I-81 VIADUCT PROJECT - PHASE 1, CONTRACT 1

PIN 3501.90, Contract D900054

CONTRACT DOCUMENTS

REQUEST FOR PROPOSALS

PART 2

DB SECTION 100
GENERAL PROVISIONS

Final June 17, 2022

INTRODUCTION

This publication has been prepared to provide a compilation of standard requirements, called Specifications, used by the New York State Department of Transportation for Design-Build contracts. These specifications are written to the Design-Builder. They define the Design-Builder's responsibility in meeting each specification, enumerate the Department's expectations and explain what the Design-Builder is expected to provide.

This publication will be incorporated into the Department's Design-Build contracts. It contains the General Provisions of the contract along with samples of the Jurat, Contract Agreement, and Bonds. The requirements stated herein may be revised or amended from time to time by notes or special specifications or documents of any description that would be furnished as part of a Design-Build contract.

Throughout this document, reference is made to the NYSDOT Standard Specifications. Where this reference appears, it shall mean the Department's Standard Specifications (USC) that are effective at the time of the Proposal Due Date. ~~Section 100 is available through https://www.dot.ny.gov/main/business-center/engineering/specifications/busi-e-standards-usc/usc-repository/2021_9_specs_usc_vol1.pdf.~~ Where references are made to various subsections of Section 100 within the Standard Specifications, it shall be interpreted to mean the corresponding section within this manual.

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DB SECTION 101
ABBREVIATIONS AND DEFINITIONS OF TERMS

Wherever the following terms, abbreviations, or symbols are used in the Contract Documents, the intent and meaning shall be interpreted as follows:

DB 101-01 ABBREVIATIONS OF TERMS.

NYSDOT Standard Specifications Section 101-01 shall apply in addition to the following:

ATC	Alternative Technical Concept
CQAE	Construction Quality Assurance Engineer
CQCE	Construction Quality Control Engineer
DB	Design-Build
DQAE	Design Quality Assurance Engineer
DQCE	Design Quality Control Engineer
IA	Independent Assurance
ITP	Instructions to Proposers
JV	Joint Venture
NCR	Non-Conformance Report
NTP	Notice to Proceed
PM	Project Manager
QA	Quality Assurance
QC	Quality Control
QCP	Quality Check Points
QCP	Quality Control Plan
QM	Quality Manager
RE	Resident Engineer
RFP	Request for Proposals

DB 101-02 DEFINITIONS OF TERMS.

NYSDOT Standard Specifications §101-02 shall apply with the following modifications:

A. The following definitions of terms replace the definitions of those same terms set forth in NYSDOT Standard Specifications §101-02:

Addenda – Separate publication(s) containing supplemental additions, deletions, and modifications to the provisions of the Request for Proposals (RFPs) after the date of advertisement of the RFP and the Standard Specifications, which are in effect on the date of advertisement of the RFP.

Contract – A binding agreement between the Department and the Design-Builder setting forth the obligations of the parties with respect to the Project, including, but not limited to, the performance of the Work, the furnishing of labor and materials, and the basis of payment. The Contract includes, but is not limited to an executed contract agreement, the Contract Documents and any amendments, supplemental agreements, and Change Orders.

Contract Documents – The documents identified as such in the *Agreement, Article 2 – Documents Forming the Contract*, including baseline data and any and all provisions required by law to be inserted in the Contract whether actually inserted or not.

Inspector – A representative of the Design-Builder or Department detailed to inspect methods of construction or fabrication and/or materials, equipment for Work both on and off the Site of the Project.

Plans - The official Design Plans and applicable Standard Sheets, which show the location, character, dimensions, and details of the Work to be performed. Also, the Design-Builder's Design Plans showing profiles, typical cross sections, and other details; Work Plans; or exact reproductions which show the location, character, dimensions, and general or specific details of the Work to be done.

Subcontractor – Any individual, firm, or corporation with whom the Design-Builder has entered into a Subcontract and any other individual, firm, or corporation with whom any Subcontractor has further subcontracted any part of the Work, at second tier (i.e., no third-tier subcontracting permitted). A Subcontractor is approved by the Department in accordance with §108-05 *Subletting or Assigning the Contract* to perform on-site work specifically required for the performance of the contract. Suppliers and materialmen are excluded from the term. The term does not include any employee with an employment contract, or any employee organization with a collective bargaining agreement, who with the written consent of the Department, sublets any part of the Contract.

B. The following definitions of terms are in addition to the definitions of terms set forth in NYSDOT Standard Specifications §101-02:

Accept/Acceptance - The confirmation provided by the Department that informs the Design-Builder that a submittal, deliverable, work product, or test result, is in conformance with the Contract requirements or NYSDOT standards.

