maintenance or disposition of DBT's Temporary Work Areas. DBT shall cause the lease, license or other agreement by which DBT acquires a property right or interest in a DBT's Temporary Work Area to contain the granting party's express acknowledgment that KYTC shall have no liability with respect thereto. DBT shall promptly deliver a copy of such documentation to KYTC.
- 5.1.5.2** DBT shall be responsible for and shall pay directly all costs and expenses in connection with acquiring, renting, using, maintaining, insuring, and disposing of DBT's Temporary Work Areas that DBT determines necessary or desirable for its convenience in constructing the Project. DBT shall not be entitled to an increase in the Contract Price, a Completion Deadline adjustment or any other Claim due to such costs and expenses.
- 5.1.6** If KYTC is obligated by Law to take title to a Replacement Utility Property Interest, then it will do so on the condition that the Utility Company concurrently accepts conveyance of title from KYTC to the Utility Company, without warranty or representation by KYTC and with the Utility Company's written indemnification against any third-party liability that may arise out of KYTC's status as title holder.
- 5.1.7** DBT shall not be entitled to an increase in the Contract Price, a Completion Deadline adjustment or any other Claim, as a result of: (a) Site conditions associated with any DBT ROW (including those relating to Hazardous Materials, Differing Site Conditions or Utilities); and (b) any delay, inability or cost associated with the acquisition of DBT's Temporary Work Areas.
- 5.1.8** If at any time, DBT or any DBT-Related Entity directly or indirectly (a) acquires or has previously acquired any interest in real property likely to be parcels of the Schematic ROW or the remainders of any such parcels, (b) loans or has previously loaned money to any interest holder in any real property likely to be a Schematic ROW parcel and accepts as security for such loan the parcel, or the remainder of any such parcel that is not a whole acquisition, or (c) purchases or has previously purchased from an existing mortgagee the mortgage instrument that secures an existing loan against real property likely to be a Schematic ROW parcel, or the remainder of any such parcel, DBT shall promptly disclose the same to KYTC. If DBT, an Equity Member of DBT, or any subsidiary or parent company of the foregoing, acquires a real property interest, whether title or mortgage, in parcels of the Schematic ROW, the real property interest acquired or a release of mortgage as the case may be, shall be conveyed to the Commonwealth of Kentucky without the necessity of eminent domain and without payment to DBT, an Equity Member of DBT, or the subsidiary or parent company of the foregoing. DBT shall not acquire or permit the acquisition by any DBT-Related Entity of any real property interest in a Schematic ROW parcel, whether in fee title or mortgage, for the purpose of

avoiding compliance with the Laws, practices, guidelines, procedures, and methods described in the Contract Documents concerning ROW acquisition.

### **5.1.9** ROW Access

**5.1.9.1** Prior to performing any Work, the DBT shall send notification letters utilizing a template to be provided by KYTC, indicating the date and duration of entry, to any affected property owners no less than forty-eight (48) hours nor more than thirty (30) days prior to the date of entry. The DBT shall forward copies of all notification letters distributed to KYTC. Any subsequent Claims for compensation due to damages incurred during the project development phase shall be negotiated between the DBT and the affected property owners.

**5.1.9.2** The decision to advance a ROW parcel to the construction stage shall not impair the safety or in any way be coercive in the context of 49 CFR 24.102(h) with respect to unacquired or occupied properties on the same or adjacent segments of ROW.

## **5.2** Utility Adjustments

### **5.2.1** DBT's Responsibility

**5.2.1.1** DBT shall coordinate and cause to be completed all Utility Adjustments necessary for the timely construction of the Project in accordance with the Contract Documents. All Utility Adjustment Work performed by DBT or a Utility Company shall comply with the Contract Documents. DBT shall coordinate, monitor, and otherwise undertake the necessary efforts to cause Utility Companies performing Utility Adjustment Work to perform such work in accordance with the Baseline Schedule, in coordination with the Work, and in compliance with the standards of design and construction and other applicable requirements specified in the Contract Documents. However, regardless of the arrangements made with the Utility Company and except as otherwise provided in Article 13, DBT shall continue to be the responsible party to KYTC for timely performance of all Utility Adjustment Work in accordance with the Baseline Schedule.

### **5.2.2** Utility Memoranda of Understanding; Utility Agreements

**5.2.2.1** Unless a Utility Agreement is already in place, the DBT is responsible for preparing, negotiating, and entering into instruction-specific, construction-detailed Utility Agreements with all Utility Owners, regardless of whether the Utility Owners are identified in Exhibit 3 (Technical Provisions) or Reference Information Documents.

**5.2.2.2** KYTC agrees to cooperate, at its own cost, as reasonably requested by DBT in pursuing Utility Agreements, including attendance at negotiation sessions and review of Utility Agreements. DBT shall keep KYTC informed of the status of any such negotiations and shall deliver to KYTC, within ten days after

execution, a true and complete copy of each Utility Agreement entered into by DBT.

- 5.2.2.3** The DBT shall request KYTC review and approval of a Utility Agreement prior to entering into such agreement(s). KYTC shall not be a party to Utility Agreements to which DBT is a party, and DBT shall cause each Utility Agreement to expressly provide that KYTC will have no liability under the Utility Agreement unless and until KYTC receives a written assignment of the DBT's interests in the Utility Agreement and assumes in writing DBT's obligations thereunder; provided, however, that DBT shall cause the Utility Agreements to designate KYTC as an intended third-party beneficiary thereof and to permit assignment of DBT's right, title, and interest thereunder to KYTC without necessity for Utility Company consent. DBT shall not enter into any agreement with a Utility Company that purports to bind KYTC in any way.
- 5.2.2.4** If a Utility Company has proper Prior Rights Documentation in connection with a Utility Adjustment or otherwise claims that it has Prior Rights Documentation concerning real property affected by a Utility Adjustment, then DBT shall follow the process in Exhibit 3 (Technical Provisions). KYTC will enter into a separate Utility Agreement between KYTC and the Utility Company solely for the purpose of acknowledging the Utility Company's Prior Rights Documentation, and shall enter this agreement within 90 days of the date on which KYTC determines that the Utility Company has proper Prior Rights Documentation.
- 5.2.2.5** If DBT has prepared and negotiated an instruction-specific, construction-detailed Utility Agreement with a Utility Company and such Utility Company refuses to enter into the Utility Agreement with DBT but is willing to enter into the Utility Agreement with KYTC, KYTC will enter into the Utility Agreement directly with the Utility Company and delegate its obligations to DBT, in which case DBT shall accept such delegation and assume such obligations.
- 5.2.2.6** DBT shall be solely responsible for the terms and conditions of all Utility Agreements into which it enters or for which it assumes obligations. DBT shall comply with and timely perform all obligations imposed on DBT by any Utility Agreement to which it is a party or which it assumes. DBT shall indemnify and hold harmless KYTC if KYTC incurs any costs whatsoever due to DBT's non-compliance with a Utility Agreement to which DBT is a party or of which DBT assumes obligations.
- 5.2.2.7** DBT shall ensure that the Utility Adjustment Work is completed in accordance with the Contract Documents, regardless of the nature or provisions of the Utility Agreements and regardless of whether DBT or its Subcontractors, or the Utility Company or its contractors, performs the Utility Adjustment Work.
- 5.2.2.8** If a conflict occurs between the terms of a Utility Agreement and those of the Contract Documents, the terms that establish the higher quality, manner or method of performing Utility Adjustment Work, establish better Good Industry

Practice, or use more stringent standards, shall prevail between DBT and KYTC. If the foregoing criteria are not met by the conflicting Utility Agreement or otherwise not relevant to the terms at issue, then the Contract Documents shall prevail, unless expressly provided otherwise in the Contract Documents.

### **5.2.3 Utility Adjustment Requirements**

Each Utility Adjustment (whether performed by DBT or by the Utility Company) shall comply with Exhibit 3 (Technical Provisions) and the KYTC Standard Specifications. All Utility Adjustment Work shall comply with all applicable Laws and the applicable Utility Agreement(s).

### **5.2.4 Real Property Matters**

The DBT shall be responsible for working with each Utility Owner to obtain all necessary replacement property rights. The DBT shall have the following responsibilities for each acquisition:

- A. The DBT shall coordinate with each Utility Owner and provide all project information needed to identify any Utility Owner property interests required, that is not already in place.
- B. If the DBT and/or DBT subcontractors assists a Utility Owner in acquiring a replacement Utility Owner property interest, the DBT shall ensure that the following requirements are met:
  - a. The files and records must be kept separate and apart from all acquisition files and records of DBT ROW.
  - b. The items used in acquisition of replacement Utility Owner property interests (e.g., title and encumbrance reports, plats, legal descriptions, appraisals, written evaluations, and owner contact reports) must be separate from the purchase of DBT ROW.
- C. The DBT shall acquire or cause to be acquired, all replacement Utility Owner property interests required for its Utility Adjustments. No Betterment in terms of property interest shall be paid for using project funds.

### **5.2.5 Utility Adjustment Risk**

**5.2.5.1** Except with respect to DBT's rights to claim a Relief Event for Unknown Utilities, DBT shall not be entitled to an increase in the Contract Price, a Completion Deadline adjustment or any other Claim or Relief Event related to the Utility Adjustment Work, inaccuracy of the Utility Information or Utilities located within or outside the Schematic ROW or otherwise impacted by, or having an impact on, the Project or the Work.

**5.2.5.2** If DBT changes its design or construction after a Utility Adjustment has been commenced or completed, and the change in design or construction results in the need for additional Utility Adjustment Work, DBT shall be responsible for the cost of design and construction of the additional Utility Adjustment Work. DBT shall not be entitled to an increase in the Contract Price, Completion

Deadline adjustment or any other Claim arising from such additional Utility Adjustment Work.

## **5.2.6 FHWA Utility Requirements**

### **5.2.6.1 Unless KYTC advises DBT otherwise:**

- (a) The Project is subject to 23 C.F.R. Part 645 Subpart A (including its requirements as to Plans, specifications, estimates, charges, tracking of costs, credits, billings, records retention, and audit) and FHWA's associated policies;
- (b) Utility Agreements for Utilities shall incorporate by reference 23 C.F.R Part 645 Subparts A and B and assign the obligations arising thereunder;
- (c) DBT shall comply (and shall require the Utility Companies to comply) with 23 C.F.R Part 645 Subparts A and B as necessary for any Utility Adjustment costs to be eligible for reimbursement from any federal financing or funding; and
- (d) To the extent applicable to this agreement, DBT shall comply with the Buy America requirements set forth in 23 U.S.C. 313, 23 CFR 635.410. and Infrastructure Investment and Jobs Act (IIJA), 117-58, including Build America, Buy America Act (BABA) 117-58, Section 70301-52 for the permanent inclusion of articles, materials, or supplies classified as: (1) iron or steel, (2) a manufactured product; or (3) a construction material. DBT is not required to change its existing standards for materials as long as the applicable Buy America requirements are met. Buy America requirements take precedence over regulations pertaining to the accommodation or relocation of the DBT's facilities set forth in 23 CFR 645 and over regulations which allow the Company to furnish materials from company stock set forth in 23 CFR 645.117(e). Company stock materials that do not meet applicable Buy America requirements may not be permanently incorporated into a FAHP funded project. DBT understands and acknowledges that the Agreement may be subject to the requirements of the Buy America law, 23 U.S.C. 313 and applicable regulations, including 23 CFR 635.410, IIJA, BABA, and Federal Highway Administration guidance. The Company must provide certification that all products, permanently incorporated into the project adhere to the Buy America requirements. In lieu of a separate certification, DBT hereby certifies that in the performance of this Agreement, for products where Buy America requirements apply, it shall use only such products for which it has received a certification from its supplier, or provider of construction services that procures the product certifying Buy America compliance. This does not include products for which waivers have been granted under 23 CFR 635.410

or other applicable provisions. Products permanently incorporated into the project shall be company certified via signature and submission of the statement of charges (TC69-008) form. In some circumstances, a waiver of the Buy America requirements may be granted by the FHWA, to be determined on a project-by-project basis.

**5.2.6.2** DBT acknowledges, however, that DBT will not have any share in any reimbursement from FHWA or other federal financing or funding that KYTC may receive on account of Utility Adjustments.

## **ARTICLE 6.**

### **DESIGN AND CONSTRUCTION**

#### **6.1 General Obligations of DBT**

In addition to performing all other requirements of the Contract Documents, DBT shall perform the following obligations.

- 6.1.1** DBT shall furnish all design and other services, provide all materials, equipment and labor (including all legal claims for labor and unemployment compensation contributions), and undertake all efforts necessary or appropriate (excluding only those materials, services, and efforts that the Contract Documents expressly specify will be undertaken by KYTC or other Persons) to design and construct the Project, and maintain the Project during construction, in accordance with the requirements of the Contract Documents so as to achieve Substantial Completion and Final Acceptance by the applicable Completion Deadlines.
- 6.1.2** DBT shall comply with, and require that all Subcontractors and DBT-Related Entities comply with, all requirements of all Laws applicable to the Work.
- 6.1.3** DBT shall cooperate with KYTC, representatives and consultants thereof, Utility Companies, and Governmental Entities with jurisdiction in all matters relating to the Work, including their review, inspection, and oversight of the design and construction of the Project and the design and construction of the Utility Adjustments.
- 6.1.4** DBT shall use commercially reasonable efforts to mitigate delay to design and construction of the Project and mitigate damages due to delay in all circumstances, to the extent possible, including by re-sequencing, reallocating, or redeploying DBT's and its Subcontractors' forces to other work, as appropriate.
- 6.1.5** DBT shall obtain and pay the cost of obtaining and maintaining all Governmental Approvals that are required in connection with the Project and not obtained or maintained by KYTC. DBT shall not be entitled to an increase in the Contract Price, a Completion Deadline adjustment or any other Claim

associated with or arising from DBT's costs or efforts to obtain and maintain all Governmental Approvals that are required for the Project.

**6.1.6** DBT shall be responsible for all costs or payments allocated to DBT in the Contract Documents.

## **6.2 Performance, Design, and Construction Standards; Deviations**

**6.2.1** DBT shall construct the Project and Utility Adjustments included in the Construction Work as designed, free from defects, and using and incorporating materials of good quality. Additionally, DBT shall furnish all aspects of the Design Work, Design Documents, and Construction Work in accordance with: (a) the requirements, terms, and conditions set forth in the Contract Documents; (b) the Baseline Schedule; (c) all Laws; (d) the requirements, terms, and conditions set forth in all Governmental Approvals; (e) the Safety Management Plan; (f) all other applicable safety, environmental, and other requirements, taking into account the Project ROW limits and other constraints affecting the Project; and (g) Good Industry Practice.

**6.2.2** DBT also shall construct the Project and Utility Adjustments in accordance with (a) the KYTC-Approved signed and sealed RFC Plans, and (b) the KYTC-Approved signed and sealed Construction Documents.

**6.2.3** The Project design and construction shall be subject to certification pursuant to the procedure contained in the KYTC-approved Quality Management Plan (QMP).

**6.2.4** DBT may apply for KYTC approval of Deviations from applicable provisions in Exhibit 3 (Technical Provisions) regarding the design or construction of the Project that have no impact on the cost or time to perform the Work. The Deviation approval process shall be as follows:

**6.2.4.1** All applications for Deviations shall be in writing. The writing shall identify the section of Exhibit 3 (Technical Provisions) from which DBT seeks the Deviation, the current language of the section of Exhibit 3 (Technical Provisions), DBT's proposed new language, and other information sufficient for KYTC to evaluate the proposed Deviation.

**6.2.4.2** KYTC will consider, in its sole discretion, but have no obligation to approve, any such application. DBT shall bear the burden of establishing that the Deviation sought constitutes sound and safe engineering consistent with Good Industry Practice, achieves KYTC's applicable safety standards and criteria, and satisfies the purpose or intent of the applicable provision(s) in Exhibit 3 (Technical Provisions).

**6.2.4.3** No Deviation shall be deemed approved or be effective unless and until stated expressly in a writing signed by KYTC's Authorized Representative.

- 6.2.4.4** KYTC's lack of issuance of an approval for any Deviation within ten Working Days after DBT applies therefor shall be deemed a disapproval of such application.
- 6.2.4.5** KYTC's denial or disapproval of a requested Deviation shall be final and not subject to the Dispute Resolution Procedures.
- 6.2.4.6** Except as provided in Section 6.2.6, nothing in the Contract Documents shall be construed as altering, expanding or otherwise affecting the process for acceptance of Deviations in this Section 6.2.4.
- 6.2.4.7** The approval of a Deviation by KYTC shall not relieve DBT of its obligations with respect to any other component of the Contract Documents, and shall not operate as a waiver by KYTC of the right to seek relief from DBT, including by asserting a Claim against DBT, for any failure of DBT's design or construction to comply with any other requirement of the Contract Documents. DBT shall be responsible for ensuring that any Deviation does not affect DBT's ability to comply with any other requirement of the Contract Documents. DBT shall not be entitled to an increase in the Contract Price, a Completion Deadline adjustment, or any other Claim arising out of DBT's inability to comply with any other provision of the Contract Documents due to a KYTC-approved Deviation.
- 6.2.5** DBT shall be responsible for all costs associated with implementation of a Deviation. DBT shall not be entitled to an increase in the Contract Price, Completion Deadline adjustment or any other Claim arising from an approved Deviation.
- 6.2.6** If a proposed Deviation would reduce DBT's cost of performing the Work or result in time savings, DBT shall submit the request as a Change Request in accordance with Section 14.2. KYTC's approval or disapproval of DBT's request shall be in accordance with Section 14.2. Any cost and time savings shall be allocated between KYTC and DBT as provided in Section 14.2.
- 6.2.7** Except as set forth in Section 1.5 or 6.2.4, any changes to Exhibit 3 (Technical Provisions) shall be subject to the Change Order process in accordance with Article 14.

### **6.3 Design Requirements; Responsibility for Design**

#### **6.3.1 Design Implementation and Submittals**

- 6.3.1.1** DBT, through the qualified and licensed design professionals identified in its Proposal shall prepare designs, Plans, and specifications in accordance with the Contract Documents. DBT shall cause the Engineers of Record, as applicable, for the Project to sign and seal all RFC Plans.
- 6.3.1.2** DBT shall deliver to KYTC accurate and complete duplicates of all interim, revised, and final Design Documents (including the RFC Plans), and



Construction Documents within seven days after DBT completes preparation thereof. DBT shall construct the Project in accordance with the approved RFC Plans and the Construction Documents.

### **6.3.2 DBT Responsibility for Design**

DBT agrees that it has full responsibility for the design of the Project and that DBT will furnish the design of the Project, notwithstanding that aspects of the Schematic Design have been provided to DBT as a preliminary basis for DBT's design. DBT specifically acknowledges and agrees that:

- (a) DBT is not entitled to rely on: (i) the Schematic Design except as specified otherwise in Section 6.3.3.2; or (ii) any other documents or information provided by KYTC, except to the extent specifically permitted in the Contract Documents;
- (b) DBT acknowledges that changes to the Schematic Design may require the DBT to be pre-qualified in additional KYTC pre-qualification areas;
- (c) DBT is responsible for correcting any Errors in the Schematic Design through the design or construction process;
- (d) Exhibit 3 (Technical Provisions) takes precedence over the Schematic Design, and that the Schematic Design may contain information that is not consistent with Exhibit 3 (Technical Provisions);
- (e) DBT shall not be entitled to an increase in the Contract Price, a Completion Deadline adjustment, or any other Claim arising from Errors in the Schematic Design or any inconsistencies between Exhibit 3 (Technical Provisions) and the Schematic Design, except only for the right to a Change Order with respect to Necessary Schematic ROW Changes as set forth in Section 13.4.1, and subject to the requirements and limitations of Article 13;
- (f) DBT's warranties and indemnities hereunder cover Errors in the Project even though they may arise from or be related to Errors in the Schematic Design; and
- (g) DBT is responsible for verifying all calculations and quantity takeoffs contained in the RFP plans or otherwise provided by KYTC. DBT shall not be entitled to an increase in the Contract Price, a Completion Deadline adjustment or any other Claim based on an Error in any calculations or quantity takeoffs contained in the RFP Documents or otherwise provided by KYTC.

### **6.3.3 Changes to Schematic Design and Schematic ROW**

- 6.3.3.1** DBT acknowledges and agrees that the requirements and constraints set forth in the Contract Documents and in the Governmental Approvals, as well as Site conditions, will impact DBT's ability to revise the concepts contained in the Schematic Design. DBT, however, may modify the Schematic Design without KYTC's prior written approval if the proposed modification:
- (a) Meets the requirements of Exhibit 3 (Technical Provisions);
  - (b) Requires no revision, modification or amendment to the NEPA Approval;
  - (c) Does not constitute a Design Exception; and
- 6.3.3.2** Does not deviate from the design concepts included in the Proposal. DBT may rely on the Schematic ROW limits, and acknowledges that it is feasible to design and develop the Basic Project Configuration within said Schematic ROW limits.
- 6.3.3.3** DBT acknowledges that the Schematic Design is preliminary and subject to refinement through the Final Design process, and that DBT is not entitled to an increase in the Contract Price, a Completion Deadline adjustment or any other Claim in connection with changes in the Schematic Design.

## **6.4 Cooperation with Other Contractors**

### **6.4.1 DBT Duty of Cooperation**

- 6.4.1.1** DBT acknowledges that KYTC and other Persons have awarded or plan to award contracts for construction and other work at or near the Site, and that other projects at or near the Site may be in various stages of design and construction.
- 6.4.1.2** DBT shall, and shall cause the DBT-Related Entities to, cooperate and coordinate the Work with other contractors, whether the contractors work for KYTC or other Persons, whose projects or work may affect the Project or the Work. DBT shall schedule and sequence the Work as reasonably necessary to accommodate the projects and work of such contractors. Further, DBT shall conduct its Work and perform its obligations under the Contract Documents without interfering with or hindering the progress or completion of the projects or work being performed by other contractors.

## **6.5 Substantial Completion; Punch List; Final Acceptance**

### **6.5.1 Substantial Completion**

- 6.5.1.1** KYTC will issue a written Certificate of Substantial Completion on the date that all the following conditions precedent to Substantial Completion have been met at all locations on the Site:

- (a) All major safety features are installed and functional. For purposes of this Section, major safety features include shoulders, guardrails, striping and delineations, concrete traffic barriers, bridge railings, cable safety systems, metal beam guard fences, safety end treatments, terminal anchor sections, and crash attenuators;
- (b) All required illumination is installed and functional;
- (c) All required signs and signals are installed and functional;
- (d) The need for temporary traffic controls or for Lane Closures at any time has ceased, except for temporary Lane Closures during hours of low traffic volumes;
- (e) All lanes of traffic set forth in the Design Documents are in their final configuration and traffic can move unimpeded through the Project at the normal, posted speed;
- (f) All Non-Conformance Reports (NCRs) have been fully resolved, and DBT has otherwise completed the Work in accordance with the Contract Documents and Design Documents, such that the Project is in a condition that it can be used for safe vehicular travel in all lanes at the normal, posted speed and at all points of entry and exit, subject only to Punch List items;
- (g) DBT has completed the final lift of paving and the final coat of striping;
- (h) All aesthetic and landscaping features for the Project have been completed, and the Plans and designs prepared in accordance therewith, with the exception of the landscaping establishment; and
- (i) All other preconditions to Substantial Completion specified in the Contract Documents and preconditions to project completion in accordance with Section 105.12 of the *KYTC Standard Specifications*, are completed.

**6.5.1.2** The procedures for notification of Substantial Completion are as follows:

- (a) DBT shall provide KYTC with not less than 30 days' prior notification of the date DBT determines it will satisfy all conditions to Substantial Completion (other than issuance by KYTC of a Certificate of Substantial Completion). During such 30-day period, DBT and KYTC will meet and confer and exchange information as needed for KYTC to determine whether DBT will achieve Substantial Completion at the close of the 30-day period.
- (b) During such 30-day period, KYTC will conduct an inspection of the Project and its components, a review of the applicable RFC Plans and

Construction Documents and such other investigation as may be necessary to evaluate whether DBT has achieved Substantial Completion.

- (c) DBT shall provide KYTC a second notification when DBT determines it has satisfied all conditions to Substantial Completion, other than issuance by KYTC of a Certificate of Substantial Completion. Within five days after expiration of the 30-day period and KYTC's receipt of the second notification, KYTC will either: (A) issue the Certificate of Substantial Completion; or (B) notify DBT, setting forth, as applicable, why the Project has not reached Substantial Completion. If KYTC and DBT cannot agree as to the date of Substantial Completion, such dispute shall be resolved according to the Dispute Resolution Procedures.

## **6.5.2** Punch List

The DBT shall develop a Punch List that shall conform to the following provisions.

- 6.5.2.1** The schedule for preparation of the Punch List shall be consistent and coordinated with the inspections to verify that DBT has achieved Substantial Completion.
- 6.5.2.2** DBT shall prepare and maintain the Punch List. DBT shall provide KYTC not less than five days' prior notice of the date when DBT will commence Punch List field inspections and Punch List preparation. KYTC may, but is not obligated to, participate in the development of the Punch List. If KYTC participates in the development of the Punch List, each Party shall have the right to add items to the Punch List, but neither shall remove any item added by the other Party without such other Party's express permission.
- 6.5.2.3** The Punch List shall solely consist of items of Work requiring correction, fine-tuning, or adjustment. The Punch List shall not contain any items of Work that DBT is commencing or performing for the first time, regardless of whether DBT contends that the item of Work does not need to be commenced to achieve the conditions to Substantial Completion. The Punch List shall not contain any Nonconforming Work for which an NCR has been issued.
- 6.5.2.4** DBT shall immediately commence work on the Punch List items and diligently prosecute such work to completion, consistent with the Contract Documents, within 90 days after receipt of the Certificate of Substantial Completion.

## **6.5.3** Final Acceptance

- 6.5.3.1** KYTC will issue a Certificate of Final Acceptance when all of the following conditions have been satisfied:

- (d) KYTC has issued a Certificate of Substantial Completion for the Project;

- (e) All Punch List items have been completed and delivered to the reasonable satisfaction of KYTC;
- (f) KYTC has received and approved a complete set of product warranties, product maintenance instructions, Record Drawings, As-Built Documents, and the As-Built Schedule;
- (g) All Utility Adjustment Work and other Work that DBT is obligated to perform for or on behalf of third parties with respect to the Project has been accepted by such third parties and DBT has paid for all work by third parties that DBT is obligated to pay for, other than disputed amounts and amounts owed to Utility Owners that have not yet been invoiced to DBT, provided that DBT has made diligent efforts to obtain invoices therefor;
- (h) All Submittals required by the Contract Documents to be submitted to and approved by KYTC prior to Final Acceptance have been submitted to and approved by KYTC, in the form and with the content required by Contract Documents;
- (i) All personnel, supplies, equipment, waste materials, rubbish, and temporary facilities of each DBT-Related Entity have been removed from the Project ROW, DBT has restored and repaired all damage or injury arising from such removal to the satisfaction of KYTC, and the Site is in good working order and condition;
- (j) DBT has delivered to KYTC a certification representing that there are no outstanding Claims (for purposes of this certification, the term "Claim" shall include all facts which may give rise to a Claim) of DBT or Claims or stop notices of any Subcontractor, Supplier, laborer, Utility Company or other Persons with respect to the Work, other than:
  - i. Any previously submitted unresolved Claims of DBT and any Claims or stop notices of a Subcontractor, Supplier, laborer, Utility Company or other Persons being contested by DBT (in which case the certification shall include a list of all such matters with such detail as is requested by KYTC and, with respect to all Claims or stop notices of a Subcontractor, Supplier, laborer, Utility Company, and other Person, shall include a representation by DBT that it is diligently and in good faith contesting such matters by appropriate legal proceedings that shall operate to prevent the enforcement or collection of the same); and
  - ii. Amounts owed to Utility Companies that have not yet been invoiced to DBT, provided that DBT has made diligent efforts to obtain invoices therefor;
- (k) DBT has paid in full all Liquidated Damages that are owing to KYTC pursuant to this Agreement and are not the subject of a Dispute, and

has provided to KYTC security for the full amount of Liquidated Damages that may then be the subject of an unresolved Dispute;

- (l) There exist no uncured DBT Defaults other than those that would be cured by the achievement of Final Acceptance;
- (m) KYTC has received from DBT and accepted all DBE-related Submittals;
- (n) KYTC has received from DBT and accepted all final documentation for the Project, including, if applicable, Good Faith Effort documentation; and
- (o) All of DBT's other obligations under the Contract Documents (other than obligations that by their nature are required to be performed after Final Acceptance) and obligations of Formal Acceptance, in accordance with Section 105.12 of the *Standard Specifications*, have been satisfied in full or waived by KYTC.

**6.5.3.2** DBT shall provide KYTC with 30 days' notice of the date when DBT expects to satisfy all conditions to Final Acceptance other than issuance by KYTC of a Certificate of Final Acceptance. During the 30-day period following receipt of such notification, DBT and KYTC will meet and confer and exchange information as necessary to determine whether DBT will satisfy the conditions to Final Acceptance at the close of the 30-day period.

**6.5.3.3** During such 30-day period, KYTC will conduct an inspection of the Punch List items to the extent not previously completed, a review of the Record Drawings, and such other investigation as may be necessary to evaluate whether DBT has satisfied the conditions to Final Acceptance.

**6.5.3.4** Within five days after expiration of such 30-day period, KYTC will either: (i) issue a Certificate of Final Acceptance for the Project; or (ii) notify DBT setting forth, as applicable, why Final Acceptance has not been achieved. If KYTC and DBT cannot agree as to the date of Final Acceptance, such issue shall be a Dispute eligible for resolution according to the Dispute Resolution Procedures.

## **6.6 Nonconforming and Defective Work**

**6.6.1** If Nonconforming Work is discovered, KYTC will have the right, exercisable in its sole discretion, to direct DBT, at DBT's sole cost and without the right to an increase in the Contract Price, a Completion Deadline adjustment or a Claim of any kind, to rectify the Nonconforming Work so that it complies with the Contract Documents. For the avoidance of doubt, KYTC's sole discretion applies to its decision whether to require rectification of Nonconforming Work; whether Nonconforming Work has occurred is not a matter within KYTC's sole discretion.

- 6.6.2** If, at DBT's request, KYTC elects to accept Nonconforming Work, KYTC may recover from DBT 100% of the cost savings, if any, of DBT associated with its failure to perform the Work in accordance with requirements of the Contract Documents (in addition to any other adjustment of the Contract Price), plus the amount of any increase in costs KYTC will incur to operate and maintain the Project after Substantial Completion that is attributable to the Nonconforming Work. In determining DBT's cost savings, the Parties shall take into account all avoided costs of DBT, including avoided design, material, equipment, labor, construction, testing, commissioning, acceptance and overhead costs, and avoided costs due to time savings. KYTC will have the right to deduct such cost savings from any sums owed by KYTC to DBT pursuant to this Agreement.
- 6.6.3** Nothing contained in the Contract Documents shall in any way limit the right of KYTC to assert claims for damages resulting from patent or latent defects in the Work for the period of limitations prescribed by applicable Law, and the foregoing shall be in addition to any other rights or remedies KYTC may have hereunder or under Law.

## **6.7 Hazardous Materials Management**

- 6.7.1** Without limiting KYTC's role or responsibilities set forth in Sections 5.1, 6.7.2, and 13.4.7, and except as provided otherwise below, DBT shall undertake Hazardous Materials Management of all Hazardous Materials and Recognized Environmental Conditions, including contaminated groundwater, in accordance with applicable Law, Governmental Approvals, the Hazardous Materials Management Plan, and all applicable provisions of the Contract Documents.
- 6.7.2** DBT shall have the following duties to avoid or mitigate adverse financial and schedule impacts of Hazardous Materials and Recognized Environmental Conditions:
- 6.7.2.1** DBT shall adopt design and construction techniques for the Project that avoid the need for Hazardous Materials Management.
- 6.7.2.2** If, having met its obligation under Section 6.5, DBT is unable to avoid Hazardous Materials or Recognized Environmental Conditions, DBT shall incorporate design modifications and construction techniques to minimize costs of Hazardous Materials Management, including minimization of KYTC's long-term costs for Hazardous Materials Management.
- 6.7.2.3** Where Hazardous Materials Management is unavoidable or is required by applicable Law, DBT shall utilize appropriately trained and licensed personnel to conduct the Hazardous Materials Management activities.
- 6.7.3** If DBT encounters Hazardous Materials or Recognized Environmental Conditions in connection with the Project, the Site or Work, in an amount, type, quality or location that would require reporting or notification to any Governmental Entity or other Person or taking any preventive or remedial

action, in each case under applicable Law, Governmental Approvals, the Hazardous Materials Management Plan or any applicable provision of the Contract Documents, DBT shall promptly notify KYTC in writing and advise KYTC of any obligation to notify Commonwealth or Federal agencies under applicable Law. If KYTC discovers Hazardous Materials or Recognized Environmental Conditions in connection with the Project, the Site or the Work, KYTC will promptly notify DBT in writing of such fact.

**6.7.4** The rights of KYTC to step in and carry out the Hazardous Materials Management obligations of DBT are as set forth in Sections 6.7.4.1 and 6.7.4.2.

**6.7.4.1** If, within a reasonable time after discovery of Hazardous Materials or Recognized Environmental Conditions, taking into consideration the nature and extent of the contamination, the type and extent of action required, and the potential impact upon DBT's schedule to perform the Work, DBT has not undertaken the Hazardous Materials Management required of it under Section 6.7.1, KYTC may provide DBT with written notice that KYTC will undertake the Hazardous Materials Management itself. KYTC thereafter may undertake the Hazardous Materials Management actions it deems necessary and appropriate. Without limiting KYTC's role or responsibilities set forth in Section 6.7.6, DBT shall reimburse to KYTC on a current basis within ten days of request therefor, the reasonable costs, including KYTC's Recoverable Costs, that KYTC incurs in carrying out such Hazardous Materials Management actions. KYTC will have no liability or responsibility to DBT arising out of KYTC's Hazardous Materials Management actions and such actions shall in no event constitute the basis of a Relief Event or other Claim, or otherwise entitle DBT to an increase in the Contract Price or adjustment of a Completion Deadline.

**6.7.4.2** Notwithstanding Section 6.7.4.1, if DBT notifies KYTC that DBT desires to preserve claims against other potentially responsible parties, then KYTC will undertake all commercially reasonable efforts to preserve such claims consistent with either the National Oil and Hazardous Substances Pollution Contingency Plan, 40 C.F.R § 300, or comparable Commonwealth regulations and standards.

**6.7.5** Section 13.1.11 addresses DBT's rights to adjustments to the Contract Price and Completion Deadlines with respect to Hazardous Materials.

**6.7.6** Off-site disposal of Hazardous Materials is subject to the provisions of Sections 6.7.6.1.

**6.7.6.1** To the extent permitted by applicable Law, as between KYTC and DBT, KYTC will take and assume sole responsibility and liability for third party claims, causes of action, and Losses arising out of or resulting from the off-site disposal of Hazardous Materials for which KYTC is the generator pursuant to this



Section 6.7.6, specifically excluding liability for off-site disposal that KYTC elects to have a responsible party assume as provided in Section 6.7.6.1.

**6.7.7** KYTC has exclusive decision-making authority regarding selection of the destination facility to which Hazardous Materials will be transported whenever it acts as generator or arranger. The foregoing shall not preclude or limit any rights or remedies that KYTC may have against DBT-Related Entities, Governmental Entities or other third parties, including prior owners, lessees, licensees, and occupants of any parcel of land that is or becomes part of the Project ROW.

**6.7.8** As between DBT and KYTC, DBT shall be considered the sole generator and arranger and shall sign manifests for: (a) each DBT Release of Hazardous Materials; (b) Hazardous Materials that migrate from points of origin located outside the boundaries of the Project ROW where the source of such Hazardous Materials is a DBT-Related Entity in the course of performing Work; (c) Hazardous Materials that DBT handles and disposes of negligently; (d) Hazardous Materials for which DBT is or becomes a generator under applicable Law or Governmental Approvals; and (e) Hazardous Materials present in or on DBT ROW. The foregoing shall not preclude or limit any rights or remedies that DBT may have against any Governmental Entity or any other third parties, including existing or prior owners, lessees, licensees, and occupants of any parcel of land that is or becomes part of the Project ROW, excluding, however, the Commonwealth, KYTC, and their respective agents. To the extent permitted by applicable Law, DBT shall indemnify, save, protect, and defend KYTC from Claims, demands, causes of action, and Losses arising out of or resulting from the off-site disposal of such Hazardous Materials for which DBT is considered the generator or arranger pursuant to this Section 6.8. The foregoing indemnity shall survive the expiration or termination of this Agreement.

**6.7.9** In the event that DBT has a good faith and bona fide claim against a third party arising from Releases of Hazardous Materials by such third party who is not a DBT-Related Entity, KYTC may, in its sole discretion, and upon receipt of a written request from DBT, assign and subrogate its rights of recovery to DBT, as such may exist.

## **6.8 Title**

DBT 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 KYTC for the operation, maintenance or repair thereof, free and clear of all Liens. Title to all of such materials, equipment, tools, and supplies that are delivered to the Site shall pass to KYTC, free and clear of all Liens, upon the sooner of: (a) incorporation into the Project, or (b) payment by KYTC to DBT of invoiced amounts pertaining thereto. Notwithstanding any such passage of title, DBT shall retain sole care, custody, and control of such materials,

equipment, tools, and supplies and shall exercise due care with respect thereto until Substantial Completion or, with respect to such materials, equipment, tools, and supplies that are necessary for DBT to satisfy its obligations under the Agreement, until such obligations are satisfied or until DBT is terminated pursuant to Articles 17 or 22 in the Agreement.

## **6.9 Site Security**

Commencing upon issuance of the NTP, DBT shall provide appropriate security for the Site, and shall take all reasonable precautions and provide protection to prevent damage, injury, or Loss to the Work and materials and equipment to be incorporated therein, as well as all other property at or on the Site, whether owned by DBT, KYTC, or any other Person.

## **6.10 Maintenance During Construction**

**6.10.1** Commencing upon issuance of the NTP and continuing thereafter during the Work, DBT shall be responsible for (a) maintenance of the existing facilities throughout the Project ROW, and (b) maintenance of all improvements DBT constructs for the Project, in accordance with the *Standard Specifications*.

## **6.11 Clayton Act Assignment**

DBT shall assign to KYTC all right, title, and interest in and to all claims and causes of action it may have under Section 4 of the Clayton Antitrust Act (15 U.S.C. Sec. 15), arising from purchases of goods, services or materials pursuant to the Contract Documents or any Subcontract. This assignment shall become automatically effective when KYTC tenders Final Payment to DBT, without further documentation or acknowledgment by the Parties.

**ARTICLE 7.**  
**TIME; NOTICE TO PROCEED; BASELINE SCHEDULE AND PROGRESS**

**7.1 Time of Essence**

Time is of the essence in this Agreement. DBT shall develop the Project in accordance with the time periods set forth in this Agreement. Except where this Agreement expressly provides for an extension of time, the time limitations set forth in the Contract Documents for KYTC's and DBT's performance of its covenants, conditions, and obligations are of the essence. DBT waives any right at law or in equity to tender or complete performance beyond the applicable time period, or to require KYTC to accept such performance; provided, however, that if DBT does not complete performance within the applicable time period, DBT shall remain responsible for completing the Project subject to KYTC's right to exercise any remedies available to it, including termination of this Agreement.

**7.2 Notice to Proceed**

KYTC shall issue a Notice to Proceed within 30 days from Project Award and KYTC's determination that the following requirements have been complied with:

- (a) Submission of the Contract Bonds described in Article 9;
- (b) Satisfactory evidence of required liability insurance has been provided in accordance with Article 10;
- (c) Satisfactory evidence of compliance with Section 102.15 of KYTC Standard Specifications;
- (d) Submission of a completed EEO-1: Employer Information Report (Standard Form 100) with the KYTC Division of Construction Procurement, unless such completed form has been previously filed with the Finance and Administration - Cabinet Office of EEO and Contract Compliance.

**7.3 Completion Deadlines**

**7.3.1 Substantial Completion Deadline**

DBT shall achieve Substantial Completion of the Project not later than the Substantial Completion Deadline.

**7.3.2 Final Acceptance Deadline**

DBT shall achieve Final Acceptance of the Project no later than the Final Acceptance Deadline.

**7.3.3 No Completion Deadline Adjustment**

Except as otherwise specifically provided in Articles 13 and 14, KYTC will have no obligation to adjust a Completion Deadline and DBT shall not be relieved of its obligation to comply with the Baseline Schedule and to achieve Substantial Completion and Final Acceptance of the Project by the applicable Completion Deadlines for any reason.

## **7.4 Scheduling of Design, Construction, and Payment**

### **7.4.1 Baseline Schedule**

DBT shall undertake and complete the Work in accordance with the Baseline Schedule prepared. The Parties shall use the Baseline Schedule for planning and monitoring the progress of the Work and as the basis for determining the amount of monthly progress payments to be made to DBT.

### **7.4.2 Float**

All Float contained in the Baseline Schedule, as shown in the Preliminary Baseline Schedule or as generated thereafter, shall be a shared, jointly owned Project resource available to either Party or both Parties as needed to absorb delay caused by Relief Events or any other event. All Float and corresponding Controlling Work Items shall be shown as such in the Baseline Schedule on each affected schedule path. KYTC will have the right to examine the identification of (or failure to identify) Float and Controlling Work Items on the Baseline Schedule in determining whether to approve the Baseline Schedule. Once identified, DBT shall monitor, account for, and maintain Float in accordance with Critical Path methodology. DBT shall submit a Time Impact Analysis within 10 days of the day on which Float is 75% consumed.

### **7.4.3 Progress Payment Scheduling**

The Baseline Schedule shall provide for payment of the Contract Price to be made solely on the basis of progress by DBT.

## **7.5 Recovery Schedule**

**7.5.1** Except as otherwise provided in Article 13, all costs incurred by DBT in preparing, implementing, and achieving the Recovery Schedule shall be borne by DBT and DBT shall not be entitled to an increase in the Contract Price, a Completion Deadline adjustment or any other Claim as a result thereof.

**ARTICLE 8.**  
**SUBCONTRACTING AND LABOR PRACTICES**

**8.1 Non-Discrimination; Equal Employment Opportunity (EEO)**

- 8.1.1** DBT shall not, and shall cause the DBT-Related Entities not to, discriminate on the basis of race, age (forty years or over), color, religion, disability, veteran status, national origin or sex in the performance of the Work under the Contract Documents in accordance with the Kentucky Equal Employment Opportunity Act (KRS 45.560 – 45.640).
- 8.1.2** DBT shall comply, and shall cause the DBT-Related Entities to comply, with all applicable Commonwealth and Federal civil rights laws. DBT and the DBT-Related Entities will not discriminate against any employee or applicant for employment because of race, age, color, religion, sex or national origin. DBT will take affirmative action to ensure that applicants are employed and that employees are treated during employment without regard to their race, age, color, religion, sex or national origin. Such action shall include, but is not limited to, the following: employment, upgrading, demotion or transfer, recruitment or recruitment advertising, layoff or termination, rates of pay or other forms of compensation, and selection for training, including apprenticeship. DBT shall post in conspicuous places, available to employees and applicants for employment, notices setting forth the provisions of this non-discrimination clause.
- 8.1.3** DBT shall include Sections 8.1.1, and 8.1.2 in every Subcontract with a cost of more than \$500,000.00. DBT shall additionally require that all Subcontractors include Sections 8.1.1 and 8.1.2 in each further Subcontract (with appropriate changes in the names of the parties), so that such provisions will be binding upon each and every entity that performs any Work on the Project. Notwithstanding the foregoing requirements, DBT, each Subcontractor and every further subcontractor thereof, shall be responsible for compliance with all applicable Laws concerning non-discrimination and equal employment opportunity.
- 8.1.4** DBT and DBT Related Entities shall ensure that it has complied with the EEO requirements in this Contract Documents, and such compliance has been certified or re-certified by the Finance and Administration Cabinet – Office of EEO and Contract Compliance at one (1) year intervals.
- 8.1.5** KYTC will notify the Finance and Administration Cabinet - Office of EEO and Contract Compliance about any Change Order that increases the value of a contract above \$500,000. At a minimum, this notice shall include the Agreement number, Contract Price and contact information for the DBT. The Office of EEO and Contract Compliance may contact the DBT for required information.

- 8.1.6** KYTC and the Finance and Administration Cabinet will coordinate on any purported non-compliance by the DBT or DBT Related Entities with this Section 8.1, and determine the appropriate course of action for such non-compliance.
- 8.1.7** In addition, failure by the DBT to carry out these requirements is a material breach of this Agreement with the Cabinet, which may result in the termination of the Agreement or such other remedy as the Cabinet deems necessary.
- 8.1.8** The requirements of 41 CFR Part 60 shall apply to this Contract and the DBT shall submit EEO Certification with its Proposal. Additional requirements are found in Exhibit 6.