Affiliate:

A. Any Person that directly or indirectly, through one or more intermediaries, controls, is controlled by, or is under common control with the Design-Builder or any Principal Participant.
B. An Affiliate may also be any Person for which 10% or more of the equity interest in such Person is held directly or indirectly, beneficially or of record, by the following:
   1. The Design-Builder;
   2. Any Principal Participant; or
   3. Any Affiliate of the Design-Builder under part (A) of this definition.

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

Alternative Technical Concept – A concept that deviates from, ~~requirements set forth in the contract documents which~~ and provides a solution equal to or better than, the requirements set forth in the contract documents. The Department's prior written approval is required for~~, in accordance with the Instructions to Proposers,~~ Alternative Technical Concepts (ATCs) in accordance with the Instruction to Proposers~~, shall be required~~.

Basic Project Configuration – The basic information presented by the Department regarding the nature of the project to be constructed as documented in the RFP.

Betterment – Any upgrading of a utility facility that is not attributable to the construction of the Project, and is made for the benefit of and at the election of the owner or other third party;

Conformed RFP - The RFP that incorporates all of the contractual changes issued by the Department during the procurement in the form of an addendum. The Conformed RFP is

provided for convenience only and should be verified for accuracy by the DB Team that is awarded the contract. The Contract Documents remain as the Final RFP and Addendum issued by NYSDOT.

Construction Inspection (CI) – The act of inspecting all construction operations and enforcing all safety measures (for employees and the traveling public), performed by the Design-Builder to ensure conformance with the contract documents. This includes performing daily inspection and testing activities in accordance with all the requirements set forth in Department policies, manuals, engineering bulletins, and engineering instructions; preparation of applicable MURK forms; preparation of monthly estimates; monitoring compliance to safety procedures, including fall protection and Work Zone Traffic Control (WZTC) requirements; monitoring compliance to environmental requirements. Construction Inspection also includes Contract Administration functions including, but not limited to keeping required records, monitoring the Design-Builder's progress, monitoring certified payroll compliance and processing of payments, monitoring adherence to Equal Opportunity and Labor requirements contained in the contract, taking measurements as required for payment, and maintaining a contemporaneous project diary documenting conformance with the contract documents.

Construction Manager – The Design-Builder's designated representative who leads construction activities of the Design-Build Contract, including overall construction oversight, assignment of the construction workforces, coordination of the construction workforces, etc.

Construction Quality Assurance Engineer (CQAE) – The Department's representative with primary responsibility for monitoring and/or auditing the Design-Builder's construction and environmental field activities for compliance with the Contract's requirements and the Design-Builder's Quality Control Plan.

Construction Quality Control Engineer – The Design-Builder's designated representative who leads the Construction QC activities. The Construction QC Engineer, or his/her designees, shall be delegated the authority to actively monitor the quality of materials and workmanship and to make necessary improvements to the quality of Work, including the suspension of the Work if required.

Constructor - A Principal Participant or subcontractor retained by the Design-Builder, who is involved in the actual construction of the Project.

Definitive Design – The stage of design development where design concepts and parameters are established that will be followed through to completion of the Project.

Department's Project Manager – The designated person, representing the Department and having direct supervision of the administration and execution of the Contract.

Design Acceptance – Written confirmation by the Department after submittal and review of the As-Built Plans that the design conforms to the Contract requirements and reflects the As-Built conditions. This is required as part of Final Acceptance.

Design-Build (DB) - A Project delivery methodology by which the Department contracts with a single firm that has responsibility for the design and construction of the Project under a single contract.

Design-Builder – The Team which enters into the Contract with the Department to design and construct the Project (also referred to as the "Design-Build Team").

Design Documents – Maps, Design Plans, Project Specifications, reports, calculations, records, submittals, and other specified documents prepared by the Design-Builder and/or Designer in the course of performing Project engineering and design Work.

Design Manager – The Design-Builder's designated person who shall have primary responsibility for coordination and oversight of the all the Project Designs including design plans, calculations, and specifications. He / She shall be a registered Professional Engineer in the State of New York.

Design Plans – Plans prepared by the Design-Builder showing the location, character, dimensions and other design-related details of the Work to be done.

Design Quality Assurance Engineer – The Department's representative with primary responsibility for monitoring and/or auditing the Design-Builder's design and engineering activities for compliance with the Contract requirements and the Design-Builder's Quality Control Plan.

Design Quality Control Engineer – The person appointed by Design-Builder who reports directly to the Design-Builder's Quality Manager and is responsible for the QC of all Work conducted by the Designer. The Design QC Engineer shall be a New York-licensed professional engineer with similar experience as the Design Manager. The Design QC Engineer shall ensure that checkers are assigned for each design discipline and for each Design Unit and that they are properly scheduled.

Design Requirements – Those specifications contained in the Contract that specify the minimum acceptable technical standards and define the limits within which the design of the Project shall be developed.

Design Review – A comprehensive and systematic examination of the design as specified in the Contract to verify that it is in conformance with the requirements of the Contract, as performed by the Design-Builder for all stages of the design except As-Built Plans, which is performed by the Department. During all stages of the design, except As-Built Plans, the Department will contribute to the review through Oversight including participation, auditing and spot-checking.

Design Unit – A distinct portion of the Project of which the design is performed as a contiguous, integrated unit.

Designer – A Principal Participant, specialized Subcontractor, or in-house designer that leads the team furnishing or performing the design of the Project.

Directive Plans – Plans contained in *Part 6 - RFP Plans* designated as Directive Plans. Directive Plans depict required elements and components of the Project within specifically defined parameters. The Design-Builder has limited or no latitude to adjust components or details shown on Directive Plans. Examples of Directive Plans may include the following:

A. Standard Plans;
B. Right–of-way plans; and
C. Any other plans included in Part 6 of the RFP.

Equity Participant - Any Person holding (directly or indirectly) a 15% or greater interest in the Proposer.

Fast Track Design - The process of performing the design of a project in increments of the final design for the purpose of allowing the project construction to begin before the final design of a project is completed. Fast Track Design will allow the project design and construction activities to overlap and occur simultaneously, thereby shortening the total duration of those activities.

Final Acceptance – The acceptance of the completed Work, given by the Department in accordance with DB §109-09.

Final Design – The stage of design development, after Interim Design, at which time the Design Plans and Project Specifications for a Design Unit are 100% complete.

Final Inspection – The inspection scheduled after receipt of notification from the Design-Builder that it has completed all Work items, including punch list items and demolition Work, so that a certificate of Project Completion may be issued.

Indicative Plans – Those Plans that are provided indicating the nature and type of Work to be designed and constructed as part of the Project and reflecting items for which the Department has not directed the specific configuration or material used in the final product. Indicative Plans do not necessarily reflect the final locations, quantities, or all elements required to complete the Work.

Interim Design – The stage of design development after Definitive Design where the Design Plans and Project Specifications for a Design Unit are at the 60% to 80% stage of completion.

Lead Principal Participant - The Principal Participant that is designated by the Proposer as having the lead responsibility for managing the Proposer's organization.

Non-Conformance Report – The written documentation of deficiencies, instances of non-compliance, errors, and/or omissions in the Work, per DB §105-23. The Non-Conformance Report is a means and method to document findings brought forth by either the Design-Builder or the Department at any point during the Project design or construction to identify non-conforming items that shall be documented and managed until Final Acceptance.

Non-responsive Price Proposal - A Proposer's Price Proposal which is incomplete or which contains mathematical errors.

Oversight – Actions by the Department to satisfy itself that the Design-Builder is designing, constructing and managing the Work in accordance with the Contract Documents. It includes actions identified in the Contract Documents by the terms QA, Independent Assurance, Verification Sampling and Testing, compliant/compliance, accept/acceptance, inspect/ inspection, audit, ensure, certify, confirm, review, verify or terms of similar import. Department's comments as a result of Oversight are conveyed to the Design-Builder through consultation and written comment. Neither the activity of Oversight nor the lack of consultation and written comment on the part of the Department shall be construed to relieve the Design-Builder and its organization from the responsibility and costs for meeting all Contract and regulatory requirements.

Person – Any individual, firm, corporation, company, sole proprietorship, limited liability company (LLC), joint venture, voluntary association, partnership, trust, unincorporated organization, or other legal entity.

Principal Participant – Any of the following entities:

A. The Design-Builder;
B. If the Design-Builder is a partnership, joint venture, or limited liability company, each general partner or member of the Design-Builder; and/or
C. Each Person holding (directly or indirectly) an equity interest in the Design-Builder.

Project Manager - The Design-Builder's designated representative responsible for all aspects of the Work, including construction oversight, design oversight, project finances, project scheduling, etc. Disputes regarding design or construction that cannot be resolved with the designer or in the field will be brought to the attention of the Design-Builder's Project Manager for resolution.

Project Specifications – Those specifications developed by the Design-Builder to define and control the specific requirements, conditions, means, and methods to be used on the Project. Project Specifications will be based on the Contract requirements, including the Standard Specifications, and shall provide finished products that meet or exceed the quality requirements of the Contract. Project Specifications are subject to review, consultation and written comment of the Department's Project Manager during Design Reviews, and to a determination by the Department, in their sole discretion, whether the Project Specifications meet the Contract requirements.

Proposal – The Proposal submitted by the Design-Builder in response to the RFP, including any revisions thereto. If the Department requested a revised Proposal, the term "Proposal" means the revised Proposal submitted by the Design-Builder, including any revisions thereto.