## **8.2 Disadvantaged Business Enterprises (DBE) Requirements**

- 8.2.1** It is the policy of the Kentucky Transportation Cabinet (“the Cabinet”) that Disadvantaged Business Enterprises (“DBE”) shall have the opportunity to participate in the development and performance of highway construction projects financed in whole or in part by Federal Funds in order to create a level playing field for all businesses who wish to contract with the Cabinet. To that end, the Cabinet will comply with the regulations found in 49 CFR Part 26, and the definitions and requirements contained therein shall be adopted as if set out verbatim herein.
- 8.2.2** DBT shall exercise all necessary and reasonable steps to ensure that DBEs participate in at least 9% percent of the Agreement as set forth as goals for this Agreement.
- 8.2.3** KYTC strongly encourages DBT to use additional DBEs above the DBE Goals in an effort to help KYTC meet its overall DBE Goals and help KYTC meet the maximum feasible portion of its DBE Goals through race neutral means as outlined in 49 CFR Part 26.
- 8.2.4** KYTC specifically encourages DBT to use the services of banks owned and controlled by minorities and women.
- 8.2.5** DBT shall designate a liaison officer responsible for effectively administering and promoting an active program for utilization of DBEs.
- 8.2.6** KYTC’s requirements for DBE participation are provided in Exhibit 6 and Exhibit 7-2.

## **8.3 Subcontracts**

- 8.3.1** DBT shall retain or cause to be retained only Subcontractors who are qualified, experienced, and capable in the performance of the portion of the Work assigned. DBT shall ensure that each Subcontractor has at the time of execution of the corresponding Subcontract, and maintains at all times during

performance of the assigned Work, all licenses required by applicable Laws, and all insurance required by the Contract Documents.

**8.3.2** The retention of Subcontractors by DBT will not relieve DBT of its responsibility hereunder or for the quality of the Work or materials provided by it. DBT shall supervise and be fully responsible to KYTC for the acts, omissions, negligence, intentional misconduct, or breach of applicable Law, contract or Governmental Approval by any DBT-Related Entity or by any member or employee of DBT or any DBT-Related Entity, as though DBT directly employed all such individuals. No Subcontract entered into by DBT will impose any obligation or liability upon KYTC to any such Subcontractor or any of its employees. Nothing in this Agreement creates any contractual relationship between KYTC and any Subcontractor.

**8.3.3** The following requirements shall apply to Subcontracts.

**8.3.3.1** DBT shall, prior to soliciting any bids for performance of work or labor or rendering of services relating to the design or construction of the Project or for special fabrication and installation of a portion of the Work, submit to KYTC for its review and comment a procedure for the conduct of the bidding process applicable to Subcontracts. DBT may use procedures set forth in the KYTC Standard Specifications or may submit alternative procedures to KYTC for approval in KYTC's sole discretion. DBT shall not enter into any Subcontract, except in accordance with the foregoing procedure. Notwithstanding the foregoing, this Section 8.3.3.1 shall not apply to any Subcontracts entered during the first sixty days following the Effective Date.

**8.3.3.2** As soon as DBT identifies a potential Subcontractor for a potential Subcontract, but in no event later than five days after executing the Subcontract, DBT shall provide in writing to KYTC the Subcontractor's name, address, phone number and license number, the name of the Subcontractor's authorized representative, and a description of work to be performed by such Subcontractor.

**8.3.3.3** Within each executed Subcontract, DBT shall clearly and expressly identify where each of the requirements set forth in Section 8.3.3 are located.

**8.3.4** Each Subcontract shall:

- (a) Set forth a standard of professional responsibility or a standard for commercial practice equal to the requirements of the Contract Documents and Good Industry Practice for work of similar scope and scale and shall set forth effective procedures for Claims and Change Orders;
- (b) Require the Subcontractor to carry out its scope of work in accordance with the Contract Documents, the Governmental Approvals, and applicable Law;

- (c) Expressly include Form FHWA-1273 and expressly include the general wage decisions applicable to the Project and set forth in Attachment 3-a to Exhibit 6 (Federal Prevailing Wage Rates), except to the extent provided otherwise in Part I, General, of Form FHWA-1273;
- (d) Provide that KYTC is a third-party beneficiary of the Subcontract with the right to enforce all terms of the Subcontract for its own benefit;
- (e) Without cost to DBT or KYTC, expressly permit assignment to KYTC or its successor, assign or designee of all DBT's rights under the Subcontract, contingent only upon delivery of request from KYTC following termination of this Agreement, allowing KYTC or its successor, assign or designee to assume the benefit of DBT's rights, with liability only for those remaining obligations of DBT accruing after the date of assumption, such assignment to include the benefit of all Subcontractor warranties, indemnities, guarantees, and professional responsibility;
- (f) Expressly state that any acceptance of assignment of the Subcontract to KYTC or its successor, assign or designee shall not operate to make the successor, assignee or designee responsible or liable for any breach of the Subcontract by DBT or for any amounts due and owing under the Subcontract for work or services rendered prior to assumption (but without restriction on the Subcontractor's rights to suspend work or demobilize due to DBT's breach);
- (g) Expressly include a covenant to recognize and attorn to KYTC upon receipt of notice from KYTC that it has exercised its rights under this Agreement, without necessity for consent or approval from DBT or to determine whether KYTC validly exercised its rights, and DBT's covenant to waive and release any claim or cause of action against the Subcontractor arising out of or relating to its recognition and attornment in reliance on any such notice;
- (h) Not be assignable by the Subcontractor to any Person other than KYTC (or its successor, assignee or designee) without DBT's prior consent;
- (i) Expressly require that the Subcontractor will: (1) maintain usual and customary Books and Records for the type and scope of business operations in which it is engaged (e.g., constructor, equipment Supplier, designer, service provider) and maintain records for disputed work in compliance with Section 21; (2) permit audit of Books and Records with respect to the Project or Work by each of DBT and KYTC pursuant to Section 21.5; and (3) provide progress reports to DBT appropriate for the type of work it is performing sufficient to enable DBT to provide the reports it is required to furnish KYTC under this Agreement;



- (j) Include the right of DBT to terminate the Subcontract in whole or in part upon any Termination for Convenience of this Agreement without liability of DBT or KYTC for the Subcontractor's lost profits, business opportunity or other consequential damages;
- (k) Expressly require the Subcontractor to participate in meetings between DBT and KYTC, upon KYTC's request, concerning matters pertaining to such Subcontract or the work thereunder, provided that all direction to such Subcontractor shall be provided by DBT, and provided further that nothing in this clause (k) shall limit the authority of KYTC to give such direction or take such action which, in its sole opinion, is necessary to remove an immediate and present threat to the safety of life or property;
- (l) Include an agreement by the Subcontractor to give evidence in any dispute resolution proceeding pursuant to Article 21, if such participation is requested by either KYTC or DBT;
- (m) Expressly include Sections 7.1.1 and 8.1.2 (with appropriate changes in the names of the parties);
- (n) Expressly include in every Subcontract (including purchase orders and in every Subcontract of any DBT-Related Entity for the Work), provisions to effectuate the DBE requirements and require that they be included in all Subcontracts at lower tiers, so that such provisions will be binding upon each Subcontractor. All Subcontracts of any tier, including those with DBE firms, and all contracts with Suppliers, shall require compliance with 49 C.F.R Part 26 and include the KYTC DBE requirements (Exhibit 6);
- (o) Expressly include in every Subcontract for Construction Work (including purchase orders and in every Subcontract of any DBT-Related Entity for Construction Work), and require that they be included in all Subcontracts at lower tiers, so that such provisions will be binding upon each such Subcontractor. All Subcontracts for Construction Work of any tier shall require compliance with the provisions of Form FHWA-1273, 23 U.S.C § 140(a), and 23 C.F.R § 230.111. The requirements of this subparagraph (p) shall not apply to Subcontracts at any tier with KYTC or Governmental Entities;
- (p) Expressly require the Subcontractor to make payments to its lower tier Subcontractors, and be liable for interest payments to such Subcontractors, as set forth in Sections 12.5.1 and 12.5.2, respectively;
- (q) Contain no waiver of the prompt payment protections for the Subcontractor provided under Section 12.5;

- (r) Expressly provide that all claims and charges of the Subcontractor and its Subcontractors at any tier shall not attach to any interest of KYTC in the Project or the Project ROW;
- (s) Expressly include a covenant, expressly stated to survive termination of the Subcontract, to promptly execute and deliver to KYTC a new contract between the Subcontractor and KYTC on the same terms and conditions as the Subcontract, in the event: (1) the Subcontract is rejected by DBT in bankruptcy or otherwise wrongfully terminated by DBT; or (2) KYTC delivers a request for such new contract following termination or expiration of this Agreement; and
- (t) Be consistent in all other respects with the terms and conditions of the Contract Documents to the extent such terms and conditions are applicable to the scope of work of a Subcontractor, and include all provisions required by this Agreement.

**8.3.5** DBT shall not amend any Subcontract with respect to any of the foregoing matters without the prior consent of KYTC.

**8.3.6** DBT shall not enter into any Subcontracts with any Person then debarred or suspended from submitting bids by any agency of the Commonwealth or the U.S. federal government.

#### **8.4 Responsibility for DBT-Related Entities**

DBT shall supervise and be responsible for the acts, omissions, negligence, intentional misconduct, or breach of applicable Law, contract or Governmental Approval by any DBT-Related Entity, as though DBT directly employed all such Persons.

#### **8.5 Key Personnel**

##### **8.5.1 Availability of Key Personnel**

**8.5.1.1** DBT represents, warrants, and covenants that all Key Personnel are available for and will perform the roles identified for them in Exhibit 3 (Technical Provisions). DBT shall not replace or permit replacement of any individual filling a Key Personnel position without KYTC's prior written approval.

**8.5.1.2** DBT shall cause the individuals filling Key Personnel positions to maintain active involvement in the prosecution and performance of the Work sufficient for satisfactory performance of the tasks to be performed by such Key Personnel.

#### **8.6 Labor Standards**

**8.6.1** DBT shall at all times comply, and require by Subcontract that all Subcontractors and Suppliers comply, with all applicable Federal and

Commonwealth labor, occupational safety, and health standards, rules, regulations, and Federal and Commonwealth orders.

- 8.6.2** All individuals performing Work shall have the skill and experience and any licenses required to perform the Work assigned to them.
- 8.6.3** If any individual employed by DBT or any Subcontractor is not performing the Work in a proper, safe, and skillful manner, or fails to perform effectively, then DBT shall, or shall cause such Subcontractor to, remove such individual and such individual shall not be re-employed on the Work. If, after notice from KYTC and reasonable opportunity to cure, such individual is not removed or if DBT fails to ensure that skilled and experienced personnel are furnished for the proper performance of the Work, then KYTC may (i) require DBT or the Subcontractor to remove such individual or replace such individual with properly skilled personnel or (ii) suspend the affected portion of the Work by delivery of notice of such suspension to DBT. Such suspension by KYTC (ii) shall be considered a suspension for cause and shall in no way relieve DBT of any obligation contained in the Contract Documents or entitle DBT to an increase in the Contract Price, a Completion Deadline adjustment or any other Claim hereunder.

## **8.7 Prevailing Wages**

- 8.7.1** DBT shall pay or cause to be paid to all applicable workers employed by it or its Subcontractors to perform the Work not less than the prevailing rates of wages, as provided in the statutes and regulations applicable to public works contracts, including the Davis-Bacon Act of 1931, and as provided in Attachment 3-a to Exhibit 6 (“Federal Prevailing Wages Rates”). DBT shall comply and cause its Subcontractors to comply with all Laws pertaining to prevailing wages. For the purpose of applying such Laws, the Project shall be treated as a public work paid for in whole or in part with public funds (regardless of whether public funds are actually used to pay for the Project). The foregoing shall not apply to Subcontracts at any tier with KYTC or Governmental Entities.
- 8.7.2** It is DBT’s sole responsibility to determine the wage rates required to be paid. If rates of wages and benefits applicable to the Project change from those provided in Attachment 3-b to Exhibit 6, DBT shall bear the cost of such changes and shall not be entitled to an increase in the Contract Price or a Completion Deadline adjustment, and shall have no other Claim against KYTC on account of such changes. Without limiting the foregoing, no Claim will be allowed that is based upon DBT’s lack of knowledge or a misunderstanding of any such requirements or DBT’s failure to include in the Contract Price adequate increases in such wages from those in Attachment 3-b to Exhibit 6. The provision of wage rates in Attachment 3-b to Exhibit 6 shall not be impact or abrogate DBT’s responsibility to pay the Federal Prevailing Wage Rates applicable to the Project.

- 8.7.3** DBT shall comply and cause its Subcontractors to comply with all Laws regarding notice and posting of intent to pay prevailing wages, of prevailing wage requirements, and of prevailing wage rates.

**ARTICLE 9.**  
**PERFORMANCE AND PAYMENT BONDS; GUARANTEES**

**9.1 Provision of Bonds**

DBT shall provide to KYTC Performance and Payment Bonds in accordance with KYTC Standard Specifications 103.05.

**ARTICLE 10.**  
**INSURANCE; RISK OF LOSS; CLAIMS AGAINST THIRD PARTIES**

**10.1 General Insurance Requirements**

DBT shall procure and keep in effect or cause to be procured and keep in effect the insurance policies in accordance with Section 107.18 of the KYTC Standard Specifications.

**ARTICLE 11.**  
**ASSIGNMENT OF WARRANTIES**

**11.1 Warranties**

- 11.1.1** DBT shall acquire and maintain all warranties described in the KYTC Standard Specifications. DBT shall assign, and cause all Subcontractors to assign, any warranties received or otherwise acquired in connection with the installation of any products or materials incorporated into the Project.
- 11.1.2** The foregoing requirement shall not apply to standard, pre-specified manufacturer warranties of mass-marketed materials, products (including software products), equipment or supplies where the warranty cannot be extended to KYTC using commercially reasonable efforts. In such case, DBT shall prosecute any remedies available under such warranties for as long as such warranties may be valid, including if after Final Acceptance. Upon notice from KYTC, DBT agrees to pursue any necessary remedies under such warranties to cause the correction of any defects in the warranted materials or products until such time as the applicable warranty expires.

**ARTICLE 12.**  
**PAYMENT FOR SERVICES**

**12.1 Contract Price**

**12.1.1 Contract Price Amount**

- (a) As full compensation for the Work and all related obligations to be performed by DBT under the Contract Documents, KYTC will pay to DBT the lump sum "Contract Price." The Contract Price as used herein shall mean the lump sum amount of \$[\*\*\*\*], subject to adjustment from time to time to account for adjustments in Change Orders, which shall only be paid based on the actual invoiced value of work. Except as provided in this Section 12.1.1, the Contract Price shall be increased for payment of Extra Work Costs, or decreased, only by a Change Order issued in accordance with Articles 13 or 14. DBT shall not be entitled to any other payments or compensation from KYTC in connection with the Project except as provided for as an increase to the Contract Price by Change Order. The Contract Price shall be paid in accordance with Sections 12.2 and 12.4.

**12.1.2 Items Included in Contract Price**

**12.1.2.1** DBT acknowledges and agrees that, subject only to DBT's rights under Article 13, the Contract Price includes:

- (a) All designs, equipment, materials, labor, insurance and bond premiums, home office, jobsite and other overhead, profit and services relating to DBT's performance of its obligations under the Contract Documents (including all Work, equipment, materials, labor, and services provided by Subcontractors and Intellectual Property rights necessary to perform the Work);
- (b) Performance of each and every portion of the Work;
- (c) The cost of obtaining all Governmental Approvals (except those previously obtained by KYTC) related to the Work;
- (d) All costs of compliance with and maintenance of the Governmental Approvals and compliance with Laws related to the Work, except to the extent compliance with or maintenance of Governmental Approvals is the responsibility of Utility Companies;
- (e) Payment of any taxes, duties, permit, and other fees or royalties imposed with respect to the Work and any equipment, materials, labor or services included therein; and

- (f) Compensation for all risks and contingencies assigned to or assumed by DBT under the Contract Documents.

## **12.2 Invoicing and Payment for the Contract Price**

The following process shall apply to invoicing and payment of (a) the Contract Price, and, as applicable, (b) Extra Work Costs and Delays Costs reimbursable to DBT for repair or replacement Work under Section 10.3.3(a).

- 12.2.1.1** KYTC will pay DBT for Work not more often than monthly, based on approved Pay Estimates, as follows:

### **12.2.2 Payment by KYTC**

- 12.2.2.1** Within seven days after KYTC receives the KYTC-Approved Pay Estimate (including all materials and reports required under Exhibit III), KYTC will review the Pay Estimate and all attachments thereto for consistency with the Pay Estimate prepared for the most recent pre-payment meeting and conformity with all requirements of the Contract Documents, and shall notify DBT of the amount approved for payment and specify the reason for disapproval of any remaining invoiced amounts. DBT may include such disapproved amounts in the next month's draft Pay Estimate after correction of the deficiencies noted by KYTC.

## **12.3 Limitations, Deductions, and Exclusions**

### **12.3.1 Deductions and Withholdings**

- 12.3.1.1** KYTC may deduct from each payment of the Contract Price, including the Final Payment, any of the following applicable to the Work or accruing prior to Final Acceptance:

- (a) Any KYTC or third party Losses for which DBT is responsible hereunder and which are not covered by insurance proceeds, except in the case where the underlying claim against DBT is the subject of a legitimate dispute;
- (b) Any Liquidated Damages that have accrued as of the date of the application for payment;
- (c) Any sums expended by or owing to KYTC as a result of DBT's failure to maintain the Record Drawings;
- (d) Any sums expended by KYTC in performing any of DBT's obligations under the Contract Documents that DBT has failed to perform or that DBT has performed in a manner that does not meet the standards of the Contract Documents; and



- (e) Any other sums that KYTC is entitled to recover or withhold from DBT under the terms of this Agreement, including any carry-over deductions (including for Liquidated Damages) or other adjustments from prior months that DBT has not satisfied as of the date KYTC makes payment.

**12.3.1.2** The failure by KYTC to deduct any of the sums set forth in Section 12.3.1 from a payment shall not constitute a waiver of KYTC's right to such sums.

### **12.3.2** Equipment

KYTC will not pay for direct costs of equipment. Costs of equipment, whether new, used or rented, and to the extent not included in the mobilization payments under Section 12.3.4, shall be allocated to and paid for as part of the activities with which the equipment is associated, in a manner which is consistent with the requirements of Section 109.04.02 of the KYTC Standard Specifications.

## **12.4** Final Payment

Final Payment for all Work will be made as follows.

### **12.4.1** Application for Final Payment

**12.4.1.1** Fifteen days prior to the date on which DBT believes that it will meet the conditions of Final Acceptance, DBT shall prepare and submit to KYTC a proposed Application for Final Payment showing the proposed total amount due to DBT as of the date of Final Acceptance, including any amounts owing from Change Orders.

**12.4.1.2** The Application for Final Payment shall list all outstanding Notice of Potential Relief Events and Relief Requests, stating the amount at issue associated with each such Notice of Potential Relief Event and Relief Request.

**12.4.1.3** The Application for Final Payment shall also be accompanied by:

- (a) Information addressing the status of all existing or threatened Claims and stop notices of Subcontractors, Suppliers, laborers, Utility Companies, and/or other third parties against DBT, KYTC or the Project;
- (b) Consent of any Guarantors and Surety to the proposed payment schedule;
- (c) Such other documentation as KYTC may reasonably require; and
- (d) The release described in Section 12.4.3, executed by DBT.

**12.4.1.4** Prior applications and payments shall be subject to correction in the Application for Final Payment. Notice of Potential Relief Events and Relief Requests filed

concurrently with the Application for Final Payment must be otherwise timely and meet all requirements under Article 13.

- 12.4.2** KYTC's obligation to make payment to DBT based on the Application for Final Payment is conditioned on KYTC's receipt of an executed release meeting the requirements of Section 12.4.3 and otherwise satisfactory in form and content to KYTC. The payment amount will be reduced by any amounts deductible under Section 12.3.
- 12.4.3** DBT shall execute a release that (i) releases KYTC from any and all Claims of DBT arising from the Work, and (ii) releases and waives any claims against the Indemnified Parties, excluding only those matters identified in any Notice of Potential Relief Events and Relief Requests that have been timely delivered and are listed as outstanding in the Application for Final Payment. The release shall be accompanied by a sworn affidavit from DBT certifying that:
- (a) All Work complies with the Contract Documents;
  - (b) DBT has resolved any Claims made by Subcontractors, Suppliers, Utility Companies, laborers, or other third parties against DBT, KYTC or the Project (except those listed by DBT in accordance with Section 12.4.1.3(a));
  - (c) DBT has no reason to believe that any Person has a valid claim against DBT, KYTC or the Project that has not been communicated in writing by DBT to KYTC as of the date of the certificate; and
  - (d) All guarantees, warranties, the Payment Bond, and the Performance Bond are in full force and effect.
- 12.4.4** Relief Requests submitted prior to the Application for Final Payment that are not in dispute shall be reconciled in the Application for Final Payment.
- 12.4.5** KYTC may withhold from the Final Payment such amount as KYTC deems advisable to cover any amounts owing or that may become owing to KYTC by DBT, including costs to complete or remediate uncompleted Work or Nonconforming Work.
- 12.4.6** KYTC will review DBT's proposed Application for Final Payment, and within 20 Working Days after receipt will deliver to DBT any changes or corrections. Any changes or corrections made pursuant to this Section 12.4.6 will be reflected in an updated payment schedule showing the amount owed to DBT by applicable period.
- 12.4.7** KYTC will fulfill its payment obligations in respect of the Work under this Agreement by paying the amounts identified in Section 12.4.6, in accordance with the schedule described in Section 12.4.6.

## **12.5 Prompt Payment to Subcontractors**

- 12.5.1** Upon receipt of payment from KYTC, DBT shall pay each Subcontractor (including DBE Subcontractors) with which it holds a direct Subcontract within seven days after DBT receives payment from KYTC, out of the amount paid to DBT on account of such Subcontractor's portion of the Work, the amount to which such Subcontractor is entitled.
- 12.5.2** If DBT fails to pay a Subcontractor within the time periods set forth in Section 12.5.1, DBT shall pay the Subcontractor interest on the unpaid balance, beginning on the eighth day or tenth day, as applicable, at a rate of 1% per month or fraction of a month.
- 12.5.3** DBT's submission of an invoice to KYTC for payment constitutes a representation that the work of the Subcontractors included in the invoice was satisfactorily performed.
- 12.5.4** Except for retainage, if any, DBT may exclude from its Pay Estimate or application for Final Payment, as applicable, and thereby withhold, payments to a Subcontractor only if the Subcontractor's work is deficient, incomplete or otherwise not in compliance with the terms of the Contract Documents applicable to the Subcontractor's work. If any Subcontractor is not paid promptly, DBT shall provide to the Subcontractor and to KYTC via the comment section of KYTC's DBE System a written explanation of the reasons and when payment can be expected. DBT shall provide such explanation within seven days after the time the Subcontractor was otherwise entitled to payment.
- 12.5.5** If a dispute arises between DBT and a Subcontractor regarding prompt payment or withholding of payment, DBT shall immediately provide to KYTC a written explanation of the matter in dispute and update KYTC monthly on the status of the dispute until it is resolved. DBT shall implement and use the dispute resolution process in the applicable Subcontract to resolve payment disputes as quickly as possible.
- 12.5.6** KYTC reserves the right to request and receive documents from DBT, all Subcontractors of any tier, and Suppliers to determine whether prompt payment requirements were met.

## **12.6 Subcontractor Payment and Payroll Reporting**

### **12.6.1 Subcontractor Payment Reporting**

- 12.6.1.1** DBT shall report on a monthly basis the amounts earned by and paid to all DBE and non-DBE Subcontractors. DBT shall deliver this report to KYTC by the 15th day of each month, for the preceding month. DBT shall separately report Professional Services and Construction Work using separate forms.

- 12.6.1.2** DBT's reports pursuant to Section 12.6.1.1 shall include all lower-tier Subcontractors regardless of whether the Subcontractor is a DBE under a Subcontract with another DBE. For each DBE trucking operation, DBT shall also indicate the type of trucking operation performed, the number of trucks owned/leased, the number of trucks working on the Site or off the Site, rate per hour/ton/load, etc., duration or amount, and total dollar value and DBE credit for trucking services for the month. DBT shall provide copies of truck leases, for verification as needed, upon request of KYTC.
- 12.6.1.3** DBT shall enter the same information required under Sections 12.6.1.1 and 12.6.1.2 by the 15th day of each month into KYTC's web-based DBE System (available at <https://KYTC.dbesystem.com/>) for payments made to DBEs and other Subcontractors for the previous month. This includes all lower-tier subcontracting regardless of whether the Subcontractor is a DBE under a Subcontract with another DBE. DBT shall separately enter payments made for Professional Services and Construction Work into KYTC's web-based DBE System.
- 12.6.1.4** DBT shall require that all DBE and non-DBE Subcontractors verify payments using the DBE System by responding to automated emails generated by KYTC's web-based DBE System each month. DBT shall actively monitor KYTC's web-based DBE System on a regular basis to ensure that all DBE and non-DBE Subcontractors verify receipt of payment by the last day of each month for the previous month's payment. Furthermore, DBT shall proactively work to resolve any payment discrepancies on the DBE System between payment amounts it reports and payment confirmation amounts reported by DBE and non-DBE Subcontractors on a monthly basis.
- 12.6.1.5** If no payments are made to any Subcontractor, DBE or non-DBE during a given month, DBT shall enter the dollar value "0" for that month and indicate clearly that (a) no work was done, (b) no invoices were submitted by the Subcontractor requiring payment during that month, or (c) the Subcontractor's work was and remains deficient, incomplete or otherwise not in compliance with the terms of the Contract Documents.

## **12.6.2** Subcontractor Payroll Reporting

No later than the 15th day of every month, DBT shall submit complete and accurate payrolls to KYTC's web-based certified payroll tracking system for all Work performed by all DBE and non-DBE Subcontractors (regardless of tier) during the previous month. If KYTC does not receive all such payrolls by this deadline, KYTC will identify in a written notice to DBT any missing payrolls and other discrepancies or inaccuracies, and the following shall apply:

- (a) If DBT does not submit the missing or corrected payrolls within ten days of the notice date, KYTC will have the right to withhold \$2,500.00 per

missing or inaccurate payroll, as applicable, from each subsequent progress payment until DBT cures;

- (b) If DBT cures within 90 days of the notice date, KYTC will pay any corresponding, accumulated withholdings with the next progress payment; and
- (c) If DBT does not cure within 90 days after the notice date, then, with respect to each missing or inaccurate payroll, KYTC will have the right to retain the accumulated withholdings as Liquidated Damages. These Liquidated Damages shall be in addition to any other rights or remedies KYTC may have hereunder or at Law or in equity.

## **ARTICLE 13.**

### **RELIEF EVENTS**

This Article 13 sets forth the requirements for obtaining monetary and schedule relief under the Contract Documents due to Relief Events defined in Exhibit 1 (Abbreviations and Definitions). DBT hereby acknowledges and agrees that the Contract Price provides for full compensation for performance of all the Work, and the Completion Deadlines provide reasonable and adequate time to perform the Work required within the Completion Deadlines, subject only to those exceptions specified in this Article 13. The compensation amounts, Completion Deadline adjustments, and performance relief specified in this Article 13 shall represent the sole and exclusive right against KYTC, the Commonwealth and their respective successors, assigns, agencies, divisions, officeholders, officers, directors, commissioners, agents, representatives, consultants, and employees to compensation, damages, deadline extension, and performance relief for the adverse financial and schedule effects of any event affecting the Work, the Project or DBT. No award of compensation or damages shall be duplicative. DBT unconditionally and irrevocably waives the right to any claim against KYTC, the Commonwealth, and their respective successors, assigns, agencies, divisions, officeholders, officers, directors, commissioners, agents, representatives, consultants, and employees for any monetary compensation, Completion Deadline adjustment or other relief except to the extent specifically provided in this Article 13. The foregoing waiver encompasses all theories of liability, whether in contract, tort (including negligence), strict liability, equity, *quantum meruit* or otherwise, and encompasses all theories to extinguish contractual obligations, including impracticability, mutual or unilateral mistake, and frustration of purpose. Notwithstanding anything to the contrary herein, no liability of DBT that arose before the occurrence of the Relief Event giving rise to a claim under this Article 13 shall be excused as a result of the occurrence. Nothing in Exhibit 3 (Technical Provisions) shall have the intent or effect or shall be construed to create any right of DBT to any claim for additional monetary compensation, Completion Deadline adjustment or other relief. The provisions of this paragraph shall not affect DBT's rights and protections under Section 6.7 or DBT's remedies under the Contract Documents in the event of an KYTC Default or upon early termination of this Agreement.

#### **13.1 Relief Event Claim Process**

##### **13.1.1 General Provisions**

**13.1.1.1** This Section 13.1 applies to all Relief Events defined in Exhibit 1 (Abbreviations and Definitions), except certain Relief Events that are a KYTC-Directed Change. The process for KYTC-Directed Changes shall be through a Change Order or Directive Letter pursuant to Sections 14.1 and 14.3, respectively; provided, however, that this Section 13.1 shall apply if the Parties disagree as to whether an KYTC-Directed Change has occurred or the extent of an KYTC-Directed Change.

**13.1.1.2** To the extent that a Subcontractor claims relief from DBT due to a Relief Event, any such request shall be deemed to have been directly incurred by DBT for

purposes of evaluating the merits of any Notice of Potential Relief Event, Relief Request or other Claim against KYTC for such Relief Event. No Subcontractor shall have the right to request relief directly from KYTC; all such claims by Subcontractors must be submitted by DBT and DBT shall be responsible for pursuing such claims on behalf of its Subcontractors.

### **13.1.2** Notice of Potential Relief Event

**13.1.2.1** If at any time DBT determines that a Relief Event has occurred or is imminent, DBT shall, within the time frame provided in Section 13.1.7, submit a written Notice of Potential Relief Event to KYTC. KYTC will promptly acknowledge receipt of each Notice of Potential Relief Event.

**13.1.2.2** The Notice of Potential Relief Event shall include, to the maximum extent of the information then available:

- (a) A description of the Relief Event and its date of occurrence or inception in reasonable detail;
- (b) The provisions of the Contract Documents applicable to, governing, or otherwise affecting or affected by the Relief Event;
- (c) DBT's preliminary good faith estimate of the anticipated adverse and beneficial effects (including cost impacts) of the Relief Event and the basis for such estimate;
- (d) DBT's preliminary good faith estimate of the Critical Path impact directly attributable to the Relief Event and the basis for such estimate;
- (e) DBT's initial analysis of any adverse effect of the Relief Event on its ability to perform its obligations under this Agreement;
- (f) The actions DBT has taken prior to the Notice of Potential Relief Event to prevent, and proposes to take thereafter to mitigate, the cost, delay, and other consequences of the Relief Event; and
- (g) The type and amount of insurance that may be applicable and amounts that have been or are anticipated to be collected under such insurance.

**13.1.2.3** The nature and scope of the potential Claim stated in the Notice of Potential Relief Event shall remain consistent (except for reductions) for the remainder of the Relief Event Claim process and, if applicable, during any subsequent Dispute Resolution Procedures, except with respect to consequences of a Relief Event that (a) are of a different nature or scope, (b) first arise or occur after DBT delivers the Notice of Potential Relief Event to KYTC, and (c) could not have been anticipated through the exercise of reasonable diligence and Good Industry Practice prior to delivering the Notice of Potential Relief Event to KYTC. If any such new consequences arise or occur prior to submission of

the Relief Request, DBT shall report them to KYTC by a supplemental Notice of Potential Relief Event.

- 13.1.2.4** DBT shall submit the Notice of Potential Relief Event on a standardized form approved by KYTC. Prior to submission of the first Notice of Potential Relief Event, DBT shall prepare a draft Notice of Potential Relief Event form that includes all of the information required by Section 13.1.2.2 for KYTC's review and approval.
- 13.1.2.5** DBT shall assign an exclusive identification number for each Notice of Potential Relief Event, starting with the number one and thereafter in chronological sequence. The exclusive identification number shall be used on each of the following corresponding documents: (a) Relief Request; (b) supplemental Notice of Potential Relief Events and submissions; and (c) final documentation of the Relief Event claim.
- 13.1.2.6** If a single Relief Event is the cause of a continuing delay, only one Notice of Potential Relief Event shall be necessary.

### **13.1.3** Relief Request

- 13.1.3.1** DBT shall, within 30 days after delivery of the Notice of Potential Relief Event, submit to KYTC a Relief Request that provides DBT's complete reasoning for additional compensation for Extra Work Costs, Completion Deadline adjustments, and other requested relief relating to the Relief Event. KYTC will promptly acknowledge receipt of each Relief Request. The Relief Request shall include the following information, to the maximum extent then available:
  - (a) Full details of the Relief Event, including its nature, the date of its occurrence, its duration (to the extent that the Relief Event and the effects thereof have ceased, or estimated duration to the extent that the Relief Event and the effects thereof have not ceased), affected locations, and items of Work affected;
  - (b) Identification of the substance of any material oral communications between KYTC and DBT, if any, relating to the Relief Event and the name of the person or persons making such oral communications;
  - (c) Identification of the specific provisions of the Contract Documents that DBT claims entitles DBT to the relief sought, and a complete, detailed statement that explains the reasons why the provisions entitle DBT to that relief. DBT shall additionally include any documents or other materials that DBT contends support entitlement to the relief sought. If DBT seeks relief for KYTC's alleged breach of the Contract Documents, then DBT shall identify the specific provisions of the Contract Documents that KYTC allegedly breached and the actions constituting the breach;



- (d) Where DBT makes a request for a Completion Deadline adjustment, a Time Impact Analysis of the Baseline Schedule that: (i) identifies Controlling Work Items and Critical Path (with activity durations, predecessor, and successor activities and resources, including total Float), and illustrates the effect of schedule changes or disruptions on the Completion Deadlines; and (ii) complies with the applicable requirements of Exhibit 3 (Technical Provisions);
- (e) A detailed, itemized estimate of all amounts claimed for Extra Work Costs to the extent such amounts are eligible for compensation under this Article 13 for the Relief Event in question;
- (f) Only if DBT makes a request for a Completion Deadline adjustment, and if so requested by KYTC in its sole discretion, a detailed, itemized estimate of all acceleration costs associated with meeting the non-adjusted Completion Deadlines, as well as any additional costs permitted hereunder. If DBT reasonably believes that it is not feasible to recover acceleration costs to meet the non-adjusted Completion Deadlines, or that the costs associated with such a recovery are prohibitive, then DBT shall so state and provide its applicable, supporting analysis;
- (g) The effect of the Relief Event on DBT's ability to perform any of its obligations under this Agreement, including details of the relevant obligations, the effect on each such obligation, and the likely duration of that effect;
- (h) An explanation of the measures that DBT has previously taken to prevent, and proposes to undertake to mitigate, the costs, delay, and other consequences of the Relief Event; and
- (i) The type and amount of insurance that may be applicable and amounts that have been or are anticipated to be collected under such insurance. DBT shall provide a copy of every notice letter and/or claim submitted to an insurer or other party that may be liable to reimburse or indemnify DBT due to the Relief Event. If the Relief Event may be covered by DBT's self-insurance or a DBT-controlled insurance program, DBT shall provide documentation of any claim against such insurance that it prepares in the ordinary course of business.

**13.1.3.2** DBT shall submit the Relief Request on a standardized form approved by KYTC. Prior to submission of the first Relief Request, DBT shall submit a draft form of Relief Request that contains the information required by Section 13.1.3.1 to KYTC for its review and approval.

**13.1.3.3** If, following issuance of any Relief Request, DBT receives or becomes aware of any further information or estimates relating to the Relief Event and its impact

on cost, schedule, Closures or performance of Work, including information on new consequences as described in Section 13.1.2.3, DBT shall submit such further information to KYTC as soon as possible. KYTC may request from DBT any further information that KYTC may reasonably require, and DBT shall supply the same within the time period stated in KYTC's request for additional information.

**13.1.3.4** Neither the fact that DBT submits to KYTC a Relief Request, nor the fact that KYTC keeps account of the costs of labor, materials, or equipment or time, shall in any way be construed as establishing the validity of the Relief Request or the Claims therein or method of computing any adjustment to the Contract Price or Completion Deadlines.

**13.1.4** KYTC Evaluation and Response to Relief Request; Negotiations

**13.1.4.1** KYTC will evaluate the information presented in the Relief Request and provide a written response to DBT within 45 days, or any extension thereof agreed by the Parties, after receipt by KYTC; provided, however, that KYTC shall have no obligation to review a Relief Request that does not fully comply with the requirements of Section 13.1.3. Provided that DBT has complied with the requirements of Sections 13.1.2 and 13.1.3, and KYTC provides a written response within such 45-day period stating that there are matters in dispute regarding the Relief Request, such matters in dispute shall be considered a Dispute for which DBT may initiate the Dispute Resolution Procedures in Article 21. As part of its written response to DBT, KYTC may issue a Directive Letter. If KYTC does not provide DBT a written response within the 45-day period, and DBT has complied with all requirements of Sections 13.1.2 and 13.1.3, then the Relief Request shall be considered a Dispute for which DBT may initiate the Dispute Resolution Procedures in Article 21.

**13.1.4.2** If DBT does not comply in full with the requirements of Section 13.1.2 and 13.1.3, KYTC may respond within the 45-day time period that DBT has not fully complied therewith. Such response by KYTC shall not constitute recognition that the Relief Request is a Dispute eligible for resolution by the Dispute Resolution Procedures. DBT shall have the option to withdraw the Relief Request or to correct the deficiencies therein and resubmit it for KYTC's consideration. The requirement to re-submit an incomplete Relief Request shall not relieve DBT of the time limitations provided in Section 13.1.7, subject to any extensions of such time limitations provided in Section 13.1.7. KYTC's time to respond before a matter is eligible for resolution by the Dispute Resolution Procedures provided by Section 13.1.4.1 shall commence only when DBT submits all information required by Sections 13.1.2 and 13.1.3, unless KYTC agrees otherwise.

**13.1.5** Final Documentation of Relief Event Claim

- 13.1.5.1** Within 30 days of the completion of Work related to a Relief Event that is the subject of a Relief Request, and provided that there has been no determination (whether by the Dispute Resolution Procedures or otherwise) that DBT is not entitled to the relief requested in its Relief Request, DBT shall submit to KYTC the full and final documentation of the Relief Event Claim. Pertinent information, references, arguments, and data to support the Relief Event Claim shall be included in the full and final documentation, including updated analyses, descriptions, actual amounts and impacts, specific dates for Completion Deadline adjustments, and other documentation covering the same scope of information as required in Section 13.1.3.1 for the Relief Request.
- 13.1.5.2** Without limiting the foregoing, if DBT claims compensation under Section 13.2, and except to the extent that such compensation is the subject of a previous written agreement by the Parties to be paid as a negotiated fixed price (which shall be subject to Section 109.04.02 of the KYTC Standard Specifications), DBT shall provide an itemized accounting of the actual direct costs. The accounting shall break down such costs in terms of labor (including burden), materials, equipment, third party fees (e.g., permit fees, plan check fees, and charges), and other direct costs and indirect costs, overhead, and any other cost category reasonably requested by KYTC. The labor, materials, and equipment cost categories shall account for the following items:
- (a) As to labor: a listing of individuals, classifications, regular hours, and overtime hours worked, dates worked, and other pertinent information related to the requested payment of labor costs;
  - (b) As to materials: invoices, purchase orders, location of materials either stored or incorporated into the Project, dates materials were transported to the Site or incorporated into the Project, and other pertinent information related to the requested payment of material costs; and
  - (c) As to equipment: a detailed description of the affected equipment (including make, model, and serial number), hours of use, dates of use, and equipment rates. Equipment rates shall be determined pursuant to the KYTC Standard Specifications.
- 13.1.5.3** DBT shall submit the full and final documentation of the Relief Event Claim on a standardized form approved by KYTC, and shall certify the Relief Event Claim to be accurate, truthful, and complete. Information submitted subsequent to the full and final documentation submittal will not be considered. No full and final documentation of the Relief Event Claim will be considered that does not have the same nature, scope (except for reductions) and circumstances, and basis of the Relief Event Claim, as those specified in the Notice of Potential Relief Event and any supplements submitted in accordance with Section 13.1.2.3 and in the Relief Request.
- 13.1.6** KYTC Response to Final Documentation; Change Order

- 13.1.6.1** KYTC's failure to respond to a complete and final documentation of a Relief Event Claim that DBT submits in accordance with Section 13.1.5 within 45 days after KYTC's receipt shall constitute KYTC's rejection of the Relief Event Claim, and shall thereafter constitute a Dispute subject to the Dispute Resolution Procedures. DBT shall not be entitled to re-submit disputes for which the Dispute Resolution Procedures have previously determined that DBT is not entitled to the relief sought.
- 13.1.6.2** If KYTC finds the Relief Event Claim or any part thereof to be valid, or if the Relief Event Claim or any part thereof is deemed to be valid as a result of completion of the Dispute Resolution Procedures, KYTC will:
- (a) Deliver to DBT notice authorizing such partial or whole Relief Event Claim;
  - (b) Pay such Relief Event Claim to the extent deemed valid (as to Extra Work Costs by one of the methods set forth in Section 13.2.2); and
  - (c) Grant a commensurate Completion Deadline adjustment, if applicable, as provided for in the Contract Documents.
- 13.1.6.3** The Parties shall thereafter promptly execute a Change Order documenting the Relief Event Claim or part thereof that KYTC finds to be valid or that is determined to be valid through the Dispute Resolution Procedures.

**13.1.7** Waiver by DBT

Time is of the essence in DBT's delivery of its written Notice of Potential Relief Event, supplemental Notice of Potential Relief Event(s), if any, and Relief Request.

- 13.1.7.1** If, for any reason, DBT fails to deliver a written Notice of Potential Relief Event or supplement thereto in compliance with all applicable requirements:
- (d) Within 10 days following the date (for purposes of this Section 13.1.7, the "starting date") on which DBT first became aware (or should have been aware, using all reasonable due diligence) of the potential Relief Event (or, in the case of a supplement, the new consequences described in Section 13.1.2.3), DBT shall be deemed to have irrevocably and forever waived and released the portion of any Claim or right to relief for any adverse effect attributable or related to the Relief Event accruing after such 10-day deadline and until the date DBT submits the written Notice of Potential Relief Event or supplement thereto, which in no case shall be more than 30 days from the starting date; and
  - (e) If for any reason DBT fails to (i) deliver the Notice of Potential Relief Event within 10 days from starting date, or (ii) deliver the written Relief Request in accordance with Section 13.1.3 within 30 days after the date of the Notice of Potential Relief Event, DBT shall be deemed to have

irrevocably and forever waived and released any and all Claim or right to relief for any effect attributable or related to such Relief Event; provided, however, that if DBT submits a Relief Request within 30 days of the date of the Notice of Potential Relief Event and KYTC responds as provided in Section 13.1.4.2 that DBT's Relief Request is not complete due to DBT's failure to comply in full with Section 13.1.3, KYTC in its sole discretion, may grant an extension of 10 days for DBT to comply in full with Section 13.1.3 before the waiver in this Section 13.1.7.1(b) becomes effective.

### **13.1.8 Open Book Basis**

DBT shall share with KYTC all data, documents, and information, and shall conduct all discussions and negotiations pertaining to a claimed Relief Event on an Open Book Basis.

### **13.1.9 Inaccurate Utility Information**

The following limitations apply to the Relief Event set forth in clause (g) of the definition thereof (concerning Inaccurate Utility Information).

**13.1.9.1** DBT's compensation for Extra Work Costs shall be limited to the aggregate Extra Work Costs of the Utility Work (including reimbursements payable to Utility Companies) that DBT would not have incurred if the Utility Information had been reasonably accurate.

**13.1.9.2** DBT may be entitled to compensation for reasonable and necessary costs to acquire Replacement Utility Property Interests for Adjustment of a Utility due to Inaccurate Utility Information only where:

- (a) It is not physically possible, including through commercially reasonable design modifications, to perform the subject Utility Adjustment within the Schematic ROW or to use Protection in Place; and
- (b) The Utility Company is not legally responsible under Law for the acquisition costs, such as in the case of a Replacement Utility Property Interest that is not for a Betterment or Utility Company Project.

**13.1.9.3** DBT shall not be entitled to an increase in the Contract Price, a Completion Deadline adjustment or any other Claim due to Inaccurate Utility Information that affects or concerns work outside the Schematic ROW.

### **13.1.10 Hazardous Materials**

**13.1.10.1** This Section 13.1.11 supersedes any Relief Event other than that under clause (g) of the definition of Relief Event that might otherwise be triggered by the presence, existence or Release of Hazardous Materials.