Quality Assurance – The Department's process of forming an acceptance decision to ensure the Design-Builder's design and construction, including the workmanship and materials incorporated into the Project, are in accordance with the Contract requirements. The QA process includes all the planned and systematic Oversight actions that provide the Department with confidence that the Design-Builder is performing QC in accordance with the Quality Control Plan, that all Work complies with the Contract and that all Materials incorporated in the Work, all Equipment, and all elements of the Work will perform satisfactorily for the purpose intended. Quality Assurance includes, but is not limited to, monitoring and verification of design through auditing, spot-checking and participation in the review of the design, and monitoring and verification of construction, manufacturing/process facilities and equipment, on site equipment and QC documentation through auditing, spot inspections and Verification Sampling and testing at production sites and the Project Site. Quality Assurance also includes Independent Assurance, consultation and provision of written comments by the Department, documentation of QA activities, final inspection and Final Acceptance.

Quality Check Points (Hold Points) – Quality Check Points (QCP) established at various stages of construction for the Project that provide an opportunity to evaluate work for acceptability before beginning the next portion of the Work.

Quality Control – The total of all activities performed by the Design-Builder, Constructor, Designer, Construction Inspection Professional Engineering Firm and the Materials Testing Firm or Laboratory, Subcontractors, producers or manufacturers to ensure that the Work performed

by the Design-Builder conforms to the Contract requirements. For design, this shall include, but not be limited to, procedures for design quality, checking, design review including reviews for constructability, and review and approval of Working Plans. For construction, Quality Control activities shall include, but not be limited to, procedures for materials handling and construction quality, inspection, sampling and testing of materials, both on site and at the plant(s), field testing of materials, obtaining and verifying material certifications, record keeping and equipment monitoring and calibration, production process control, and monitoring of environmental compliance. Quality Control also includes documentation of all QC design and construction efforts.

Quality Control Plan – The Design-Builder's plan for implementing the Design-Builder's overall Quality System and associated activities, including Design-Builder's QC and procedures to assure and document quality of design and construction activities through reviews, inspections, testing, internal communications, and necessary interfaces with the Department and the Department's QA activities.

Quality Manager – The Design-Builder's designated individual who is responsible for the overall Quality Program of the Design-Builder, including the quality of management, design, and construction.

Quality Program – The overall quality system and associated activities, including the Department's QA and IA program, Design-Builder QC activities and associated Quality Control Plan that will assure materials and workmanship incorporated into the Project are in conformity with the Contract requirements, Design Documents and Project Specifications.

Release for Construction – The stage of design development where the Design Plans and Project Specifications for a Design Unit or a component thereof are 100% complete and satisfy the requirements of Part 3, Section 5.7.4~~3~~.

Resident Engineer – A qualified individual as specified in the RFP, who directs the organization and coordination of the inspectors and the on-site Construction Quality Control inspection of the execution of the construction by the Design-Builder. They ensure that the construction is executed in accordance with the approved designs, drawings and specifications related to the Work under construction.

RFP Plans – Those plans included in *Part 6 – RFP Plans* which are, generally-speaking, incomplete plans representing the Project and its components. RFP Plans may be Directive Plans and/or Indicative Plans.

Safety Manager - The Design-Builder's designated person who working under the direction of the Project Manager shall have the primary responsibility for implementing and tracking safety measures for the Project and for ensuring that the Project is progressed safely and in accordance with the Design-Builders Safety Plan, the Contract requirements and the Safety Requirements of the Project.

Subcontract – Any agreement entered into by the Design-Builder or a Subcontractor (limited to second-tier) for a portion of the construction or any other part of the Work in connection with, and under the terms of, the Contract.

Substantial Completion – The point at which the Project, or Section thereof, is complete, such that all items or Work, as described in Contract Document, Part 3 – Project Requirements, have

been completed in accordance with the Contract Requirements and Approved by the Department's Project Manager.

Unbalanced Price Proposal - A Price Proposal may be unbalanced either Materially or Mathematically. A Materially Unbalanced Price Proposal is a Price Proposal that generates a reasonable doubt that awarding the Contract to the Proposer submitting the price Proposal will result in the lowest ultimate cost to the Department. A Mathematically Unbalanced Price Proposal is a Price Proposal containing lump sum or Unit Price items that do not reasonably reflect the actual costs plus a reasonable proportionate share of the Proposer's anticipated profit, overhead costs, and other indirect costs.

Utility Relocation Plans – The Design Plans for Relocation of a utility impacted by the Project, to be prepared by the Design-Builder or the utility owner.

DB SECTION 102
REQUIREMENTS AND CONDITIONS

DB 102-01 LOCATION OF REGIONAL OFFICES.

NYSDOT Standard Specification §102-01 shall apply.

DB 102-02 EXAMINING THE CONTRACT DOCUMENTS AND THE WORK SITE.