**13.1.10.2** If there occurs any Relief Event under clause (g) of the definition of Relief Event within the Schematic ROW, and if DBT timely satisfies the terms and conditions for asserting a Relief Event set forth in Section 13.1, then DBT may be entitled to a Completion Deadline adjustment, Extra Work Costs directly attributable to Hazardous Materials Management of such Hazardous Materials, subject to each of the following.

- (a) Such Extra Work Costs shall be limited as set forth in Section 13.4.5.4.
- (b) If (i) the Hazardous Materials are contained in soils or other solid materials or objects that may be returned to trenches or other areas of excavation within or adjacent to the Project ROW pursuant to regulations, policies or approvals of applicable Governmental Entities, and (ii) the excavation of such contaminated soils or other solid materials or objects is undertaken for any purpose or reason other than the fact of contamination, then the Extra Work Costs shall be limited to the reasonable out-of-pocket costs of handling such contaminated soils, materials, and objects in excess of the out-of-pocket costs DBT would incur to handle the same if they were not contaminated.
- (c) If the Hazardous Materials are contained in soils or other solid materials or objects that are removed from the Site for any purpose or reason other than the fact of contamination, then the Extra Work Costs for which KYTC is liable shall be limited to the incremental increase in out-of-pocket cost to excavate, handle, contain, haul, transport, remove, remediate, and dispose of the soils or other solid materials or objects over the out-of-pocket cost to excavate, handle, contain, haul, transport, remove, remediate, and dispose of such soils or other solid materials or objects if they did not contain Hazardous Materials.
- (d) If avoidance or remediation of such Hazardous Materials is capable of being accomplished under applicable Laws and Governmental Approvals through measures less costly than excavation, removal, and off-site disposal of contaminated soil and groundwater, or less costly than return to trenches and other areas of excavation, then KYTC will only be liable for the least costly alternative. Such alternate, less costly measures may include (i) design modifications and construction techniques to avoid such Hazardous Materials or reduce the quantities to be excavated, handled, contained, hauled, transported, removed, remediated, and disposed off-site, and (ii) on-site containment and institutional controls. If, however, DBT demonstrates that the total cost of alternate measures to be borne by DBT, will exceed the total cost of excavation, removal, and off-site disposal or return to trenches and other areas of excavation to be borne by DBT, then DBT shall not be obligated to implement the alternate measure. DBT shall respond to all reasonable requests by KYTC for supporting information regarding such cost comparison.

**13.1.10.3** Extra Work Costs for off-site disposal of soils contaminated with Hazardous Materials for which KYTC is liable under this Section 13.1.11.2 shall be determined by applying the same unit price (per ton or cubic yard) that applies to DBT under the Subcontract for off-site disposal of Hazardous Materials of similar character for which DBT is not compensated by KYTC. If no such Subcontract exists, or if no such unit price is stated in such Subcontract, then the unit price shall not exceed the unit price KYTC could obtain through competitive low bid from a qualified contractor for such work.

**13.1.10.4** None of the following liabilities, costs, expenses, and Losses shall be chargeable against or reimbursable by KYTC:

- (a) Liabilities, costs, expenses, and Losses to the extent attributable to DBT Releases of Hazardous Materials;
- (b) Liabilities, costs, expenses, and Losses that could be avoided by the exercise of Good Industry Practice to mitigate and reduce cost, including exercise of DBT's duties to avoid and mitigate set forth in Section 6.8.2;
- (c) Costs and expenses to investigate and characterize Hazardous Materials, except with respect to Hazardous Materials of an unexpected and extraordinary quantity or toxicity;
- (d) DBT Releases of Hazardous Materials;
- (e) Liabilities, costs, expenses, and Losses incurred attributable to acts or omissions of any DBT-Related Entity that exacerbate release of, or costs to undertake Hazardous Materials Management of Hazardous Materials;
- (f) Liabilities, costs, expenses, and Losses incurred attributable to acts or omissions of any DBT-Related Entity that increase the costs to undertake Hazardous Materials Management of KYTC Releases of Hazardous Materials, to the extent of such increased costs;
- (g) Liabilities, costs, expenses, and Losses incurred if KYTC is not afforded the opportunity to inspect sites containing Hazardous Materials or KYTC Releases of Hazardous Materials before DBT takes any action that would inhibit KYTC's ability to ascertain, based on a site inspection, the nature and extent of the Hazardous Materials, except for DBT's Emergency actions necessary to stabilize and contain a sudden release or otherwise required by Law to address the Emergency immediately;
- (h) Liabilities, costs, expenses, and Losses with respect to Hazardous Materials in, on or under locations DBT is required to avoid pursuant to Exhibit 3 (Technical Provisions); and
- (i) Liabilities (except generator liability to the extent assumed by KYTC under Section 6.7.8, costs, expenses, delays, and Losses with respect

to Hazardous Materials in, on or under DBT ROW, provided that this limitation shall not apply to a Relief Event under clause (i) of the definition of Relief Event.

**13.1.10.5** DBT shall not be entitled to Extra Work Costs due to the presence of Hazardous Materials outside the Schematic ROW or Hazardous Materials Management outside the Schematic ROW.

**13.1.11 Differing Site Conditions**

DBT's entitlement to Extra Work Costs, and Completion Deadline adjustment for Differing Site Conditions shall be subject to the following conditions.

**13.1.11.1** If DBT believes it has encountered Differing Site Conditions, DBT shall immediately notify KYTC thereof telephonically or in person, to be followed immediately by written notification. DBT shall be responsible for determining the appropriate action to be undertaken, subject to concurrence by KYTC. In the event that any Governmental Approvals specify a procedure to be followed, DBT shall follow the procedure set forth in the applicable Governmental Approvals.

**13.1.11.2** DBT shall bear the burden of proving that a Differing Site Condition exists and that DBT could not reasonably have worked around the Differing Site Condition so as to avoid additional cost or delay.

**13.1.11.3** DBT shall bear the burden of proving that the Differing Site Condition could not have reasonably been discovered through Reasonable Investigation, review of RIDs or any other publicly available information relating to the site existing prior to the Setting Date.

**13.1.11.4** Each Notice of Potential Relief Event and Relief Request relating to a Differing Site Condition shall include a statement by a Professional Engineer setting forth all relevant assumptions made by DBT with respect to the condition of the affected area, justifying the basis for such assumptions, explaining exactly how the existing conditions differ from those assumptions, and stating the efforts DBT undertook to find alternative design or construction solutions to eliminate or minimize the effect of the conditions and the associated costs.

**13.1.11.5** Unless DBT proves that a Differing Site Condition exists, DBT shall not be entitled to an increase in the Contract Price, a Completion Deadline adjustment or any other Claim in connection with work stoppages in the affected area during the period of time DBT investigates conditions in the affected area.

**13.1.11.6** DBT shall not be entitled to an increase in the Contract Price, a Completion Deadline adjustment or any other Claim for a Differing Site Condition or other Relief Event arising from DBT's reliance on or use of geotechnical information provided by KYTC.



**13.1.11.7** DBT shall not be entitled to an increase in the Contract Price, a Completion Deadline adjustment or any other Claim for Differing Site Conditions in, on or under DBT ROW or otherwise outside the Schematic ROW.

**13.1.12** Change in Law

**13.1.12.1** New or revised Commonwealth statutes adopted after the Setting Date that change, add to or replace applicable standards, criteria, requirements, conditions, procedures, and specifications, including safety standards relating to the Work, as well as revisions to the Exhibit 3 (Technical Provisions) to conform to such new or revised Commonwealth statutes, shall be treated as a Change in Law (clause (m) of the definition of Relief Event) rather than an KYTC-Directed Change to Exhibit 3 (Technical Provisions); provided, however, that changes in Adjustment Standards due to new or revised Commonwealth statutes shall constitute neither a Change in Law nor an KYTC-Directed Change. The foregoing shall not otherwise alter or amend the definition of Change of Law.

**13.1.13** Change in Adjustment Standards

DBT shall not be entitled to an increase in the Contract Price, a Completion Deadline adjustment or any other Claim due to a Change in Adjustment Standards.

**13.2 Effect of Relief Events on Completion Deadlines, Performance, and DBT Default, and Deductions**

**13.2.1** Subject to Section 13.3 and satisfaction of any conditions or requirements set forth in the Contract Documents, including in Sections 13.1 and 13.4, DBT may be entitled to an extension of applicable Completion Deadlines by the period that the end of the Critical Path extends beyond the original Completion Deadline due to any Relief Event that DBT cannot reasonably avoid through mitigation as required under Section 13.4. Notwithstanding the foregoing, DBT shall not be entitled to an extension of applicable Completion Deadlines to the extent that a Relief Event is concurrent with another delay not caused by a Relief Event, except that, where the Relief Event is an KYTC-Caused Delay, DBT may be entitled to an extension of applicable Completion Deadlines even if concurrent with another delay not caused by a Relief Event. DBT's entitlement to any Completion Deadline adjustment under the Contract Documents is subject to DBT demonstrating that the Baseline Schedule in the absence of the Relief Event contained a reasonable amount of time to complete the Work that is the subject of the Relief Event. All Completion Deadline adjustments are subject to this Section 13.2.1, notwithstanding anything to the contrary in the Contract Documents.

**13.2.2** As an alternative to the Completion Deadline adjustment(s) to which DBT is otherwise entitled under Relief Events set forth in clauses (a), (d), (f), (g), (h), (i), and (j) of the definition thereof, KYTC in its sole discretion may pay DBT

acceleration costs, as contemplated in Sections 13.1.3.1(f) and 14.1.3(c). In such cases, KYTC's election to pay acceleration costs in lieu of Completion Deadline adjustment(s) shall be set forth in the applicable Change Order.

**13.2.3** DBT shall not be excused from timely payment of monetary obligations under this Agreement due to the occurrence of a Relief Event. DBT shall not be excused from compliance with the Contract Documents or applicable Laws due to the occurrence of a Relief Event, except temporary inability to comply due solely and directly to the Relief Event.

**13.2.4** DBT shall be entitled to rely upon the occurrence of a Relief Event as a defense against a DBT Default where the occurrence of the Relief Event causes such DBT Default; provided, however, that this defense shall not apply if actions or omissions by a DBT-Related Entity other than the Relief Event, but occurring at or around the same time, result in a DBT Default.

**13.2.5** Refer to Article 18 regarding the effect of a Relief Event on Liquidated Damages for Lane Closures.

### **13.3 Exclusive Relief; Release of Claims**

The relief provided through agreement or pursuant to the Dispute Resolution Procedures for a Relief Event shall represent the sole right to compensation, damages, and other relief from the adverse effects of a Relief Event. As a condition precedent to KYTC's obligation to pay any compensation amount or grant or abide by such relief, DBT shall execute a full, unconditional, irrevocable waiver and release, in form reasonably acceptable to KYTC, of any other Claims, Losses or rights to relief associated with such Relief Event and the facts or events underlying such Relief Event.

### **13.4 Prevention and Mitigation**

**13.4.1** DBT shall be entitled to the relief and protection provided under this Article 13 only if the occurrence of a Relief Event and the effects of such occurrence:

- (a) Are beyond the reasonable control of DBT-Related Entities;
- (b) Are not due to any act, omission, negligence, recklessness, willful misconduct, fault, breach of contract, or breach of the requirements of the Contract Documents, or violation of Law or a Governmental Approval of or by any of the DBT-Related Entities; and
- (c) Could not have been avoided by the exercise of caution, due diligence or reasonable efforts by DBT-Related Entities.

**13.4.2** DBT shall take all steps reasonably necessary to mitigate the consequences of any Relief Event, including all steps that would generally be taken in accordance with Good Industry Practice.

**13.4.3 Re-sequencing and Re-scheduling of Work**

**13.4.3.1** DBT shall not be entitled to an increase in the Contract Price, Completion Deadline adjustment or other Claim or relief for impacts that could have been avoided through re-sequencing and re-scheduling of the Work or other work-around measures; provided, however, that DBT shall not be required to implement mitigation measures where the cost thereof would exceed the Extra Work Costs if the mitigation measures were not implemented.

**13.4.3.2** Whenever a Relief Event occurs and DBT submits an original or supplemental Notice of Potential Relief Event for Extra Work Costs, DBT shall concurrently submit to KYTC an analysis of potential re-sequencing, re-scheduling, and other work-around measures and a comparison of the estimated costs thereof to the estimated savings in the Extra Work Costs that would result.

**13.4.3.3** DBT shall cooperate with KYTC to identify the re-sequencing, re-scheduling, and other work-around measures that will maximize mitigation of costs to KYTC, taking into account the cost of the potential re-sequencing, re-scheduling, and other work-around measures.

**13.4.3.4** KYTC will compensate DBT for the reasonable costs of re-sequencing, re-scheduling, and other work-around measures authorized in writing by KYTC, in the same manner it compensates for Extra Work Costs under Section 13.4.

**13.4.4** If any claim is asserted or administrative proceeding, litigation or other legal action is brought against DBT by any third party (other than a DBT-Related Entity) seeking relief that would or could entitle DBT to Extra Work Costs or a Completion Deadline adjustment if determined adversely to DBT, then DBT, at its expense, shall defend against such claim, administrative proceeding, litigation or other legal action diligently and professionally, shall not interfere with or resist KYTC's intervention in the claim negotiations or administrative proceeding, litigation or other legal action, and shall actively assist and cooperate with KYTC in its defense against the claim, administrative proceeding, litigation or other legal action. At the request of either Party, both Parties shall enter into, or cause their respective legal counsel to enter into, a joint defense agreement setting forth terms for their joint cooperation and defense. The Parties may mutually choose, but are not obligated, to be jointly represented by legal counsel in such administrative proceeding, litigation or other legal action.

**13.4.5** For further mitigation obligations of DBT respecting Hazardous Materials and Recognized Environmental Conditions, refer to Section 6.7.

**ARTICLE 14.**  
**KYTC-DIRECTED CHANGES; DBT CHANGES; DIRECTIVE LETTERS**

**14.1 KYTC-Directed Changes**

**14.1.1 KYTC's Right to Issue Change Order**

**14.1.1.1** KYTC may, at any time and from time to time, without notice to any Surety, authorize or require, pursuant to a Change Order, changes in the Work (including reductions in the scope of the Work) or in terms and conditions of the Exhibit 3 (Technical Provisions) (including changes in the standards applicable to the Work).

**14.1.1.2** KYTC also shall have the right to issue a Change Order for any other event that the Contract Documents expressly state shall be treated as an KYTC-Directed Change.

**14.1.1.3** KYTC's changes to the Work shall be documented through issuance of a Change Order or Directive Letter. No document, including any field directive, comment to a Submittal, correspondence discussing the Contract or the Work, or otherwise, shall be valid, effective or enforceable as an KYTC-Directed Change or a Change Order unless expressly identified as such and signed by an authorized KYTC representative or their designee.

**14.1.1.4** KYTC may in its discretion unilaterally issue a Change Order that amends this Agreement if there is no effect on the DBT's costs or schedule. Such discretion shall be limited to ministerial and administrative changes necessary for KYTC's proper administration of this Agreement.

**14.1.2 Request for Change Proposal**

**14.1.2.1** If KYTC desires to issue an KYTC-Directed Change or to evaluate whether to initiate such a change, then KYTC may, at its sole discretion, issue a Request for Change Proposal. The Request for Change Proposal shall set forth the nature, extent, and details of the proposed KYTC-Directed Change. KYTC may, in its sole discretion, determine whether to implement the potential change after consideration of DBT's response.

**14.1.2.2** Within five Working Days after DBT receives a Request for Change Proposal, or such longer period to which the Parties may mutually agree, KYTC and DBT shall consult to define the proposed scope of the change. Within five Working Days after the initial consultation, or such longer period to which the Parties may mutually agree, KYTC and DBT shall consult concerning the estimated financial, schedule, and other impacts.

**14.1.3 Response to Request for Change Proposal**

As soon as possible through the exercise of diligent efforts, and in any event within 30 days following KYTC's delivery to DBT of a Request for Change Proposal, DBT shall provide KYTC with a response that contains a detailed assessment of the cost, schedule, and other impacts of the proposed KYTC-Directed Change, including the following:

- (a) DBT's detailed estimate of the impacts on costs of carrying out the proposed KYTC-Directed Change, including any Extra Work Costs, or reduction in costs to DBT;
- (b) A Time Impact Analysis showing the effect of the proposed KYTC-Directed Change on the Baseline Schedule, including achievement of the Completion Deadlines, taking into consideration DBT's duty to mitigate any delay, or any time saved by implementation of the proposed KYTC-Directed Change;
- (c) If so requested by KYTC, in its sole discretion, an alternative cost and schedule proposal showing the acceleration costs associated with meeting Completion Deadlines without an adjustment, as well as any additional costs permitted hereunder; and
- (d) Any other relevant information related to carrying out the proposed KYTC-Directed Change.

#### **14.1.4 Negotiation and Directed Changes**

**14.1.4.1** Following KYTC's receipt of DBT's response to the Request for Change Proposal and of such further assessment by KYTC and its consultants of the cost, schedule, and other impacts of the proposed KYTC-Directed Change, if KYTC decides, in its sole discretion, to proceed with the proposed KYTC-Directed Change, KYTC and DBT shall exercise Good Faith Efforts to negotiate a mutually acceptable Change Order, including: (a) if applicable, adjustment of the Completion Deadlines; and (b) either (i) if applicable, any Extra Work Costs to which DBT is entitled, and the timing and method for payment of any Extra Work Costs) or (ii) if applicable, any net cost savings and schedule savings to which KYTC is entitled and the timing and method for realizing such cost savings.

**14.1.4.2** If KYTC and DBT are unable to reach agreement on a Change Order, KYTC may, in its sole discretion, elect to resolve the disagreement according to the Dispute Resolution Procedures with or without issuing a Directive Letter. If KYTC elects not to issue a Directive Letter, DBT shall not implement the proposed KYTC-Directed Change until resolution by the Dispute Resolution Procedures. If KYTC delivers to DBT a Directive Letter pursuant to Section 14.3 directing DBT to proceed with performance of the Work in question notwithstanding such disagreement, then: (a) DBT shall implement and perform the Work in question as directed by KYTC; and (b) KYTC will make interim payment(s) to DBT on a monthly progress payment basis for the

reasonable documented Extra Work Costs that are not disputed by KYTC, if any, that are not disputed by KYTC, if any, in question, subject to subsequent adjustment through the Dispute Resolution Procedures. KYTC will additionally make an adjustment to the Completion Deadlines, if any, as determined by agreement or through the Dispute Resolution Procedures.

#### **14.1.5 Reductive KYTC-Directed Changes**

**14.1.5.1** In addition to a Request for Change Proposal, KYTC may deliver to DBT a written notice that, in KYTC's opinion, an KYTC-Directed Change will reduce DBT costs or result in the saving of time. In such event, KYTC may prepare an analysis and a detailed assessment of the cost and schedule impacts of the proposed KYTC-Directed Change, either independently of or in reply to DBT's written response to a Request for Change Proposal, including the following:

- (a) KYTC's estimate of the impacts on costs of carrying out the proposed KYTC-Directed Change;
- (b) The effect of the proposed KYTC-Directed Change on shortening the Baseline Schedule and Completion Deadlines; and
- (c) Any other relevant information related to carrying out the proposed KYTC-Directed Change.

**14.1.5.2** DBT and KYTC thereafter shall cooperate in good faith to determine the estimated net cost savings and time savings, if any, attributable to the Request for Change Proposal or KYTC-Directed Change. Any dispute regarding such savings shall be resolved according to the Dispute Resolution Procedures.

**14.1.5.3** KYTC will be entitled to 100% of the estimated net cost savings, if any, attributable to any reductive KYTC-Directed Change. Such net cost savings shall include the net reduction, if any, in labor, material, equipment, and overhead and profit costs associated with the KYTC-Directed Change. KYTC shall receive such savings: (a) as periodic payments from DBT, (b) as an adjustment to the Contract Price, or (c) through any combination of the foregoing, as selected by KYTC. KYTC also may take such reduction in labor, material, equipment, and overhead and profit costs as a credit against any sums owed by KYTC to DBT under the Contract Documents. If KYTC selects periodic payments from DBT, such payments shall be due and owing to KYTC monthly on the last day of each month.

**14.1.5.4** KYTC will be entitled to 100% of the effect of the proposed KYTC-Directed Change on shortening the Baseline Schedule and Completion Deadlines. The time savings shall be realized by subtracting the number of days saved from the number of days remaining until the Substantial Completion Deadline in effect the day before the corresponding Change Order is executed. The resulting number of days remaining shall become the Substantial Completion Deadline in the corresponding Change Order.

### **14.1.6 KYTC-Directed Changes as a Relief Event**

If DBT contends that an KYTC-Directed Change has occurred and KYTC has either not issued (a) a Change Order therefor or (b) a Request for Change Proposal, then, if DBT seeks to assert that a Relief Event has occurred, DBT shall comply with and be subject to the procedures under Section 13.1 for Relief Event Claims and the remainder of Article 13, and shall not have the right to initiate the Dispute Resolution Procedures until permitted by Article 13. This Section 14.1.6 shall not apply to the inability to agree to a Change Order after KYTC's issuance of a Request for Change Proposal.

## **14.2 DBT Changes**

**14.2.1** By submittal of a written Change Request, with supplementary information as needed or required, DBT may request KYTC to approve:

- (a) Modifications to Exhibit 3 (Technical Provisions); or
- (b) Modifications to DBT's Proposal Commitments.

Any such Change Request shall only request an adjustment to the foregoing that is of equal or better quality than the original Exhibit 3 (Technical Provisions) provisions or DBT's Proposal Commitments, unless KYTC agrees otherwise, which decision shall be in KYTC's sole discretion. The Change Request shall set forth DBT's detailed estimate of net impacts (positive and negative) on costs and schedule attributable to the requested change, consistent with applicable provisions of this Agreement. DBT shall submit a Time Impact Analysis with any Change Request that affects a Completion Deadline.

**14.2.2** KYTC, in its sole discretion (and, if KYTC so elects, after receiving a comprehensive report, the cost of which is borne by DBT, from an independent engineer regarding the proposed Change Request), may accept or reject any Change Request proposed by DBT. If KYTC accepts such Change Request, DBT shall execute a Change Order and shall implement such change in accordance with the Change Order, applicable Exhibit 3 (Technical Provisions) provisions, Good Industry Practice, and all applicable Laws. No acceptance of a Change Request by KYTC shall be deemed to take effect unless documented in a written Change Order signed by KYTC's Authorized Representative or by his/her designee appointed in writing. No such Change Order shall constitute an KYTC-Directed Change regardless of its title, designation or wording.

**14.2.3** DBT shall solely bear the risk of any increase in the costs of the Work or other costs, and for any additional risks, resulting from a Change Request accepted by KYTC. DBT shall not be entitled to an increase in the Contract Price, a Completion Deadline adjustment or any other Claim for delays or other impacts resulting from a Change Request accepted by KYTC, except where explicitly approved by KYTC.

**14.2.4** Without limiting the foregoing, DBT shall compensate KYTC for any incremental increase in KYTC's overhead, administrative, and out-of-pocket

costs resulting from a Change Request accepted by KYTC. DBT shall make payment in the amount and at the time or times agreed upon in the Change Order. If KYTC and DBT are unable to agree to the terms of such Change Order, then either Party may initiate the Dispute Resolution Procedures for the purpose of fixing the incremental increase in KYTC's overhead, administrative, and out-of-pocket costs resulting from a Change Request accepted by KYTC.

- 14.2.5** To the extent a Change Request accepted by KYTC results in a net cost savings to DBT, KYTC will be entitled to 100% of such savings. KYTC will obtain its share of the savings in the manner described in Section 14.1.5.3. To the extent a Change Request results in time savings, KYTC shall be entitled to 100% of such time savings, calculated in the manner described in Section 14.1.5.4.
- 14.2.6** Certain minor changes without significant cost savings may be approved, in KYTC's sole discretion, in writing by KYTC as Deviations, as described in Section 6.2, and in such event shall not require a Change Order. Any other change in the requirements of the Contract Documents shall require a Change Order.

### **14.3 Directive Letters**

- 14.3.1** KYTC may at any time issue a Directive Letter to DBT regarding any matter for which a Change Order can be issued or in the event of any disagreement regarding the scope of the Work or whether DBT has performed in accordance with the requirements of the Contract Documents. KYTC shall state in each Directive Letter whether the directive therein is Work that is within the scope of Work set forth in the Contract Documents, is an addition to the scope of the Work in the Contract Documents, or is a reduction to the scope of Work in the Contract Documents. No document, including any field directive, comment to a Submittal, correspondence discussing the Contract or the Work, or otherwise, shall be valid, effective or enforceable as a Directive Letter unless expressly identified as a "Directive Letter" and signed KYTC's authorized representative or their designee.
- 14.3.2** The Directive Letter will state that it is issued under this Section 14.3, will describe the Work in question and, if the Directive Letter concerns a matter for which a Change Order can or will be issued, will provide for, as applicable, payment of Extra Work Costs, if any, or reductions in compensation, if any, and schedule adjustment, if any, directly attributable to such matters. Any such adjustment of the Contract Price shall not be applicable until execution of the corresponding Change Order.
- 14.3.3** DBT shall proceed immediately as directed in the Directive Letter, including by commencing any Work described therein within the time specified in the Directive Letter.



- 14.3.4** If the Directive Letter states that the Work therein is an addition to the scope of Work in the Contract Documents, but KYTC and DBT disagree as to the extent of the addition to the scope of Work, DBT shall have the right to assert that an KYTC-Directed Change has occurred. In such situation, DBT shall comply with and be subject to the procedures under Section 13.1 for Relief Event Claims and the remainder of Article 13, to the extent of the disagreement of the change in the scope of the Work.
- 14.3.5** If the Directive Letter states that the Work is within DBT's original scope of Work set forth in the Contract Documents or is necessary to comply with the requirements of the Contract Documents, DBT shall proceed with the Work as directed, but shall have the right to assert that an KYTC-Directed Change has occurred. In such situation, DBT shall comply with and be subject to the procedures under Section 13.1 for Relief Event Claims and the remainder of Article 13.
- 14.3.6** The fact that a Directive Letter was issued by KYTC will not be considered evidence that an KYTC-Directed Change occurred.

## **ARTICLE 15. THIRD PARTY AGREEMENTS**

### **15.1 Delegation of Obligations**

DBT shall perform and comply with all obligations assigned to DBT under or pursuant to the Third-Party Agreements.

### **15.2 Changes to Third-Party Agreements**

- 15.2.1** The executed Third-Party Agreements as they existed on the Effective Date are set forth in the Reference Information Documents.
- 15.2.2** If DBT's design or DBT's performance of the Work necessitates a change to a Third-Party Agreement, or issuance of a new Third-Party Agreement, DBT shall be responsible for obtaining the amended or new Third-Party Agreement and performing the obligations thereunder. No such amended or new Third-Party Agreement shall entitle DBT to an increase in the Contract Price, adjustment of the Completion Deadlines or any other Claim or Change Order.
- 15.2.3** DBT shall perform and comply with such KYTC obligations as KYTC may delegate to DBT that are contained in Third-Party Agreements entered into after the Effective Date. DBT may request relief for such additional obligations as an KYTC-Directed Change.

## **ARTICLE 16.** **SUSPENSION**

### **16.1 Suspensions for Convenience**

- 16.1.1** KYTC may, at any time and for any reason, order DBT to suspend all or any part of the Work required under the Contract Documents for the period of time that KYTC deems appropriate for the convenience of KYTC. DBT shall promptly comply with any such suspension order. DBT shall promptly recommence the Work upon receipt of notice from KYTC directing DBT to resume work.
- 16.1.2** Any such suspension for convenience shall be considered an KYTC-Directed Change or an KYTC-Caused Delay.

### **16.2 Suspensions for Cause**

- 16.2.1** Upon KYTC's delivery of notice of a DBT Default for any of the following, KYTC will have the right and authority to suspend for cause all of the Work or any affected portion of the Work, regardless of whether an Event of Default has been declared or any cure period (other than any cure period provided below in paragraphs (a), (b), (c), (d), and (e) of this Section 16.2.1) has not yet lapsed:
- (a) The existence of conditions unsafe for workers, other Project personnel or the general public, including failure to comply with any provision of the Safety Management Plan;
  - (b) Failure to comply with any Law or Governmental Approval;
  - (c) Discovery of Nonconforming Work or of any activity that is proceeding or about to proceed that would constitute or cause Nonconforming Work, where the Nonconforming Work or activity is not substantially cured within 15 days after KYTC delivers written notice thereof to DBT, unless DBT demonstrates to KYTC's satisfaction that DBT has completed a full and complete cure of the Nonconforming Work and that verification by KYTC of such cure remains practicable if Work continues without suspension;
  - (d) Failure to carry out and comply with Directive Letters, where such failure is not cured within 15 days after KYTC delivers written notice thereof to DBT;
  - (e) Failure to replace or remove personnel as set forth in Sections 8.6, as applicable, where such failure is not cured within 30 days after KYTC delivers written notice thereof to DBT;

- (f) Failure to provide proof of required insurance coverage;
- (g) Failure to deliver or maintain the Payment Bond, Performance Bond, or any other bonds or other security required hereunder;
- (h) Failure to comply with any provision of the Quality Management Plan, where such failure is not cured within 15 days after KYTC delivers written notice thereof to DBT.

**16.2.2** DBT shall promptly comply with any such suspension order, even if DBT disputes the grounds for suspension. KYTC will lift the suspension order promptly after DBT fully cures and corrects the applicable breach or failure to perform or all other reasons for the suspension order cease to apply. DBT shall promptly recommence the Work upon receipt of notice from KYTC directing DBT to resume work. KYTC will have no liability to DBT, and DBT shall have no right to an increase in the Contract Price, a Completion Deadline adjustment or any other Claim in connection with any suspension of Work properly founded on any of the grounds set forth in Section 16.2.1. If DBT contends that KYTC's suspension order was not properly founded on any of the grounds set forth in Section 16.2.1, DBT may initiate the Dispute Resolution Procedures to determine whether KYTC properly issued the suspension order. If KYTC orders suspension of Work on one of the foregoing grounds but it is finally determined under the Dispute Resolution Procedures that such grounds did not exist, the suspension shall be treated as a suspension for KYTC's convenience under Section 16.1; and the amount of any compensation or Completion Deadline adjustment may be determined by the Dispute Resolution Procedures. DBT may request that the same initiation of the Dispute Resolution Procedures be used to determine both whether KYTC properly issued the suspension order and the amount, if any, of compensation and/or Completion Deadline adjustment.

### **16.3 Responsibilities of DBT during Suspension Periods**

During periods in which Work is suspended, DBT shall make passable, place in a maintainable condition, and shall open to traffic such portions of the Project and temporary roadways as may be agreed upon between KYTC and DBT for temporary accommodation of traffic during the anticipated period of suspension. Additionally, if KYTC does not suspend the Work in its entirety, DBT shall continue other Work that has been or can be performed at the Site or off the Site during the period that Work is suspended.

**ARTICLE 17.**  
**DEFAULT; REMEDIES**

**17.1 Default of DBT**

**17.1.1 Events and Conditions Constituting Default**

DBT shall be in breach under this Agreement upon the occurrence of any one or more of the following events or conditions (each a “DBT Default”):

- (a) DBT fails to commence and prosecute the Work authorized by the Notice to Proceed;
- (b) DBT fails to prosecute the Work with sufficient manpower, equipment, or materials or fails to prosecute the Work satisfactorily;
- (c) DBT fails to remove materials or perform Work that KYTC rejects as defective or unsuitable
- (d) Subject to Section 18.1, DBT fails to achieve Substantial Completion or Final Acceptance by the applicable Completion Deadline, as either may be extended pursuant to this Agreement;
- (e) DBT fails to perform the Work in accordance with the Contract Documents, including conforming to applicable standards set forth therein in the design and construction of the Project, or refuses to correct, remove, and replace Nonconforming Work;
- (f) DBT suspends, ceases, stops or abandons the Work or fails to continuously and diligently prosecute the Work (exclusive of work stoppage (i) due to termination by KYTC, (ii) due to and during the continuance of a Force Majeure Event that prevents prosecution of the Work, (iii) due to and during suspension by KYTC, or (iv) due to and during the continuance of any work stoppage under this Section 17.1.1 (f));
- (g) DBT fails to comply with applicable Governmental Approvals and Laws, including the Federal Requirements;
- (h) DBT fails to obtain, provide, and maintain any insurance, bonds, guarantees or other performance or payment security as and when required under this Agreement for the benefit of relevant parties, or fails to comply with any requirement of this Agreement pertaining to the amount, terms or coverage of the same;
- (i) DBT makes or attempts to make or suffers a voluntary or involuntary assignment or transfer of all or any portion of this Agreement in violation of Section 24.4;

- (j) DBT fails, absent a valid dispute, to make payment when due for labor, equipment, materials or property in accordance with its agreements with Subcontractors, Suppliers, and Utility Companies and in accordance with applicable Laws, or fails to make payment to KYTC of any amounts owing to KYTC under this Agreement when such payment is due;
- (k) DBT fails to timely observe or perform or cause to be observed or performed any other covenant, agreement, obligation, term or condition required to be observed or performed by DBT under the Contract Documents;
- (l) Any representation or warranty in the Contract Documents made by DBT or any Guarantor, or any certificate, schedule, report, instrument or other document delivered by or on behalf of DBT to KYTC pursuant to the Contract Documents is false or materially misleading or inaccurate when made or omits material information when made;
- (m) DBT commences a voluntary case seeking liquidation, reorganization or other relief with respect to itself or its debts under any U.S. or foreign bankruptcy, insolvency or other similar Law now or hereafter in effect, seeks the appointment of a trustee, receiver, liquidator, custodian or other similar official of it or any substantial part of its assets; becomes insolvent, or generally does not pay its debts as they become due; admits in writing its inability to pay its debts; makes an assignment for the benefit of creditors; or takes any action to authorize any of the foregoing;
- (n) An involuntary case is commenced against DBT: seeking (i) liquidation, reorganization, dissolution, winding up, a composition or arrangement with creditors, a readjustment of debts or other relief with respect to DBT or DBT's debts under any U.S. or foreign bankruptcy, insolvency or other similar Law now or hereafter in effect, (ii) the appointment of a trustee, receiver, liquidator, custodian or other similar official of DBT or any substantial part of DBT's assets, (iii) the issuance of a writ of attachment, execution, or similar process, or (iv) like relief; and such involuntary case is not dismissed or stayed within 60 days of commencement;
- (o) In any voluntary or involuntary case seeking liquidation, reorganization or other relief with respect to DBT or its debts under any U.S. or foreign bankruptcy, insolvency or other similar Law now or hereafter in effect, this Agreement or any of the other Contract Documents is rejected, including a rejection pursuant to 11 USC § 365 or any successor statute;
- (p) Any Guarantor revokes or attempts to revoke its obligations under its guarantee or otherwise takes the position that such instrument is no longer in full force and effect;

- (q) Whether in connection with this Project or any other, any final judgment is issued holding DBT or any Guarantor liable for an amount in excess of \$100,000 based on a finding of intentional or reckless misconduct or violation of a state or federal false claims act, and DBT allows such final judgment to remain unsatisfied for a period of 10 days;
- (r) DBT fails to resume performance that had been suspended or stopped within the time specified by KYTC to resume or (if applicable) after cessation of the event preventing performance;
- (s) After exhaustion of all rights of appeal, there occurs any disqualification, suspension or debarment (distinguished from ineligibility due to lack of financial qualifications), or there goes into effect an agreement for voluntary exclusion, from bidding, proposing or contracting with any Federal or Commonwealth Cabinet or agency of (i) DBT, (ii) any affiliate of DBT (as "Affiliate" is defined in 29 CFR § 3.2 or successor regulation of similar import), or (iii) any Equity Member;
- (t) There occurs any Closure of the roadway within the Project ROW or any portion thereof, or any Lane Closure, except as expressly permitted otherwise or expressly excused under this Agreement, Exhibit 3 (Technical Provisions), and the KYTC-approved Transportation Management Plan;
- (u) DBT fails to comply with KYTC's written suspension of Work order issued in accordance with Section 17.2.1 within the time stated in such order;
- (v) There occurs any use of the Project or Airspace or any portion thereof in violation of this Agreement, Exhibit 3 (Technical Provisions), Governmental Approvals or Laws (except violations of Law by Persons other than DBT-Related Entities); or
- (w) There occurs a change in any Key Personnel that is not otherwise permitted under Section 8.6.

#### **17.1.2 Notice and Opportunity to Cure**

For the purpose of KYTC's exercise of other remedies, and subject to remedies that this Article 18 expressly states may be exercised before lapse of a cure period, DBT shall have the following cure periods with respect to the following DBT Defaults:

- (a) As to a DBT Default under clauses (s) and (t) of Section 18.1.1, a period of five days after KYTC delivers to DBT written notice of the DBT Default;
- (b) As to a DBT Default under clauses (a), (d), (f), (g), (h), and (p) of Section 18.1.1, a period of 15 days after KYTC delivers to DBT notice of the DBT Default; provided, however, that with respect to a DBT Default under

clause (f) of Section 18.1.1, KYTC will have the right, but not the obligation, to effect cure, at DBT's expense, if such DBT Default under clause (f) of Section 18.1.1 continues beyond five days after such notice is delivered;

- (c) As to a DBT Default under clauses (c), (e), (i), (j), (q), (u), and (v) of Section 18.1.1, a period of 30 days after KYTC delivers to DBT notice of the DBT Default; provided, however, that: (i) if the DBT Default is of such a nature that the cure cannot with diligence be completed within such time period and DBT has commenced meaningful steps to cure immediately after receiving the default notice, DBT shall have such additional period of time, up to a maximum cure period of 60 days, as is reasonably necessary to diligently effect cure; and (ii) as to clause (i) of Section 18.1.1, cure will be regarded as complete when the adverse effects of the breach are cured;
- (d) As to a DBT Default under clauses (b), (k), (l), (m), (n), and (o) of Section 18.1.1, there shall be no cure period, and there shall be no right to notice of a DBT Default under clauses (b), (k), (l), (m), (n), and (o) of Section 18.1.1; and
- (e) As to a DBT Default under clause (r) of Section 18.1.1, the cure period shall be as specified in Section 18.2.2.

### **17.1.3 Declaration of Event of Default**

If any event or condition described in Section 18.1.1 is either not subject to cure or is not cured within the period (if any) specified in Section 18.1.2, KYTC may declare that an "Event of Default" has occurred. The declaration of an Event of Default shall be in writing and provided to DBT and, at KYTC's election, provided to the Surety(ies).

## **17.2 KYTC Remedies for DBT Default**

### **17.2.1 Termination for Default**

**17.2.1.1** In the event of any DBT Default that is or becomes an Event of Default, KYTC may terminate this Agreement or a portion thereof, including DBT's rights of entry upon and control of the Project. Such termination shall be effective upon delivering notice of termination or any other date specified in such notice, which notice may be included in the declaration of the Event of Default. If this Agreement or a portion thereof is so terminated for an Event of Default, KYTC will have the following rights without further notice and without waiving or releasing DBT from any obligations and DBT shall have the following obligations (as applicable).

- (a) KYTC may deduct any amounts owed by DBT to KYTC (including interest thereon as permitted under this Agreement) from any amounts payable by KYTC to DBT. The amounts that KYTC may deduct include



reimbursements owing; Liquidated Damages w amounts KYTC deems advisable to cover any existing or threatened claims and stop notices of Subcontractors, laborers or other Persons; amounts of any Losses that have accrued, subject to any limitations on the recovery thereon in the Contract Documents; the cost to complete or remediate uncompleted Work or Nonconforming Work; interest owing KYTC under this Agreement; or other damages or amounts that KYTC has determined are or may be payable to KYTC under the Contract Documents.

- (b) KYTC will have the right, but not the obligation, to pay any amount or perform any act as may then be required from DBT under the Contract Documents or Subcontracts.
- (c) KYTC may appropriate any or all materials, supplies, and equipment on the Site and may direct the Surety to complete this Agreement or may enter into an agreement for the completion of this Agreement according to the terms and provisions hereof with another contractor or the Surety, or use such other methods as may be required for the completion of the Work and the requirements of the Contract Documents, including completion of the Work by KYTC.
- (d) If KYTC exercises any right to perform any obligations of DBT, KYTC 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 KYTC deems necessary to employ such architects, engineers, consultants, and contractors and obtain materials and equipment as may be required for the purpose of completing such Work;
  - iii. Execute all applications, certificates, and other documents as may be required for completing the Work;
  - iv. Modify or terminate any contractual arrangements;
  - v. Take any and all other actions that it may in its good faith discretion consider necessary to complete the Work; and
  - vi. Prosecute and defend any action or proceeding incident to the Work.

**17.2.1.2** In lieu of the provisions of this Section 17.2.1 for terminating this Agreement for default and completing the Work, KYTC may, in its sole discretion, pay DBT for the parts already done according to the provisions of the Contract Documents and KYTC may treat the parts remaining undone as if they had never been included or contemplated by this Agreement. No Claim or other request for

relief in any form under this Section 18.2.1.3 will be allowed for prospective profits on, or any other compensation relating to, Work uncompleted by DBT.

**17.2.1.3** If KYTC determines under Section 17.2.1.2 that KYTC owes any amounts to DBT or its Surety related to the Work or KYTC elects to pay DBT the amount owed for Work completed in accordance with Section 18.2.1.3, such amounts shall be payable by KYTC subject to the terms and conditions of the Contract Documents.

**17.2.1.4** If this Agreement is terminated for grounds that are later determined not to justify a termination for default, such termination shall be deemed to constitute a Termination for Convenience pursuant to Article 22.

## **17.2.2** DBT Defaults Related to Safety

**17.2.2.1** Notwithstanding anything to the contrary in this Agreement, if in the good faith judgment of KYTC a DBT Default results in an Emergency or danger to persons or property, and if DBT is not then diligently taking all necessary steps to rectify such Emergency or danger, KYTC may, without notice and without awaiting lapse of the period to cure any breach, and in addition and without prejudice to its other remedies, (but is not obligated to):

- (a) Immediately take such action as may be reasonably necessary to rectify the Emergency or danger, in which event DBT shall pay to KYTC on demand the cost of such action, including KYTC's Recoverable Costs; or
- (b) Suspend the Work or close or cause to be closed any and all portions of the Project affected by the Emergency or danger.

**17.2.2.2** So long as KYTC undertakes such action in good faith, even if under a mistaken belief in the occurrence of such failure or existence of an Emergency or danger as a result thereof, such action shall not be deemed unlawful or a breach of this Agreement, shall not expose KYTC to any liability to DBT and shall not entitle DBT to an increase in the Contract Price, Completion Deadline adjustment or any other Claim, it being acknowledged that KYTC has a high priority, paramount public interest in protecting public and worker safety at the Project and adjacent and connecting areas.

**17.2.2.3** KYTC's good faith determination of the existence of such a failure, Emergency or danger shall be deemed conclusive in the absence of clear and convincing evidence to the contrary.

**17.2.2.4** Immediately following rectification of such Emergency or danger, as determined by KYTC, KYTC will allow the Work to continue or such portions of the Project to reopen, as the case may be.

**17.2.3 Damages; Offset**

**17.2.3.1** Subject to Article 19, KYTC will be entitled to recover any and all damages available at Law for any and all causes of action KYTC may have against DBT, including, but not limited to, for damages caused by a DBT Default. DBT shall owe any such damages that accrue after the occurrence of the DBT Default (provided that KYTC delivers notice thereof, if any, required by this Agreement) regardless of whether the DBT Default is subsequently cured or ripens into an Event of Default.

**17.2.3.2** DBT, Sureties, shall not be relieved of liability for continuing Liquidated Damages due to a DBT Default nor by KYTC's declaration of an Event of Default, or actions taken by KYTC under this Section 17.2.

**17.2.3.3** KYTC's remedies with respect to Nonconforming Work shall include the right to accept such Work and receive payment as provided in Section 6.6 in lieu of the remedies specified in this Section 17.2.

**17.2.3.4** Where this Agreement is not terminated and KYTC pursues other actions described in this Article 17, damages include:

- (a) Costs KYTC incurs to complete the Work;
- (b) Compensation and reimbursements due but unpaid to KYTC under the Contract Documents;
- (c) Costs to remedy any defective part of the Work;
- (d) Costs to rectify any breach or failure to perform by DBT or to bring the condition of the Project to that required by the Contract Documents; and
- (e) Any other damages available at law or in equity.

**17.2.4 Performance Security**

Upon the occurrence of an Event of Default and without waiving or releasing DBT from any obligations, KYTC will be entitled to make demand upon and enforce any bond, and make demand upon, draw on and enforce and collect any letter of credit, or other performance security available to KYTC under this Agreement with respect to the Event of Default in question. Where access to a bond is to satisfy damages owing, KYTC will be entitled to make demand and enforce, regardless of whether the Event of Default is subsequently cured. Where access to a letter of credit or other performance security is to satisfy damages owing, KYTC will be entitled to make demand, draw, enforce, and collect, regardless of whether the Event of Default is subsequently cured. KYTC will apply the proceeds of any such action to the satisfaction of DBT's obligations under this Agreement, including payment of amounts due KYTC. The foregoing does not limit or affect KYTC's right to give notice to or make demand upon and enforce any bond, and make demand upon, draw on and enforce, and collect any letter of credit, or other performance security,

immediately after KYTC is entitled to do so under the bond, letter of credit, or other performance security.

### **17.2.5 Other Rights and Remedies; Cumulative Remedies**

Subject to Section 17.3:

- (a) KYTC may exercise any other rights and remedies available under this Agreement, or available at law or in equity;
- (b) Each right and remedy of KYTC hereunder shall be cumulative and shall be in addition to every other right or remedy provided herein or now or hereafter existing at law or in equity or by statute or otherwise; and
- (c) The exercise or beginning of the exercise by KYTC of any one or more of any of such rights or remedies shall not preclude the simultaneous or later exercise by KYTC of any or all other such rights or remedies.

### **17.3 Event of Default Due Solely to DBT's Failure to Achieve Completion Deadlines**

**17.3.1** If an Event of Default consists solely of DBT's failure to achieve Substantial Completion or Final Acceptance by the applicable Completion Deadline, then KYTC agrees not to terminate or seek damages respecting the delay except its right to Liquidated Damages so long as (a) the KYTC-approved Baseline Schedule (incorporating any KYTC-approved Recovery Schedule) demonstrates that DBT is capable of meeting such Completion Deadline within 180 days of the Substantial Completion Deadline or 45 days of the Final Acceptance Deadline, as applicable, and (b) DBT diligently performs the Work in accordance with such schedule. Nothing in this Section 17.3 shall prejudice any other rights or remedies that KYTC may have due to any other Event of Default during such 180-day period or 45-day period, as applicable.

**17.3.2** If Substantial Completion or Final Acceptance of the Project has not occurred within 180 days or 45 days, respectively, of the applicable Completion Deadline, KYTC will have the right to exercise any other right or remedy under this Agreement, at law or in equity, including termination of this Agreement.

### **17.4 Immediate KYTC Entry to Cure Wrongful Use or Closure**

**17.4.1** Without prior notice and without awaiting lapse of the period to cure, if any DBT Default occurs under clause (t) or (v) of Section 17.1.1, KYTC may enter and take control of the relevant portion of the Project to reopen and continue traffic operations for the benefit of the public and restore the permitted uses, until such time as such DBT Default is cured or KYTC terminates this Agreement.

**17.4.2** DBT shall pay to KYTC on demand KYTC's Recoverable Costs in connection with KYTC's exercise of its rights under Section 17.4.1.

- 17.4.3** So long as KYTC undertakes such action in good faith, even if under a mistaken belief in the occurrence of such a DBT Default, KYTC's action shall not be deemed unlawful or a breach of this Agreement, shall not subject KYTC to any liability to DBT, and shall not entitle DBT to an increase in the Contract Price, Completion Deadline adjustment or any other Claim, unless KYTC's action constitutes recklessness or willful misconduct. DBT acknowledges that KYTC has a high priority, paramount public interest in maintaining continuous public access to the Project and maintaining the authorized uses of the Project. KYTC's good faith determination that such action is needed shall be deemed conclusive in the absence of clear and convincing evidence to the contrary.
- 17.4.4** Immediately following rectification of such DBT Default, as determined by KYTC, KYTC will relinquish control of the relevant portion of the Project back to DBT.

### **17.5 KYTC Step-in Rights**

- 17.5.1** Without having declared an Event of Default, KYTC may exercise its step-in rights on the terms and conditions set forth in this Section 17.5:
- (a) If a DBT Default has occurred; and
  - (b) If the cure period, if any, available to DBT under Section 17.1, or any shorter period, has expired without full and complete cure by DBT.
- 17.5.2** KYTC will have the right, but not the obligation, to pay and perform (including by entering an agreement with another Person to perform) all or any portion of DBT's obligations and the Work that are the subject of a DBT Default, as well as any other then-existing DBT Defaults or failures to perform for which DBT received prior written notice from KYTC but has not commenced or does not continue diligent efforts to cure. Exercise of such rights shall not waive or release DBT from any obligations.
- 17.5.3** KYTC may, to the extent reasonably required for or incident to curing the DBT Default or such other DBT Defaults or failures to perform:
- (a) Perform or attempt to perform, or caused to be performed, such Work;
  - (b) Employ security guards and other safeguards to protect the Project;
  - (c) Spend such sums as KYTC deems reasonably necessary to employ and pay such architects, engineers, consultants, and contractors and obtain materials and equipment as may be required to perform such Work, without obligation or liability to DBT or any Subcontractors for loss of opportunity to perform the same Work or supply the same materials and equipment;

- (d) In accordance with Section 17.2.5, draw on and use proceeds from the Payment Bond and Performance Bond and any other available security to the extent such instruments provide recourse to pay such sums;
- (e) Execute all applications, certificates, and other documents as may be required;
- (f) Make decisions respecting, assume control over, and continue Work as may be reasonably required;
- (g) Modify or terminate any contractual arrangements in KYTC's good faith discretion, without liability for termination fees, costs or other charges;
- (h) Meet with, coordinate with, direct and instruct contractors and suppliers, process invoices and applications for payment from contractors and suppliers, pay contractors and suppliers, and resolve claims of contractors, subcontractors and suppliers, and for this purpose DBT irrevocably appoints KYTC as its attorney-in-fact with full power and authority to act for and bind DBT in its place and stead;
- (i) Take any and all other actions it may in its good faith discretion consider necessary to effect cure and perform the Work; and
- (j) Prosecute and defend any action or proceeding incident to the Work.

**17.5.4** DBT shall reimburse KYTC, within 30 days of receiving an invoice, for KYTC's Recoverable Costs in connection with the performance of any act or Work authorized by this Section 17.5. In lieu of reimbursement, KYTC may elect, in its sole discretion, to deduct such amounts from any amounts payable to DBT under this Agreement.

**17.5.5** Neither KYTC nor any of its Authorized Representatives, contractors, subcontractors, vendors, and employees shall be liable to DBT in any manner for any inconvenience or disturbance arising out of KYTC's entry onto the Project, Project ROW or DBT's Temporary Work Areas to perform under this Section 17.5, unless caused by the recklessness, intentional misconduct or bad faith of such Person. If any Person exercises any right to pay or perform under this Section 18.5, it nevertheless shall have no liability to DBT for the sufficiency or adequacy of any such payment or performance, or for the manner or quality of design, construction, operation or maintenance, unless caused by the recklessness, intentional misconduct or bad faith of such Person.

**17.5.6** KYTC's rights under this Section 17.5 are subject to the right of any Surety under Payment and Performance Bonds to assume performance and completion of all bonded work.

**17.5.7** In the event KYTC takes action described in this Section 17.5 and it is later finally determined that KYTC lacked the right to do so because there did not

occur a DBT Default and expiration, without full and complete cure, of the cure period, if any, available to DBT, and expiration of such cure period is a precondition to KYTC's action, then KYTC's action shall be treated as a Directive Letter for an KYTC-Directed Change. DBT shall comply with the Relief Event Claims process under Article 13 if DBT seeks an increase in the Contract Price, a Completion Deadline adjustment or to assert any other Claim arising therefrom.

- 17.5.8** If KYTC exercises a step-in right under this Article 17, with respect to any portion of the Project (the "affected Project portion"), then all cure periods that are available for Default respecting the affected Project portion and that arose prior to and are pending as of the date the step-in commences shall be deemed forfeited by DBT.

**ARTICLE 18.**  
**LIQUIDATED DAMAGES**  
**AND LIMITATION OF LIABILITY**

**18.1 Liquidated Damages Respecting Delays**

**18.1.1** DBT shall be liable for and pay to KYTC Liquidated Damages with respect to any failure to achieve Substantial Completion or Final Acceptance of the Project by the applicable Completion Deadline, as the same may be extended pursuant to this Agreement. Liquidated Damages will be assessed even when seasonal or temperature limitations prohibit the DBT from proceeding with the Work. The amounts of such Liquidated Damages are as follows:

- (a) \$4,750 for each day that Substantial Completion is delayed beyond the Substantial Completion Deadline; and
- (b) \$4,750 for each day that Final Acceptance is delayed beyond the 90 days from issuance of the Certificate of Substantial Completion.

**18.1.2** The Liquidated Damages described in this Section 18.1 shall commence on the day of the Substantial Completion Deadline or the lapse of the 90 days from issuance of the Certificate of Substantial Completion, as the same may be extended pursuant to this Agreement, and shall continue to accrue until the Substantial Completion Date or the Final Acceptance Date, measured as of the date on which KYTC issues the Certificate of Substantial Completion or Certificate of Final Acceptance, respectively, or until termination of this Agreement. Subject to Section 17.3, such Liquidated Damages shall constitute KYTC's sole right to damages against DBT for such delay.

**18.1.3** DBT agrees and acknowledges that:

- (a) If DBT fails to achieve Substantial Completion or Final Acceptance of the Project by the applicable Completion Deadline, KYTC will incur substantial damages;
- (b) As of the Effective Date, the amounts of Liquidated Damages under this Section 18.1 represent good faith estimates and evaluations by the Parties as to the actual potential damages that KYTC would incur as a result of late Substantial Completion or late Final Acceptance of the Project, as applicable, and do not constitute a penalty;
- (c) Actual potential damages include loss of use, enjoyment, and benefit of the Project and connecting KYTC transportation facilities by the general public, injury to the credibility and reputation of KYTC's transportation improvement program with policy makers and with the general public who depend on and expect availability of service of the Project by the Substantial Completion Deadline, and additional costs of administering



this Agreement (including engineering, legal, accounting, overhead, and other administrative costs);

- (d) The Parties have agreed to Liquidated Damages under this Section 18.1 to fix and limit DBT's costs and to avoid later disputes over what amounts of damages are properly chargeable to DBT;
- (e) Such sums are reasonable in light of the anticipated or actual harm caused by delayed Substantial Completion or delayed Final Acceptance of the Project, the difficulties of the proof of loss, and the inconvenience or infeasibility of otherwise obtaining an adequate remedy;
- (f) Such Liquidated Damages are not intended to, and do not, liquidate DBT's liability under the indemnification provisions of Article 19, even though third party claims against Indemnified Parties may arise out of the same event, breach or failure that gives rise to the Liquidated Damages; and
- (g) Such Liquidated Damages are not intended to, and do not, liquidate damages for cost to complete the Project or any other damages except damages due to delay in Substantial Completion or Final Acceptance.

## **18.2 Liquidated Damages for Lane Closures**

**18.2.1** Liquidated Damages shall be imposed for Non-Permitted Lane Closures as provided in accordance with Exhibit 3 (Technical Provisions).

**18.2.2** DBT acknowledges and agrees that the Liquidated Damages described in this Section 18.2 are reasonable to compensate KYTC for damages KYTC will incur by reason of the matters that result in Liquidated Damages for Lane Closures. Such damages include loss of use, enjoyment and benefit of the Project, and connection to KYTC transportation facilities by the general public, injury to the credibility and reputation of KYTC's transportation improvement program with policy makers and with the general public who depend on and expect availability of service, and additional costs of administering this Agreement (including engineering, legal, accounting, overhead, and other administrative costs). DBT further acknowledges that these damages are incapable of accurate measurement because of, among other things, the unique nature of the Project and the unavailability of a substitute for it. The Parties have agreed to Liquidated Damages under this Section 18.2 to fix and limit DBT's costs and to avoid later disputes over what amounts of damages are properly chargeable to DBT.

**18.2.3** Liquidated Damages for Lane Closures shall not be assessed for Lane Closures that are necessary because of damage or destruction to a traffic lane, ramp, structure, cross road, shoulder or sidewalk directly attributable to a Relief Event; provided that such waiver of Liquidated Damages will continue only for so long as necessary, taking into account DBT's duty to mitigate, to repair or

replace the damage or destruction and reopen the affected traffic lane, ramp, structure, cross road, shoulder or sidewalk.

**18.2.4** Liquidated Damages for any full or partial Lane Closure shall not be assessed to the extent it persists beyond the end of the approved time period as a result of any of the following, provided that (1) such waiver of Liquidated Damages shall only apply to the minimum extra time period that would be required to end the Lane Closure through use of diligent efforts, and (2) DBT shall immediately notify KYTC if any such event occurs that DBT believes will delay ending the Lane Closure on time:

- (a) A Relief Event that occurs during the Lane Closure and directly adversely impacts the ability to end the Lane Closure on time;
- (b) An Incident or Emergency that occurs during the Lane Closure and directly adversely impacts the ability to end the Lane Closure on time, provided that the Incident or Emergency is not caused by the negligence, willful misconduct, breach of contract, or violation of Law or Governmental Approval by any DBT-Related Entity;
- (c) Unexpected loss, disruption, break, explosion, leak or other damage of a Utility that occurs during the Lane Closure and directly adversely impacts the ability to end the Lane Closure on time, provided that the same is not caused by the negligence, willful misconduct, breach of contract, or violation of Law or Governmental Approval by any DBT-Related Entity; or
- (d) KYTC's unjustified and direct delay of, or unjustified and direct interference with, DBT's efforts to end the Lane Closure on time.

**18.2.5** Assessment of Liquidated Damages for Lane Closures shall not preclude KYTC's exercise of its right to remove a Lane Closure that is not a Permitted Closure at DBT's expense under Section 18.2.

**18.2.6** Liquidated Damages for Lane Closures shall separately apply to each Lane Closure that is not a Permitted Closure and shall be cumulative. When a Lane Closure that is not a Permitted Closure affects multiple junctions or lanes, Liquidated Damages shall separately accrue for each affected portion, regardless of whether the junctures or lanes overlap.

### **18.3 Payment; Satisfaction; Waiver; Non-Exclusive Remedy**

**18.3.1** DBT shall pay any Liquidated Damages owing under this Article 19 within 20 days after KYTC delivers to DBT KYTC's invoice or demand therefor.

**18.3.2** KYTC will have the right to deduct and offset Liquidated Damages from any amounts owing to DBT. KYTC also shall have the right to draw on any bond,

certificate of deposit, letter of credit or other security provided by DBT pursuant to this Agreement to satisfy Liquidated Damages not paid when due.

**18.3.3** Permitting or requiring DBT to continue and finish the Work or any part thereof after a Completion Deadline, as applicable, shall not act as a waiver of KYTC's right to receive Liquidated Damages hereunder or any rights or remedies otherwise available to KYTC.

**18.3.4** KYTC's right to, and imposition of Liquidated Damages are in addition, and without prejudice, to any other rights and remedies available to KYTC under this Agreement, at law or in equity respecting the breach, failure to perform or DBT Default that is the basis for the Liquidated Damages or any other breach, failure to perform or DBT Default, except for recovery of the monetary damages that the Liquidated Damages are intended to compensate.

#### **18.4 Penalties Relating to Non-Compliance of Maintenance and Control of Traffic**

**18.4.1** The DBT shall be subject to penalties for non-compliance of maintaining and controlling traffic, in accordance with Section 112.03.15 of the Standard Specifications.

#### **18.5 Liquidated Damages Respecting Disruption of Utility Service**

**18.5.1** The DBT shall be subject to Liquidated Damages for any unauthorized, intentional or accidental disruption in utility service, whether to the main or Service Line, in accordance with Section 13.6.10 of Exhibit 3 (Technical Provisions).

**ARTICLE 19.**  
**INDEMNIFICATION**

**19.1 Indemnity by DBT**

**19.1.1** DBT shall release, protect, defend, indemnify, and hold harmless the Indemnified Parties from and against any and all claims, causes of action, suits, judgments, investigations, legal or administrative proceedings, demands and Losses, in each case if asserted or incurred by or awarded to any third party, arising out of, relating to or resulting from:

- (a) The breach or alleged breach of any of the Contract Documents by any DBT-Related Entity;
- (b) The failure or alleged failure by any DBT-Related Entity to comply with the Governmental Approvals, any applicable Environmental Laws or other Laws;
- (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 KYTC or another Indemnified Party pursuant to this Agreement; provided, however, that this indemnity shall not apply to any infringement to the extent resulting from KYTC's failure to comply with specific written instructions regarding use provided to KYTC by DBT;
- (d) The actual or alleged culpable act, error, omission, negligence, breach or misconduct of any DBT-Related Entity in or associated with performance of the Work;
- (e) Any and all claims by any governmental or taxing authority claiming taxes based on gross receipts, purchases or sales, or the use of any property or income of any DBT-Related Entity with respect to any payment for the Work made to or earned by any DBT-Related Entity;
- (f) The failure or alleged failure by any DBT-Related Entity to pay sums due for the work or services of Subcontractors, laborers, or Suppliers, provided that KYTC has paid all undisputed amounts owing to DBT with respect to such work;
- (g) Any actual or threatened DBT Release of Hazardous Materials;
- (h) The claim or assertion by any other KYTC contractor or DBT: (i) that any DBT-Related Entity failed to cooperate reasonably with such other KYTC contractor or DBT, so as to cause disruption, delay or Loss, except where the DBT-Related Entity was not in any manner engaged

in performance of the Work or (ii) that any DBT-Related Entity interfered with or hindered the progress or completion of work being performed by such other KYTC contractor or DBT, so as to cause disruption, delay or Loss, to the extent such claim arises out of the actual or alleged culpable act, error, omission, negligence, breach or misconduct of any DBT-Related Entity;

- (i) DBT's performance of, or failure to perform, the obligations under any Utility Agreement, or any dispute between DBT and a Utility Company arising out of Utility Adjustments;
- (j) (i) Any DBT-Related Entity's breach of or failure to perform an obligation that KYTC owes to a third person, including Governmental Entities, under Law or under any agreement between KYTC and a third person, where KYTC has delegated performance of the obligation to DBT under the Contract Documents or (ii) the acts or omissions of any DBT-Related Entity that render KYTC unable to perform or abide by an obligation that KYTC owes to a third person, including Governmental Entities, under any agreement between KYTC and a third person, where the agreement was disclosed or known to DBT;
- (k) The fraud, bad faith, arbitrary or capricious acts, or violation of Law by any DBT-Related Entity in or associated with the performance of the Work;
- (l) Inverse condemnation, trespass, nuisance or similar taking of or harm to real property by reason of: (i) the failure of any DBT-Related Entity to comply with Good Industry Practices, requirements of the Contract Documents, or Governmental Approvals respecting control and mitigation of construction activities and construction impacts, (ii) the negligence or intentional misconduct of any DBT-Related Entity, or (iii) the actual physical entry onto or encroachment upon another's property by any DBT-Related Entity;
- (m) Errors, inconsistencies or other defects in the design, construction or maintenance of the Project or of Utility Adjustments included in the Work. For Design Work, this indemnity obligation shall only apply to the extent DBT did not perform such Design Work;
- (n) Damage to water or sewer lines caused by DBT's operations; or
- (o) Any other indemnity obligation of DBT in the Contract Documents.

**19.1.2** Subject to the releases and disclaimers herein, including all the provisions set forth in Section 3.1.5 of this Agreement, DBT's indemnity obligation shall not extend to any third party Loss to the extent caused by:

- (a) The sole negligence, reckless or intentional misconduct, bad faith or fraud of such Indemnified Party;
- (b) KYTC's material breach of any of its material obligations under the Contract Documents;
- (c) An Indemnified Party's material violation of any Laws or Governmental Approvals; or
- (d) An unsafe requirement inherent in prescriptive design or prescriptive construction specifications of Exhibit 3 (Technical Provisions), but only where, prior to occurrence of the third party Loss: (i) DBT complied with such specifications and did not actually know, or would not have known, while exercising reasonable diligence, that the requirement created a potentially unsafe condition or (ii) DBT knew of and reported to KYTC the potentially unsafe requirement.

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

**19.1.4** For purposes of this Section 19.1, "third party" means any person or entity other than an Indemnified Party and DBT, except that a "third party" includes any Indemnified Party's employee, agent or contractor who asserts a claim against an Indemnified Party that is within the scope of the indemnities and that is not covered in full by the Indemnified Party's worker's compensation program.

**19.1.5** DBT hereby acknowledges and agrees that it is DBT's obligation to perform the Work in accordance with the Contract Documents and that the Indemnified Parties are fully entitled to rely on DBT's performance of such obligation. DBT further agrees that any certificate, review or approval by KYTC or others hereunder shall not relieve DBT of any of its obligations under the Contract Documents or in any way diminish its liability for performance of such obligations or its obligations under this Article 20.

**19.1.6** The indemnity set forth in Section 19.1.1(g) is intended to operate as an agreement pursuant to Section 107(e) of the Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. Section 9607(e) to insure, protect, hold harmless, and indemnify the Indemnified Parties.

**19.1.7** The obligations under this Article 19 shall not be construed to negate, abridge, or reduce other rights or obligations that would otherwise exist in favor of an Indemnified Party hereunder.

## **19.2 Defense and Indemnification Procedures**

- 19.2.1** If KYTC receives notice of a claim or otherwise has actual knowledge of a claim that it believes is within the scope of the indemnities under Section 19.1, and if KYTC gives notice thereof pursuant to Section 19.2, then KYTC will have the right to conduct its own defense unless either an insurer accepts defense of the claim within the time required by law or DBT accepts the tender of the claim in accordance with Section 19.2.3.
- 19.2.2** Subject to Section 19.2.6, if the insurer under any applicable insurance policy accepts the tender of defense, KYTC and DBT shall cooperate in the defense as required by the insurance policy. If no insurer under potentially applicable insurance policies provides defense, then Section 19.2.3 shall apply.
- 19.2.3** If the defense is tendered to DBT, then within 15 days after receipt of the tender, DBT shall notify the Indemnified Party whether DBT has tendered the matter to an insurer. If DBT does not tender the matter to an insurer, then within such 15 days, or if the insurer has rejected the tender, then within five days after such rejection, DBT shall deliver a notice to the Indemnified Party stating one of the following:
- (a) DBT accepts the tender of defense and confirms that the claim is subject to full indemnification without any “reservation of rights” to deny or disclaim full indemnification thereafter;
  - (b) DBT accepts the tender of defense but with a “reservation of rights” to deny or disclaim indemnification thereafter, in whole or in part; or
  - (c) DBT rejects the tender of defense based on a determination that it is not required to indemnify against the claim under the terms of this Agreement or any other agreement or obligation to provide indemnification.
- 19.2.4** If DBT accepts the tender of defense under Section 19.2.3(a), DBT shall have the right to select legal counsel for the Indemnified Party, subject to reasonable approval by the Indemnified Party, and DBT shall otherwise control the defense of such claim, including settlement, and bear the fees and costs of defending and settling such claim. During such defense:
- (a) DBT shall fully and regularly inform the Indemnified Party of the progress of the defense and of any settlement discussions; and
  - (b) The Indemnified Party shall fully cooperate in said defense, provide to DBT all materials and access to personnel it requests as necessary for defense, preparation, and trial and which or who are under the control of or reasonably available to the Indemnified Party, and maintain the confidentiality of all communications between it and DBT concerning such defense.

- 19.2.5** If DBT responds to the tender of defense as specified in Section 19.2.3(b) or 19.2.3(c), the Indemnified Party shall be entitled to select its own legal counsel and otherwise control the defense of such claim, including settlement.
- 19.2.6** Notwithstanding Section 19.2.3(a) or 19.2.3(b), the Indemnified Party may assume its own defense by delivering to DBT notice of such election and the reasons therefor, if the Indemnified Party, at the time it gives notice of the claim or at any time thereafter, reasonably determines that:
- (a) A conflict exists between it and DBT that prevents or potentially prevents DBT from presenting a full and effective defense;
  - (b) DBT is otherwise not providing an effective defense in connection with the claim; or
  - (c) DBT lacks the financial capacity to satisfy potential liability or to provide an effective defense.
- 19.2.7** If the Indemnified Party is entitled and elects to conduct its own defense of a claim for which it is entitled to indemnification, DBT shall reimburse on a current basis all reasonable costs and expenses the Indemnified Party incurs in investigating and defending, except to the extent the Indemnified Party conducts its own defense as a result of DBT's denial of such defense pursuant to Section 19.2.3(c). In the event the Indemnified Party is entitled to and elects to conduct its own defense, then:
- (a) In the case of a defense conducted under Section 19.2.3(a), it shall have the right to settle or compromise the claim with DBT's prior consent, which shall not be unreasonably withheld or delayed;
  - (b) In the case of a defense conducted under Section 19.2.3(b), it shall have the right to settle or compromise the claim with DBT's prior consent, which shall not be unreasonably withheld or delayed, or with approval of the court or arbitrator following reasonable notice to DBT and opportunity to be heard and without prejudice to the Indemnified Party's rights to be indemnified by DBT; and
  - (c) In the case of a defense conducted under Section 19.2.3(c), it shall have the right to settle or compromise the claim without DBT's prior consent and without prejudice to its rights to be indemnified by DBT. If it is determined that DBT wrongfully denied the defense of the Indemnified Party, the Indemnified Party shall be entitled to reimbursement of the costs of defense, including reimbursement of reasonable attorney's fees and other litigation and defense costs, and indemnification of costs to settle or compromise the claim, in addition to interest, calculated as the Prime Rate in effect from time to time plus 100 basis points, payable on such defense and settlement amounts from the date such costs and expenses are incurred by the Indemnified Party.



- 19.2.8** The Parties acknowledge that while Section 19.1 contemplates that DBT will have responsibility for certain claims and liabilities arising out of its obligations to indemnify, circumstances may arise in which there may be shared liability of the Parties with respect to such claims and liabilities. In such case, where either Party believes a claim or liability may entail shared responsibility and that principles of comparative negligence and indemnity are applicable, it shall confer with the other Party on management of the claim or liability in question. If the Parties cannot agree on an approach to representation in the matter in question, each shall arrange to represent itself and to bear its own costs in connection therewith pending the outcome of such matter. Within 30 days subsequent to the final, non-appealable resolution of the matter in question, whether by arbitration, judicial proceedings, or otherwise, the Parties shall adjust the costs of defense, including reimbursement of reasonable attorney's fees and other litigation and defense costs, in accordance with the indemnification arrangements of Section 19.2, and consistent with the outcome of such proceedings concerning the respective liabilities of the Parties on the third-party claim.
- 19.2.9** In determining responsibilities and obligations for defending suits pursuant to this Section 19.2, and to the extent consistent with applicable Law, specific consideration shall be given to the following factors: (a) the party performing the activity in question; (b) the location of the activity and incident; (c) contractual arrangements then governing the performance of the activity; and (d) allegations of respective fault contained in the claim.

**ARTICLE 20.**  
**PARTNERING AND DISPUTE RESOLUTION PROCEDURES**

**20.1 Partnering**

**20.1.1 General Provisions**

**20.1.1.1** For the mutual benefit of the Parties, KYTC and DBT shall establish a partnering relationship to complete the Project effectively. The purpose of the partnering relationship is to establish and maintain effective communication between the Parties to cooperatively identify and resolve critical Project-related issues. Neither the partnering relationship itself, nor discussions between the Parties addressed at the initial partnering workshop, refresher partnering meetings or the construction closeout partnering meeting (collectively "Partnering Meetings"), shall modify the terms and conditions of this Agreement.

**20.1.1.2** In implementing and managing the partnering relationship required under this Section 20.1, KYTC and DBT shall:

- (a) Use early and regular communication;
- (b) Establish and maintain a relationship of shared trust, equity, and commitment;
- (c) Identify, quantify, and support attainment of mutual goals;
- (d) Develop strategies for using risk-management tools and concepts;
- (e) Implement timely communication and decision making;
- (f) Resolve potential problems at the lowest level of responsible management to avoid negative impacts and Disputes, including by developing a process for the escalation of field-level issues, such as by using the Issue Resolution Ladder informally as disputes arise to resolve them before they materialize into Claims and Disputes;
- (g) Develop a plan for periodic joint evaluation based on mutually agreed goals;
- (h) Hold Partnering Meetings, to preserve the partnering relationship and its benefits; and
- (i) Establish periodic joint evaluations of the partnering process and attainment of mutual goals.

## **20.2 Dispute Resolution Procedures**

The Parties agree that any Dispute which is not resolved by partnering shall be resolved pursuant to Section 105.13 of the KYTC Standard Specifications;

**ARTICLE 21.**  
**RECORDS AND AUDITS; OWNERSHIP OF DOCUMENTS AND INTELLECTUAL**  
**PROPERTY**

**21.1 Escrow Proposal Documents (EPDs)**

**21.1.1 EPDs**

Upon execution of the Contract, the DBT delivered to KYTC one copy (either hard copy or electronic thumb drive) of all documentary information used in preparation of its Price Proposal ("Escrow Proposal Documents" or "EPDs"), excluding documents relating to other projects which may have been referenced by DBT in determining the proposed Contract Price.

**21.1.2 Supplemental EPDs**

One copy of all documentary information used in preparation of the Request for Change Proposal and the resulting Change Order shall be added to the EPDs ("Supplemental EPDs"), and retained.

Within ten Working Days after the Change Order has been executed, representatives of KYTC and DBT shall review the Supplemental EPDs to determine whether it is completed. The Supplemental EPDs shall be organized and added to the index of EPDs. Each page shall be appropriately labelled so that it is obvious that the page is a part of the EPDs so as to enable a person reviewing the page to determine where the Supplemental EPDs can be found within the EPDs.

If the Supplemental EPDs are determined to be incomplete, KYTC may request DBT to supply data to make the Supplemental EPDs complete. DBT shall provide all such data within three Working Days of the request, and at that time it will be date stamped, labeled to identify it as supplementary EPD information. DBT shall have no right to add documents to the EPDs except upon KYTC's request.

**21.1.3 Retention of EPDs and Supplemental EPDs**

EPDs and Supplemental EPDs are held and retained in a locked fireproof cabinet in a locked room in the DBT's offices. The cabinet will have two locks, with one key held by the DBT and the other key held by KYTC.

EPDs will be held in such cabinet or until all of the following have occurred: (a) 180 days have elapsed after expiration of the warranties under the Contract Documents, (b) all Disputes regarding the Contract have been settled, and (c) final payment on the Contract has been made by KYTC and accepted by DBT.

**21.1.4 Contents of EPD**

EPDs and Supplemental EPDs shall clearly itemize the estimated costs of performing the Work required by the Proposal, the Change Order, and the Contract Documents, as follows:

- (j) All Work shall be separated into sub-items to present a complete and detailed estimate of all costs.
- (k) Crews, equipment, quantities and rates of production shall be detailed.
- (l) Estimates of costs shall be further divided into usual cost categories such as direct labor, repair labor, equipment ownership and operation, expendable materials, permanent materials and subcontract costs as appropriate.
- (m) Plant and equipment and indirect costs shall be detailed.
- (n) Allocation of plant and equipment, indirect costs, contingencies, markup and other items to each direct cost item shall be clearly identified.
- (o) The EPDs and Supplemental EPDs shall include all assumptions, quantity takeoffs, rates of production, DBT's internal equipment rental rates and progress calculations, quotes from subcontractors, consultants and suppliers, memoranda, narratives and all other information used by DBT to arrive at the cost for the Proposal or Change Order.

#### **21.1.5 Availability for Review**

KYTC shall be entitled to review all or any part of the EPDs or Supplemental EPDs in order to satisfy itself regarding the applicability of the EPDs or Supplemental EPDs to Disputes that may arise during the course of the Project. EPDs and Supplemental EPDs shall be available during Business Hours for joint review by DBT and KYTC in the resolution of Disputes or in connection with an audit.

KYTC shall be entitled to make and retain copies of such documents as it deems appropriate in connection with any such matters, provided that KYTC has executed and delivered to DBT a confidentiality agreement specifying that, except as required by law or court order, all proprietary information contained in such documents will be kept confidential, that copies of such documents will not be distributed to any third parties other than KYTC's agents, attorneys and experts, and other dispute resolvers hereunder, and that all copies of such documents (other than those delivered to dispute resolvers) will be either destroyed or returned to the depository (or to DBT if the EPD have been returned to it) upon final resolution of the negotiations or Disputes. The foregoing shall in no way be deemed a limitation on KYTC's discovery rights with respect to such documents. Nothing in this Section 21.1.5 shall prohibit KYTC from producing such documents it believes, in its discretion, it is required to produce in response to a request pursuant to the Kentucky Open Records Act or as otherwise required by law or court order. Nothing in this Section

21.1.5. shall restrict KYTC's rights to use the Design Documents and Technical Proposal Documents as provided for elsewhere in the Contract Documents.

#### **21.1.6 Proprietary Information**

EPDs and Supplemental EPDs shall at all times be treated as proprietary and confidential information and shall be used only for purposes described in this Section 22.1.

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

DBT shall label any EPDs that it considers to be exempt from disclosure pursuant to the Kentucky Open Records Act. At DBT's request, confidentiality agreements shall be executed and delivered to DBT by KYTC's employees or agents who review or have access to the EPD.

#### **21.1.7 Representation**

DBT represents and warrants that the EPDs provided upon execution of the Contract constitute all of the information used in the preparation of the Proposal and agrees that no other information will be considered in resolving Disputes. DBT also agrees that EPDs are not part of the Contract and that nothing in the EPDs shall change or modify the Contract.

DBT further represents and warrants that EPDs and Supplemental EPDs have been personally examined prior to escrow by an authorized officer of DBT and that they meet the requirements of Section 22.1.4 and are adequate to enable a complete understanding and interpretation of how DBT arrived at its Proposal

#### **21.1.8 Form of EPDs and Supplemental EPDs**

Except as otherwise provided in the RFP, DBT shall submit the EPDs and Supplemental EPDs in such format as is used by DBT in connection with its Proposal.

### **21.2 Subcontract Pricing Documents**

**21.2.1** Each Subcontract shall include a provision requiring the Subcontractor to preserve all documentary information used in establishing its Subcontract price

and to provide such documentation to DBT or KYTC in connection with any claim made by such Subcontractor or any Claim by DBT that involves work performed by such Subcontractor.

### **21.3 Maintenance and Inspection of Books and Records**

**21.3.1** Requirements for maintenance and inspections of Books and Records shall be in accordance with Exhibit 3 (Technical Provisions).

### **21.4 Audits**

**21.4.1** KYTC shall have the right to review and audit DBT, its Subcontractors, and their respective Books and Records as and when KYTC deems necessary for purposes of verifying compliance with the Contract Documents and applicable Law. KYTC may conduct any such audit of Books and Records upon 24 hours' prior notice, or unannounced and without prior notice where KYTC has a good faith suspicion of fraud.

**21.4.2** All Claims or Disputes are subject to audit at any time following Design-Builder's delivery of notice of the Claim or Dispute. The audit may be performed by employees of KYTC or by an auditor under contract with KYTC. No notice is required from KYTC before commencing any audit during the Work and up to (1) 60 days after Final Acceptance or (2) 60 days after termination of this Agreement. Thereafter, KYTC will provide 20 days' notice to DBT, any Subcontractors or their respective agents before commencing an audit. DBT, Subcontractors or their agents shall provide and cause DBT-Related Entities to provide adequate facilities, acceptable to KYTC, for the audit during normal Business Hours. DBT shall cooperate and cause DBT-Related Entities to cooperate with the auditors. At a minimum, the auditors shall have available to them the following documents:

- (a) Daily time sheets and supervisor's daily reports;
- (b) Union agreements;
- (c) Insurance, welfare, and benefits records;
- (d) Payroll registers;
- (e) Earnings records;
- (f) Payroll tax forms;
- (g) Material invoices and requisitions;
- (h) Material cost distribution work sheet;
- (i) Equipment records (list of company equipment, rates, etc.);

- (j) Subcontractors' and Suppliers' invoices;
- (k) Subcontractors' and agents' payment certificates;
- (l) Canceled checks (payroll, Subcontractors and Suppliers);
- (m) Job cost report;
- (n) Job payroll ledger;
- (o) General ledger;
- (p) Cash disbursements journal;
- (q) Baseline Schedules;
- (r) All documents that relate to each and every Claim or Dispute, together with all documents that support the amount of damages in each Claim or Dispute; and
- (s) Work sheets used to prepare the Claim or Dispute establishing the cost components for items of the Claim or Dispute, including labor, benefits and insurance, materials, equipment, Subcontractors, all documents that establish the time periods, individuals involved, the hours for the individuals, and the rates for the individuals.

**21.4.3** Failure of any DBT-Related Entity to maintain and retain sufficient records to allow the auditors to verify any portion of a Claim or Dispute shall constitute a waiver, and bar any recovery or relief, regarding such portion of the Claim or Dispute. Failure of any DBT-Related Entity to permit the auditor access to the Books and Records of any DBT-Related Entity, or to otherwise fully comply with the provisions of this Section 21.4.3, shall constitute a waiver of the Claim or Dispute and shall bar any recovery or relief thereunder.

**21.4.4** Certain rights of the FHWA to review and audit DBT, its Subcontractors, and their respective Books and Records are set forth in Exhibit 6.

**21.4.5** DBT represents and warrants the completeness and accuracy of all information it or its agents provide in connection with KYTC audits, and shall cause all Subcontractors other than KYTC and Governmental Entities acting as Subcontractors to warrant the completeness and accuracy of all information such Subcontractors or their agents provide in connection with KYTC audits.

**21.4.6** KYTC's rights of audit include the right to observe the business operations of DBT and its Subcontractors to confirm the accuracy of Books and Records.

**21.4.7** Nothing in the Contract Documents shall in any way limit the constitutional and statutory powers, duties, and rights of elected Commonwealth officials,



including the independent rights of the Commonwealth Auditor of Public Accounts, in carrying out his or her legal authority. DBT understands and acknowledges that:

- (a) The Commonwealth Auditor of Public Accounts may conduct an audit or investigation of any Person receiving funds from the Commonwealth directly under this Agreement or indirectly through a Subcontract;
- (b) Acceptance of funds directly under this Agreement or indirectly through a Subcontract acts as acceptance of the authority of the Commonwealth Auditor of Public Accounts, under the direction of the Joint Legislative Audit Committee, to conduct an audit or investigation in connection with those funds; and
- (c) A Person that is the subject of an audit or investigation must provide the Commonwealth Auditor of Public Accounts with access to any information the Commonwealth Auditor of Public Accounts considers relevant to the investigation or audit.

## **21.5 Kentucky Open Records Act**

**21.5.1** DBT acknowledges and agrees that all records, documents, drawings, Plans, specifications, and other materials in KYTC's possession, including materials submitted by DBT, are subject to the provisions of the Kentucky Open Records Act.

**21.5.2** KYTC shall not be obligated to maintain in confidence any information that is not confidential or proprietary including information that: (a) is already known by the Commonwealth, (b) is or comes into the public domain through no fault of the Commonwealth, (3) is independently developed by the Commonwealth, or (4) comes to the Commonwealth from a third party in a manner not in violation of any obligation of confidentiality by such third party to the DBT. Kentucky Law generally requires that documents that contain both confidential and non-confidential information be disclosed with confidential information redacted.

## **21.6 Intellectual Property**

**21.6.1** Proprietary Intellectual Property

**21.6.1.1** DBT acknowledges and agrees that all Proprietary Intellectual Property, in any medium, is specially ordered or commissioned by KYTC, including works made for hire in accordance with Section 101 of the Copyright Act of the United States. DBT hereby assigns to KYTC all rights, title, and interest in and to the Proprietary Intellectual Property including any and all software, work product, and designs.

**21.6.1.2** As a condition of Final Acceptance, DBT shall deliver to KYTC all work product, documents, results, and related materials created in the development of Proprietary Intellectual Property, as well as a complete, indexed collection of such materials. Without limiting the generality of the foregoing, delivery of such materials shall include Design Documents and Construction Documents. DBT may retain a copy of such work product, documents, results, and related materials.

**21.6.1.3** KYTC hereby grants to DBT a non-exclusive, irrevocable, perpetual, fully paid up license to use, exploit, manufacture, distribute, copy, adapt, and display the Proprietary Intellectual Property, including in connection with (a) incorporation into the Project, (b) the Work for this Project, (c) all other services performed for or on behalf of KYTC to complete the Work, or comply with DBT's obligations under this Agreement, and (d) other projects and work of DBT. No Intellectual Property rights of KYTC are being licensed to DBT except as otherwise expressly provided in this Section. DBT's use or exploitation of the licensed Proprietary Intellectual Property shall be at DBT's sole discretion and risk, and in no way shall be deemed to confer liability or an indemnity obligation on KYTC. KYTC shall not be liable to DBT or any other person for any claim, loss, damage, cost, judgment, fee, penalty, charge or expense (including attorney's fees and costs) to the extent arising out of or resulting from use or exploitation of the licensed Proprietary Intellectual Property by DBT, any transferee of the license or any of their respective board members, officers, agents or employees. KYTC makes no warranty or representation, express or implied, regarding the licensed Proprietary Intellectual Property or its suitability for any intended purpose.

## **21.6.2** DBT Intellectual Property

**21.6.2.1** Subject to this Section 21.6.2, DBT hereby grants to KYTC a non-exclusive, irrevocable, perpetual, fully paid-up right and license to use, exploit, manufacture, distribute, copy, adapt, and display the DBT Intellectual Property, including any enhancements thereof.

**21.6.2.2** DBT shall identify and disclose all DBT Intellectual Property contained or included in the Project Intellectual Property, including (when reasonably available) full and specific information detailing Intellectual Property claimed, date of authorship, creation or invention, date of application(s), application number(s) and registering entit(ies), date of registration(s), registration number(s), and registering entit(ies), if any, and owner including person or entity name and address.

**21.6.2.3** DBT shall deliver to KYTC all DBT Intellectual Property contained or included in the Project Intellectual Property promptly upon request.

## **21.6.3** Third Party Intellectual Property

**21.6.3.1** Whenever using any design, device, material, software or process protectable or protected as Third Party Intellectual Property, DBT shall obtain the right and license for such use. Without limiting the foregoing, and subject to [Section 21.6.3](#), DBT shall secure nonexclusive, transferable, irrevocable, unconditional, royalty-free licenses in the name of KYTC to use, reproduce, modify, adapt, and disclose Third Party Intellectual Property and shall pay any and all royalties and license fees required to be paid for any Intellectual Property incorporated into the Project Intellectual Property. All Third Party Intellectual Property licenses are subject to KYTC's review and approval. The foregoing requirement shall not apply, however, to mass-marketed software products (sometimes referred to as "shrink wrap software") owned by such a Person where such a license cannot be extended to KYTC using commercially reasonable efforts. In such case, DBT shall acquire the proper rights for KYTC to make use of such products as necessary for DBT to comply with the Contract Documents.

**21.6.3.2** DBT shall identify and disclose all Third Party Intellectual Property contained or included in the Project Intellectual Property, including (when reasonably available) full and specific information detailing Intellectual Property claimed, date of authorship, creation or invention, date of application(s), application number(s) and registering entit(ies), date of registration(s), registration number(s), and registering entit(ies), if any, and owner, including person or entity name and address.

#### **21.6.4** Inclusion in Contract Price

DBT acknowledges and agrees that the Contract Price includes all royalties and costs arising from Project Intellectual Property or in any way involved in the Work.

#### **21.6.5** Licensing Limitations

Licenses granted under this Agreement shall be limited as follows:

**21.6.5.1** The right to transfer the license is limited to any Governmental Entity that succeeds to the power and authority of KYTC generally or with respect to the Project, and any Governmental Entity having power and authority over any municipality, city, state or county road where the Proprietary Intellectual Property of DBT is installed, deployed or operated.

**21.6.5.2** The right to sublicense is limited to Commonwealth, regional, and local Governmental Entities that own or operate a Commonwealth Highway or other road (tolled or not tolled) where the Proprietary Intellectual Property of DBT is installed, deployed or operated, and to the concessionaires, DBTs, contractors, subcontractors, employees, attorneys, consultants, and agents that are retained by or on behalf of KYTC or any such Commonwealth, regional or local Governmental Entity in connection with the Project, another State Highway, or

other road (tolled or untolled) where the Proprietary Intellectual Property of DBT is installed, deployed or operated.

**21.6.5.3** KYTC will:

- (a) Not disclose any DBT Intellectual Property or Third Party Intellectual Property to any Person other than authorized transferees and sublicensees who agree to be bound by any confidentiality obligations of KYTC relating thereto;
- (b) Enter into a commercially reasonable confidentiality agreement if requested by DBT with respect to the licensed DBT Intellectual Property or Third Party Intellectual Property; and
- (c) Include, or where applicable require, such Commonwealth, regional or local Governmental Entity to include, in the contract with the sublicensee its covenant to employ sound business practices no less diligent than those used for its own confidential information, and no less diligent than required by commercially reasonable standards of confidentiality, to protect all DBT Intellectual Property or Third Party Intellectual Property and other materials provided under the sublicense against disclosure to third parties not in receipt of a sublicense, and to use the sublicense only for the permitted purposes.

**21.6.6** Limitation on KYTC Liability

Notwithstanding any contrary provision of this Agreement, in no event shall KYTC or any of its directors, officers, employees, consultants or agents be liable to DBT, any Affiliate, any Subcontractor or any DBT-Related Entity for any damages, including loss of profit, arising out of breach of the duty of confidentiality if such breach is not the result of recklessness or intentional misconduct. DBT hereby irrevocably waives all claims to any such damages.