Information on construction contracting opportunities, including letting and procurement schedules, contract documents, detailed plans of the Work, contract proposals, supplemental information available to bidders and proposers, amendments, and other information are available on the Construction Opportunities > Contract Documents page of the Department's Business Center web site at: www.dot.ny.gov/business for free download. Standard sheets are available on the Engineering > CADD Info > Drawings page of the Department's Business Center web site at: www.dot.ny.gov/business for free download.

The attention of persons intending to make proposals is specifically called to Article 3, *Examination of Documents and Site*, of the contract agreement wherein the Proposer agrees that it has examined the contract documents and the site of the Work and has fully informed itself from personal examination of the same regarding the quantities, character, location and other conditions affecting the Work to be performed including the existence of poles, wires, pipes, ducts, conduits, and other facilities and structures of municipal and other public service corporations on, over or under the site.

The Proposer agrees that its proposed contract prices include all costs arising from existing conditions shown, or specified in the contract documents, and/or readily observable from a site inspection during the procurement period available under this contract, and/or generally recognized as inherent in the nature of the Work. The Proposer shall take no advantage of any apparent error or omission in the RFP documents.

Subsurface Information. Boring logs and other subsurface information made available for the inspection of Proposers were obtained with reasonable care and recorded in good faith by the Department. It is made available to Proposers so that they may have access to the same information available to the State. It is presented in good faith, but as with all subsurface information it represents only a small fraction of the total volume of material at the site. The Department represents that, to the best of its knowledge, the information represented by the borings and tests taken by the Department are accurate at the location of the tests. Any extrapolation of such information to other locations by the Design-Builder shall be at Design-Builder's risk. Furthermore, the Design-Builder is responsible to determine what additional geotechnical information is required to support its design and is responsible for obtaining such information and is responsible for the accuracy of such information.

The soil and rock descriptions shown are as determined by a visual inspection of the samples from the various explorations unless otherwise noted. The observed water levels and/or water conditions indicated thereon are as recorded at the time of the exploration. These levels and/or conditions may vary considerably, with time, according to the prevailing climate, rainfall and other factors. Interpolation between data points may not be indicative of the actual material to be encountered.

The locations of utilities or other underground man-made features were ascertained with reasonable care and recorded in good faith from various sources, including the records of municipal and other public service corporations, and therefore the location of known utilities

may only be approximate. Subsurface utility quality level designations shown in the contract documents are defined in accordance with §107-07F *Quality Level Designations*.

DB 102-03 OTHER CONTRACTS.

NYSDOT Standard Specifications §102-03 shall apply.

DB 102-04 PROPOSAL CONTENT.

See ITP 1.7.

DB 102-05 PROPOSAL SUBMISSION.

See ITP 4.1.

DB 102-06 BID DEPOSIT.

NYSDOT Standard Specification §102-06 shall apply.

DB 102-07 MODIFICATION OR WITHDRAWAL OF PROPOSAL.

A Proposer may withdraw its Proposal only by a written and signed request that is received by the Department prior to the Proposal Due Date and time. Following withdrawal of its Proposal, the Proposer may submit a new Proposal, provided that it is received prior to the Proposal Due Date and time.

The Proposer agrees that its Proposal will remain valid for 120 days following the Proposal Due Date, or such longer period as may be agreed to in writing by the Proposer and the Department.

The Department will not consider any late Proposals or late requests to modify or withdraw Proposals. Proposals and/or modification or withdrawal requests received after the Proposal Due Date and time will be returned to the Proposer.

DB 102-08 SAMPLE APPENDIX A – STANDARD CLAUSES FOR ALL NEW YORK STATE CONTRACTS.

NYSDOT Standard Specification Section 102-08 shall apply.

DB 102-09 VACANT.

DB 102-10 LABOR AND EMPLOYMENT.

NYSDOT Standard Specification §102-10, as amended by Part 5, Special Provisions, shall apply.

DB 102-11 EQUAL EMPLOYMENT OPPORTUNITY REQUIREMENTS.

NYSDOT Standard Specification §102-11 shall apply.

DB 102-12 D/M/WBE PARTICIPATION.

NYSDOT Standard Specification §102-12, as supplemented by ITP 1.9, *D/M/W/BE Participation*, and the following shall apply.

B.1. *Established Goal(s).*

The goal(s) are stated in the RFP Part 1 and remain in effect throughout the life of the contract. In executing the Agreement, the Design Builder declares that it subscribes to the participation goal(s) and shall meet the goal(s) or demonstrate that it could not meet the goal(s) despite its good faith efforts.

G. *D/M/WBE Pre-Award Participation Package.*

After the successful Proposer has identified pre-award commitments (Form LDB Table 1) to D/M/WBEs in EBO, each D/M/WBE shall acknowledge the commitment in EBO within 10 calendar days after designation.