**ARTICLE 22.**  
**EARLY TERMINATION OF AGREEMENT**

**22.1 Termination for Convenience**

**22.1.1** KYTC may, at any time, terminate this Agreement and the performance of the Work by DBT, in whole or in part, if KYTC determines, in its sole discretion, that a termination is in KYTC's best interest ("Termination for Convenience"). KYTC will terminate by delivering to DBT a Notice of Termination for Convenience or Notice of Partial Termination for Convenience specifying the extent of termination and its Effective Date.

**22.1.2** If KYTC terminates this Agreement on grounds or in circumstances beyond KYTC's termination rights specifically set forth in this Agreement, such termination shall be deemed a Termination for Convenience for the purpose of determining the amount of termination compensation due (but not for any other purpose).

**22.2 Termination for Convenience Compensation Amount**

**22.2.1** If KYTC exercises its right of Termination for Convenience, it shall owe compensation to DBT in an amount equal to the sum of the following:

- (a) Payments due but not yet paid in accordance with Article 12 for all Work performed up to the date of termination, including work in progress since the last Pay Estimate; plus
- (b) DBT's actual reasonable out-of-pocket cost, without profit, and including equipment costs only to the extent permitted by Section 109.04.02 of the KYTC Standard Specifications for demobilization, and work done to secure the applicable portion of the Project for termination, including reasonable overhead; plus
- (c) The cost of settling and paying claims arising out of the termination of Work under Subcontracts and Utility Agreements, exclusive of the amounts paid or payable on account of supplies or materials delivered or services furnished by the Subcontractor prior to the Effective Date of the Notice of Termination for Convenience or Notice of Partial Termination for Convenience of Work under this Agreement, which amounts shall be included in the cost for which payment is made under clause (a) above; plus
- (d) The reasonable out-of-pocket cost incurred (including reasonable overhead) to preserve and protect property; plus
- (e) The reasonable out-of-pocket cost incurred to prepare and carry out the transition plan under Section 22.5.1; plus

- (f) Any other reasonable out-of-pocket cost (including overhead) incurred incidental to termination of Work under this Agreement, including the reasonable cost to DBT of handling material returned to a Supplier, delivered to KYTC or otherwise disposed of as directed by KYTC, and including a reasonable allowance for DBT's administrative costs in determining the amount payable due to termination of this Agreement, but excluding any costs and expenses incurred in connection with any Disputes or Claims; minus
- (g) The cost of property, materials, supplies, equipment, and other things to be retained by DBT, or the agreed price for, or proceeds from, the sale of such items not otherwise delivered to KYTC, and other appropriate deductions allowed under this Agreement, including those deductions that would be permitted in connection with the Final Payment; minus
- (h) All unliquidated advance or other payments made to or on behalf of DBT applicable to the terminated portion of the Work or Agreement; minus
- (i) The cost of repairing any Nonconforming Work (or, in KYTC's sole discretion, the amount which KYTC is entitled to recover under Section 6.6); minus
- (j) The amount of any other Claim that KYTC may have against any DBT-Related Entity in connection with this Agreement; minus
- (k) Any other amounts due or payable by DBT to KYTC pursuant to this Agreement; minus
- (l) Amounts that KYTC reasonably deems advisable to retain to cover any existing or threatened claims and stop notices relating to the Project, including claims by Utility Companies, provided that KYTC will promptly pay to DBT any such retained amounts remaining after the need for the retention ends.

**22.2.2** DBT 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 22.2.1) and that, except to the extent provided in Section 22.2.1(a), items such as lost or anticipated profits, unabsorbed overhead, and opportunity costs shall not be recoverable by it upon termination of this Agreement. If any refund is payable with respect to insurance or bond premiums, letter of credit fees, deposits or other items that were previously passed through to KYTC by DBT, DBT shall pay such refund to KYTC or such amount will otherwise be credited to KYTC. Except for normal spoilage, and except to the extent that KYTC will have otherwise expressly assumed the risk of loss, there will be excluded from the amounts payable to DBT under Section 22.2.1 the fair value, as determined by KYTC, of equipment, machinery, materials, supplies, and property that is destroyed, lost, stolen, or damaged so as to become

undeliverable to KYTC. Information contained in the EPDs may be considered in determining the value of the Work terminated.

- 22.2.3** Upon determination of the amount of the termination payment, the Parties shall amend this Agreement to reflect the agreed termination payment. KYTC will pay DBT any amount that may be due, and, in the case of a Partial Termination for Convenience, the Contract Price shall be reduced to reflect the reduced scope of Work using procedures comparable to those for KYTC reductive changes under Article 14.

### **22.3 Subcontracts**

- 22.3.1** Provisions shall be included in each Subcontract (at all tiers) regarding terminations for convenience, allowing such termination rights and obligations to be passed through to the Subcontractors and establishing terms and conditions relating thereto, including procedures for determining the amount payable to the Subcontractor upon a termination, consistent with this Article 23.
- 22.3.2** Each Subcontract shall provide that, in the event of a termination for convenience by KYTC, the Subcontractor will not be entitled to any anticipatory or unearned profit on Work terminated or partly terminated, or to any payment which constitutes consequential damages or punitive damages due to the termination or partial termination.

### **22.4 Termination by Court Ruling**

- 22.4.1** This Agreement and the other Contract Documents are subject to Termination by Court Ruling.
- 22.4.2** Termination by Court Ruling becomes effective, and automatically terminates this Agreement, upon issuance of the final, non-appealable court order by a court of competent jurisdiction; provided, however, that where Section 22.4 applies, Termination by Court Ruling becomes effective only after the Parties determine they are unable to negotiate revisions to the Contract Documents to effect their original intent.
- 22.4.3** If both Parties agree in writing, they may elect to terminate this Agreement in part due to such court order and to continue the remainder of this Agreement in effect, to the extent it is possible to do so without violating the court order.
- 22.4.4** If Termination by Court Ruling occurs, then KYTC will owe termination compensation to DBT equal to that owing upon a Termination for Convenience or Partial Termination for Convenience, as applicable.

## **22.5 Responsibilities after Notice of Termination**

- 22.5.1** Within three days after either Party delivers to the other Party a notice of termination of this Agreement, DBT and KYTC shall meet and confer for the purpose of developing an interim transition plan for the orderly transition of the terminated Work, demobilization, and transfer of the Project design and construction to KYTC. The Parties shall use diligent efforts to complete preparation of the interim transition plan within 15 days after the date of such notice of termination. The Parties shall use diligent efforts to complete a final transition plan within 30 days after such date. The transition plan shall be in form and substance acceptable to KYTC in its good faith discretion and shall include and be consistent with the provisions and procedures set forth in Section 23.5.2.
- 22.5.2** After either Party delivers to the other Party a notice of termination of this Agreement, and except as otherwise directed by KYTC, DBT shall timely comply with the following obligations independent of, and without regard to, the timing for preparing or implementing the transition plan or for determining, adjusting, settling, and paying any amounts due DBT under this Agreement:
- 22.5.2.1** DBT shall stop the Work as specified in the notice;
- 22.5.2.2** DBT shall notify all affected Subcontractors and Suppliers that this Agreement is being terminated and that their Subcontracts (including orders for materials, services or facilities) are not to be further performed unless otherwise authorized in writing by KYTC;
- 22.5.2.3** DBT shall not enter into any further Subcontracts (including orders for materials, services or facilities), except as necessary to complete the continued portion of the Work;
- 22.5.2.4** Unless instructed otherwise by KYTC, DBT shall terminate all Subcontracts and Utility Agreements to the extent they relate to the Work terminated;
- 22.5.2.5** To the extent directed by KYTC, DBT shall execute and deliver to KYTC written assignments, in form and substance acceptable to KYTC, acting reasonably, of all of DBT's right, title, and interest in and to: (a) Subcontracts and Utility Agreements that relate to the terminated Work, provided KYTC assumes in writing all of DBT's obligations thereunder that arise after the Effective Date of assignment; and (b) all assignable warranties, Claims, and causes of action held by DBT against Subcontractors and other Persons in connection with the terminated Work, to the extent such Work is adversely affected by any Subcontractor or other Person's breach of warranty, contract or other legal obligation; provided, however, that DBT may retain Claims against Subcontractors for which KYTC has been fully compensated;



- 22.5.2.6** Subject to the prior approval of KYTC, DBT shall settle all outstanding liabilities and Claims arising from termination of Subcontracts and Utility Agreements that are required to be terminated hereunder;
- 22.5.2.7** Within 30 days after notice of termination is delivered, DBT shall provide KYTC with a true and complete list of all materials, goods, machinery, equipment, parts, supplies, and other property in inventory or storage (whether held by DBT or any Person or entity on behalf of or for the account of DBT) for use in or respecting the terminated Work, or on order or previously completed but not yet delivered from Suppliers for use in or respecting such Work. In addition, if requested by KYTC, DBT shall promptly transfer title and deliver to KYTC or KYTC's Authorized Representative, through bills of sale or other documents of title, as directed by KYTC, all such materials, goods, machinery, equipment, parts, supplies, and other property, provided KYTC assumes in writing all of DBT's obligations under any contracts relating to the foregoing that arise after the effective date of transfer of title;
- 22.5.2.8** On or about the effective date of termination, DBT shall execute and deliver to KYTC the following, together with an executed bill of sale or other written instrument, in form and substance acceptable to KYTC, acting reasonably, assigning and transferring to KYTC all of DBT's right, title, and interest in and to the following:
- (a) All completed or partially completed drawings (including Plans, elevations, sections, details, and diagrams), specifications, designs, Record Drawings, surveys, and other Design Documents and information pertaining to the design or construction of the terminated Work;
  - (b) All samples, borings, boring logs, geotechnical data, and similar data, and information relating to the terminated Work;
  - (c) All books, records, reports, test reports, studies, and other documents of a similar nature relating to the terminated Work; and
  - (d) All other work product used or owned by DBT or any Affiliate relating to the terminated Work;
- 22.5.2.9** In the case of a partial termination, DBT shall complete performance in accordance with the Contract Documents of all Work not terminated, except to the extent performance of the remaining Work is rendered impossible due to the scope of the partial termination;
- 22.5.2.10** For the period of time specified by KYTC in the notice of termination or until KYTC takes over the Work, DBT shall take all action that may be necessary, or that KYTC may direct, for the safety, protection, and preservation of:
- (a) The public, including public and private vehicular movement;

- (b) The Work; and
- (c) Equipment, machinery, materials, and property related to the Project that is in the possession of DBT and in which KYTC has or may acquire an interest;

**22.5.2.11** As authorized by KYTC in writing, DBT shall use its best efforts to sell, at reasonable prices, any property of the types referred to in Section 22.5.2 (c); provided, however, that DBT: (a) is not required to extend credit to any purchaser; and (b) may acquire the property under the conditions prescribed and at prices approved by KYTC. The proceeds of any transfer or disposition will be applied to reduce any payments to be made by KYTC under the Contract Documents or paid in any other manner directed by KYTC;

**22.5.2.12** DBT shall immediately safely demobilize and secure construction, staging, lay down, and storage areas for the Project and Utility Adjustments included in the Work, including DBT's Temporary Work Areas, in a manner satisfactory to KYTC, and remove all debris and waste materials, except as otherwise approved by KYTC in writing;

**22.5.2.13** DBT shall assist KYTC in such manner as KYTC may require prior to and for a reasonable period following the effective date of termination to ensure the orderly transition of the terminated Work and its management to KYTC, and shall, if appropriate and if requested by KYTC, take all steps as may be necessary to enforce the provisions of Subcontracts pertaining to the surrender of the terminated Work;

**22.5.2.14** DBT shall deliver to KYTC all Books and Records and the then-current electronic document management system, except for information in Books and Records exempt under applicable Commonwealth Law from discovery in legal actions, including information protected by the attorney-client or other legal privilege based upon an opinion of counsel reasonably satisfactory to KYTC;

**22.5.2.15** DBT shall carry out such other directions as KYTC may give for the termination of the Work; and

**22.5.2.16** DBT shall take such other actions as are necessary or appropriate to mitigate further cost.

**22.5.3** Termination (or partial termination) of this Agreement under this Article 23 shall not relieve DBT or any Surety or Guarantor of its obligation for any Claims.

## **22.6 Payment**

**22.6.1** KYTC may, but is not obligated to, make advance partial payments to DBT for costs DBT incurs in connection with a termination under this Article 23 before DBT's termination compensation is finally determined. If the total of such advance partial payments exceeds the amount of the termination

compensation finally determined to be owing to DBT under this Article 23, such excess shall be payable by DBT to KYTC upon demand.

## **22.7 No Consequential Damages**

Under no circumstances shall DBT be entitled to anticipatory or unearned profits or consequential or other damages as a result of any termination under this Article 23. The payment to DBT determined in accordance with this Article 23 constitutes DBT's exclusive remedy for a termination hereunder.

## **22.8 No Waiver; Release**

**22.8.1** Notwithstanding anything contained in this Agreement to the contrary, a termination under this Article 23 shall not waive any right or claim to damages that KYTC may have. KYTC may pursue any cause of action that it may have at Law, in equity or under the Contract Documents.

**22.8.2** KYTC's payment to DBT of the amounts required under this Article 23 shall constitute full and final satisfaction of, and upon payment KYTC will be forever released and discharged from, any and all Claims, causes of action, suits, demands, and Losses, known or unknown, suspected or unsuspected, that DBT may have against KYTC arising out of or relating to the terminated Work. Upon such payment, DBT shall execute and deliver to KYTC all such releases and discharges as KYTC may reasonably require to confirm the foregoing, but no such release and discharge shall be necessary to give effect to the foregoing satisfaction and release.

**22.9 Dispute Resolution**

The failure of the Parties to agree on amounts due under this Article 23 shall be a Dispute to be resolved in accordance with Article 21, which procedures shall apply notwithstanding the termination of this Agreement.

**22.10 Allowability of Costs**

All costs claimed by DBT under this Article 23 must be allowable, allocable, and reasonable in accordance with the cost principles and procedures of 48 CFR Part 31.

**ARTICLE 23.**  
**MISCELLANEOUS PROVISIONS**

**23.1 Amendments**

The Contract Documents may be amended only by a written instrument duly executed by the Parties or their respective successors or assigns, except to the extent expressly provided otherwise in this Agreement.

**23.2 Waiver**

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

**23.2.2** The exercise by a Party of any right or remedy provided under the Contract Documents shall not waive or preclude any other or further exercise thereof or the exercise of any other right or remedy. No waiver by any Party of any right or remedy under the Contract Documents shall be deemed to be a waiver of any other or subsequent right or remedy under the Contract Documents. The consent by one Party to any act by the other Party requiring such consent shall not be deemed to render unnecessary the obtaining of consent to any subsequent act for which consent is required, regardless of whether similar to the act for which consent is given.

**23.2.3** Except as provided otherwise in the Contract Documents, no act, delay or omission done, suffered or permitted by one Party or its agents shall be deemed to waive, exhaust or impair any right, remedy or power of such Party hereunder, or to relieve the other Party from the full performance of its obligations under the Contract Documents.

**23.2.4** Either Party's waiver of any breach or failure to enforce any of the terms, covenants, conditions or other provisions of the Contract Documents at any time shall not in any way limit or waive that Party's right thereafter to enforce or compel strict compliance with every term, covenant, condition or other provision. Furthermore, if the Parties make and implement any interpretation of the Contract Documents without documenting such interpretation by an instrument signed by both Parties, such interpretation and implementation thereof will not be binding in the event of any subsequent Claims or Disputes.

**23.3 Independent Contractor**

**23.3.1** DBT is an independent contractor, and nothing contained in the Contract Documents shall be construed as constituting any relationship with KYTC other than that of Project DBT and independent contractor.

**23.3.2** Nothing in the Contract Documents is intended or shall be construed to create any partnership, joint venture or similar relationship between KYTC and DBT;

and in no event shall either Party take a position in any tax return or other writing of any kind that a partnership, joint venture or similar relationship exists.

**23.3.3** In no event shall the relationship between KYTC and DBT be construed as creating any relationship whatsoever between KYTC and DBT's employees. Neither DBT nor any of its employees is or shall be deemed to be an employee of KYTC. Except as otherwise specified in the Contract Documents, DBT 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 DBT or any Subcontractor hires to perform or assist in performing the Work.

#### **23.4 Successors and Assigns; Change of Control**

**23.4.1** The Contract Documents shall be binding upon and inure to the benefit of KYTC and DBT and their permitted successors, assigns, and legal representatives.

**23.4.2** KYTC may transfer and assign all or any portion of its rights, title, and interests in and to the Contract Documents, including rights with respect to the Payment Bond, the Performance Bond, Guarantees, letters of credit, and other security for payment or performance:

- (a) Without DBT's consent, to any other public agency or public entity as permitted by Law, provided that the successor or assignee has assumed all of KYTC's obligations, duties, and liabilities under the Contract Documents then in effect;
- (b) Without DBT's consent, to any other Person that succeeds to the governmental powers and authority of KYTC; provided, however, that such successor(s) has assumed all of KYTC's obligations, duties, and liabilities under the Contract Documents then in effect; and
- (c) To any other Person with the prior approval of DBT.

**23.4.3** All rights of KYTC under Article 11, as well as all other rights and claims of KYTC, insofar as they will be owned by Persons other than KYTC (such as Utility Companies and the Local Jurisdictions), shall be assignable to such Persons.

**23.4.4** In the event of KYTC's assignment of all of its rights, title, and interests in the Contract Documents as permitted hereunder, DBT shall have no further recourse to KYTC under the Contract Documents or otherwise except as specifically provided by other contractual agreement or by statute.

**23.4.5** DBT shall not voluntarily or involuntarily sell, assign, convey, transfer, pledge, mortgage or otherwise encumber DBT's interest in and to the Contract Documents or any portion thereof without KYTC's prior approval. DBT shall not

- grant any right of entry, license or other special occupancy of the Project to any other Person that is not in the ordinary course of DBT performing the Work, without KYTC's prior approval. Any sale, assignment, conveyance, transfer, pledge, mortgage, encumbrance, grant of right of entry, license or other special occupancy in violation of this provision shall be null and void ab initio and KYTC, at its option, may declare any such attempted action to be a material DBT Default and Event of Default.
- 23.4.6** DBT shall not voluntarily or involuntarily cause, permit or suffer any Change of Control without KYTC's prior approval. If there occurs any voluntary or involuntary Change of Control without KYTC's prior approval, KYTC, at its option, may declare it to be a material DBT Default and Event of Default.
- 23.4.7** Where KYTC's prior approval is required for a proposed sale, assignment, conveyance, transfer, pledge, mortgage, encumbrance, sublease or grant of right of entry, license or other special occupancy, or for any proposed Change of Control, KYTC may withhold or condition its approval in its sole discretion. Any such decision of KYTC to withhold consent shall be final, binding, and not subject to the Dispute Resolution Procedures.
- 23.4.8** Assignments and transfers of DBT's interest in or to the Contract Documents permitted under this Section 23.4 or otherwise approved by KYTC will be effective only upon KYTC's receipt of notice of the assignment or transfer and a written recordable instrument executed by the transferee, in form and substance acceptable to KYTC, in which the transferee, without condition or reservation, assumes all of DBT's obligations, duties, and liabilities under this Agreement and the other Contract Documents then in effect and agrees to perform and observe all provisions thereof applicable to DBT. Each transferee shall take DBT's interest in or to the Contract Documents subject to, and shall be bound by, all Subcontracts, the Utility Agreements, the Governmental Approvals, and all agreements between the transferor and Governmental Entities with jurisdiction over the Project or the Work, except to the extent otherwise approved by KYTC in its good faith discretion.

## **23.5 Change of Organization or Name**

- 23.5.1** DBT shall not change its legal form of business organization without the prior approval of KYTC, which consent may be granted or withheld in KYTC's sole discretion.

## **23.6 Designation of Representatives; Cooperation with Representatives**

- 23.6.1** KYTC and DBT shall each designate an individual or individuals with the authority to make decisions and bind the Parties on matters relating to the Contract Documents (for each Party, its respective "Authorized Representative").

- 23.6.2** DBT's Authorized Representative(s) shall have onsite field and office authority to represent and act on behalf of DBT. Such Authorized Representative(s) shall be present at the Site at all times while Work is in progress.
- 23.6.3** The Parties may also designate technical representatives who shall be authorized to investigate and report on matters relating to the design and construction of the Project and negotiate on behalf of each of the Parties, but who do not have authority to bind KYTC or DBT.
- 23.6.4** DBT shall cooperate with KYTC and all representatives of KYTC designated as described above.

### **23.7 Survival**

DBT's representations and warranties, including those under Articles 2 and 11, the provisions regarding invoicing and payment under Article 12, the express rights and obligations of the Parties following termination of this Agreement under Articles 17 and 22, the provisions of Sections 6.8, the indemnifications and releases contained in Article 19, the Dispute Resolution Procedures contained in Article 20, the provisions of Article 21, and all other provisions in the Contract Documents that contemplate actions or obligations after termination of this Agreement or completion of the Work or any other provisions that by their inherent character should survive termination of this Agreement or completion of the Work, shall survive the termination of this Agreement or completion of the Work. The provisions of Article 20 shall continue to apply after expiration or earlier termination of this Agreement to all Claims and Disputes between the Parties arising out of the Contract Documents.

### **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 commence any legal proceeding of any nature whatsoever pursuant to the terms or provisions hereof, except to the extent that specific provisions (such as the indemnity provisions) identify third parties 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 KYTC and a Subcontractor, Supplier or any Person other than DBT.

### **23.9 No Personal Liability of KYTC Employees; Limitation on Commonwealth's Liability**

- 23.9.1** KYTC's Authorized Representatives, employees, and consultants are acting solely as agents and representatives of KYTC when carrying out the provisions of or exercising the power or authority granted to them. They shall not be liable to any DBT-Related Entity either personally or as employees of KYTC for actions in their ordinary course of employment.



- 23.9.2** In no event shall KYTC be liable for any injury, damage or death caused by the actions, omissions, negligence, intentional misconduct, or breach of applicable Law or contract by any DBT-Related Entity.

### **23.10 Governing Law and Venue**

The Contract Documents shall be governed by and construed in accordance with the Laws of the Commonwealth for contracts made and to be performed in the Commonwealth, and without regard to its principles concerning conflict of laws. The exclusive venue for any litigation, arbitration, mediation, administrative hearing or other legal proceeding or action arising out of or relating to the Contract Documents shall be in Franklin County, Commonwealth of Kentucky.

### **23.11 Notices and Communications**

- 23.11.1** Notices under the Contract Documents shall be in writing and: (a) delivered personally; (b) sent by certified mail, return receipt requested; (c) sent by a recognized overnight mail or courier service, with delivery receipt requested; or (d) sent by email communication followed by a hard copy and with receipt confirmed by telephone, to the addresses set forth in Sections 23.11.2 and 24.12.3, as applicable (or to such other address as may from time to time be specified in writing).

- 23.11.2** All notices, correspondence, and other communications to DBT shall be delivered to the following address or as otherwise directed by DBT's Authorized Representative:

[NAME OF DBT FIRM]  
[ADDRESS]  
Attn: [NAME OF REPRESENTATIVE]  
Telephone: [\*\*\*-\*\*\*-\*\*\*\*]  
E-mail: [\*\*\*\*]

- 23.11.3** All notices, correspondence, and other communications to KYTC will be marked as regarding the Project and shall be delivered to the following address or as otherwise directed by KYTC's Authorized Representative:

Kentucky Cabinet of Transportation  
200 Mero St. Frankfort Kentucky  
Attn: [CONTRACT MANAGER]  
Telephone: [\*\*\*-\*\*\*-\*\*\*\*]  
E-mail: [\*\*\*\*]

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

- 23.11.4** 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. Notices delivered by email communication shall be deemed received when actual receipt at the email address of the addressee is confirmed. Notwithstanding the foregoing, notices sent or received after 5:00 p.m. (measured as of the prevailing time in Frankfort, Kentucky) shall be deemed received on the first Working Day following delivery. Any technical or other communications pertaining to the Work shall be conducted by DBT's Authorized Representative and technical representatives designated by KYTC.

### **23.12 Taxes**

DBT shall pay, prior to delinquency, all applicable taxes. DBT shall have no right to an adjustment to the Contract Price, a Completion Deadline or any other Claim due to its misinterpretation of Laws respecting taxes or incorrect assumptions regarding applicability of taxes.

In addition, DBT shall disclose its violations or compliance with specified Kentucky Revised Statute chapters in accordance with KRS 45A.485.

### **23.13 Interest on Amounts Due and Owing**

**23.13.1** Any amount owed to KYTC under this Agreement, including any overpayment to DBT as a result of an inaccuracy in a Pay Estimate, and not paid when due shall bear interest at a floating rate equal to the following:

- (a) If not in good faith dispute, then at the Prime Rate in effect from time to time plus 100 basis points, commencing on the date of KYTC's payment of the Pay Estimate, or the date KYTC claims any other amount is due, and continuing until the date the overpayment or other amount due is paid to KYTC or KYTC deducts such amount from payment to DBT; and
- (b) If the subject of a good faith dispute over whether it is due, then at the Prime Rate in effect from time to time, commencing on the date of KYTC's payment of the Pay Estimate, or the date KYTC claims any other amount is due, and continuing until the date the amount is finally determined to be due pursuant to settlement or the Dispute Resolution Procedures, and thereafter at the Prime Rate in effect from time to time plus 100 basis points until paid.

**23.13.2** KYTC's right to receive interest is without prejudice to any other rights and remedies it may have under this Agreement.

### **23.14 Integration of Contract Documents**

KYTC and DBT agree and expressly intend that this Agreement and other Contract Documents constitute a single, non-severable, integrated agreement, the terms of which are interdependent and non-divisible.

### **23.15 Severability**

**23.15.1** If any clause, provision, section or part of the Contract Documents is ruled invalid 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 adjustment to the Contract Price, in accordance with the procedure for Change Orders that adjust 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.

**23.15.2** 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 Documents, which shall be construed and enforced as if the Contract Documents did not contain such invalid or unenforceable clause, provision, section or part.

### **23.16 Headings**

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

### **23.17 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.

### **23.18 Counterparts**

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

IN WITNESS WHEREOF, this Agreement has been executed as of the date first set forth above.

DBT:

KENTUCKY TRANSPORTATION  
CABINET

□

By: \_\_\_\_\_  
Name: □  
Title: □

By: \_\_\_\_\_  
Name: □  
Title: □

□

By: \_\_\_\_\_  
Name: □  
Title: □

□

By: \_\_\_\_\_  
Name: □  
Title: □

**DESIGN-BUILD AGREEMENT  
EXHIBITS**

for

KY 555 Design Build Project

between

**KENTUCKY TRANSPORTATION CABINET**

and

**[Name of Design-Build Team Firm]**

**Dated as of: [Date]**

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**EXHIBIT 1****ABBREVIATIONS AND DEFINED TERMS**

Unless otherwise specified, wherever the abbreviations or defined terms included in this Exhibit 1 are used in the Agreement, they shall have the meanings set forth below.

6	<b>AAA</b>	American Arbitration Association
7	<b>AASHTO</b>	American Association of State Highway and Transportation Officials
8	<b>ACI</b>	American Concrete Institute
9	<b>ADA</b>	Americans with Disabilities Act, 42 U.S.C. § 12101, <i>et seq.</i>
10	<b>ANSI</b>	American National Standards Institute
11	<b>ASTM</b>	American Society of Testing and Materials
12	<b>ATC</b>	Alternative Technical Concept
13	<b>AWS</b>	American Welding Society
14	<b>BMP</b>	Best Management Practice
15	<b>BU</b>	Buildable Unit
16	<b>CAD</b>	Computer-Aided Design
17	<b>CADD</b>	Computer Aided Drafting and Design
18	<b>CFR</b>	Code of Federal Regulations
19	<b>CPI</b>	Consumer Price Index
20	<b>CPM</b>	Critical Path Methodology
21	<b>CQCM</b>	Construction Quality Control Manager
22	<b>CQMP</b>	Construction Quality Management Plan
23	<b>CWA</b>	Clean Water Act
24	<b>D&amp;C</b>	Design and Construction
25	<b>DB</b>	Design Build
26	<b>DBE</b>	Disadvantaged Business Enterprise
27	<b>DBT</b>	Design Build Team
28	<b>DR</b>	Design Requirements
29	<b>DQMP</b>	Design Quality Management Plan

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1		
2	<b>EDMS</b>	Electronic Data Management System
3	<b>EEO</b>	Equal Employment Opportunity
4	<b>EMP</b>	Environmental Management Plan
5	<b>EO</b>	Executive Order
6	<b>EPA</b>	United States Environmental Protection Agency
7	<b>EPD</b>	Escrowed Proposal Documents
8	<b>ESA</b>	Environmental Prior Assessment
9	<b>°F</b>	Degrees Fahrenheit
10	<b>FAA</b>	Federal Aviation Administration
11	<b>FEA</b>	Final Environmental Assessment
12	<b>FEMA</b>	Federal Emergency Management Agency
13	<b>FDC</b>	Field Design Change
14	<b>FHWA</b>	U.S. Cabinet of Transportation, Federal Highway Administration
15	<b>fps</b>	Feet per Second
16	<b>GAAP</b>	Generally Accepted Accounting Principles
17	<b>GPS</b>	Global Positioning System
18	<b>HCRS</b>	Highway Condition Reporting System
19	<b>HDGM</b>	Highway Design Guidance Manual
20	<b>H:V</b>	Horizontal: Vertical
21	<b>HEC</b>	Hydraulic Engineering Circular
22	<b>HOV</b>	High-Occupancy Vehicle
23	<b>HVAC</b>	Heating, Ventilation and Air Conditioning
24	<b>ID</b>	Identification
25	<b>IGA</b>	Intergovernmental Agreement
26	<b>IQF</b>	Independent Quality Firm
27	<b>ISO</b>	International Organization for Standardization
28	<b>ITP</b>	Instructions to Proposers

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1	<b>ITS</b>	Intelligent Transportation System
2	<b>ksi</b>	Kips per Square Inch
3	<b>KDOW</b>	Kentucky Division of Water
4	<b>KMZ</b>	Keyhole Markup language Zipped
5	<b>KRS</b>	Kentucky Revised Statue
6	<b>KY</b>	Kentucky
7	<b>KYDOH</b>	Kentucky Department of Highways
8	<b>KYTC</b>	Kentucky Transportation Cabinet
9	<b>LED</b>	Light-Emitting Diode
10	<b>LF</b>	Linear feet
11	<b>LOS</b>	Level of Service
12	<b>LRFD</b>	Load and Resistance Factor Design
13	<b>m<sup>2</sup></b>	Square meter
14	<b>MASH</b>	Manual for Assessing Safety Hardware
15	<b>MBPS</b>	Mega-Bits Per Second
16	<b>mcd</b>	Millicandelas
17	<b>mil</b>	One-thousandth of an inch (0.001")
18	<b>MOT</b>	Maintenance of Traffic
19	<b>mph</b>	Miles per Hour
20	<b>MPU</b>	Monthly Progress Update
21	<b>MSE</b>	Mechanically Stabilized Earth
22	<b>MUTCD</b>	Manual of Uniform Traffic Control Devices
23	<b>MWC</b>	Minor Work Change
24	<b>NB</b>	Northbound
25	<b>NCHRP</b>	National Cooperative Highway Research Program
26	<b>NEMA</b>	National Electrical Manufacturers Association
27	<b>NEPA</b>	National Environmental Policy Act
28	<b>NESHAP</b>	National Emission Standards for Hazardous Air Pollutants



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1	<b>NTP</b>	Notice to Proceed
2	<b>OJT</b>	On-the-Job Training
3	<b>OSHA</b>	Occupational Safety and Health Administration
4	<b>PA</b>	Programmatic Agreement
5	<b>PDF</b>	Portable Document Format
6	<b>PDS</b>	Pavement Design Summary
7	<b>PIP</b>	Public Information Plan
8	<b>PPE</b>	Personal Protective Equipment
9	<b>PPM</b>	Pre-Proposal Meeting
10	<b>psf</b>	Pounds per Square Foot
11	<b>QA</b>	Quality Acceptance
12	<b>QC</b>	Quality Control
13	<b>QMP</b>	Quality Management Plan
14	<b>REC</b>	Recognized Environmental Condition
15	<b>RFC</b>	Release for Construction
16	<b>RFI</b>	Request for Information
17	<b>RFP</b>	Request for Proposals
18	<b>RFQ</b>	Request for Qualifications
19	<b>RIDs</b>	Reference Information Documents
20	<b>ROD</b>	Record of Decision
21	<b>ROW</b> or <b>R/W</b>	Right-of-Way
22	<b>SB</b>	Southbound
23	<b>SF</b>	Square Foot
24	<b>SOV</b>	Schedule of Values
25	<b>SPT</b>	Standard Penetration Test
26	<b>SR</b>	State Route
27	<b>TL</b>	Testing Level
28	<b>TMP</b>	Traffic Management Plan

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1	<b>TP</b>	Technical Provision
2	<b>US</b>	United States
3	<b>USACE</b>	United States Army Corps of Engineers
4	<b>USC</b>	United States Code
5	<b>USEPA</b>	United States Environmental Protection Agency
6	<b>USFWS</b>	United States Fish and Wildlife Service
7	<b>USPAP</b>	Uniform Standard of Professional Appraisal Practices
8	<b>WB</b>	Westbound
9	<b>WBS</b>	Work Breakdown Structure

10

11 **Acceleration Costs** means those fully-documented, incremental costs reasonably  
12 incurred by DBT which are (i) directly attributable to increasing the performance level of  
13 the Work in an attempt to complete the Work earlier than otherwise anticipated in  
14 accordance with the Contract Documents, and (ii) necessary to mitigate further delay in  
15 meeting the non-adjusted Completion Deadline(s). Acceleration Costs may include costs  
16 for additional equipment, overtime, overhead and other indirect costs, which shall be paid  
17 in accordance with Section 109.04.02 of the KYTC Standard Specifications.

18 **Additional ROW** or **Additional Right-of-Way** means ROW that is necessary to deliver  
19 the Project in accordance with the requirements of the Contract Documents but is not  
20 within the Schematic ROW, as identified by the DBT in the ROW Identification Plan and  
21 accepted by KYTC in its sole discretion.

22 **Adjacent Work** means any project, work, improvement or development to be planned,  
23 designed or constructed that could or does impact the Project or that is located on  
24 property contiguous with the Project.

25 **Adjustments** means Utility Adjustments.

26 **Adjustment Standards** means the standard design and construction methods that a  
27 Utility Company applies to facilities (comparable to those being Adjusted on account of  
28 the Project) constructed by the Utility Company (or for the Utility Company by its  
29 contractors), at its own expense. Unless the context or applicable Utility Agreement  
30 requires otherwise, references in the Contract Documents to a Utility Company's  
31 "applicable Adjustment Standards" refer to those that are in effect as of the Setting Date.

32 **Affiliate** means:

33 (a) Any member, partner or joint venture member of DBT;

34

1 (b) Any Person that directly or indirectly through one or more intermediaries controls,  
2 or is controlled by, or is under common control with, DBT or any of its shareholders,  
3 members, partners or joint venture members; and  
4

5 (c) Any Person for which 20 percent or more of the equity interest in such Person is  
6 held directly or indirectly, beneficially or of record by (i) DBT, (ii) any of the  
7 shareholders, members, partners or joint venture members of DBT, or (iii) any  
8 Affiliate of DBT under clause (b) of this definition.

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

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

13 **Agreement** means this Design-Build Agreement, including all Exhibits attached hereto,  
14 as such Agreement or any such Exhibits may be amended, supplemented, restated or  
15 otherwise modified in accordance with the terms hereof, and the executed originals of  
16 Exhibits that are contracts.

17 **Alternative Technical Concept** means a change to the Project Scope that provides a  
18 solution that is equal to or better than the required scope as determined by KYTC.

19 **As-Built Documents** means the document as described in Exhibit III (Technical  
20 Provisions).

21 **As-Built Schedule** means the document as described in Exhibit III (Technical  
22 Provisions).

23 **Authorized Representative** has the meaning set forth in Section 23.6.1 of the  
24 Agreement.

25 **Award** or **Project Award** means the acceptance by KYTC of a Proposal.

26 **Baseline Schedule** means the logic-based critical path schedule for all Work leading up  
27 to and including Final Acceptance, and for tracking the performance of such Work, as the  
28 same may be revised and updated from time to time in accordance with Article 2 of Exhibit  
29 III (Technical Provisions).

30 **Basic Project Configuration** has the meaning set forth in Article 1 of Exhibit III  
31 (Technical Provisions).

32 **Beech Fork Bridge** means the bridge structure at KY 555 mile post 3.48.

33 **Betterment** has, with respect to a given Utility being Adjusted, the meaning (if any) set  
34 forth in the applicable Utility Agreement. When not defined by a Utility Agreement, then  
35 in all other cases, “Betterment” means any upgrading of a Utility or related facilities in the  
36 course of a Utility Adjustment that is not necessary for the construction of the Project, and  
37 is made for the benefit of and at the election of the Utility Company, including an increase

1 in the capacity, capability, efficiency or function of an adjusted Utility over that which was  
2 provided by the existing Utility; provided, however, that the following shall not be  
3 considered Betterments:

- 4 (a) Any upgrade that is required by the Project;
- 5 (b) Replacement devices or materials that are of equivalent standards although not  
6 identical;
- 7 (c) Replacement of devices or materials no longer regularly manufactured with an  
8 equivalent grade or size;
- 9 (d) Any upgrading required by applicable Law;
- 10 (e) Replacement devices or materials that are used for reasons of economy in  
11 accordance with the Utility Company's Standards (e.g., non-stocked items may be  
12 uneconomical to purchase); or
- 13 (f) Any upgrading required by the Utility Company's Standards.

14 **Books and Records** means any and all documents, books, records, papers, or other  
15 information relating to the Project, Project ROW, Utility Adjustments or Work, including:

- 16 (a) All design and construction documents (including drawings, specifications,  
17 submittals, subcontracts, subconsultant agreements, purchase orders, invoices,  
18 schedules, meeting minutes, budgets, forecasts, change orders, Utility Adjustment  
19 documents, and files);
- 20 (b) Income statements, balance sheets, statements of cash flow and changes in  
21 financial position, and details regarding expenses and capital expenditures;
- 22 (c) All budgets, certificates, claims, contracts, correspondence, data (including test  
23 data), documents, expert analyses, facts, files, information, investigations,  
24 materials, notices, plans, projections, proposals, records, reports, requests,  
25 samples, schedules, settlements, statements, studies, surveys, tests, test results,  
26 traffic information (including volume counts, classification counts, origin and  
27 destination data, speed and travel time information, and vehicle jurisdiction data)  
28 that is analyzed, categorized, characterized, created, collected, generated,  
29 maintained, processed, produced, prepared, provided, recorded, stored or used  
30 by DBT or any of its Representatives in connection with the Project; and
- 31 (d) With respect to all of the above, any information that is stored electronically or on  
32 computer-related media, including in the Electronic Document Management  
33 System.

34 **Buildable Units** refers to portions of the project which may be designed, reviewed and  
35 built with only limited controls and assumptions coming from the design of other portions  
36 of the project, and as further defined in Section 3.2 of Exhibit III (Technical Provisions).

37 **Business Hours** means 8:00 a.m. to 5:00 p.m., local prevailing time in Frankfort,  
38 Kentucky.

39 **Buy America** means the Buy America requirements set forth in 23 C.F.R. § 635.410.

1 **Certificate of Final Acceptance** means the certificate issued by KYTC stating that the  
2 Project has achieved the conditions for Final Acceptance set forth in KYTC Standard  
3 Specifications Subsection 105.12

4 **Certificate of Substantial Completion** means the certificate issued by KYTC in  
5 accordance with Section 6.5.1 of the Agreement.

6 **Change in Law** means:

- 7 (a) The adoption of any Law of the Commonwealth after the Setting Date that  
8 materially increases the costs of, or the time required to complete, DBT's  
9 performance of its obligations under the Contract Documents; or  
10 (b) Any change in the Law of the Commonwealth , or in the interpretation or application  
11 thereof by any Governmental Entity of the Commonwealth, after the Setting Date,  
12 in each case that is materially inconsistent with Laws of the Commonwealth in  
13 effect on the Setting Date and that materially increases the costs of, or the time  
14 required to complete, DBT's performance of its obligations under the Contract  
15 Documents.

16 The term "Change in Law" excludes:

- 17 (i) Any change in, or new, federal or local Law;  
18 (ii) Any change in, or new, Law of the Commonwealth that also constitutes or  
19 causes a change in, or new, Utility Company Standards;  
20 (iii) Any change in, or new, Law passed or adopted but not yet effective as of  
21 the Setting Date;  
22 (iv) Any change in, or new, Law of the Commonwealth relating to DBT's general  
23 business operations, including licensing and registration fees, income  
24 taxes, gross receipts taxes, property taxes, transaction privilege taxes,  
25 sales and use taxes, social security, Medicare, unemployment, and other  
26 payroll-related taxes; and  
27 (v) Any change in, or new, Law that constitutes a Force Majeure Event as  
28 described in clause (i) of the definition thereof.

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

- 1 (a) A change in possession of the power to direct or control the management of DBT  
2 or a material aspect of its business due solely to a bona fide transaction involving  
3 beneficial interests in the ultimate parent organization of a shareholder, member,  
4 partner or joint venture member of DBT, (but not if the shareholder, member,  
5 partner or joint venture member is the ultimate parent organization), unless the  
6 transferee in such transaction is at the time of the transaction suspended or  
7 debarred or subject to a proceeding to suspend or debar from bidding, proposing  
8 or contracting with any federal or Commonwealth Cabinet or agency;
- 9 (b) An upstream reorganization or transfer of direct or indirect interests in DBT so long  
10 as there occurs no change in the entity with ultimate power to direct or control or  
11 cause the direction or control of the management of DBT;
- 12 (c) A transfer of interests between managed funds that are under common ownership  
13 or control other than a change in the management or control of a fund that  
14 manages or controls DBT; or
- 15 (d) The exercise of minority veto or voting rights (whether provided by Law, by DBT's  
16 organizational documents or by related member or shareholder agreements or  
17 similar agreements) over major business decisions of DBT, provided that if such  
18 minority veto or voting rights are provided by shareholder or similar agreements,  
19 KYTC has received copies of such agreements.

20 **Change Order** means a written request, issued by KYTC to the DBT detailing significant  
21 changes to the specified work quantities or that increase or modify the scope of the  
22 original Contract. Upon execution by the DBT, the Change Order becomes a  
23 Supplemental Agreement.

24 **Claims** defined in KYTC Standard Specifications Section 105.13

25 **Closure or Lane Closure** means that any traffic lane, ramp, cross road, trail, bike lane,  
26 shoulder or sidewalk is closed or blocked, or that the use thereof is otherwise restricted  
27 for any duration.

28 **Commonwealth Highway** means a highway designated as part of the state highway  
29 system by the State Highway Agency.

30 **Completion Deadline(s)** means either or both of the Substantial Completion Deadline  
31 and Final Acceptance Deadline, as the context requires.

32 **Construction Documents** means all Project and Utility Adjustment Construction  
33 Drawings, fabrication plans, material and hardware descriptions, and specifications.

34 **Construction Manager or DBT Construction Manager** means the individual described  
35 in Exhibit III (Technical Provisions). The Construction Manager is one of the Key  
36 Personnel listed in Exhibit 9 to the Agreement.

37 **Construction Quality Management Plan (QMP)** means the plan that establishes quality  
38 control and quality acceptance procedures for the Work.

1 **Construction Work** means all Work to build or construct, make, form, manufacture,  
2 furnish, install, supply, deliver or equip the Project or the Utility Adjustments. Construction  
3 Work includes landscaping and landscape establishment.

4 **Contract** has the meaning set forth in KYTC Standard Specifications Definition for  
5 *Contract* and *Contract Form*.

6 **Contract Documents** has the meaning set forth in KYTC Standard Specifications  
7 Definition for *Contract* and *Contract Form*.

8 **Contract Price** means the lump sum price for Work set forth in Section 12.1.1 of the  
9 Agreement, as it may be modified from time to time in accordance with the express  
10 provisions of the Agreement.

11 **Controlling Work Item** means a work activity in which any delay in its completion will  
12 result in a delay to a Completion Deadline.

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

20 **Day** or **day** means calendar day.

21 **DBE Goals** has the meaning set forth in Article 8. Section 8.2 in the Agreement.

22 **Defect** means an attribute, whether by design, construction, installation, damage or wear,  
23 affecting the condition, use, functionality or operation of any Element of the Project, which  
24 would cause or have the potential to cause one or more of the following:

- 25 (a) A hazard, nuisance or other risk to public or worker health or safety, including  
26 the health and safety of those traveling on the Project;  
27 (b) A structural deterioration of the affected Element or any other part of the  
28 Project;  
29 (c) Damage to a third party's property or equipment;  
30 (d) Damage to the Environment; or  
31 (e) Failure of the affected Element or any other part of the Project to meet a  
32 requirement of the Contract Documents.