For each D/M/WBE identified on Form LDB Table 1, the Design-Builder shall explain, in writing, the scope of work to be performed by the D/M/WBE and expressly indicate any item or component of the scope which is not completely performed by the D/M/WBE. The value of each work assignment to a D/M/WBE shall have a corresponding NYSDOT work code for Departmental verification of certification and payment. Each D/M/WBE shall be identified for its type of service / material provided (e.g. design, inspection, materials, trucking, construction etc.).

H. *Good Faith Efforts.*

If at the time of the proposal due date, the Proposer has not met the D/M/WBE goal(s), through the combined use of commitments to D/M/WBE firms (Form LDB Table 1) and to work items to be performed by D/M/WBEs during the life of the contract (Form LDB Table 2), it shall submit the AAP10 *D/M/WBE Solicitation Log*, together with other documentation that provides evidence of good faith efforts.

If at the time of the proposal due date, the Proposer has met the D/M/WBE goal(s) solely by commitments to D/M/WBE firms (Form LDB Table 1 only), then submission of evidence of good faith efforts is not required.

L. *Bidder's Compliance with DBE Program Requirements.*

The Design-Builder shall continue to submit updates of their commitments to DBE Firms (as previously committed to on Form LDB Tables 1 & 2) and shall enter them electronically into EBO.

DB 102-13 STATE AND LOCAL SALES TAX EXEMPTION.

NYSDOT Standard Specification §102-13 shall apply.

DB 102-14 FORM OF CONTRACT AND BID BONDS.

NYSDOT Standard Specification §102-14 shall apply.

DB 102-15 SAMPLE FORM OF BID BOND.

NYSDOT Standard Specification §102-15 shall apply.

DB 102-16 VACANT.

DB 102-17 SAMPLE FORM OF ITEMIZED PROPOSAL / JURAT.

NYSDOT Standard Specification §102-17 shall apply.

DB SECTION 103
CONTRACT AWARD AND EXECUTION

DB 103-01 CONTRACT AWARD.
See ITP 6.0.

DB 103-02 EXECUTION OF CONTRACT.
See ITP 6.2.

DB 103-03 CONTRACT BONDS.
NYSDOT Standard Specification §103-03 shall apply.

DB 103-04 CANCELLING AWARD.
NYSDOT Standard Specification §103-04 shall apply.

DB 103-05 PARTNERING.
NYSDOT Standard Specification §103-05 shall apply.

DB 103-06 SAMPLE FORM OF CONTRACT AGREEMENT.

STATE OF NEW YORK
DEPARTMENT OF TRANSPORTATION
DESIGN BUILD
CONTRACT AGREEMENT

Contract
County(ies):

THIS AGREEMENT, made by and between THE PEOPLE OF THE STATE OF NEW YORK, hereinafter referred to as 'State', acting by and through the Department of Transportation, pursuant to the Highway Law, and

☐ an individual / Sole Proprietor conducting business as: _____
☐ a Partnership, consisting of: _____
☐ a Corporation organized and existing under the laws of the State of: _____
☐ a Limited Liability Company (LLC), organized under the laws of the State of: _____
☐ a Joint Venture, consisting of: _____

the location of whose principal office is: _____
hereinafter called the "Design-Builder" or “Proposer” or “Contractor”.

WITNESSETH: That the State and the Design-Builder, for the consideration hereinafter named agree as follows:

ARTICLE 1. WORK TO BE DONE. The Design-Builder shall furnish all the materials, appliances, tools and labor of every kind required, and construct and complete in the most substantial and skillful manner, the design, construction, improvement or reconstruction of the project on or before the completion date(s) described in Article 4, and in accordance with this Contract Agreement

and any Contract Documents specific to the following project:

[Contract Description]
F.A. Project Number:
in the County(ies) listed above which constitutes contract D900054

The Design-Builder further agrees that their Proposal, as defined by the Design Build (DB) Section 100 General Provisions, is not based upon the assumption that any specifications, traffic restrictions, scheduling or phasing/staging requirements will be waived; an extension of Contract Completion Date will be granted; a labor dispensation will be granted; substitution of non-approved products, alternatives or claimed functional equivalents for specified construction materials and methods will be allowed; or any Value Engineering Change Proposals will be approved.

As full compensation for the Work, the Department will pay the Design-Builder a lump sum of $. , which shall equal the total lump sum proposal price for the Project, as agreed to by the Department, less the unused portion of the lump sum price for the Design-Build Extra Work and any deletion of Work. The Contract Amount may be subject to adjustment from time to time by Change Order(s).

In accordance with Section 41 of the New York State Finance Law, this Contract shall be deemed executory only to the extent of money available to the State for the performance of the terms hereof and no liability on account thereof shall be incurred by the State beyond moneys available for the purpose thereof.

ARTICLE 2. COMPONENTS OF THE CONTRACT. This Contract shall incorporate and consist of: (a) this Agreement, which includes Appendix A *Standard Clauses for New York State Contracts*; (b) contract bonds, and (c) Contract Documents.

Contract Documents shall be deemed to include the following, specific to the above-referenced project: Appendix B Federal Requirements (including Attachment 1, FHWA Form 1273; Attachment 2, Federal Prevailing Wage Rate); Appendix C (including Attachment 1, State Prevailing Wage Rates; Attachment 2, Goals for Equal Employment Opportunity (EEO) Participation; Attachment 3, DBE/MBE/WBE/SDVOB Participation Goals (Request for Proposals Part 1); Design Build (DB) Section 100 General Provisions (also referred to as “DB §”) and the referenced sections of the Standard Specifications of the New York State Department of Transportation (Request for Proposals Part 2); the Project Requirements (Request for Proposals Part 3); the Utility Requirements (Request for Proposals Part 4); the Special Provisions (Request for Proposals Part 5); the Directive Plans and Indicative Plans included in the RFP Plans (Request for Proposals Part 6); the Engineering Data (Request for Proposals Part 7); the Special Specifications (Request for Proposals Part 8); and the Design-Builder’s Proposal, including all addenda or appendices thereto (Request for Proposals Part 9); RFP Addenda (Request for Proposals Part 10); the Standard Specifications of the New York State Department of Transportation, Sections 200 through 700, in effect as of the Proposal Due Date, as adopted by the Department); Request for Proposals Instructions to Proposers; any supplemental agreements, amendments, Change Orders, Contract modifications, including those made after execution of the Contract; and all provisions required by law to be inserted in the Contract, whether actually inserted or not. Whenever separate publications are referenced in the Contract Documents it shall mean those, as amended, which are current as of the Proposal Due Date. Those components referenced above, but not attached to this Agreement, shall be deemed incorporated by reference.

The components of the Contract Documents, as amended, are intended to be complementary

and to describe and provide for a complete Project. The following components of the Contract Documents, as amended, complement one another in the following declining order of precedence:

A) Appendix A, *Standard Clauses for New York State Contracts*;

B) Appendix B Federal Requirements, including Attachment 1, FHWA Form 1273; Attachment 2, Federal Prevailing Wage Rate;

C) Appendix C, including Attachment 1, State Prevailing Wage Rates; Attachment 2, Goals for Equal Employment Opportunity (EEO) Participation; Attachment 3, DBE/MBE/WBE/SDVOB Participation Goals;

D) Design Build Contract Agreement (other than Appendix A, B, and C);

E) Request for Proposals Addenda (Request for Proposals Part 10);

F) Request for Proposals Instructions to Proposers;

G) Request for Proposals Parts 3 through 8;

H) Design Build (DB) Section 100 General Provisions (Request for Proposals Part 2);

I) The Standard Specifications of the New York State Department of Transportation, effective on the Proposal Due Date, Sections 200 through 700;

J) Design-Builder's Proposal, including all addenda or appendices thereto (Request for Proposal Part 9) (except as provided below).

However, where the Design-Builder's Proposal presents Work or products of a higher quality than that shown elsewhere in the Contract Documents, and the Department has accepted the proposed change to the Work and products to that of a higher quality, the Design-Builder's Proposal will take precedence for that specific higher quality Work and products, as applicable. Additionally, subject to Part 2 of the RFP, DB Section 100 General Provisions, and DB §104-11 *Alternative Technical Concepts*, where the Design-Builder's Proposal includes an approved Alternative Technical Concept, the Design-Builder's Proposal (including the approved Alternative Technical Concept) will take precedence for that specific Work that is the subject of the approved Alternative Technical Concept.

ARTICLE 3. EXAMINATION OF DOCUMENTS AND SITE. The Design-Builder agrees that before submitting a proposal, the Design-Builder carefully examined the Contract Documents, together with the site of the proposed Work, as well as the surrounding territory of the site, and the Design-Builder is informed regarding all of the conditions affecting the Work to be done and labor and materials to be furnished for the completion of this contract, including the existence of poles, wires, pipes and other facilities and structures of municipal and other public service corporations on, over or under the site, except latent conditions that meet the requirements of DB §104-03 *Differing Site Conditions*, and that the Design-Builder's information was secured by personal and other investigation and research.

ARTICLE 4. DATE OF COMPLETION. The Design-Builder further agrees that it will begin the

Work herein embraced upon receipt of the Notice to Proceed (NTP), unless the consent of the State, in writing, is given to begin at a later date, and that it will prosecute the same so that the Interim Completion Milestone Date(s) shown in Article 4.1, if applicable, shall be achieved, and that the project shall be entirely completed and performed on or before the completion date shown in Article 4.2.