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

- 1 **Design Exception** has the meaning as defined in the KYTC Highway Design Guidance  
2 Manual
- 3 **Design Exception Request** means the request prepared by the DBT and submitted to  
4 KYTC as described in Exhibit III (Technical Provisions).
- 5 **Design Executive Summary (DES)** the record of engineering decisions related to the  
6 project.
- 7 **Design Quality Management Plan (DQMP)** means the plan described in, and satisfying  
8 the requirements listed in the Agreement.
- 9 **Design Variance** has the meaning as defined in the KYTC Highway Design Guidance  
10 Manual
- 11 **Design Work** means all Work of design, engineering or architecture for the Project or  
12 Utility Adjustments.
- 13 **Deviations** refers to changes to the applicable provisions in Exhibit III (Technical  
14 Provisions) regarding the design or construction of the Project that have no impact on the  
15 cost or time to perform the Work. DBT may apply for Deviations in accordance with Article  
16 6, Section 6.2. of the Contract.
- 17 **DBE Utilization Plan** means the plan that DBT submitted in its Proposal concerning the  
18 recruiting and use of Persons to fulfill the DBE Goals. The DBE Utilization Plan may be  
19 updated after the Contract has been executed, as appropriate or as required by KYTC.
- 20 **DBT** means Design Build Team, the entity entering into a Design-Build Agreement with  
21 KYTC on behalf of the DBT-Related Entities
- 22 **DBT Default** or **Default** has the meaning set forth in the Agreement in Article 17.
- 23 **DBT Design Project Manager** means the individual described in Exhibit III (Technical  
24 Provisions) and identified as Key Personnel.
- 25 **DBT ROW** or **Design-Builder ROW** means all ROW outside the Schematic ROW that is  
26 acquired by DBT or at DBT's request for the Project. DBT ROW includes all DBT ROW,  
27 Temporary Construction Easements outside the Schematic ROW, DBT's Temporary  
28 Work Areas, and Replacement Utility Property Interests.
- 29 **DBT Intellectual Property** means all Intellectual Property developed by DBT or its  
30 Affiliates or Subcontractors independently of and not related to its (their) obligations to  
31 perform under the Contract Documents.
- 32 **DBT-Related Entity** means:
- 33 (a) DBT's shareholders, members, partners or joint venture members;  
34 (b) Subcontractors and Suppliers;  
35 (c) Any other Persons performing any of the Work directly or indirectly on DBT's behalf  
36 or over which DBT directly or indirectly exercises control;



- 1 (d) Any other Persons for whom DBT may be legally or contractually responsible; and  
2 (e) The employees, agents, officers, directors, shareholders, representatives,  
3 consultants, successors, assigns, and invitees of any of the foregoing.

4 **DBT Release of Hazardous Materials** means:

- 5 (a) Release(s) of Hazardous Material, or the exacerbation of any such release(s),  
6 attributable to the culpable actions, culpable omissions, negligence, intentional  
7 misconduct, or breach of applicable Law or contract by any DBT-Related Entity;  
8 (b) Release(s) of Hazardous Materials arranged to be brought onto the Site or  
9 elsewhere by any DBT-Related Entity, regardless of cause; or  
10 (c) Use, containment, storage, management, handling, transport, and disposal of any  
11 Hazardous Materials by any DBT-Related Entity in violation of the requirements of  
12 the Contract Documents or any applicable Law or Governmental Approval.

13 **DBT's Proposal Commitments** means (a) the content of Exhibits 4-1 to the Agreement  
14 and (b) any other content of the Proposal as determined in accordance with Section 1.2.4  
15 of the Agreement.

16 **DBT's Schematic Design** means DBT's preliminary design for the Project set forth in  
17 Exhibit 4-10 of the Agreement.

18 **DBT's Temporary Work Areas** means areas in which DBT carries out, on a temporary  
19 basis, Project-specific or Project-related activities in connection with the Work but not  
20 within the Project ROW boundaries identified in the NEPA Approval, such as construction  
21 work sites, the optional office (as described in Exhibit III (Technical Provisions)), staging  
22 areas, storage areas, lay-down areas, earth work material borrow sites, and other  
23 locations for the convenience of DBT.

24 "DBTs Temporary Work Areas" do not include Temporary Construction Easements.

25 **Deviation** means any proposed or actual change, deviation, modification, alteration or  
26 exception from Exhibit III (Technical Provisions).

27 **Differing Site Conditions** means:

- 28 (a) Subsurface or latent conditions encountered within one foot from the actual boring  
29 holes identified in the geotechnical reports included in the Reference Information  
30 Documents, which differ materially from those conditions indicated in the  
31 geotechnical reports for such boring holes; or  
32 (b) Subsurface or surface physical conditions of an unknown nature, differing  
33 materially from those ordinarily encountered in the area and generally recognized  
34 as inherent in the type of work provided for in the Agreement.

35 Upon discovery of a Differing Site Condition, prompt notification to the Engineer with a  
36 written notice within 7 calendar days of the encountering shall be made. Await guidance  
37 from the Engineer before disturbing the conditions and before performing the affected  
38 work.

1 Upon written notification, the Engineer will investigate the conditions and determine if the  
2 conditions materially differ and cause an increase or decrease in the cost or time required  
3 for the performance of work under the Contract. When justified, the Engineer will make  
4 an adjustment, in time, or cost, or both, excluding anticipated profits, and modify the  
5 Contract in writing accordingly. The Engineer will notify the Contractor whether or not the  
6 conditions warrant an adjustment.

7 The Cabinet will allow no Contract adjustment unless the Contractor provides the required  
8 written notice.

9 **Directive Letter** has the meaning set forth in Section 14.3 of the Agreement.

10 **Disadvantaged Business Enterprise** has the meaning set forth in 49 C.F.R. Part 26  
11 and in KYTC Standard Specifications. It refers to a for profit small business where socially  
12 and economically disadvantaged individuals own at least 51 percent interest and also  
13 control management and daily business operations of the company.

14 **Dispute** means any dispute, Claim, disagreement or controversy between KYTC and  
15 DBT concerning their respective rights and obligations under the Contract Documents,  
16 including concerning any alleged breach or failure to perform and remedies therefor, that  
17 has satisfied all predicate notice and information requirements set forth in the Agreement  
18 and that is eligible for resolution using the Dispute Resolution Procedures. Dispute  
19 includes all disputes that the Agreement expressly designates as Disputes or as eligible  
20 for resolution under the Dispute Resolution Procedures without any further prerequisites.  
21 The word “dispute” in its lower case spelling shall have its plain language meaning.

22 **Dispute Resolution Procedures** means collectively, the procedures established under  
23 Section 20.2 of the Agreement.

24 **Effective Date** means the date of the Agreement, which shall be the last date on which  
25 all required signatures for the Agreement to be in effect are obtained.

26 **Element** means a discrete portion of the Project (e.g., a sign).

27 **Emergency** means any unplanned event or condition originating from within or adjacent  
28 to the Project ROW that: (a) presents an immediate or imminent threat to the integrity of  
29 any part of the infrastructure of the Project, to the environment, to property adjacent to  
30 the Project or to the safety of the public; (b) has caused serious injury to persons, or  
31 significant damage to property or the environment, within or adjacent to the Project; or (c)  
32 is recognized by the Kentucky Cabinet of Public Safety as an emergency.

33 **Engineer of Record** means the professional engineer(s) or engineering firm registered  
34 and licensed in the Commonwealth that performs the design and analysis, and is  
35 responsible for the preparation of the Design Documents.

36 **Environmental Approvals** means all Governmental Approvals arising from or required  
37 by any Environmental Law in connection with development of the Project, including;

- 1 (a) The NEPA Approval;
- 2 (b) Other approvals and permits required under NEPA; and
- 3 (c) Any revision, modification, supplement or amendment of the foregoing approvals
- 4 and permits.

5 **Environmental Commitment** means the environmental commitments and obligations  
6 set forth in the Agreement and Environmental Approvals.

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

- 17 (a) The manufacture, processing, use, distribution, existence, treatment,  
18 storage, disposal, generation, and transportation of Hazardous Materials;
- 19 (b) Air, soil, surface and subsurface strata, stream sediments, surface water,  
20 and groundwater;
- 21 (c) Releases of Hazardous Materials;
- 22 (d) Protection of wildlife, Threatened or Endangered Species, sensitive  
23 species, wetlands, water courses and water bodies, historical,  
24 archeological, and paleontological resources, and natural resources;
- 25 (e) The operation and closure of underground storage tanks;
- 26 (f) Safety of employees and other persons; and
- 27 (g) Notification, documentation, and record keeping requirements relating to  
28 the foregoing.

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

- 31 (i) The National Environmental Policy Act (42 U.S.C. §§ 4321 *et seq.*),  
32 as amended;
- 33 (ii) Title VI of the Civil Rights Act of 1964 (42 U.S.C. § 2000d)
- 34 (iii) Section 4(f) of the U.S. Cabinet of Transportation Act of 1966 (49  
35 U.S.C. § 303(c))
- 36 (iv) Uniform Relocation Assistance and Real Property Acquisition  
37 Policies Act 9 of 1970 (49 C.F.R. Part 24)
- 38 (v) The Comprehensive Environmental Response, Compensation, and  
39 Liability Act (42 U.S.C. §§ 9601 *et seq.*), as amended;

- 1 (vi) The Solid Waste Disposal Act, as amended by the Resource  
2 Conservation and Recovery Act (42 U.S.C. §§ 6901 *et seq.*);
- 3 (vii) The Emergency Planning and Community Right to Know Act of  
4 1986 (42 U.S.C. §§ 11001 *et seq.*), as amended;
- 5 (viii) The Clean Air Act (42 U.S.C. §§ 7401 *et seq.*), as amended;
- 6 (ix) The Federal Water Pollution Control Act, as amended by the Clean  
7 Water 18 Act (33 U.S.C. §§ 1251 *et seq.*);
- 8 (x) The Resource Conservation and Recovery Act (42 U.S.C. §§ 6901,  
9 *et seq.*), as amended;
- 10 (xi) The Toxic Substances Control Act (15 U.S.C. §§ 2601 *et seq.*), as  
11 amended;
- 12 (xii) The Hazardous Materials Transportation Act (49 U.S.C. §§ 1801 *et*  
13 *seq.*), as amended;
- 14 (xiii) The Oil Pollution Act (33 U.S.C. §§ 2701, *et. seq.*), as amended;
- 15 (xiv) The Federal Insecticide, Fungicide and Rodenticide Act (7 U.S.C.  
16 §§ 136 *et seq.*), as amended;
- 17 (xv) The Federal Safe Drinking Water Act (42 U.S.C. §§ 300 *et seq.*), as  
18 amended;
- 19 (xvi) The Federal Radon and Indoor Air Quality Research Act (42 U.S.C.  
20 §§ 7401 *et seq.*), as amended;
- 21 (xvii) The Occupational Safety and Health Act (29 U.S.C. §§ 651 *et seq.*);
- 22 (xviii) The Endangered Species Act (16 U.S.C. §§ 1531 *et seq.*), as  
23 amended;
- 24 (xix) The Fish and Wildlife Coordination Act (16 U.S.C. §§ 661 *et seq.*),  
25 as amended;
- 26 (xx) The National Historic Preservation Act (16 U.S.C. §§ 470 *et seq.*),  
27 as amended;
- 28 (xxi) The Coastal Zone Management Act (33 U.S.C. §§ 1451 *et seq.*), as  
29 amended;
- 30 (xxii) General;
- 31 (xxiii) Water Quality Control;
- 32 (xxiv) Air Quality;
- 33 (xxv) Solid Waste Management;
- 34 (xxvi) Hazardous Waste Disposal;
- 35 (xxvii) Underground Storage Tank Regulation;
- 36 (xxviii) Light Pollution;
- 37 (xxix) Water Infrastructure Finance Program; and
- 38 (xxx) Natural Gas Facilities.

39 **Equity Member** means: (a) each entity with a direct equity interest in DBT (whether as a  
40 member, partner, joint venture member or otherwise); and (b) each entity with an indirect  
41 interest in DBT through one or more intermediaries and that exercises control over DBT  
42 or otherwise has the ability to direct DBT's decision-making.

1 Notwithstanding the foregoing, if DBT is a publicly traded company, shareholders with  
2 less than a 20% interest in DBT shall not be considered Equity Members.

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

4 **Escrowed Proposal Documents (“EPDs”)** are the documentary information used in  
5 preparation of its best value proposal for cost for the Project.

6 **Event of Default** has the meaning set forth in Section 18.1.3 of the Agreement.

7 **Extra Work** means any Work in the nature of additional work, altered work or deleted  
8 work that is directly attributable to occurrence of a Relief Event and absent the Relief  
9 Event would not be required by the Contract Documents. For clarity, the term “Extra Work”  
10 includes additional work necessary for DBT to obtain Environmental Approvals,  
11 reevaluations, amendments and supplements of the NEPA Approval, and other  
12 Governmental Approvals required in connection with a Relief Event.

13 **Extra Work Costs** means the incremental increase in DBT’s cost of labor, material,  
14 equipment, and other direct and indirect costs directly attributable to Extra Work. Such  
15 Extra Work Costs shall be calculated in accordance with Section 109.04.02 of the KYTC  
16 Standard Specifications for Road and Bridge Construction.

17 **FAA Permit 7460** means the permit acquired, as necessary, by the DBT, and issued by  
18 the FAA, for construction within a certain distance or glide path from an airport.

19 **Federal Requirements** means the provisions required to be part of construction  
20 contracts funded wholly or in part with federal-aid funding or other federal funds or credit,  
21 including the provisions set forth in Exhibit 4 to the Agreement.

22 **Field Design Change (FDC)** means the document as described in Exhibit III (Technical  
23 Provisions).

24 **Final Acceptance** means the occurrence of all of the events and satisfaction of all of the  
25 conditions set forth in the Contract Documents.

26 **Final Acceptance Date** means the date on which Final Acceptance of the Project occurs,  
27 as indicated by the date the Certificate of Final Acceptance has been issued.

28 **Final Acceptance Deadline** means the deadline for Final Acceptance, which is 90 days  
29 after the Certificate of Substantial Completion has been issued, unless adjusted by  
30 Supplemental Agreement pursuant to the Agreement.

31 **Final Inspection Plans** means the Design Document as described in Exhibit III  
32 (Technical Provisions)

33 **Final Payment** means payment by KYTC of the final installment of the Contract Price.  
34 The requirements are laid out in Sections 105.12 and 109 of the KYTC Standard  
35 Specifications.

1 **Final Plans** are plans prepared in accordance with the Contract Documents and  
2 Governing Regulations, per Exhibit III (Technical Provisions).

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

9 **Flood Event** means storms and floods for which the Governor of the Commonwealth has  
10 proclaimed a state of emergency, and when the damaged work of the Project is located  
11 within the territorial limits to which such proclamation is applicable.

12 **Force Account Work** means Extra Work Costs determined on a force account basis, in  
13 accordance with Section 109.04.02 of the KYTC Standard Specifications for Road and  
14 Bridge Construction.

15 **Force Majeure Event** means the occurrence of any of the following events that (1) is  
16 beyond the reasonable control of DBT, (2) is not attributable to the negligence, willful  
17 misconduct, or breach of applicable Law or contract by any DBT-Related Entity, and (3)  
18 actually, demonstrably, materially, and adversely affects performance of DBT's  
19 obligations (other than payment obligations) in accordance with the terms of the Contract  
20 Documents, provided that such events (or the effects of such events) are not caused, and  
21 could not have been avoided by the exercise of caution, due diligence or reasonable  
22 efforts, by any DBT-Related Entity:

- 23 (a) War (including civil war and revolution), invasion, armed conflict, violent act of  
24 foreign enemy, military or armed blockade, or military or armed takeover of the  
25 Project or the Site, in each case occurring within the Commonwealth of Kentucky;  
26 (b) Any act of terrorism, riot, insurrection, civil commotion or sabotage within the  
27 Project ROW that hinders or precludes achievement of Substantial Completion by  
28 the Substantial Completion Deadline;  
29 (c) National strikes not specific to DBT, embargoes, acts or omissions of a port or  
30 transportation authority, wars, and events that occur outside of the Commonwealth  
31 that, in each case, directly causes interruption to construction of the Project;  
32 (d) Nuclear explosion that causes direct physical damage to the Project or the Site, or  
33 radioactive contamination of the Project or the Site;  
34 (e) Flood Event, fire, explosion, gradual inundation caused by natural events, tornado,  
35 sinkhole caused by natural events, or landslide caused by natural events, in each  
36 case directly impacting the physical improvements of the Project or performance  
37 of Work at the Site;  
38 (f) Any governor-declared Emergency within the limits of the Project ROW, except  
39 one consisting of or arising out of traffic accidents;

1 (g) One or more earthquakes of a moment magnitude greater than 5.0 (measured by  
2 the United States Geological Survey moment magnitude) with an epicenter within  
3 150 miles of the northernmost point of the Project ROW, including all foreshocks  
4 and aftershocks, where such earthquakes include ground shaking, liquefaction,  
5 settlement, or ground movements that directly impact, and cause damage to,  
6 temporary or permanent works of the Project;

7 **Formal Acceptance** has the meaning set forth in the *Standard Specifications*.

8 **General Engineering Consultant** means the entity, as well as its personnel, designated  
9 by KYTC as its program manager for the Project, and which shall have all duties,  
10 responsibilities, and rights granted by KYTC.

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

14 **Good Faith Efforts** means (a) with respect to DBE, the efforts to meet the DBE Goals  
15 required under 49 C.F.R. Part 26, and (b) with respect to OJT, the effort to meet the OJT  
16 Goals required under 23 C.F.R. § 230.409(g)(4).

17 **Good Industry Practice** means the exercise of the degree of skill, diligence, prudence,  
18 and foresight that would reasonably and ordinarily be expected from a skilled and  
19 experienced designer, engineer or construction contractor seeking in good faith to comply  
20 with its contractual obligations, complying with all applicable Laws and engaged in the  
21 same type of undertaking under circumstances and conditions similar to those within the  
22 same geographic area as the Project.

23 **Governmental Approval** means any permit, license, consent, concession, grant,  
24 franchise, authorization, waiver, certification, exemption, filing, lease, registration or  
25 ruling, variance or other approval, guidance, protocol, agreement, mitigation agreement,  
26 or memoranda of agreement/understanding, and any amendment or modification of any  
27 of them, required by or with, or provided by, Governmental Entities, including  
28 Commonwealth, local, or federal regulatory agencies, agents, or employees, which  
29 authorize or pertain to the Work or the Project, but excluding any such approvals given  
30 by or required from any Governmental Entity in its capacity as a Utility Company.  
31 Governmental Approvals include Environmental Approvals.

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

35 **Guaranteed Obligations** has the meaning set forth in the Guaranty.

36 **Guarantor** means each of the entities that provided, in the applicable form of Exhibit 10  
37 to the Agreement, a guaranty of the obligations of DBT under the Contract Documents.

1 **Guaranty** means each guaranty executed by a Guarantor guaranteeing the obligations  
2 of DBT under the Contract Documents.

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

- 9 (a) Hazardous wastes, hazardous material, hazardous substances, hazardous  
10 constituents, and toxic substances or related materials, whether solid, liquid, or  
11 gas, including substances defined as or included in the definition of "hazardous  
12 substance", "hazardous waste", "hazardous material", "extremely hazardous  
13 waste", "acutely hazardous waste", "radioactive waste", "radioactive materials",  
14 "bio-hazardous waste", "pollutant", "toxic pollutant", "contaminant", "restricted  
15 hazardous waste", "infectious waste", "toxic substance", "toxic waste", "toxic  
16 material", or any other term or expression intended to define, list or classify  
17 substances by reason of properties harmful to health, safety or the indoor or  
18 outdoor environment (including harmful properties such as ignitability, corrosivity,  
19 reactivity, carcinogenicity, toxicity, reproductive toxicity, "TCLP toxicity" or "EP  
20 toxicity" or words of similar import under any applicable Environmental Laws);
- 21 (b) Any petroleum, including crude oil and any fraction thereof, and including any  
22 refined petroleum product or any additive thereto or fraction thereof or other  
23 petroleum derived substance; and any waste oil or waste petroleum byproduct or  
24 fraction thereof or additive thereto;
- 25 (c) Any drilling fluids, produced waters, and other wastes associated with the  
26 exploration, development or production of crude oil, natural gas or geothermal  
27 resources;
- 28 (d) Any flammable substances or explosives;
- 29 (e) Any radioactive materials;
- 30 (f) Any asbestos or asbestos-containing materials;
- 31 (g) Any lead and lead-based paint;
- 32 (h) Any radon or radon gas;
- 33 (i) Any methane gas or similar gaseous materials;
- 34 (j) Any urea formaldehyde foam insulation;
- 35 (k) Electrical equipment that contains any oil or dielectric fluid containing regulated  
36 levels of polychlorinated biphenyls;
- 37 (l) Pesticides;
- 38 (m) Any other chemical, material or substance, exposure to which is prohibited, limited  
39 or regulated by any Governmental Entity or which may or could pose a hazard to  
40 the health and safety of the owners, operators, users or any Persons in the vicinity  
41 of the Project or to the indoor or outdoor environment; and



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

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

11 **Hazardous Materials Management Plan** means the plan prepared by DBT for the safe  
12 handling, storage, treatment or disposal of Hazardous Materials both within and outside  
13 the Project ROW.

14 **Holidays** means those days defined as legal holidays in KYTC Standard Specifications.

15 **Inaccurate Utility Information** means, with respect to any Utility Adjustment, that one or  
16 more of the following circumstances applies:

- 17 (a) The subject Utility lies underground and the Utility Information incorrectly indicates  
18 that the subject Utility does not exist anywhere within the portion of the Schematic  
19 ROW covered by the Utility Information;
- 20 (b) The subject Utility lies underground and the horizontal centerline of the actual  
21 location of the subject Utility lies more than six horizontal feet from the horizontal  
22 centerline as shown in the Utility Information;
- 23 (c) The subject Utility lies underground and the Utility Information incorrectly indicates  
24 that the subject Utility is abandoned (i.e., nonexistent except for its presence in the  
25 records, or existent but no longer active for any type of Utility use);
- 26 (d) The Utility Information fails to indicate, and DBT otherwise lacks actual or  
27 constructive knowledge, that the Utility Company holds or is assumed to hold Prior  
28 Rights Documentation with respect to the subject Utility; or
- 29 (e) The subject Utility lies underground and the pothole data provided by KYTC prior  
30 to the Setting Date does not indicate the existence of the subject Utility within the  
31 dimensions of the pothole.

32 If any discrepancy exists between the information provided by (a) one component of the  
33 Utility Information and (b) that provided by any other component of the Utility Information,  
34 only the more recent information shall be relevant for purposes of this definition.

35 **Incident** means a localized disruption to the free flow of traffic to users of the Project, or  
36 a localized disruption to the safety of users of the Project.

37 **Indemnified Parties** means KYTC, the Commonwealth, and the General Engineering  
38 Consultant, and for each of the foregoing, their respective successors, assigns,  
39 officeholders, officers, directors, agents, representatives, consultants, and employees.

1 **Inspect** shall mean to perform an Inspection. When used in its lower case spelling, the  
2 term “inspect” shall have its plain language meanings.

3 **Inspection** means a detailed inspection by Design Build Team of a specific Element  
4 carried out by duly qualified personnel. When used in its lower case spelling, the term  
5 “inspection” shall have its plain language meaning.

6 **Intellectual Property** means all current and future legal or equitable rights and interests  
7 in know-how, patents (including applications), copyrights (including moral rights),  
8 trademarks (registered and unregistered), service marks, trade secrets, designs  
9 (registered and unregistered), utility models, circuit layouts, plant varieties, business and  
10 domain names, inventions, solutions embodied in technology, and other intellectual  
11 activity, and applications of or for any of the foregoing, subsisting in or relating to the  
12 Project, Project design data or Project traffic data. Intellectual Property includes traffic  
13 management algorithms and software used in connection with the Project (including  
14 software used for management of traffic on the Project), and software source code.

15 Intellectual Property is distinguished from physical embodiments and other  
16 documentation that disclose Intellectual Property.

17 **Issue Resolution Ladder** has the meaning set forth in the Agreement.

18 **Key Personnel** means those individuals identified in DBT’s Proposal Commitments to fill  
19 the “Key Personnel” positions identified in Exhibit III (Technical Provisions).

20 **Known Cultural Resource Sites** means those specific locations within the Project Limits  
21 identified in the NEPA Approval that were found to contain cultural resources.

22 **Known or Suspected Hazardous Materials** means Hazardous Materials and  
23 Recognized Environmental Conditions that are known, reasonably suspected to exist as  
24 of the Setting Date, or could be discovered through a Reasonable Investigation.

25 **KYTC-Caused Delay** means any of the following events, to the extent they result in a  
26 delay or interruption in the performance of any material DBT obligation under the  
27 Agreement, and provided such events are beyond DBT’s control and are not due to any  
28 act, omission, negligence, recklessness, willful misconduct or breach or violation of  
29 contract, the requirements of the Contract Documents or Law by any DBT-Related Entity,  
30 and further provided that such events (or the effects of such events) could not have been  
31 avoided by the exercise of caution, due diligence or reasonable efforts by DBT:

- 32 (a) KYTC-Directed Change;  
33 (b) Failure or inability of KYTC to make available to DBT any Schematic ROW parcel;  
34 (c) Suspensions for convenience;  
35 (d) Any other event that the Contract Documents expressly state is an “KYTC-Caused  
36 Delay”.

37 Any proper suspension of Work pursuant to the Agreement shall not be considered an  
38 KYTC-Caused Delay.

1 **KYTC Consultant** means any firm or person under contract to KYTC to perform services  
2 for or on behalf of KYTC, whether or not the identity or status of such firm or person is  
3 known to DBT.

4 **KYTC-Directed Change** means Changes in the scope of the Work or terms and  
5 conditions of the Contract Documents (including changes in the standards applicable to  
6 the Work) that KYTC has directed DBT to perform

7 **KYTC's Recoverable Costs** means:

- 8 (a) The costs of any assistance, action, activity or Work undertaken by KYTC and for  
9 which DBT is liable, or is to reimburse KYTC, under the terms of the Contract  
10 Documents, including the charges of additional services by the GEC, third party  
11 contractors, and reasonably allocated wages, salaries, compensation, and  
12 overhead of KYTC staff and employees performing such action, activity or Work;  
13 plus  
14 (b) Third-party costs KYTC incurs to procure or contract with any third-party  
15 contractors; plus  
16 (c) Reasonable fees and costs of attorneys, including the reasonably allocable fees  
17 and costs of the Kentucky Attorney General's Office (but not including attorney's  
18 fees and costs incurred in prosecuting or defending Disputes and Claims under  
19 the Dispute Resolution Procedures against DBT, as provided by Section 20.2 of  
20 the Agreement), financial advisors, engineers, architects, insurance brokers and  
21 advisors, investigators, traffic and revenue consultants, risk management  
22 consultants, other consultants, and expert witnesses, as well as court costs and  
23 other litigation costs, in connection with any such assistance, action, activity or  
24 Work, including in connection with defending claims by and resolving disputes with  
25 third party contractors; plus  
26 (d) Interest on all of the foregoing sums at the applicable floating rate set forth in  
27 Section 23.13 of the Agreement, commencing on the date due under the applicable  
28 terms of the Contract Documents and continuing until paid.

29 **KYTC Standard Specifications** means the Kentucky Transportation Cabinet Standard  
30 Specifications for Road and Bridge Construction and Supplemental Specifications as of  
31 the Setting Date.

32 **Lane Closure Request** means a written request from DBT to KYTC for a Lane Closure.  
33 A Lane Closure Request must identify the specific time requested for a Lane Closure.

34 **Law** means: (a) any law, statute, code, regulation, ordinance, rule or common law; (b)  
35 any binding judgment (other than regarding a Claim or Dispute); (c) any binding judicial  
36 or administrative order or decree (other than regarding a Claim or Dispute); (d) any written  
37 directive, guideline, policy requirement or other governmental restriction (including those  
38 resulting from the initiative or referendum process, but excluding those by KYTC within  
39 the scope of its administration of the Contract Documents); or (e) any similar form of  
40 decision of or determination by, or any written interpretation or administration of any of

- 1 the foregoing by, any Governmental Entity, in each case which is applicable to or has an  
2 impact on the Project or the Work, whether taking effect before or after the Effective Date,  
3 including Environmental Laws. "Laws", however, excludes Governmental Approvals.
- 4 **Lead Contractor** means [\*\*\*].
- 5 **Lead Designer** means [\*\*\*].
- 6 **Lien** means any pledge, lien, security interest, mortgage, deed of trust or other charge or  
7 encumbrance of any kind, or any other type of preferential arrangement (including any  
8 agreement to give any of the foregoing, any conditional sale or other title retention  
9 agreement, any lease in the nature of a security instrument, and the filing of or agreement  
10 to file any financing statement under the Uniform Commercial Code of any jurisdiction).
- 11 **Liquidated Damages** means the liquidated damages specified in Articles 8 and 18 of the  
12 Agreement, and in any other part of the Agreement.
- 13 **Long Lick Branch Bridge** means the bridge structure at KY 555 mile post 8.3.
- 14 **Loss** or **Losses** means any loss, damage, injury, liability, obligation, cost, response cost,  
15 expense (including attorney's, accountant's and expert witnesses' fees and expenses  
16 (including those incurred in connection with the enforcement of any indemnity or other  
17 provision of the Agreement)), fee, charge, judgment, penalty, fine or third-party claims.  
18 Losses include injury to or death of persons, damage or loss of property, and harm or  
19 damage to natural resources.
- 20 **Maintenance of Traffic (MOT)** refers to the maintaining, controlling, and protection of  
21 vehicular, bicycle, and pedestrian traffic adjacent to and within the construction area.  
22 Refer to *Standard Specifications* for further information.
- 23 **Maintenance During Construction** means any and all management, administration,  
24 maintenance, repair, preservation, modification, reconstruction, rehabilitation, restoration,  
25 renewal, and replacement to be performed by DBT in connection with the Project prior to  
26 Substantial Completion.
- 27 **Major Team Members** are the Lead Contractor and the Lead Designer for the DBT.
- 28 **Maximum Contract Value** refers to how the Price Proposal may not go over \$22,000,000  
29 or the Proposal may be considered non-responsive.
- 30 **Meeting Notes** means the notes that DBT records from Project-related meetings DBT  
31 attends.
- 32 **Minor Work Change** means the document as described in Exhibit III (Technical  
33 Provisions).
- 34 **Monthly Progress Update** means the report described Exhibit III (Technical Provisions).
- 35 **Monthly Progress Update Schedule** means the schedule submitted by DBT, consistent  
36 with the Completion Deadlines, setting forth the approved schedule of Work on a monthly

- 1 basis against which any subsequent schedule amendments are tracked, as more  
2 particularly described in Exhibit III (Technical Provisions).
- 3 **NEPA Approval** means the Categorical Exclusion issued for the Project.
- 4 **Non-Conformance Report** means documentation of Nonconforming Work.
- 5 **Non-working Hours** are periods of time when the DBT does not have work crews actively  
6 performing construction operations at the site.
- 7 **Nonconforming Work** means Work that does not conform to the requirements of the  
8 Contract Documents, the Governmental Approvals, applicable Law or the Design  
9 Documents.
- 10 **Notice of Potential Relief Event** means the Notice required to be provided by DBT under  
11 Section 13.1.2 of the Agreement.
- 12 **Open Book Basis** all underlying assumptions and data, documents, and information  
13 associated with pricing or compensation (whether of DBT or KYTC) or adjustments  
14 thereto, including assumptions as to costs of the Work, Extra Work Costs, schedule,  
15 composition of equipment spreads, equipment rates (including rental rates), labor rates  
16 and benefits, productivity, estimating factors, design and productivity allowance,  
17 contingency and indirect costs, risk pricing, discount rates, interest rates, inflation and  
18 deflation rates, insurance rates, bonding rates, letter of credit fees, overhead, profit, and  
19 other items reasonably required by KYTC to satisfy itself as to the validity or  
20 reasonableness of the amount.
- 21 **Oil Pollution Spill Prevention and Countermeasure Plan** refers to the plan Kentucky  
22 Open Records Act, as specified in Section 21.5 in the Agreement.
- 23 **Open Records Act** refers to the Kentucky Open Records Act, as specified in Section  
24 21.5 in the Agreement.
- 25 **Oversight** means monitoring, inspecting, sampling, measuring, spot checking, attending,  
26 observing, testing, investigating, and conducting any other oversight respecting any part  
27 or aspect of the Project or the Work, including all the activities described in Article 3 of  
28 the Agreement.
- 29 **Partial Termination for Convenience** means a partial termination of the Agreement  
30 pursuant to Article 22 of the Agreement.
- 31 **Parties** means DBT and KYTC, collectively.
- 32 **Partnering Meetings** has the meaning set forth in Article 20.1.1 of the Agreement.
- 33 **Party** means DBT or KYTC, as the context may require.
- 34 **Pay Estimate** means the DBT's monthly estimate, in the form of payment request, for the  
35 work completed by the DBT.

1 **Payment Bond** means the bond referred to Article 9 of the Agreement.

2 **Performance Bond** means the bond referred to in Article 9 of the Agreement.

3 **Permitted Closure** means a Lane Closure that KYTC approves upon written request  
4 from DBT, and that involves one of the following:

5 (a) A Lane Closure due to an KYTC-Directed Change, provided DBT is using  
6 commercially reasonable efforts to: (i) mitigate the impact of such KYTC-Directed  
7 Change; (ii) reopen the affected segment to traffic; and (iii) minimize the impact of  
8 DBT's activities and the Closure to traffic flow;

9 (b) A Lane Closure specified, caused or ordered by, and continuing only for so long  
10 as required by, KYTC or any Governmental Entity, or a Utility Company performing  
11 work under a permit issued by KYTC, except to the extent such Lane Closure is  
12 the result of the negligence, willful misconduct, or breach of applicable Law or  
13 contract, by DBT or any DBT-Related Entity;

14 (c) A Lane Closure required due to a Relief Event, subject to Article 13 of the  
15 Agreement; or

16 (d) A Lane Closure that is approved by KYTC.

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

20 **Plans** means the plans described in Exhibit III (Technical Provisions). When used in its  
21 lower case spelling, the term "plan(s)" shall have its plain language meaning.

22 **Preconstruction Conference** means the meeting as described in Exhibit III (Technical  
23 Provisions) and the *Standard Specifications*.

24 **Pre-Released for Construction Plans** or **Pre-RFC Plans** means the Design Document  
25 as described in Exhibit III (Technical Provisions).

26 **Preliminary Baseline Schedule** means the time-scaled, Critical Path network that  
27 depicts Project sections, Project milestones, and subordinate activities and their  
28 respective durations, sequencing, and interrelationships that represent DBT's Work plan  
29 for designing, constructing, and completing the Project, attached as Exhibit 4-3 to the  
30 Agreement.

31 **Preliminary Line and Grade** is as defined in Section 208 of the KYTC Highway Design  
32 Guidance Manual.

33 **Price Proposal** is the Proposal submittal by the DBT that includes the price for which the  
34 DBT offers to perform the work described in the Contract Document.

35 **Prime Rate** means the prime rate as published from time to time by the board of  
36 governors of the Federal Reserve System in statistical release H.15 or any publication  
37 that may supersede it.

1 **Prior Rights Documentation** means documents showing that the Utility Company's  
2 facility predates the acquisition of the property for street or highway purposes, or that it  
3 occupies an easement or other compensable land right. Such documents provide  
4 verification that the Utility Company is entitled to compensation for the cost of  
5 Adjustments required to accommodate the Project.

6 **Professional Engineer** means a person who has been granted registration in one or  
7 more branches of engineering by the Kentucky Board of Engineers and Land Surveyors,  
8 and is authorized to practice professionally in the Commonwealth of Kentucky. If a branch  
9 of engineering is included in the title, such as Professional Civil Engineer, registration in  
10 that branch shall be required.

11 **Professional Services** means all Work performed under the Agreement other than  
12 Construction Work and Maintenance During Construction, including the following services  
13 and Work:

- 14 (a) Design and engineering;
- 15 (b) Utility Adjustment design;
- 16 (c) Environmental permitting and compliance;
- 17 (d) Public involvement;
- 18 (e) ROW acquisition services;
- 19 (f) Surveying; and
- 20 (g) Independent quality services.

21 **Progress Schedule** is as described in Section 108 of the KYTC Standard Specifications.

22 **Project** means the transportation facilities and all related structures, improvements, and  
23 systems to be developed, designed, and constructed pursuant to the terms of the  
24 Contract Documents. "Project" does not include DBT's Temporary Work Areas.

25 **Project Intellectual Property** means all Proprietary Intellectual Property, DBT  
26 Intellectual Property, and Third-Party Intellectual Property incorporated into the Project.

27 **Project Limits** means the area within the Project ROW that defines the area available  
28 for access by the DBT in accordance with the Contract Documents.

29 **Project Manager** means the individual described in Exhibit III (Technical Provisions). The  
30 Project Manager is one of the Key Personnel listed in Exhibit 9 to the Agreement.

31 **Project ROW** or **Project Right-of-Way** means, except as provided below, any real  
32 property (which term is inclusive of all estates, easements, leases, and other interests in  
33 real property, permanent or temporary) located:

- 34 (a) Within the lines delineating the outside boundaries of the Project as set forth in the  
35 Schematic ROW or as adjusted in accordance with the Contract Documents  
36 (including adjustments for Additional ROW, DBT ROW, except for DBT's  
37 Temporary Work Areas outside the Schematic ROW and Replacement Utility  
38 Property Interests); or

1 (b) Outside such lines and required for performance of the Work or construction,  
2 operation or maintenance of the Project, and easements and other property  
3 interests for the Project and other components and features required for roadway  
4 function or environmental compliance.

5 The term Project ROW or Project Right-of-Way specifically includes all airspace, surface  
6 rights, and subsurface rights within the boundaries of the Project ROW or Project Right-  
7 of-Way. The term specifically excludes:

- 8 (i) Real property for DBT's Temporary Work Areas outside the boundaries set  
9 forth in the Schematic ROW; and  
10 (ii) Replacement Utility Property Interests.

11 **Project Scope or Project Scope of Services** are the documents detailing requirements  
12 of the Project, which is part of the Agreement and shall be made part of any Contract  
13 entered into between the DBT and KYTC.

14 **Project Standards** means the manuals, specifications, standards, and other material as  
15 specified in Exhibit III (Technical Provisions), Attachment 2: *Project Standards*.

16 **Proposal** means DBT's original Proposal submitted in response to the RFP, including  
17 any clarifications.

18 **Proposal Due Date** means February 3, 2023, the deadline for submission of the Proposal  
19 to KYTC under the RFP.

20 **Proposer** means the entity submitting a Proposal to KYTC to perform the advertised  
21 work.

22 **Proprietary Intellectual Property** means all Intellectual Property created, authored or  
23 invented under or for the purposes of a Proposal, the Contract Documents or the Project.

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

30 **Punch List** means the itemized list of the Work that remains to be completed after  
31 Substantial Completion has been achieved and before Final Acceptance, the existence,  
32 correction and completion of which will have no material or adverse effect on the normal  
33 and safe use and operation of the Project. The Punch List is subject to the limitations  
34 described in Section 6.6 of the Agreement.

35 **Quality Acceptance** means all planned and systematic actions performed by the IQF, as  
36 defined in the Contract Documents for their portion of the Acceptance Program.



1 **Quality Management Plan** means, collectively, the Quality Management Plan, the  
2 Design Quality Management Plan, and the Construction Quality Management Plan, as  
3 more fully described in Exhibit III (Technical Provisions).

4 **Reasonable Investigation** means the following activities performed by appropriate,  
5 qualified professionals prior to the Setting Date:

- 6 (a) Review and analysis of all TPs;
- 7 (b) Visit and visual, non-intrusive inspection of the Site and surrounding locations,  
8 except areas to which access rights have not been made available by the Setting  
9 Date;
- 10 (c) Review and analysis of all Reference Information Documents;
- 11 (d) Review and analysis of the NEPA Approval;
- 12 (e) Reasonable inquiry with Utility Companies, including requests for and review of  
13 Utility plans provided by Utility Companies;
- 14 (f) Reasonable inquiry with Governmental Entities that issue Environmental  
15 Approvals for the Project or the Work; and
- 16 (g) Review and analysis of Laws applicable to the Project or the Work as of the Setting  
17 Date.

18 **Recognized Environmental Conditions** means environmental conditions known to  
19 exist within the Project ROW and which the NEPA Approval requires DBT to avoid  
20 disturbing or otherwise impacting.

21 **Record Design Plans** means Design Document Submittal as described in Exhibit III  
22 (Technical Provisions) Section 3.1.5. ..

23 **Recovery Schedule** means the schedule DBT is required to provide under Section 7.10  
24 of the Agreement and more fully described in Exhibit III (Technical Provisions).

25 **Reference Information Documents (RIDs)** means those documents provided to the  
26 DBT during the RFP phase of the Project, as informational reference material. The RIDs  
27 are not considered Contract Documents and were provided to DBT for informational  
28 purposes only and without representation or warranty by KYTC.

29 **Related Transportation Facility** means all existing and future highways, streets, and  
30 roads, including upgrades and expansions thereof, that are or will be adjacent to,  
31 connecting with or crossing under or over the Project.

32 **Released for Construction Plans** or **RFC Plans** mean the signed and sealed Design  
33 Document submittal as described in Exhibit III (Technical Provisions).

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

1 **Relief Event** means any of the following events, subject to the requirements, limitations,  
2 deductibles, and the duty to prevent and to mitigate consequences that are set forth in  
3 the Agreement for such events:

- 4 (a) KYTC failure to perform or observe any of its covenants under the Contract  
5 Documents;  
6 (b) KYTC -Directed Change;  
7 (c) KYTC -Caused Delay;  
8 (d) Force Majeure Event;  
9 (e) Inaccurate Utility Information that directly affects the Work, subject to the following:  
10 (i) Excluding Work outside the Schematic ROW;  
11 (ii) Excluding where the existence of a Utility in the correct location or size, or  
12 of a Utility Company's Prior Rights Documentation, as applicable, was  
13 known to DBT as of the Setting Date, or would have become known to DBT  
14 as of the Setting Date by undertaking a Reasonable Investigation prior to  
15 the Setting Date, including by requesting and reviewing Utility plans  
16 provided by Utility Companies; and  
17 (iii) Excluding where the existence of a Utility in the correct location or size could  
18 have been determined with a reasonable visual inspection.  
19 (f) Discovery of any Hazardous Materials (including KYTC Release(s) of Hazardous  
20 Material) on Schematic ROW or Additional ROW, excluding DBT Releases of  
21 Hazardous Materials and Known or Suspected Hazardous Materials;  
22 (g) Discovery on or under the Project ROW, excluding DBT ROW, of any  
23 archaeological, paleontological or cultural resources, excluding any such  
24 resources at the Known Cultural Resource Sites;  
25 (h) Differing Site Conditions in the Schematic ROW;  
26 (i) Discovery at, near or on the Project ROW, excluding Replacement Utility Property  
27 Interests and DBT ROW, of any Threatened or Endangered Species (regardless  
28 of whether the species is listed as threatened or endangered as of the Setting  
29 Date), excluding any such presence species known to DBT prior to the Setting  
30 Date or that would become known to DBT by undertaking Reasonable  
31 Investigation;  
32 (j) Change in Law;

33 **Relief Request** has the meaning set forth in Section 13.1.3 of the Agreement.

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

39 **Representative** means, with respect to any Person, any director, officer, employee,  
40 official, lender (or any agent or trustee acting on its behalf), partner, member, owner,  
41 agent, lawyer, accountant, auditor, professional advisor, consultant, engineer,

1 Subcontractor, or other person for whom such Person is, at law, responsible, or another  
2 representative of such Person and any professional advisor, consultant or engineer  
3 designated by such Person as its "representative."

4 **Request for Change Proposal** means a written notice issued by KYTC to DBT under  
5 Section 14.1.2 of the Agreement, advising DBT that KYTC may issue an KYTC-Directed  
6 Change or wishes to evaluate whether to initiate such a change pursuant to Section 14.1  
7 of the Agreement.

8 **Request for Information** shall be the DBT-initiated mechanism for the DBT members to  
9 request information from one another or from KYTC, as described in Exhibit III (Technical  
10 Provisions).

11 **Request for Proposals** means the request for proposals referenced in Recital B of the  
12 Agreement. It includes the documents supplied to the shortlisted DBTs and describes the  
13 Projects in detail, outlining the procurement process, forms the basis for the final  
14 Proposals, and is an element in the Contract.

15 **Required Personnel** means the DBT-provided personnel for the Project, as identified in  
16 Exhibit III (Technical Provisions).

17 **Revised Schedule of Values** means the document as described in Exhibit III (Technical  
18 Provisions).

19 **RFP Documents** means all of the information and materials supplied to DBT in  
20 connection with the issuance of the RFQ and the RFP, including Instructions to  
21 Proposers, the Contract Documents, and the Reference Information Documents, and any  
22 addenda issued in connection with any of the foregoing.

23 **Roadway** means that portion of the Project ROW required for construction, limited by the  
24 outside edges of slopes, including ditches, channels, and all structures pertaining to the  
25 Work.

26 **ROW Identification Plan** means the plan described in, and satisfying the requirements  
27 in Exhibit III (Technical Provisions).

28 **Safety Management Plan** means the plan described in, and satisfying the requirements  
29 in Exhibit III (Technical Provisions).

30 **Schedule of Values** means the submittal prepared by the DBT in accordance with Exhibit  
31 III (Technical Provisions).

32 **Schematic Design** means the placemark file, roll plots, utility matrix, wall report, traffic  
33 data, or associated electronic files that KYTC prepared depicting KYTC's conceptual  
34 design for the Project, as included in the Reference Information Documents.

35 **Schematic ROW** means the ROW identified by KYTC anticipated to be necessary to  
36 deliver the Basic Project Configuration, including Temporary Construction Easements  
37 identified by KYTC. KYTC intends for the existing highway ROW to be sufficient for the

1 delivery of the Basic Project Configuration. The existing highway ROW shall be the  
2 Schematic ROW.

3 **Section 401 Water Quality Certification** means the individual permit for the Project  
4 issued by the Kentucky Division of Water (KDOW) under Section 401 of the Clean Water  
5 Act (33 U.S.C. §1341).

6 **Section 404 Permit** means the individual permit for the Project issued by the U.S. Army  
7 Corps of Engineers (USACE) under Section 404 of the Clean Water Act (33 U.S.C.  
8 §1344) for the placement of dredged and fill material into waters of the United States,  
9 based upon the Final Design and the Project ROW.

10 **Service Line** means a utility line other than a main utility line, including any meter, that  
11 connects or may be connected to a main utility line and services or is available to service  
12 individuals, businesses, and other entities. A Service Line is that portion of a utility line  
13 that extends from the tap of the main utility line, including such tap, through and including  
14 any meter, to a consumer's or potential consumer's residence(s), business(es) or other  
15 improvement(s), facility(ies), equipment or the like, whether existing, planned or potential  
16 / possible. Additionally, any and all utility lines that connect to a Service Line, including  
17 any and all meters, but excluding main utility lines, are Service Lines.

18 **Service Line Adjustment** means any work or adjustment to a Service Line to  
19 accommodate a Utility Adjustment.

20 **Setting Date** means the issue date of the Final RFP.

21 **Site** means Schematic ROW, DBT ROW, Replacement Utility Property Interests, any  
22 ROW where Work for the Project is to be performed, and DBT's Temporary Work Areas.

23 **Subcontract** means any agreement by DBT with any other Person or Subcontractor to  
24 perform any part of the Work, or any such agreement at a lower tier, between a  
25 Subcontractor and its lower tier Subcontractor, at all tiers.

26 **Subcontractor** means any Person with whom DBT has entered into any Subcontract to  
27 perform any part of the Work on behalf of DBT and any other Person with whom any  
28 Subcontractor has further subcontracted any part of the Work, at all tiers.

29 **Submittal** means any individual document, individual work product item or other written  
30 or electronic end product or item required under the Contract Documents to be delivered  
31 or submitted to KYTC, including those items identified as Submittals in the Exhibit III.  
32 "Submittal" does not include notices, correspondence or invoices for payment. When  
33 used in its lower case spelling, the term "submittal" shall have its plain language meaning.

34 **Submittal Type** means either a Type 1, 2, or 3 Submittal.

35 **Substantial Completion** means the occurrence of all of the events and satisfaction of all  
36 of the conditions set forth in Section 6.5 of the Agreement, as and when KYTC delivers a  
37 Certificate of Substantial Completion for the Project.

1 **Substantial Completion Date** means the date on which Substantial Completion of the  
2 Project occurs, as indicated by the date the Certificate of Substantial Completion has  
3 been issued.

4 **Substantial Completion Deadline** is October 31, 2024, beginning on, and including, the  
5 date that KYTC issues NTP, as such deadline may be subject to adjustment by  
6 Supplemental Agreement pursuant to the Agreement.

7 **Supplemental Agreement** means a written order agreement executed by the DBT and  
8 the Commissioner, with the consent of the surety when required, covering significant  
9 changes, and revised or new unit prices and items, that supplements the original  
10 Contract. See also *Change Order* and KYTC Standard Specifications for further detail.

11 **Supplemental EPDs** refer to additional Escrow Proposal Documents that have been  
12 submitted to KYTC as part of a Change Order. See Article 21.1.2 in the Agreement for  
13 further detail.

14 **Supplier** means any Person not performing work at or on the Site that supplies  
15 machinery, equipment, materials, hardware, software, systems or any other  
16 appurtenance to the Project to DBT or to any Subcontractor in connection with the  
17 performance of the Work. Persons who merely transport, pick up, deliver or carry  
18 materials, personnel, parts or equipment or any other items or persons to or from the Site  
19 shall not be deemed to be performing Work at the Site.

20 **Surety** means the corporation, firm, or individual, other than the DBT, executing a bond  
21 furnished by the DBT.

22 **Temporary Construction Easement** means temporary easements or other temporary  
23 property interests within the Schematic ROW or DBT ROW granting rights of use to DBT  
24 for the limited purposes of carrying out Construction Work or providing detour routes  
25 during the Construction Work. Temporary Construction Easements are distinguished  
26 from DBT's Temporary Work Areas by the fact that a Temporary Construction Easement  
27 is utilized either to directly carry out the activity of constructing the physical facilities  
28 making up the Project or to divert traffic to enable such construction activity.

29 **Termination by Court Ruling** means any of the following:

- 30 (a) Issuance of a final, non-appealable order by a court of competent jurisdiction to  
31 the effect that the Agreement is void or unenforceable or impossible to perform in  
32 its entirety, except where void, unenforceable or impossible to perform by reason  
33 of DBT's acts, omissions, negligence, willful misconduct, fraud or breach of  
34 warranty or representation;
- 35 (b) Issuance of a final, non-appealable order by a court of competent jurisdiction that  
36 causes impossibility of performance of a fundamental obligation by DBT or KYTC  
37 under the Contract Documents or impossibility of exercising a fundamental right of  
38 DBT or KYTC under the Contract Documents, and such impossibility cannot be

1 avoided or cured through severability and reformation of the Contract Documents  
2 as provided in Section 24.16 of the Agreement; or  
3 (c) Issuance of a final, non-appealable order by a court of competent jurisdiction:

- 4  
5 (i) Permanently enjoining or prohibiting performance or completion of the  
6 Construction Work for a material portion of the Project, except where such  
7 injunction or prohibition is attributable to DBT's acts, omissions, negligence,  
8 willful misconduct, fraud, breach of an obligation under the Contract  
9 Documents or violation of Law or an applicable Governmental Approval, or  
10 (ii) Requiring KYTC, either individually or in concert with FHWA, to undertake  
11 additional or supplemental evaluations, studies or other work under NEPA  
12 that, in KYTC's sole discretion, is impracticable in light of the purpose and  
13 intent of KYTC Agreement or the Project.

14 **Termination for Convenience** means a termination of the Agreement made pursuant to  
15 Section 23.1 of the Agreement.

16 **Third-Party Agreement** means any agreement between KYTC and any third-party listed  
17 in the Agreement. Such executed agreements are included in Exhibit III (Technical  
18 Provisions).

19 **Third Party Intellectual Property** means any Intellectual Property owned by any Person  
20 unrelated to DBT or its Affiliates or Subcontractors and that is incorporated into the  
21 Project.

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

26 **Time Impact Analysis** means an analysis, as described in, and satisfying the  
27 requirements of Section 14.1.3 in Exhibit II.

28 **Transportation Management Plan** means the plan prepared by DBT for the  
29 management of traffic during construction.

30 **Type 1 Submittal** shall mean a submittal either:

- 31 a. expressed to be subject to the review or comment of KYTC; or  
32 b. otherwise determined by the KYTC (in its sole discretion) to be a Type 1 Submittal.

33 **Type 2 Submittal** shall mean a submittal either:

- 34 a. expressed to be subject to acceptance by KYTC, but is not a Type 3 Submittal; or  
35 b. otherwise determined by KYTC (in its sole discretion) to be a Type 2 Submittal.

1 **Type 3 Submittal** shall mean a submittal expressed to be subject to acceptance by KYTC  
2 (in its sole discretion).

3 **Uniform Act** means the Federal Uniform Relocation Assistance and Real Property  
4 Acquisition Policies Act, 42 USC Sections 4601 *et seq.*, P.L. 91-646, as amended.

5  
6 **Utility** or **utility** means a public, private, cooperative, municipal or government line,  
7 facility or system used for the carriage, transmission or distribution of cable television,  
8 electric power, heat, telephone, telegraph, water, gas, oil, petroleum products, steam,  
9 chemicals, hydrocarbons, telecommunications, sewage, storm water not connected with  
10 the drainage of the Project, and similar substances that directly or indirectly serve the  
11 public. The term “Utility” or “utility” includes private irrigation facilities that are available on  
12 a common carriage basis throughout the relevant service area.

13 The term “Utility” or “utility” specifically excludes:

- 14 (a) Stormwater facilities providing drainage for the Project ROW;
- 15 (b) Street lights and traffic signals; and
- 16 (c) ITS facilities.

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

21 **Utility Adjustment** means each relocation (temporary or permanent), abandonment,  
22 Protection in Place, removal (of previously abandoned Utilities as well as of newly  
23 abandoned Utilities), replacement, reinstallation, or modification of existing Utilities  
24 necessary to accommodate construction, operation, or use of the Project.

25 For any Utility crossing the Project ROW, the Utility Adjustment Work for each crossing  
26 of the Project ROW by that Utility shall be considered a separate Utility Adjustment. For  
27 any Utility installed longitudinally within the Project ROW, the Utility Adjustment Work for  
28 each continuous segment of that Utility located within the Project ROW shall be  
29 considered a separate Utility Adjustment.

30 **Utility Adjustment Report** means the report developed and maintained by the DBT in  
31 accordance with Exhibit III (Technical Provisions).

32 **Utility Adjustment Work** means all efforts and costs necessary to accomplish the Utility  
33 Adjustments, whether provided by DBT or by the Utility Companies, including all  
34 coordination, design, design review, permitting, construction, inspection, maintenance of  
35 records, relinquishment of Existing Utility Property Interests, preparation of Utility  
36 Adjustments, and acquisition of Replacement Utility Property Interests. The term also  
37 includes any reimbursement of Utility Companies that is DBT’s responsibility pursuant to  
38 Section 5.4.4 of the Agreement. Any Utility Adjustment Work furnished or performed by

1 DBT is part of the Work; any Utility Adjustment Work furnished or performed by a Utility  
2 Company is not part of the Work.

3 **Utility Agreement** means an agreement between DBT and a Utility Company that  
4 establishes the rights and obligations of DBT and the Utility Company with respect to one  
5 or more Utility Adjustments. Such an agreement may be general or comprehensive or  
6 may address only certain aspects of a Utility Adjustment.

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

10 **Utility Company Project** means the design and construction by or at the direction of a  
11 Utility Company (or by DBT pursuant to the Agreement) of a new Utility other than as part  
12 of a Utility Adjustment. Betterments are not Utility Company Projects. Utility Company  
13 Projects shall be entirely the financial obligation of the Utility Company.

14 **Utility Company Standards** means the standard design and construction methods that  
15 a Utility Company applies to facilities, as identified in the Contract Document and/or the  
16 Utility Agreements.

17 **Utility Information** means the information regarding Utilities included in the Reference  
18 Information Documents or the Contract Documents, together with any other information  
19 KYTC provided to DBT prior to the Setting Date with regard to identification of Utilities,  
20 and the information contained in any encroachment permits KYTC has issued prior to the  
21 Setting Date. The Utility Information includes:

- 22 (a) Survey information regarding existing utilities;
- 23 (b) Utility maps included as an overlay on the survey;
- 24 (c) As-built maps for existing Utilities;
- 25 (d) Prior Rights Documentation; and
- 26 (e) Other information as to the existence or nature of any rights or interests of any  
27 Utility Company relating to use or occupancy of real property. In the event of any  
28 conflict within the various components of the Utility Information, the more accurate  
29 information will prevail.

30 **Work** means all of the work required under the Contract Documents, including all  
31 administrative, inspection, design, permitting, engineering, ROW acquisition, support  
32 services, Utility Adjustment Work to be furnished or provided by DBT, reimbursement of  
33 Utility Companies for Utility Adjustment Work furnished or provided by such Utility  
34 Companies or their contractors and consultants, procurement, professional,  
35 manufacturing, supply, installation, construction, supervision, management, testing,  
36 verification, labor, materials, equipment, maintenance, documentation, and other duties  
37 and services to be furnished and provided by DBT as required by the Contract  
38 Documents, including all efforts necessary or appropriate to achieve Final Acceptance,



1 except for those efforts that the Contract Documents expressly specify will be performed  
2 by Persons other than the DBT-Related Entities.

3 **Working Day** means any day except Saturdays, Sundays, and Holidays.

4

5

**[END OF EXHIBIT 1]**

**EXHIBIT 2**

**KYTC'S FINAL RESPONSES TO QUESTIONS AND ANSWERS**

**EXHIBIT 3**

**TECHNICAL PROVISIONS [Volume III of RFP]**

**EXHIBIT 4**  
**DBT'S PROPOSAL**

**EXHIBIT 4-1**  
**PROPOSAL COMMITMENTS**

Item	Topic	Reference	Commitment
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**EXHIBIT 4-2**

**ALTERNATIVE TECHNICAL CONCEPTS**

**EXHIBIT 4-3**

**PRELIMINARY PROJECT BASELINE SCHEDULE**



**EXHIBIT 4-4**

**CONTRACT PRICE BREAKDOWN**

**EXHIBIT 4-5**

**EQUAL EMPLOYMENT OPPORTUNITY CERTIFICATION**

**EXHIBIT 4-6**

**DBE ASSURANCE & CONTRACT GOAL DECLARATION**

**EXHIBIT 4-7**

**BUY AMERICA CERTIFICATION**

**EXHIBIT 4-8**

**CERTIFICATION REGARDING USE OF CONTRACT FUNDS FOR LOBBYING**

**EXHIBIT 4-9**

**CERTIFICATION REGARDING INELIGIBLE CONTRACTORS**

**EXHIBIT 4-10**

**DBT PRELIMINARY DESIGN**

**EXHIBIT 5**

**NOT USED**



**EXHIBIT 6**  
**FEDERAL REQUIREMENTS**

<b>Exhibit</b>	<b>Description</b>
Attachment 1	Federal Requirements for Federal-Aid Construction Projects
Attachment 2	FHWA Form 1273
Attachments 3-a and 3-b	Federal Prevailing Wage Rates
Attachment 4	Equal Employment Opportunity
Attachment 5	Affirmative Action
Attachment 6	Appendix A to DOT Standard Title VI Assurances and Non-Discrimination Provisions: Contractor Assurances
Attachment 7	Appendix E to DOT Standard Title VI Assurances and Non-Discrimination Provisions: Pertinent Non-Discrimination Authorities
Attachment 8	Compliance with Cargo Preference Act

## **ATTACHMENT 1 TO EXHIBIT 6**

### **FEDERAL REQUIREMENTS FOR FEDERAL-AID CONSTRUCTION PROJECTS**

GENERAL. — The Work herein proposed will be financed in whole or in part with Federal funds, and therefore all of the statutes, rules and regulations promulgated by the Federal Government and applicable to work financed in whole or in part with Federal funds will apply to such work. The "Required Contract Provisions, Federal-Aid Construction Contracts, Form FHWA 1273," are included in this Exhibit 4.

Whenever in said required contract provisions, or elsewhere in this Exhibit 4 (as applicable), references are made to:

- (a) "contracting officer" or "authorized representative" such references shall be construed to mean KYTC or its Authorized Representative;
- (b) "contractor," "prime contractor," "bidder," "proposer," "Federal-aid construction contractor," "prospective first tier participant," or "First Tier Participant," such references shall be construed to mean DBT or its Authorized Representative;
- (c) "contract," "prime contract," "Federal-aid construction contract," or "design- build contract," such references shall be construed to mean the Contract between DBT and KYTC for the Project;
- (d) "subcontractor", "supplier," "vendor," "prospective lower tier participant," "lower tier prospective participant," "Lower tier participant," or "lower tier subcontractor," such references shall be construed to mean any Subcontractor or Supplier; and
- (e) "Cabinet," "agency," "Cabinet or agency with which this transaction originated," "Cabinet or agency entering into this transaction," or "contracting agency," such references shall be construed to mean KYTC, except where a different Cabinet or agency is specified.

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

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

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

affidavit statement required by Section 112 as a certification under penalty of perjury rather than as a sworn statement as permitted by 28 U.S.C., Sec. 1746, is included in the Proposal.

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

#### CONVICT PRODUCED MATERIALS

- a. FHWA Federal-aid projects are subject to 23 CFR § 635.417, Convict produced materials.
- b. Materials produced after July 1, 1991, by convict labor may only be incorporated in a Federal aid highway construction project if such materials have been: (i) produced by convicts who are on parole, supervised release, or probation from a prison, or (ii) produced in a prison project in which convicts, during the 12 month period ending July 1, 1987, produced materials for use in Federal aid highway construction projects, and the cumulative annual production amount of such materials for use in Federal aid highway construction does not exceed the amount of such materials produced in such project for use in Federal aid highway construction during the 12 month period ending July 1, 1987.

#### ACCESS TO RECORDS

- a. As required by 49 CFR 18.36(i)(10), DBT and its subcontractors shall allow FHWA and the Comptroller General of the United States, or their duly authorized representatives, access to all books, documents, papers, and records of DBT and subcontractors which are directly pertinent to any grantee or subgrantee contract, for the purpose of making audit, examination, excerpts, and transcriptions thereof. In addition, as required by 49 CFR 18.36(i)(11), DBT and its subcontractors shall retain all books, documents, papers and records for three years after final payment is made pursuant to any such contract and all other pending matters are closed.
- b. DBT agrees to include this section in each Subcontract at each tier, without modification except as appropriate to identify the subcontractor who will be subject to its provisions.

## ATTACHMENT 2 TO EXHIBIT 6

### FHWA FORM 1273

#### REQUIRED CONTRACT PROVISIONS

#### FEDERAL-AID CONSTRUCTION CONTRACTS

- I. General
- II. Nondiscrimination
- III. Non-segregated Facilities
- IV. Davis-Bacon and Related Act Provisions
- V. Contract Work Hours and Safety Standards Act Provisions
- VI. Subletting or Assigning the Contract
- VII. Safety: Accident Prevention
- VIII. False Statements Concerning Highway Projects
- IX. Implementation of Clean Air Act and Federal Water Pollution Control Act
- X. Certification Regarding Debarment, Suspension, Ineligibility and Voluntary Exclusion
- XI. Certification Regarding Use of Contract Funds for Lobbying
- XII. Use of United States-Flag Vessels

#### ATTACHMENTS

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

#### I. GENERAL

1. Form FHWA-1273 must be physically incorporated in each construction contract funded under Title 23, United States Code, as required in 23 CFR 633.102 (excluding emergency contracts solely intended for debris removal). The

contractor (or subcontractor) must insert this form in each subcontract and further require its inclusion in all lower tier subcontracts (excluding purchase orders, rental agreements and other agreements for supplies or services). 23 CFR 633.102(e). The applicable requirements of Form FHWA-1273 are incorporated by reference for work done under any purchase order, rental agreement or agreement for other services. The prime contractor shall be responsible for compliance by any subcontractor, lower-tier subcontractor or service provider. 23 CFR 633.102(e). Form FHWA-1273 must be included in all Federal-aid design-build contracts, in all subcontracts and in lower tier subcontracts (excluding subcontracts for design services, purchase orders, rental agreements and other agreements for supplies or services) in accordance with 23 CFR 633.102. The design-builder shall be responsible for compliance by any subcontractor, lower-tier subcontractor or service provider. Contracting agencies may reference Form FHWA-1273 in bid proposal or request for proposal documents, however, the Form FHWA-1273 must be physically incorporated (not referenced) in all contracts, subcontracts and lower-tier subcontracts (excluding purchase orders, rental agreements and other agreements for supplies or services related to a construction contract). 23 CFR 633.102(b).

2. Subject to the applicability criteria noted in the following sections, these contract provisions shall apply to all work performed on the contract by the

contractor's own organization and with the assistance of workers under the contractor's immediate superintendence and to all work performed on the contract by piecework, station work, or by subcontract. 23 CFR 633.102(d).

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

4. Selection of Labor: During the performance of this contract, the contractor shall not use convict labor for any purpose within the limits of a construction project on a Federal-aid highway unless it is labor performed by convicts who are on parole, supervised release, or probation. The term Federal-aid highway does not include roadways functionally classified as local roads or rural minor collectors. 23 U.S.C 101(a).

## **II. NONDISCRIMINATION** (23 CFR 230.107(a); 23 CFR Part 230 Subpart A, Appendix A; EO 11246)

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

In addition, the contractor and all subcontractors must comply with the following policies: Executive Order 11246, 41 CFR Part 60, 29 CFR Parts 1625-1627, 23 U.S.C. 140, Section 540 of the Rehabilitation Act of 1973, as amended (29 U.S.C. 794), Title VI of the Civil Rights Act of 1964, as amended 42 U.S.C. 2000d et seq.), and related regulations including 49

CFR Parts 21, 26 and 27; and 23 CFR Parts 200, 230, and 633.

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

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

- a. The contractor will work with the contracting agency and the Federal Government to ensure that it has made every good faith effort to provide equal opportunity with respect to all of its terms and conditions of employment and in their review of activities under the contract. 23 CFR 230.409 (g)(4) & (5).
- b. The contractor will accept as its operating policy the following statement:

"It is the policy of this Company to assure that applicants are employed, and that employees are treated during employment,

without regard to their race, religion, sex, color, national origin, age or disability. Such action shall include: employment, upgrading, demotion, or transfer; recruitment or recruitment advertising; layoff or termination; rates of pay or other forms of compensation; and selection for training, including apprenticeship, pre-apprenticeship, and/or on-the-job training."

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

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

- a. Periodic meetings of supervisory and personnel office employees will be conducted before the start of work and then not less often than once every six months, at which time the contractor's EEO policy and its implementation will be reviewed and explained. The meetings will be conducted by the EEO Officer.
- b. All new supervisory or personnel office employees will be given a thorough indoctrination by the EEO Officer, covering all major aspects of the contractor's EEO obligations within thirty days following their reporting for duty with the contractor.

- c. All personnel who are engaged in direct recruitment for the project will be instructed by the EEO Officer in the contractor's procedures for locating and hiring minorities and women.
- d. Notices and posters setting forth the contractor's EEO policy will be placed in areas readily accessible to employees, applicants for employment and potential employees.
- e. The contractor's EEO policy and the procedures to implement such policy will be brought to the attention of employees by means of meetings, employee handbooks, or other appropriate means.

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

- a. The contractor will, unless precluded by a valid bargaining agreement, conduct systematic and direct recruitment through public and private employee referral sources likely to yield qualified minorities and women. To meet this requirement, the contractor will identify sources of potential minority group employees, and establish with such identified sources procedures whereby minority and women applicants may be referred to the contractor for employment consideration.
- b. In the event the contractor has a valid bargaining agreement providing for exclusive hiring hall referrals, the contractor is expected to observe the provisions of that

agreement to the extent that the system meets the contractor's compliance with EEO contract provisions. Where implementation of such an agreement has the effect of discriminating against minorities or women, or obligates the contractor to do the same, such implementation violates Federal nondiscrimination provisions.

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

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

- a. The contractor will conduct periodic inspections of project sites to insure that working conditions and employee facilities do not indicate discriminatory treatment of project site personnel.
- b. The contractor will periodically evaluate the spread of wages paid within each classification to determine any evidence of discriminatory wage practices.
- c. The contractor will periodically review selected personnel actions in depth to determine whether there is evidence of discrimination. Where evidence is found, the contractor will promptly take corrective action. If the review indicates that the discrimination may extend beyond the actions reviewed, such

corrective action shall include all affected persons.

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

**6. Training and Promotion:**

- a. The contractor will assist in locating, qualifying, and increasing the skills of minorities and women who are applicants for employment or current employees. Such efforts should be aimed at developing full journey level status employees in the type of trade or job classification involved.
- b. Consistent with the contractor's work force requirements and as permissible under Federal and State regulations, the contractor shall make full use of training programs, i.e., apprenticeship, and on-the-job training programs for the geographical area of contract performance. In the event a special provision for training is provided under this contract, this subparagraph will be superseded as indicated in the special provision. The contracting agency may reserve training positions for persons who receive welfare assistance in accordance with 23 U.S.C. 140(a).
- c. The contractor will advise employees and applicants for

employment of available training programs and entrance requirements for each.

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

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

- a. The contractor will use good faith efforts to develop, in cooperation with the unions, joint training programs aimed toward qualifying more minorities and women for membership in the unions and increasing the skills of minorities and women so that they may qualify for higher paying employment.
- b. The contractor will use good faith efforts to incorporate an EEO clause into each union agreement to the end that such union will be contractually bound to refer applicants without regard to their race, color, religion, sex, national origin, age or disability.
- c. The contractor is to obtain information as to the referral practices and policies of the labor union except that to the extent such information is within the exclusive possession of the labor union and such labor union refuses to furnish such information to the contractor, the contractor shall so certify to the contracting agency and shall set

forth what efforts have been made to obtain such information.

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

**8. Reasonable Accommodation for Applicants / Employees with Disabilities:**

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

**9. Selection of Subcontractors, Procurement of Materials and Leasing of Equipment:**

The contractor shall not discriminate on the grounds of race, color, religion, sex, national origin, age or disability in the selection and retention of subcontractors, including procurement of



materials and leases of equipment. The contractor shall take all necessary and reasonable steps to ensure nondiscrimination in the administration of this contract.

- a. The contractor shall notify all potential subcontractors and suppliers and lessors of their EEO obligations under this contract.
- b. The contractor will use good faith efforts to ensure subcontractor compliance with their EEO obligations.

#### **10. Assurance Required by**

- a. The requirements of 49 CFR Part 26 and the State DOT's U.S. DOT-approved DBE program are incorporated by reference.
- b. The contractor, subrecipient or subcontractor shall not discriminate on the basis of race, color, national origin, or sex in the performance of this contract. The contractor shall carry out applicable requirements of 49 CFR Part 26 in the award and administration of DOT-assisted contracts. Failure by the contractor to carry out these requirements is a material breach of this contract, which may result in the termination of this contract or such other remedy as the contracting agency deems appropriate, which may include, but is not limited to:
  - (1) Withholding monthly progress payments;
  - (2) Assessing sanctions;
  - (3) Liquidating damages; and/or
  - (4) Disqualifying the contractor from future bidding as non-responsible.
- c. The Title VI and nondiscrimination provisions of U.S. DOT Order 1050.2A at Appendixes A and E are

incorporated by reference. 49 CFR Part 21.

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

- a. The records kept by the contractor shall document the following:
  - 1) The number and work hours of minority and non-minority group members and women employed in each work classification on the project;
  - 2) The progress and efforts being made in cooperation with unions, when applicable, to increase employment opportunities for minorities and women; and
  - 3) The progress and efforts being made in locating, hiring, training, qualifying, and upgrading minorities and women;
- b. The contractors and subcontractors will submit an annual report to the contracting agency each July for the duration of the project, indicating the number of minority, women, and non-minority group employees currently engaged in each work classification required by the contract work. This information is to be reported on Form FHWA- 1391. The staffing data should represent the project work force on board in all or any part of the last payroll period preceding the end of July. If on-the-job training is being required by special provision, the contractor will

be required to collect and report training data. The employment data should reflect the work force on board during all or any part of the last payroll period preceding the end of July.

### **III. NONSEGREGATED FACILITIES**

This provision is applicable to all Federal-aid construction contracts and to all related construction subcontracts of \$10,000 or more. 41 CFR 60-1.5.

As prescribed by 41 CFR 60-1.8, the contractor must ensure that facilities provided for employees are provided in such a manner that segregation on the basis of race, color, religion, sex, or national origin cannot result. The contractor may neither require such segregated use by written or oral policies nor tolerate such use by employee custom. The contractor's obligation extends further to ensure that its employees are not assigned to perform their services at any location, under the contractor's control, where the facilities are segregated. The term "facilities" includes waiting rooms, work areas, restaurants and other eating areas, time clocks, restrooms, washrooms, locker rooms, and other storage or dressing areas, parking lots, drinking fountains, recreation or entertainment areas, transportation, and housing provided for employees. The contractor shall provide separate or single-user restrooms and necessary dressing or sleeping areas to assure privacy between sexes.

### **IV. DAVIS-BACON AND RELATED ACT PROVISIONS**

This section is applicable to all Federal-aid construction projects exceeding \$2,000 and to all related subcontracts and lower-tier subcontracts (regardless of subcontract size), in accordance with 29 CFR 5.5. The requirements apply to all projects located

within the right-of-way of a roadway that is functionally classified as Federal-aid highway. 23 U.S.C. 113. This excludes roadways functionally classified as local roads or rural minor collectors, which are exempt. 23 U.S.C. 101. Where applicable law requires that projects be treated as a project on a Federal-aid highway, the provisions of this subpart will apply regardless of the location of the project. Examples include: Surface Transportation Block Grant Program projects funded under 23 U.S.C. 133 [excluding recreational trails projects], the Nationally Significant Freight and Highway Projects funded under 23 U.S.C. 117 and National Highway Freight Program projects funded under 23 U.S.C. 167.

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

#### **1. Minimum wages**

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

Contributions made or costs reasonably anticipated for bona fide fringe benefits

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

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

- (i) The work to be performed by the classification requested is not performed by a

classification in the wage determination; and

- (ii) The classification is utilized in the area by the construction industry; and
- (iii) The proposed wage rate, including any bona fide fringe benefits, bears a reasonable relationship to the wage rates contained in the wage determination.

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

(3) In the event the contractor, the laborers or mechanics to be employed in the classification or their representatives, and the contracting officer do not agree on the proposed classification and wage rate (including the amount designated for fringe benefits, where appropriate), the contracting officer shall refer the questions, including the views of all interested parties and the recommendation of the contracting officer, to the Wage and Hour Administrator for determination. The Wage and Hour Administrator, or an authorized representative, will issue a determination within 30 days of receipt and so advise the

contracting officer or will notify the contracting officer within the 30-day period that additional time is necessary.

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

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

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

## **2. Withholding (29 CFR 5.5)**

The contracting agency shall upon its own action or upon written request of an authorized representative of the Cabinet of Labor, withhold or cause to be withheld from the contractor under this contract, or any other Federal contract with the same prime contractor, or any other federally-assisted contract subject to Davis-Bacon prevailing wage requirements, which is held by the same prime contractor, so much of the accrued payments or advances as may be

considered necessary to pay laborers and mechanics, including apprentices, trainees, and helpers, employed by the contractor or any subcontractor the full amount of wages required by the contract. In the event of failure to pay any laborer or mechanic, including any apprentice, trainee, or helper, employed or working on the site of the work, all or part of the wages required by the contract, the contracting agency may, after written notice to the contractor, take such action as may be necessary to cause the suspension of any further payment, advance, or guarantee of funds until such violations have ceased.

## **3. Payrolls and basic records**

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

the actual cost incurred in providing such benefits. Contractors employing apprentices or trainees under approved programs shall maintain written evidence of the registration of apprenticeship programs and certification of trainee programs, the registration of the apprentices and trainees, and the ratios and wage rates prescribed in the applicable programs.

b. (1) The contractor shall submit weekly for each week in which any contract work is performed a copy of all payrolls to the contracting agency. The payrolls submitted shall set out accurately and completely all of the information required to be maintained under 29 CFR 5.5(a)(3)(i), except that full social security numbers and home addresses shall not be included on weekly transmittals. Instead the payrolls shall only need to include an individually identifying number for each employee ( e.g. , the last four digits of the employee's social security number). The required weekly payroll information may be submitted in any form desired. Optional Form WH-347 is available for this purpose from the Wage and Hour Division Web site at <http://www.dol.gov/esa/whd/forms/wh347instr.htm> or its successor site. The prime contractor is responsible for the submission of copies of payrolls by all subcontractors.

Contractors and subcontractors shall maintain the full social security number and current address of each covered worker, and shall provide them upon request to the contracting agency for transmission to the State DOT, the FHWA or the Wage and Hour Division of the Cabinet of Labor for purposes of an investigation or audit of compliance with prevailing wage requirements. It is not a violation of this section for a prime contractor to require a subcontractor to provide addresses and social security numbers to the prime contractor for its own records, without

weekly submission to the contracting agency.

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

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

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

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

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

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

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

#### **4. Apprentices and trainees (29 CFR 5.5)**

##### **a. Apprentices (programs of the USDOL).**

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

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

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

In the event the Office of Apprenticeship Training, Employer and Labor Services, or a State Apprenticeship Agency recognized by the Office, withdraws approval of an

apprenticeship program, the contractor will no longer be permitted to utilize apprentices at less than the applicable predetermined rate for the work performed until an acceptable program is approved.

b. Trainees (programs of the USDOL).

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

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

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

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

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

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

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

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

**5. Compliance with Copeland Act requirements.** The contractor shall comply with the requirements of 29 CFR part 3, which are incorporated by reference in this contract as provided in 29 CFR 5.5.

**6. Subcontracts.** The contractor or subcontractor shall insert Form FHWA-1273 in any subcontracts and also require the subcontractors to include Form FHWA-1273 in any lower tier subcontracts. The prime

contractor shall be responsible for the compliance by any subcontractor or lower tier subcontractor with all the contract clauses in 29 CFR 5.5.

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

**8. Compliance with Davis-Bacon and Related Act requirements.** All rulings and interpretations of the Davis- Bacon and Related Acts contained in 29 CFR parts 1, 3, and 5 are herein incorporated by reference in this contract as provided in 29 CFR 5.12.

**9. Disputes concerning labor standards.** As provided in 29 CFR 5.5, disputes arising out of the labor standards provisions of this contract shall not be subject to the general disputes clause of this contract. Such disputes shall be resolved in accordance with the procedures of the Department of Labor set forth in 29 CFR parts 5, 6, and 7. Disputes within the meaning of this clause include disputes between the contractor (or any of its subcontractors) and the contracting agency, the U.S. Department of Labor, or the employees or their representatives.

**10. Certification of eligibility.**

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

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

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

**V. CONTRACT WORK HOURS AND SAFETY STANDARDS ACT**

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

**1. Overtime requirements.** No contractor or subcontractor contracting for any part of the contract work which may require or involve the employment of laborers or mechanics shall require or permit any such laborer or mechanic in any workweek in which he or she is employed on such work to work in excess of forty hours in such workweek unless such laborer or mechanic receives compensation at a rate not less than one and one-half times the basic rate of pay for all hours worked in excess of forty hours in such workweek. 29 CFR 5.5.

**2. Violation; liability for unpaid wages; liquidated damages.** In the event of any violation of the clause set forth in paragraph (1.) of this section, the contractor and any subcontractor responsible therefor shall be liable for the unpaid wages. In addition, such contractor and subcontractor shall be liable to the United States (in the case of work done under contract for the District of Columbia or a territory, to such District or to such territory), for liquidated damages. Such liquidated damages shall be computed with respect to each individual laborer or mechanic, including watchmen and guards, employed in violation of the clause set forth in paragraph (1.) of this section, in the sum



of \$10 for each calendar day on which such individual was required or permitted to work in excess of the standard workweek of forty hours without payment of the overtime wages required by the clause set forth in paragraph (1.) of this section. 29 CFR 5.5.

\* \$27 as of January 23, 2019 (See 84 FR 213-01, 218) as may be adjusted annually by the Department of Labor, pursuant to the Federal Civil Penalties Inflation Adjustment Act of 1990).

**3. Withholding for unpaid wages and liquidated damages.** The FHWA or the contracting agency shall upon its own action or upon written request of an authorized representative of the Cabinet of Labor withhold or cause to be withheld, from any moneys payable on account of work performed by the contractor or subcontractor under any such contract or any other Federal contract with the same prime contractor, or any other federally-assisted contract subject to the Contract Work Hours and Safety Standards Act, which is held by the same prime contractor, such sums as may be determined to be necessary to satisfy any liabilities of such contractor or subcontractor for unpaid wages and liquidated damages as provided in the clause set forth in paragraph (2.) of this section. 29 CFR 5.5.

**4. Subcontracts.** The contractor or subcontractor shall insert in any subcontracts the clauses set forth in paragraph (1.) through (4.) of this section and also a clause requiring the subcontractors to include these clauses in any lower tier subcontracts. The prime contractor shall be responsible for compliance by any subcontractor or lower tier subcontractor with the clauses set forth in paragraphs (1.) through (4.) of this section. 29 CFR 5.5.

## **VI. SUBLETTING OR ASSIGNING THE CONTRACT**

This provision is applicable to all Federal-aid construction contracts on the National Highway System pursuant to 23 CFR 635.116.

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

a. The term "perform work with its own organization" refers to workers employed or leased by the prime contractor, and equipment owned or rented by the prime contractor, with or without operators. Such term does not include employees or equipment of a subcontractor or lower tier subcontractor, agents of the prime contractor, or any other assignees. The term may include payments for the costs of hiring leased employees from an employee leasing firm meeting all relevant Federal and State regulatory requirements. Leased employees may only be included in this term if the prime contractor meets all of the following conditions: (based on longstanding interpretation)

- (1) the prime contractor maintains control over the supervision of the day-to-day activities of the leased employees;
- (2) the prime contractor remains responsible for the quality of the work of the leased employees;
- (3) the prime contractor retains all power to accept or exclude

- individual employees from work on the project; and
- (4) the prime contractor remains ultimately responsible for the payment of predetermined minimum wages, the submission of payrolls, statements of compliance and all other Federal regulatory requirements.

b. "Specialty Items" shall be construed to be limited to work that requires highly specialized knowledge, abilities, or equipment not ordinarily available in the type of contracting organizations qualified and expected to bid or propose on the contract as a whole and in general are to be limited to minor components of the overall contract. 23 CFR 635.102.

2. Pursuant to 23 CFR 635.116(a), the contract amount upon which the requirements set forth in paragraph (1) of Section VI is computed includes the cost of material and manufactured products which are to be purchased or produced by the contractor under the contract provisions.

3. Pursuant to 23 CFR 635.116(c), the contractor shall furnish (a) a competent superintendent or supervisor who is employed by the firm, has full authority to direct performance of the work in accordance with the contract requirements, and is in charge of all construction operations (regardless of who performs the work) and (b) such other of its own organizational resources (supervision, management, and engineering services) as the contracting officer determines is necessary to assure the performance of the contract.

4. No portion of the contract shall be sublet, assigned or otherwise disposed of except with the written consent of the contracting officer, or authorized representative, and such consent when given shall not be

construed to relieve the contractor of any responsibility for the fulfillment of the contract. Written consent will be given only after the contracting agency has assured that each subcontract is evidenced in writing and that it contains all pertinent provisions and requirements of the prime contract. 23 CFR 635.116.

5. The 30% self-performance requirement of paragraph (1) is not applicable to design-build contracts; however, contracting agencies may establish their own self-performance requirements. 23 CFR 635.116(d).

## **VII. SAFETY: ACCIDENT PREVENTION**

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

1. In the performance of this contract the contractor shall comply with all applicable Federal, State, and local laws governing safety, health, and sanitation (23 CFR 635). The contractor shall provide all safeguards, safety devices and protective equipment and take any other needed actions as it determines, or as the contracting officer may determine, to be reasonably necessary to protect the life and health of employees on the job and the safety of the public and to protect property in connection with the performance of the work covered by the contract. 23 CFR 635.1089.

2. It is a condition of this contract, and shall be made a condition of each subcontract, which the contractor enters into pursuant to this contract, that the contractor and any subcontractor shall not permit any employee, in performance of the contract, to work in surroundings or under conditions which are unsanitary, hazardous or dangerous to his/her health or safety, as determined under construction safety and health standards (29 CFR 1926) promulgated by the Secretary of Labor, in

accordance with Section 107 of the Contract Work Hours and Safety Standards Act (40 U.S.C. 3704). 29 CFR 1926.10.

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

### **VIII. FALSE STATEMENTS CONCERNING HIGHWAY PROJECTS**

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

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

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

"Whoever, being an officer, agent, or employee of the United States, or of any State or Territory, or whoever, whether a person, association, firm, or corporation,

knowingly makes any false statement, false representation, or false report as to the character, quality, quantity, or cost of the material used or to be used, or the quantity or quality of the work performed or to be performed, or the cost thereof in connection with the submission of plans, maps, specifications, contracts, or costs of construction on any highway or related project submitted for approval to the Secretary of Transportation; or

Whoever knowingly makes any false statement, false representation, false report or false claim with respect to the character, quality, quantity, or cost of any work performed or to be performed, or materials furnished or to be furnished, in connection with the construction of any highway or related project approved by the Secretary of Transportation; or Whoever knowingly makes any false statement or false representation as to material fact in any statement, certificate, or report submitted pursuant to provisions of the Federal-aid Roads Act approved July 1, 1916, (39 Stat. 355), as amended and supplemented;

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

### **IX. IMPLEMENTATION OF CLEAN AIR ACT AND FEDERAL WATER POLLUTION CONTROL ACT (42. U.S.C. 7608; 2 CFR 200.88; EO 11738)**

This provision is applicable to all Federal-aid construction contracts and to all related subcontracts. 48 CFR 2.101; 2 CFR 200.326.

By submission of this bid/proposal or the execution of this contract, or subcontract, as appropriate, the bidder, proposer, Federal-aid construction contractor, subcontractor, or vendor agrees to comply with all applicable standards, orders or regulations issued pursuant to the Clean Air Act (42 U.S.C. 7401-7671q) and the Federal Water

Pollution Control Act, as amended (33 U.S.C. 1251-1387). Violations must be reported to the Federal highway Administration and the Regional office of the Environmental Protection Agency. 2 CFR Part 200, Appendix II.

The contractor agrees to include or cause to be included the requirements of this Section in every subcontract, and further agrees to take such action as the contracting agency may direct as a means of enforcing such requirements. 2 CFR 200.326.

#### **X. CERTIFICATION REGARDING DEBARMENT, SUSPENSION, INELIGIBILITY AND VOLUNTARY EXCLUSION**

This provision is applicable to all Federal-aid construction contracts, design-build contracts, subcontracts, lower-tier subcontracts, purchase orders, lease agreements, consultant contracts or any other covered transaction requiring FHWA approval or that is estimated to cost

\$25,000 or more – as defined in 2 CFR Parts 180 and 1200.

##### **1. Instructions for Certification – First Tier Participants:**

- a. By signing and submitting this proposal, the prospective first tier participant is providing the certification set out below.
- b. The inability of a person to provide the certification set out below will not necessarily result in denial of participation in this covered transaction. The prospective first tier participant shall submit an explanation of why it cannot provide the certification set out below. The certification or explanation will be considered in connection with the Cabinet or agency's determination whether to enter into this transaction. However, failure of the prospective first tier participant to furnish a certification or an explanation shall

disqualify such a person from participation in this transaction. 2 CFR 180.320,

c. The certification in this clause is a material representation of fact upon which reliance was placed when the contracting agency determined to enter into this transaction. If it is later determined that the prospective participant knowingly rendered an erroneous certification, in addition to other remedies available to the Federal Government, the contracting agency may terminate this transaction for cause of default. 2 CFR 180.325,

d. The prospective first tier participant shall provide immediate written notice to the contracting agency to whom this proposal is submitted if any time the prospective first tier participant learns that its certification was erroneous when submitted or has become erroneous by reason of changed circumstances. 2 CFR 180.345, 180.350,

e. The terms "covered transaction," "debarred," "suspended," "ineligible," "participant," "person," "principal," and "voluntarily excluded," as used in this clause, are defined in 2 CFR Parts 180 and 1200. "First Tier Covered Transactions" refers to any covered transaction between a grantee or subgrantee of Federal funds and a participant (such as the prime or general contract). "Lower Tier Covered Transactions" refers to any covered transaction under a First Tier Covered Transaction (such as subcontracts). "First Tier Participant" refers to the participant who has entered into a covered transaction with a grantee or subgrantee of Federal funds (such as the prime or general contractor). "Lower Tier Participant" refers any participant who has entered into a covered transaction with a First Tier Participant or other Lower Tier Participants (such as subcontractors and suppliers).

f. The prospective first tier participant agrees by submitting this proposal that,

should the proposed covered transaction be entered into, it shall not knowingly enter into any lower tier covered transaction with a person who is debarred, suspended, declared ineligible, or voluntarily excluded from participation in this covered transaction, unless authorized by the Cabinet or agency entering into this transaction. 2 CFR 180.330

g. The prospective first tier participant further agrees by submitting this proposal that it will include the clause titled "Certification Regarding Debarment, Suspension, Ineligibility and Voluntary Exclusion-Lower Tier Covered Transactions," provided by the Cabinet or contracting agency, entering into this covered transaction, without modification, in all lower tier covered transactions and in all solicitations for lower tier covered transactions exceeding the \$25,000 threshold. 2 CFR 180.220, 180.300,

h. A participant in a covered transaction may rely upon a certification of a prospective participant in a lower tier covered transaction that is not debarred, suspended, ineligible, or voluntarily excluded from the covered transaction, unless it knows that the certification is erroneous. A participant is responsible for ensuring that its principals are not suspended, debarred, or otherwise ineligible to participate in covered transactions. To verify the eligibility of its principals, as well as the eligibility of any lower tier prospective participants, each participant may, but is not required to, check the Excluded Parties List System website (<https://www.epls.gov/>), which is compiled by the General Services Administration. 2 CFR 180.300, 180.320, and 180.325

i. Nothing contained in the foregoing shall be construed to require the establishment of a system of records in order to render in good faith the certification required by this

clause. The knowledge and information of the prospective participant is not required to exceed that which is normally possessed by a prudent person in the ordinary course of business dealings.

j. Except for transactions authorized under paragraph (f) of these instructions, if a participant in a covered transaction knowingly enters into a lower tier covered transaction with a person who is suspended, debarred, ineligible, or voluntarily excluded from participation in this transaction, in addition to other remedies available to the Federal Government, the Cabinet or agency may terminate this transaction for cause or default. 2 CFR 180.325

\* \* \* \* \*

## **2. Certification Regarding Debarment, Suspension, Ineligibility and Voluntary Exclusion – First Tier Participants:**

a. The prospective first tier participant certifies to the best of its knowledge and belief, that it and its principals:

(1) Are not presently debarred, suspended, proposed for debarment, declared ineligible, or voluntarily excluded from participating in covered transactions by any Federal Cabinet or agency, 2 CFR 180.335;

(2) Have not within a three-year period preceding this proposal been convicted of or had a civil judgment rendered against them for commission of fraud or a criminal offense in connection with obtaining, attempting to obtain, or performing a public (Federal, State or local) transaction or contract under a public transaction; violation of Federal or State antitrust statutes or commission of embezzlement, theft, forgery, bribery, falsification or destruction of records, making false statements, or receiving stolen property, 2 CFR 180.800;

(3) Are not presently indicted for or otherwise criminally or civilly charged by a governmental entity (Federal, State or local) with commission of any of the offenses enumerated in paragraph (a)(2) of this certification, 2 CFR 180.700 and 180.800; and

(4) Have not within a three-year period preceding this application/proposal had one or more public transactions (Federal, State or local) terminated for cause or default. 2 CFR 180.335(d).

(5) Are not a corporation that has been convicted of a felony violation under any Federal law within the two-year period preceding this proposal (USDOT Order 4200.6 implementing appropriations act requirements); and

(6) Are not a corporation with any unpaid Federal tax liability that has been assessed, for which all judicial and administrative remedies have been exhausted, or have lapsed, and that is not being paid in a timely manner pursuant to an agreement with the authority responsible for collecting the tax liability (USDOT Order 4200.6 implementing appropriations act requirements).

b. Where the prospective participant is unable to certify to any of the statements in this certification, such prospective participant shall attach an explanation to this proposal.

### **3. Instructions for Certification - Lower Tier Participants:**

(Applicable to all subcontracts, purchase orders and other lower tier transactions requiring prior FHWA approval or estimated to cost \$25,000 or more - 2 CFR Parts 180 and 1200) 2 CFR 180.220 and 1200.220.

a. By signing and submitting this proposal, the prospective lower tier is providing the certification set out below.

b. The certification in this clause is a material representation of fact upon which reliance was placed when this transaction was entered into. If it is later determined that the prospective lower tier participant knowingly rendered an erroneous certification, in addition to other remedies available to the Federal Government, the Cabinet, or agency with which this transaction originated may pursue available remedies, including suspension and/or debarment.

c. The prospective lower tier participant shall provide immediate written notice to the person to which this proposal is submitted if at any time the prospective lower tier participant learns that its certification was erroneous by reason of changed circumstances. 2 CFR 180.365.

d. The terms "covered transaction," "debarred," "suspended," "ineligible," "participant," "person," "principal," and "voluntarily excluded," as used in this clause, are defined in 2 CFR Parts 180 and 1200. You may contact the person to which this proposal is submitted for assistance in obtaining a copy of those regulations. "First Tier Covered Transactions" refers to any covered transaction between a grantee or subgrantee of Federal funds and a participant (such as the prime or general contract). "Lower Tier Covered Transactions" refers to any covered transaction under a First Tier Covered Transaction (such as subcontracts). "First Tier Participant" refers to the participant who has entered into a covered transaction with a grantee or subgrantee of Federal funds (such as the prime or general contractor). "Lower Tier Participant" refers any participant who has entered into a covered transaction with a First Tier Participant or other Lower Tier Participants (such as subcontractors and suppliers).

e. The prospective lower tier participant agrees by submitting this proposal that, should the proposed covered transaction be entered into, it shall not knowingly enter into any lower tier covered transaction with a person who is debarred, suspended, declared ineligible, or voluntarily excluded from participation in this covered transaction, unless authorized by the Cabinet or agency with which this transaction originated. 2 CFR 1200.220 and 1200.332.

f. The prospective lower tier participant further agrees by submitting this proposal that it will include this clause titled "Certification Regarding Debarment, Suspension, Ineligibility and Voluntary Exclusion-Lower Tier Covered Transaction," without modification, in all lower tier covered transactions and in all solicitations for lower tier covered transactions exceeding the \$25,000 threshold. 2 CFR 180.220 and 1200.220.

g. A participant in a covered transaction may rely upon a certification of a prospective participant in a lower tier covered transaction that is not debarred, suspended, ineligible, or voluntarily excluded from the covered transaction, unless it knows that the certification is erroneous. A participant is responsible for ensuring that its principals are not suspended, debarred, or otherwise ineligible to participate in covered transactions. To verify the eligibility of its principals, as well as the eligibility of any lower tier prospective participants, each participant may, but is not required to, check the Excluded Parties List System website (<https://www.epls.gov/>), which is compiled by the General Services Administration. 2 CFR 180.300, 180.320, 180.330, 180.335.

h. Nothing contained in the foregoing shall be construed to require establishment of a system of records in order to render in good

faith the certification required by this clause. The knowledge and information of participant is not required to exceed that which is normally possessed by a prudent person in the ordinary course of business dealings.

i. Except for transactions authorized under paragraph e of these instructions, if a participant in a covered transaction knowingly enters into a lower tier covered transaction with a person who is suspended, debarred, ineligible, or voluntarily excluded from participation in this transaction, in addition to other remedies available to the Federal Government, the Cabinet or agency with which this transaction originated may pursue available remedies, including suspension and/or debarment. 2 CFR 180.325.

\* \* \* \* \*

**Certification Regarding Debarment, Suspension, Ineligibility and Voluntary Exclusion--Lower Tier Participants:**

1. The prospective lower tier participant certifies, by submission of this proposal, that neither it nor its principals:

a. is presently debarred, suspended, proposed for debarment, declared ineligible, or voluntarily excluded from participating in covered transactions by any Federal Cabinet or agency. 2 CFR 180.355

b. is a corporation that has been convicted of a felony violation under any Federal law within the two-year period preceding this proposal (USDOT Order 4200.6 implementing appropriations act requirements); and

c. is a corporation with any unpaid Federal tax liability that has been assessed, for which all judicial and administrative remedies have been exhausted, or have lapsed, and that is not being paid in a timely manner pursuant to an agreement with the

authority responsible for collecting the tax liability. (USDOT Order 4200.6 implementing appropriations act requirements).

2. Where the prospective lower tier participant is unable to certify to any of the statements in this certification, such prospective participant shall attach an explanation to this proposal.

\* \* \* \* \*

#### **XI. CERTIFICATION REGARDING USE OF CONTRACT FUNDS FOR LOBBYING**

This provision is applicable to all Federal-aid construction contracts and to all related subcontracts which exceed \$100,000. 49 CFR Part 20, App A.

1. The prospective participant certifies, by signing and submitting this bid or proposal, to the best of his or her knowledge and belief, that:

a. No Federal appropriated funds have been paid or will be paid, by or on behalf of the undersigned, to any person for influencing or attempting to influence an officer or employee of any Federal agency, a Member of Congress, an officer or employee of Congress, or an employee of a Member of Congress in connection with the awarding of any Federal contract, the making of any Federal grant, the making of any Federal loan, the entering into of any cooperative agreement, and the extension, continuation, renewal, amendment, or modification of any Federal contract, grant, loan, or cooperative agreement.

b. If any funds other than Federal appropriated funds have been paid or will be paid to any person for influencing or attempting to influence an officer or employee of any Federal agency, a Member of Congress, an officer or employee of Congress, or an employee of a Member of Congress in connection with this Federal

contract, grant, loan, or cooperative agreement, the undersigned shall complete and submit Standard Form-LLL, "Disclosure Form to Report Lobbying," in accordance with its instructions.

2. This certification is a material representation of fact upon which reliance was placed when this transaction was made or entered into. Submission of this certification is a prerequisite for making or entering into this transaction imposed by 31 U.S.C. 1352. Any person who fails to file the required certification shall be subject to a civil penalty of not less than \$10,000 and not more than \$100,000 for each such failure.

3. The prospective participant also agrees by submitting its bid or proposal that the participant shall require that the language of this certification be included in all lower tier subcontracts, which exceed \$100,000 and that all such recipients shall certify and disclose accordingly.

#### **XII. USE OF UNITED STATES-FLAG VESSELS:**

This provision is applicable to all Federal-aid construction contracts, design-build contracts, subcontractors, lower-tier subcontracts, purchase orders, lease agreements, or any other covered transaction. 46 CFR Part 381.

This requirement applied to material or equipment that is acquired for a specific Federal-aid highway project. 46 CFR 381.7. It is not applicable to goods or materials that come into inventories independent of an FHWA funded-contract.

When oceanic shipments (or shipments across the Great Lakes) are necessary for materials or equipment acquired for a specific Federal-aid construction project, the bidder, proposer, contractor, subcontractor, or vendor agrees.



1. To utilize privately owned United States-flag commercial vessels to ship at least 50 percent of the gross tonnage (computed separately for dry bulk carriers, dry cargo liners and tankers) involved, whenever shipping any equipment, material, or commodities pursuant to this contract, to the extent such vessels are available at fair and reasonable rates for United States-flag commercial vessels. 46 CFR 381.7.

2. To furnish within 20 days following the date of loading for shipments originating within the United States or within 30 working days following the date of loading for shipments originating outside the United States, a legible copy of a rated 'on-board' commercial ocean bill-of-lading in English for each shipment of cargo described in paragraph (b)(1) of this section to both the Contracting Officers (through the prime contractor in the case of subcontractor bills-of-lading) and the Division of National Cargo, Office of Market Development, Maritime Administration, Washington, DC 20590. (MARAD requires copies of the ocean carrier's (master) bills of lading, certified onboard, dated, with rates and charges. These bills of lading may contain business sensitive information and therefore may be submitted directly to MARAD by the Ocean Transportation Intermediary on behalf of the contractor). 46 CFR 3814.7.

**ATTACHMENT A - EMPLOYMENT AND MATERIALS PREFERENCE FOR APPALACHIAN DEVELOPMENT HIGHWAY SYSTEM OR APPALACHIAN LOCAL ACCESS ROAD CONTRACTS**

(23 CFR 633, Subpart B, Appendix B) This provision is applicable to all Federal-aid projects funded under the Appalachian Regional Development Act of 1965.

1. During the performance of this contract, the contractor undertaking to do work which is, or reasonably may be, done as on-site work, shall give preference to qualified persons who regularly reside in the labor area as designated by the DOL wherein the contract work is situated, or the subregion, or the Appalachian counties of the State wherein the contract work is situated, except:

- a. To the extent that qualified persons regularly residing in the area are not available.
- b. For the reasonable needs of the contractor to employ supervisory or specially experienced personnel necessary to assure an efficient execution of the contract work.
- c. For the obligation of the contractor to offer employment to present or former employees as the result of a lawful collective bargaining contract, provided that the number of nonresident persons employed under this subparagraph (1c) shall not exceed 20 percent of the total number of employees employed by the contractor on the contract work, except as provided in subparagraph (4) below.

2. The contractor shall place a job order with the State Employment Service indicating (a) the classifications of the laborers, mechanics and other employees required to perform the contract work, (b) the number of employees required in each classification, (c) the date on which the participant estimates such employees will be required, and (d) any other pertinent information required by the State Employment Service to complete the job order form. The job order may be placed with the State Employment Service in writing or by telephone. If during the course of the contract work, the information submitted by the contractor in the original

job order is substantially modified, the participant shall promptly notify the State Employment Service.

3. The contractor shall give full consideration to all qualified job applicants referred to him by the State Employment Service. The contractor is not required to grant employment to any job applicants who, in his opinion, are not qualified to perform the classification of work required.

4. If, within one week following the placing of a job order by the contractor with the State Employment Service, the State Employment Service is unable to refer any qualified job applicants to the contractor, or less than the number requested, the State Employment Service will forward a certificate to the contractor indicating the unavailability of applicants. Such certificate shall be made a part of the contractor's permanent project records. Upon receipt of this certificate, the contractor may employ persons who do not normally reside in the labor area to fill positions covered by the certificate, notwithstanding the provisions of subparagraph (1c) above.

5. The provisions of 23 CFR 633.207(e) allow the contracting agency to provide a contractual preference for the use of mineral resource materials native to the Appalachian region.

6. The contractor shall include the provisions of Sections 1 through 4 of this Attachment A in every subcontract for work which is, or reasonably may be, done as on-site work.

**ATTACHMENT 3-a TO EXHIBIT 6**  
**FEDERAL PREVAILING WAGE RATES**

The federal prevailing wage rates for the Work shall be those set forth below.

**ATTACHMENT 3-b TO EXHIBIT 6**  
**PREVAILING WAGE RATES AS OF [\*\*\*\*]**

## **ATTACHMENT 4 TO EXHIBIT 6**

### **EQUAL EMPLOYMENT OPPORTUNITY SPECIAL PROVISION 000---006**

#### **Standard Federal Equal Employment Opportunity**

#### **Construction Contract Specifications (Executive Order 11246)**

1. As used in these specifications:
  - a. "Covered area" means the geographical area described in the solicitation from which this contract resulted;
  - b. "Director" means Director, Office of Federal Contract Compliance Programs, United States Cabinet of Labor, or any person to whom the Director delegates authority;
  - c. "Employer identification number" means the Federal Social Security number used on the Employer's Quarterly Federal Tax Return, U.S. Treasury Cabinet Form 941.
  - d. "Minority" includes:
    - (i) Black (all persons having origins in any of the Black African racial groups not of Hispanic origin);
    - (ii) Hispanic (all persons of Mexican, Puerto Rican, Cuban, Central or South American or other Spanish Culture or origin, regardless of race);
    - (iii) Asian and Pacific Islander (all persons having origins in any of the original peoples of the Far East, Southeast Asia, the Indian Subcontinent, or the Pacific Islands); and
    - (iv) American Indian (all persons having origins in any of the original peoples of North American and maintaining identifiable tribal affiliations through membership and participation or community identification).
  
2. Whenever the contractor, or any subcontractor at any tier, subcontracts a portion of the work involving any construction trade, it shall physically include in each subcontract in excess of \$10,000 the provisions of these specifications and the Notice which contains the applicable goals for minority and female participation and which is set forth in the solicitations from which this contract resulted.
  
3. If the contractor is participating (pursuant to 41 CFR 60-4.5) in a Hometown Plan approved by the U. S. Cabinet of Labor in the covered area either individually or through an association, its affirmative action obligations on all work in the Hometown Plan area (including goals and timetables) shall be in accordance with that plan for those trades which have unions participating in the Hometown Plan. Contractors must be able to demonstrate their participation in and compliance with the provisions of any such Hometown Plan. Each contractor or subcontractor participating in an approved Hometown Plan is individually required to comply with its obligations under the EEO clause, and to make a good faith effort to achieve each goal under the Hometown Plan in each trade in which it has employees. The overall good faith performance by other contractors or subcontractors toward a goal in an approved Hometown Plan does not excuse any covered contractor's or subcontractor's failure to take good faith efforts to achieve the Hometown Plan goals and timetables.

4. The contractor shall implement the specific affirmative action standards provided in paragraphs 7a through p of these specifications. The goals set forth in the solicitation from which this contract resulted are expressed as percentages of the total hours of employment and training of minority and female utilization the contractor should reasonably be able to achieve in each construction trade in which it has employees in the covered area. Covered construction contractors performing contracts in geographical areas where they do not have a Federal or federally assisted construction contract shall apply the minority and female goals established for the geographical area where the contract is being performed. Goals are published periodically in the Federal Register in notice form and such notices may be obtained from any Office of Federal Contract Compliance Programs office or any Federal procurement contracting officer. The contractor is expected to make substantially uniform progress toward its goals in each craft during the period specified.

5. Neither the provisions of any collective bargaining agreement, nor the failure by a union with whom the contractor has a collective bargaining agreement, to refer either minorities or women shall excuse the contractor's obligations under these specifications, Executive Order 11246, or the regulations promulgated pursuant thereto.

6. In order for the nonworking training hours of apprentices and trainees to be counted in meeting the goals, such apprentices and trainees must be employed by the contractor during the training period, and the contractor must have made a commitment to employ the apprentices and trainees at the completion of their training, subject to the availability of employment opportunities. Trainees must be trained pursuant to training programs approved by the U. S. Cabinet of Labor.

7. The contractor shall take specific affirmative actions to ensure equal employment opportunity. The evaluation of the contractor's compliance with these specifications shall be based upon its effort to achieve maximum results from its actions. The contractor shall document these efforts fully, and shall implement affirmative action steps at least as extensive as the following:

- a. Ensure and maintain a working environment free of harassment, intimidation, and coercion at all sites, and in all facilities at which the contractor's employees are assigned to work. The contractor, where possible, will assign two or more women to each construction project. The contractor shall specifically ensure that all foremen, superintendents, and other on-site supervisory personnel are aware of and carry out the contractor's obligation to maintain such a working environment, with specific attention to minority or female individuals working at such sites or in such facilities.
- b. Establish and maintain a current list of minority and female recruitment sources, provide written notification to minority and female recruitment sources and to community organizations when the contractor or its unions have employment opportunities available, and maintain a record of the organizations' responses.
- c. Maintain a current file of the names, addresses and telephone numbers of each minority and female off-the-street applicant and minority or female referral from a union, a recruitment source or community organization and of what action was taken with respect to each such individual. If such individual was sent to the union hiring hall for referral and was not referred back to the Contractor by the union or, if referred, not employed by the

contractor, this shall be documented in the file with the reason therefor, along with whatever additional actions the contractor may have taken.

- d. Provide immediate written notification to the Director when the union or unions with which the contractor has a collective bargaining agreement has not referred to the contractor a minority person or woman sent by the contractor, or when the contractor has other information that the union referral Process has impeded the contractor's efforts to meet its obligations.
- e. Develop on-the-job training opportunities and/or participate in training programs for the area which expressly include minorities and women, including upgrading programs and apprenticeship and trainee programs relevant to the contractor's employment needs, especially those programs funded or approved by the Cabinet of Labor. The contractor shall provide notice of these programs to the sources compiled under 7b above.
- f. Disseminate the contractor's EEO policy by providing notice of the policy to unions and training programs and requesting their cooperation in assisting the contractor in meeting its EEO obligations; by including it in any policy manual and collective bargaining agreement; by publicizing it in the company newspaper, annual report, etc.; by specific review of the policy with all management personnel and with all minority and female employees at least once a year; and by posting the contractor's EEO policy on bulletin boards accessible to all employees at each location where construction work is performed.
- g. Review, at least annually, the contractor's EEO policy and affirmative action obligations under these specifications with all employees having any responsibility for hiring, assignment, layoff, termination or other employment decisions including specific review of these items with onsite supervisory personnel such as Superintendents, General Foremen, etc., prior to the initiation of construction work at any job site. A written record shall be made and maintained identifying the time and place of these meetings, persons attending, subject matter discussed, and disposition of the subject matter.
- h. Disseminate the contractor's EEO policy externally by including it in any advertising in the news media, specifically including minority and female news media, and providing written notification to and discussing the contractor's EEO policy with other contractors and subcontractors with whom the contractor does or anticipates doing business.
- i. Direct its recruitment efforts, both oral and written, to minority, female and community organizations, to schools with minority and female students and to minority and female recruitment and training organizations serving Contractor's recruitment area and employment needs. Not later than one month prior to the date for the acceptance of applications for apprenticeship or other training by any recruitment source, the Contractor shall send written notification to organizations such as the above, describing the openings, screening procedures, and tests to be used in the selection process.
- j. Encourage present minority and female employees to recruit other minority persons and women and, where reasonable, provide after school, summer and vacation employment to minority and female youth both on the site and in other areas of a contractor's workforce.
- k. Validate all tests and other selection requirements where there is an obligation to do so under 41 CFR Part 60-3.
- l. Conduct, at least annually, an inventory and evaluation at least of all minority and female personnel for promotional opportunities and encourage these employees to seek or to prepare for, through appropriate training, etc., such opportunities.
- m. Ensure that seniority practices, job classifications, work assignments and other personnel practices, do not have a discriminatory effect by continually monitoring all personnel and

employment related activities to ensure that the contractor's EEO policy and the contractor's obligations under these specifications are being carried out.

- n. Ensure that all facilities and company activities are non-segregated except that separate or single-user toilet and necessary changing facilities shall be provided to assure privacy between the sexes.
- o. Document and maintain a record of all solicitations of offers for subcontracts from minority and female construction contractors and suppliers, including circulation of solicitations to minority and female contractor associations and other business associations.
- p. Conduct a review, at least annually, of all supervisors' adherence to and performance under the contractor's EEO policies and affirmative action obligations.

8. Contractors are encouraged to participate in voluntary associations which assist in fulfilling one or more of their affirmative action obligations (7a through p). The efforts of a contractor association, joint contractor-union, contractor-community, or other similar group of which the contractor is a member and participant, may be asserted as fulfilling any one or more of its obligations under 7a through p of these specifications provided that the contractor actively participates in the group, makes every effort to assure that the group has a positive impact on the employment of minorities and women in the industry, ensures that the concrete benefits of the program are reflected in the contractor's minority and female workforce participation, makes a good faith effort to meet its individual goals and timetables, and can provide access to documentation which demonstrates the effectiveness of actions taken on behalf of the contractor. The obligation to comply, however, is the contractor's and failure of such a group to fulfill an obligation shall not be a defense for the contractor's noncompliance.

9. A single goal for minorities and a separate single goal for women have been established. The contractor, however, is required to provide equal employment opportunity and to take affirmative action for all minority groups, both male and female, and all women, both minority and non-minority. Consequently, the contractor may be in violation of the Executive Order if a particular group is employed in a substantially disparate manner (for example, even though the contractor has achieved its goals for women generally, the contractor may be in violation of the Executive Order if a specific minority group of women is underutilized).

10. Nondiscrimination programs require that Federal-aid recipients, subrecipients, and contractors prevent discrimination and ensure nondiscrimination in all of their programs and activities, whether those programs and activities are federally funded or not. The factors prohibited from serving as a basis for action or inaction which discriminates include race, color, national origin, sex, age, and handicap/disability. The efforts to prevent discrimination must address, but not be limited to a program's impacts, access, benefits, participation, treatment, services, contracting opportunities, training opportunities, investigations of complaints, allocations of funds, prioritization of projects, and the functions of right-of-way, research, planning, and design.

11. The contractor shall not enter into any subcontract with any person or firm debarred from Government contracts pursuant to Executive Order 11246.



12. The contractor shall carry out such sanctions and penalties for violation of these specifications and of the Equal Opportunity Clause, including suspension, termination and cancellation of existing subcontracts as may be imposed or ordered pursuant to Executive Order 11246, as amended, and its implementing regulations, by the Office of Federal Contract Compliance Programs. Any contractor who fails to carry out such sanctions and penalties shall be in violation of these specifications and Executive Order 11246, as amended.

13. The contractor, in fulfilling its obligations under these specifications, shall implement specific affirmative action steps, at least as extensive as those standards prescribed in paragraph 7 of these specifications, so as to achieve maximum results from its efforts to ensure equal employment opportunity. If the contractor fails to comply with the requirements of the Executive Order, the implementing regulations, or these specifications, the Director shall proceed in accordance with 41 CFR 60-4.8.

14. The contractor shall designate a responsible official to monitor all employment related activity to ensure that the company EEO policy is being carried out, to submit reports relating to the provisions hereof as may be required by the Government and to keep records. Records shall at least include for each employee the name, address, telephone numbers, construction trade, union affiliation if any, employee identification number when assigned, social security number, race, sex, status (e.g., mechanic, apprentice, trainee, helper, or laborer), dates of changes in status, hours worked per week in the indicated trade, rate of pay, and locations at which the work was performed. Records shall be maintained in an easily understandable and retrievable form; however, to the degree that existing records satisfy this requirement, contractors shall not be required to maintain separate records.

15. Nothing herein provided shall be construed as a limitation upon the application of other laws which establish different standards of compliance or upon the application of requirements for the hiring of local or other area residents (e.g., those under the Public Works Employment Act of 1977 and the Community Development Block Grant Program).

16. In addition to the reporting requirements set forth elsewhere in this contract, the contractor and the subcontractors holding subcontracts, not including material suppliers, of \$10,000 or more, shall submit an Annual EEO Report on Form FHWA-1391 (Appendix C to 23 CFR, Part 230), and in accordance with the instructions included thereon. Contractors and subcontractors are required to submit the information in the FHWA-1391 report via LCPtracker system, a labor compliance software monitoring certified payroll and prevailing wage. The staffing figures to be reported should represent the project workforce on board in all or any part of the last annual payroll period preceding the end of July. The report shall be submitted no later than September 1.

**ATTACHMENT 5 TO EXHIBIT 6**

**NOTICE OF REQUIREMENT FOR AFFIRMATIVE ACTION TO ENSURE EQUAL  
EMPLOYMENT OPPORTUNITY**

**(EXECUTIVE ORDER 11246)**

1. The Offeror's or Bidder's attention is called to the "Equal Opportunity Clause" and the "Standard Federal Equal Employment Specifications" set forth herein.

2. The goals and timetables for minority and female participation, expressed in percentage terms for the Contractor's aggregate work force in each trade on all construction work in the covered area, are as follows:

<b>GOALS FOR MINORITY PARTICIPATION IN EACH TRADE</b>	<b>GOALS FOR FEMALE PARTICIPATION IN EACH TRADE</b>
9.6%	6.9%

These goals are applicable to all the Contractor's construction work (whether or not it is Federal or federally-assisted) performed in the covered area. If the contractor performs construction work in a geographical area located outside of the covered area, it shall apply the goals established for such geographical area where the work is actually performed. With regard to this second area, the contractor also is subject to the goals for both its federally involved and non-federally involved construction.

The Contractor's compliance with the Executive Order and the regulations in CFR Part 60-4 shall be based on its implementation of the Equal Opportunity Clause, specific affirmative action obligations required by the specifications set forth in 41 CFR 60-4, 3(a), and its efforts to meet the goals. The hours of minority and female employment and training must be substantially uniform throughout the length of the contract, and in each trade, and the contractor shall make a good faith effort to employ minorities and women evenly on each of its projects. The transfer of minority or female employees or trainees from Contractor to Contractor or from project to project for the sole purpose of meeting the Contractor's goals shall be a violation of the contract, the Executive Order and the regulations in 41 CFR Part 60-4. Compliance with the goals will be measured against the total work hours performed.

4.3. The Contractor shall provide written notification to the Director of the Office of Federal Contract Compliance Programs within ten (10) working days of award of any construction subcontract in excess of \$10,000.00 at any tier for construction work under the contract resulting from this solicitation. The notification shall list the name, address and telephone number of the subcontractor; employer identification number of the subcontractor; estimated dollar amount of the subcontract; estimated starting and completion dates of the subcontract; and the geographical area in which the subcontract is to be performed. The notification shall be mailed to:

**Evelyn Teague, Regional Director**

**Office of Federal Contract  
Compliance Programs**

**61 Forsyth Street, SW,  
Suite 7B75  
Atlanta, Georgia 30303-8609**

5.4. As used in this Notice, and in the contract resulting from this solicitation, the **"covered area"** is Washington County.

## ATTACHMENT 6 TO EXHIBIT 6

### APPENDIX A TO DOT STANDARD TITLE VI ASSURANCES AND NON-DISCRIMINATION PROVISIONS: CONTRACTOR ASSURANCES

Note: Whenever in this Attachment 6 to Exhibit 4 references are made to:

- (a) "Acts and Regulations," such reference shall be construed to mean (i) Title VI of the Civil Rights Act of 1964 (42 U.S.C. § 2000d et seq., 78 stat. 252), (prohibits discrimination on the basis of race, color, national origin), (ii) 49 C.F.R. Part 21 (entitled Non-discrimination In Federally-Assisted Programs of the Cabinet of Transportation – Effectuation of Title VI of the Civil Rights Act of 1964); and (iii) 28 C.F.R. section 50.3 (U.S. Cabinet of Justice Guidelines for Enforcement of Title VI of the Civil Rights Act of 1964);
- (b) "contract," such reference shall be construed to mean Agreement;
- (c) "contractor," such reference shall be construed to mean DBT; and
- (d) "Recipient," such reference shall be construed to mean KYTC.

During the performance of this contract, the contractor, for itself, its assignees, and successors in interest (hereinafter referred to as the "contractor") agrees as follows:

1. **Compliance with Regulations:** The contractor (hereinafter includes consultants) will comply with the Acts and the Regulations relative to Non-discrimination in Federally-assisted programs of the U.S. Cabinet of Transportation, Federal Highway Administration, as they may be amended from time to time, which are herein incorporated by reference and made a part of this contract.
2. **Non-discrimination:** The contractor, with regard to the work performed by it during the contract, will not discriminate on the grounds of race, color, or national origin in the selection and retention of subcontractors, including procurements of materials and leases of equipment. The contractor will not participate directly or indirectly in the discrimination prohibited by the Acts and the Regulations, including employment practices when the contract covers any activity, project, or program set forth in Appendix B of 49 CFR Part 21.
3. **Solicitations for Subcontracts, Including Procurements of Materials and Equipment:** In all solicitations, either by competitive bidding, or negotiation made by the contractor for work to be performed under a subcontract, including procurements of materials, or leases of equipment, each potential subcontractor or supplier will be notified by the contractor of the contractor's obligations under this contract and the Acts and the Regulations relative to Non-discrimination on the grounds of race, color, or national origin.
4. **Information and Reports:** The contractor will provide all information and reports required by the Acts, the Regulations, and directives issued pursuant thereto and will permit access to its books, records, accounts, other sources of information, and its facilities as may be determined by the Recipient or the Federal Highway Administration to be pertinent to ascertain compliance with such Acts, Regulations, and instructions. Where any information required of a contractor is in the exclusive possession of another who fails or refuses to furnish the information, the contractor will so certify to the Recipient or the

Federal Highway Administration, as appropriate, and will set forth what efforts it has made to obtain the information.

5. **Sanctions for Noncompliance:** In the event of a contractor's noncompliance with the Non-discrimination provisions of this contract, the Recipient will impose such contract sanctions as it or the Federal Highway Administration may determine to be appropriate, including, but not limited to:
  - a. withholding payments to the contractor under the contract until the contractor complies; and/or
  - b. cancelling, terminating, or suspending a contract, in whole or in part.
6. **Incorporation of Provisions:** The contractor will include the provisions of paragraphs one through six in every subcontract, including procurements of materials and leases of equipment, unless exempt by the Acts, the Regulations and directives issued pursuant thereto. The contractor will take action with respect to any subcontract or procurement as the Recipient or the Federal Highway Administration may direct as a means of enforcing such provisions including sanctions for noncompliance. Provided, that if the contractor becomes involved in, or is threatened with, litigation by a subcontractor or supplier because of such direction, the contractor may request the Recipient to enter into any litigation to protect the interests of the Recipient. In addition, the contractor may request the United States to enter into the litigation to protect the interests of the United States.

## **ATTACHMENT 7 TO EXHIBIT 6**

### **APPENDIX E TO DOT STANDARD TITLE VI ASSURANCES / NON- DISCRIMINATION STATUTES: AND AUTHORITIES**

Note: Whenever in this Attachment 7 to Exhibit 4 references are made to:

- (a) "contract," such reference shall be construed to mean Agreement; and
- (b) "contractor," such reference shall be construed to mean DBT.

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

Pertinent Non-Discrimination Authorities:

- Title VI of the Civil Rights Act of 1964 (42 U.S.C. § 2000d et seq., 78 stat. 252), (prohibits discrimination on the basis of race, color, national origin); and 49 CFR Part 21;
- The Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, (42 U.S.C. § 4601), (prohibits unfair treatment of persons displaced or whose property has been acquired because of Federal or Federal-aid programs and projects);
- Federal-Aid Highway Act of 1973, (23 U.S.C. § 324 et seq.), (prohibits discrimination on the basis of sex);
- Section 504 of the Rehabilitation Act of 1973, (29 U.S.C. § 794 et seq.), as amended, (prohibits discrimination on the basis of disability); and 49 CFR Part 27;
- The Age Discrimination Act of 1975, as amended, (42 U.S.C. § 6101 et seq.), (prohibits discrimination on the basis of age);
- Airport and Airway Improvement Act of 1982, (49 USC § 471, Section 47123), as amended, (prohibits discrimination based on race, creed, color, national origin, or sex);
- The Civil Rights Restoration Act of 1987, (PL 100-209), (Broadened the scope, coverage and applicability of Title VI of the Civil Rights Act of 1964, The Age Discrimination Act of 1975 and Section 504 of the Rehabilitation Act of 1973, by expanding the definition of the terms "programs or activities" to include all of the programs or activities of the Federal-aid recipients, sub-recipients and contractors, whether such programs or activities are Federally funded or not);
- Titles II and III of the Americans with Disabilities Act, which prohibit discrimination on the basis of disability in the operation of public entities, public and private transportation systems, places of public accommodation, and certain testing entities (42 U.S.C. §§ 12131 — 12189) as implemented by Cabinet of Transportation regulations at 49 C.F.R. parts 37 and 38;
- The Federal Aviation Administration's Non-discrimination statute (49 U.S.C. § 47123) (prohibits discrimination on the basis of race, color, national origin, and sex);
- Executive Order 12898, Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations, which ensures discrimination against minority populations by discouraging programs, policies, and activities with disproportionately high and adverse human health or environmental effects on minority and low-income populations;

- Executive Order 13166, Improving Access to Services for Persons with Limited English Proficiency, and resulting agency guidance, national origin discrimination includes discrimination because of limited English proficiency (LEP). To ensure compliance with Title VI, you must take reasonable steps to - ensure that LEP persons have meaningful access to your programs (70 Fed. Reg. at 74087 to 74100);
- Title IX of the Education Amendments of 1972, as amended, which prohibits you from discriminating because of sex in education programs or activities (20 U.S.C. 1681 et seq).





## **ATTACHMENT 8 TO EXHIBIT 6**

### **COMPLIANCE WITH CARGO PREFERENCE ACT**

In accordance with FHWA's Memorandum dated December 11, 2015 on "Implementation of Cargo Preference Act Requirements in the Federal-aid Highway Program," DBT and all construction Subcontractors shall comply with the Cargo Preference Act of 1954 (46 U.S.C. §55305) and its implementing regulations (46 CFR Part 381). Without limiting the foregoing, DBT agrees:

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

b. To furnish within 20 days following the date of loading for shipments originating within the United States or within 30 Business Days following the date of loading for shipments originating outside the United States, a legible copy of a rated, 'on-board' commercial ocean bill-of-lading in English for each shipment of cargo described in paragraph (a) above to both KYTC (through DBT in the case of Subcontractor bills-of-lading) and to the Division of National Cargo, Office of Market Development, Maritime Administration, Washington, DC 20590; and

c. To insert the substance of these provisions in all construction Subcontracts.

## **EXHIBIT 7-1**

### **KYTC EEO REQUIREMENTS**

#### **KENTUCKY TRANSPORTATION CABINET**

#### **EMPLOYMENT REQUIREMENTS RELATING TO NONDISCRIMINATION OF EMPLOYEES (APPLICABLE TO FEDERAL-AID SYSTEM CONTRACTS)**

#### **AN ACT OF THE KENTUCKY GENERAL ASSEMBLY TO PREVENT DISCRIMINATION IN EMPLOYMENT**

#### **KRS CHAPTER 344 EFFECTIVE JUNE 16, 1972**

The contract on this project, in accordance with KRS Chapter 344, provides that during the performance of this contract, the contractor agrees as follows:

1. The contractor shall not fail or refuse to hire, or shall not discharge any individual, or otherwise discriminate against an individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, national origin, sex, disability or age (forty and above); or limit, segregate, or classify his employees in any way which would deprive or tend to deprive an individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, national origin, sex, disability or age forty (40) and over. The contractor agrees to post in conspicuous places, available to employees and applicants for employment, notices to be provided setting forth the provisions of this nondiscrimination clause.

2. The contractor shall not print or publish or cause to be printed or published a notice or advertisement relating to employment by such an employer or membership in or any classification or referral for employment by the employment agency, indicating any preference, limitation, specification, or discrimination, based on race, color, religion, national origin, sex, or age forty (40) and over, or because the person is a qualified individual with a disability, except that such a notice or advertisement may indicate a preference, limitation, or specification based on religion, national origin, sex, or age forty (40) and over, or because the person is a qualified individual with a disability, when religion, national origin, sex, or age forty (40) and over, or because the person is a qualified individual with a disability, is a bona fide occupational qualification for employment.

3. If the contractor is in control of apprenticeship or other training or retraining, including on-the-job training programs, he shall not discriminate against an individual because of his race, color, religion, national origin, sex, disability or age forty (40) and over, in admission to, or employment in any program established to provide apprenticeship or other training.

4. The contractor will send to each labor union or representative of workers with which he has a collective bargaining agreement or other contract or understanding, a notice to be provided advising the said labor union or workers' representative of the contractor's commitments under this section, and shall post copies of the notice in conspicuous places available to employees and applicants for employment. The contractor will take such action with respect to any subcontract or purchase order as the administrating agency may direct as a means of enforcing such provisions, including sanctions for non-compliance.

Revised: January 25, 2017

## **EXHIBIT 7-2**

### **DISADVANTAGED BUSINESS ENTERPRISE PROGRAM**

It is the policy of the Kentucky Transportation Cabinet (“the Cabinet”) that Disadvantaged Business Enterprises (“DBE”) shall have the opportunity to participate in the performance of highway construction projects financed in whole or in part by Federal Funds in order to create a level playing field for all businesses who wish to contract with the Cabinet. To that end, the Cabinet will comply with the regulations found in 49 CFR Part 26, and the definitions and requirements contained therein shall be adopted as if set out verbatim herein.

The Cabinet, contractors, subcontractors, subconsultants, and sub-recipients shall not discriminate on the basis of race, color, national origin, or sex in the performance of work performed pursuant to Cabinet contracts. The Design Build Team (DBT) shall carry out applicable requirements of 49 CFR 26 in the award and administration of federally assisted highway construction projects. The DBT will include this provision in all its subcontracts and supply agreements pertaining to contracts with the Cabinet.

Failure by the DBT to carry out these requirements is a material breach of its contract with the Cabinet, which may result in the termination of the contract or such other remedy as the Cabinet deems necessary.

#### **DBE GOAL**

The Disadvantaged Business Enterprise (DBE) goal established for this contract is the percentage of the total value of the contract.

The DBT shall exercise all necessary and reasonable steps to ensure that Disadvantaged Business Enterprises participate in at least the percent of the contract as set forth above as goals for this contract.

#### **SANCTIONS FOR FAILURE TO MEET DBE REQUIREMENTS OF THE PROJECT**

Failure by the Design Build Team to fulfill the DBE requirements of a project under contract or to demonstrate good faith efforts to meet the goal constitutes a breach of contract. When this occurs, the Cabinet will hold the DBT accountable, as would be the case with all other contract provisions. Therefore, the DBT’s failure to carry out the DBE contract requirements shall constitute a breach of contract and as such the Cabinet reserves the right to exercise all administrative remedies at its disposal including, but not limited to the following:

- Disallow credit toward the DBE goal;
- Withholding progress payments;
- Withholding payment to the DBT in an amount equal to the unmet portion of the contract goal; and/or

- Termination of the contract.

## **PROMPT PAYMENT**

The Design Build Team is required to pay the DBE subcontractor, subconsultant, supplier or broker within seven (7) working days after he or she has received payment from the Kentucky Transportation Cabinet for work performed or materials furnished.

## **CONTRACTOR REPORTING**

The Design Build Team must keep detailed records and provide reports to the Cabinet on their progress in meeting the DBE goal on the Contract. These records may include, but shall not be limited to payroll, lease agreements, cancelled payroll checks, executed subcontracting agreements, etc. The Lead Contractor and Lead Designer of the DBT will be required to complete and submit a signed and notarized Affidavit of Subcontractor Payment (TC 18-7) and copies of checks for any monies paid to each DBE subcontractor, subconsultant, supplier or broker utilized to meet a DBE goal. Information that needs to be reported on the form includes date the payment is sent to the DBE, check number, Contract ID, and the amount of payment. These documents must be completed and signed within 7 days of being paid by the Cabinet.

The DBT must certify that all payments were made to all DBE subcontractors, DBE subconsultants, DBE suppliers, and/or DBE brokers prior to final payment on this contract.

\*\*\*\*\* IMPORTANT\*\*\*\*\*

Please mail the original, signed and completed TC(18-7) Affidavit of Subcontractor Payment form and all copies of checks for payments listed above to the following address:

Office of Civil Rights and Small Business Development

6th Floor West 200 Mero Street

Frankfort, KY 40622

The DBT should notify the Kentucky Transportation Cabinet - Office of Civil Rights and Small Business Development seven (7) days prior to any DBE (including suppliers and brokers) commencing work on the project. Mr. Melvin Bynes is the current contact in the Office of Civil Rights and Small Business Development. Mr. Bynes' current contact information is: email address - melvin.bynes2@ky.gov and office telephone (502) 564-3601.

## **DEFAULT OR DECERTIFICATION OF THE DBE**

If the DBE subcontractor, subconsultant, supplier or broker is decertified or defaults in the performance of its work, and the overall goal cannot be credited for the uncompleted work, the Design Build Team may utilize a substitute DBE or elect to fulfill the DBE goal with another DBE on a different work item. If after exerting good faith effort in accordance with the Cabinet's Good Faith Effort policies and procedures, the DBT is

unable to replace the DBE, then the unmet portion of the goal may be waived at the discretion of the Cabinet.

#### PROHIBITION ON TELECOMMUNICATIONS EQUIPMENT OR SERVICES

In accordance with the FY 2019 National Defense Authorization Act (NDAA), 2 CFR 200.216, and 2 CFR 200.471, Federal agencies are prohibited, after August 13, 2020, from obligating or expending financial assistance to obtain certain telecommunications and video surveillance services and equipment from specific producers. As a result of these regulations, contractors and subcontractors are prohibited, on projects with federal funding participation, from providing telecommunication or video surveillance equipment, services, or systems produced by:

- Huawei Technologies Company or ZTE Corporation (or any subsidiary or affiliate of such entities)
- Hytera Communications Corporation, Hangzhou Hikvision Digital Technology Company, or Dahua Technology Company (or any subsidiary or affiliate of such entities)

**EXHIBIT 8**

**NOTICE OF AWARD**

**EXHIBIT 9**  
**PERFORMANCE BOND**

**EXHIBIT 10**  
**PAYMENT BOND**



**Exhibit 11**

**Build America, Buy America Certification**

State Project Number:	22-9002	Federal Project Number:	
Project Name:	KY 555 Design Build Project		
Contractor:			
Contract Number:			

“Build America, Buy America (BABA)” was signed into law as part of the “Infrastructure Investment and Jobs Act,” PL 117-58, on November 15, 2021.

These new requirements are now incorporated in the DBA for the Project.

As a supplier for the Project listed above, I certify that I have read, understand, and will comply with Exhibit 4-7 of the DBA for the Project. Furthermore, I understand that Exhibit 4-7 of the DBA for the Project applies to any and all portions of this Project, including subcontracted portions and I certify that all materials I supply for the Project comply with BABA and Exhibit 4-7 of the DBA.

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Signature of Authorized Representative

Date

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Printed Name and Title of Authorized Representative

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Name of Representative’s Company

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Company Address

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Company Telephone Number