ARTICLE 4.1 Interim Completion Milestone Date(s). The Project's Interim Completion Milestone Date(s) shall be based on the Design-Builder's Proposal, more specifically the number of calendar days past the Notice to Proceed (NTP) date issued by the Department. The number of calendar days past the NTP is found on the Schedule of Contract Durations Form SCD as part of the Design-Builder's Proposal.

No extension beyond the Interim Completion Milestone Date(s) fixed by the terms of this Contract shall be effective unless in writing signed by the State in accordance with the terms of State Finance Law §112. Any extension shall be for such time and terms and conditions as shall be fixed by the State, which may include the assessment of Liquidated Damages and Engineering Charges associated with Quality Assurance of design and construction activities or other expenses.

Notice of application for such extension shall be filed with the Department's Project Manager at least 15 days prior to the Interim Completion Milestone Date(s) fixed by the terms of this Contract.

ARTICLE 4.2 Project Completion Date. The Project's Completion Date shall be based on the Design-Builder's proposal, more specifically the number of calendar days past the Notice to Proceed (NTP) date issued by the Department. The number of calendar days past the NTP is found on the Schedule of Contract Durations Form SCD as part of the Design-Builder's Proposal.

No extension beyond the Project Completion Date fixed by the terms of this Contract shall be effective unless in writing signed by the State. Any extension shall be for such time and terms and conditions as shall be fixed by the State, which may include the assessment of Liquidated Damages and a charge for engineering, inspection, or other expenses actually incurred.

Notice of application for such extension shall be filed with the Department's Project Manager at least 15 days prior to the Project Completion Date fixed by the terms of this Contract.

ARTICLE 5. ALTERATIONS AND OMISSIONS. The said Work shall be performed in accordance with the true intent and meaning of the Contract Documents without any further expense of any nature whatsoever to the State other than the consideration named in this Agreement.

The State reserves the right, at any time during the progress of the Work, to alter the scope of the Work or omit any portion of the Work as it may deem reasonably necessary for the public interest, making allowances for additions and deductions with compensation made in accordance with the Contract, without constituting grounds for any claim by the Contractor for damages or for loss of profits, whether actual or anticipated.

ARTICLE 6. NO COLLUSION OR FRAUD. The Design-Builder hereby agrees that the only person or persons interested as Principal or Principals in the proposal submitted by the Design-Builder for this contract are named therein, and that no person other than those mentioned therein has any interest in the above mentioned proposal or in securing of the award, and that this contract has been secured without any connection with any person or persons other than those named, and that the proposal is in all respects fair and was prepared and the contract was secured without collusion or fraud and that neither any officer nor employee of the New York State

Department of Transportation has or shall have a financial interest in the performance of the contract or in the supplies, Work or business to which it relates, or in any portion of the profits thereof. Legal requirements to which the Contractor must adhere are set forth in State Finance Law §139-a and §139-b.

ARTICLE 7. CONTRACT PAYMENTS. As the Work progresses in accordance with the contract and in a manner that is satisfactory to the State, the State hereby agrees to make payments to the Design-Builder therefore, based upon the proposal attached hereto and made a part hereof, as follows: The State shall once in each month and on such days as it may fix, determine the quantity of Work completed and of material which has actually been put in place in accordance with the terms and conditions of the contract, during the preceding month, and compute the value thereof and pay to the Design-Builder the monies due as provided in §38(7) of the Highway Law. No monthly payment shall be rendered unless the value of the Work completed equals 5% of the contract amount or $1,000, whichever is the lesser. Semi-monthly payments may be rendered provided (a) the value of the Work performed in two successive weeks is more than $50,000 or (b) the Commissioner of Transportation deems it to be in the best interests of the State to do so. The Design-Builder shall not hold any retainage from any Subcontractor.

The Design-Builder agrees to the terms for Periodic Payments described in Part 2, DB §109-01 *Measuring Quantities* and DB §109-06 *Contract Payments*.

ARTICLE 8. NO PAYMENT DUE TO DESIGN-BUILDER'S NON-COMPLIANCE. It is further agreed that so long as any lawful or proper direction concerning the Work or material given by the Commissioner of Transportation, or his/her/their representative, shall remain uncomplied with, the Design-Builder shall not be entitled to have said contract payment processed, nor shall any contract payment(s) be processed for Work performed or material furnished until such lawful or proper direction aforesaid has been fully and satisfactorily complied with.

ARTICLE 9. FINAL ACCEPTANCE OF WORK. When in the opinion of the Regional Director a Design-Builder has fully performed the Work under the contract, the Regional Director shall recommend to the Commissioner of Transportation the acceptance of the Work so completed. If the Commissioner accepts the recommendation of the Regional Director, he/she/they shall thereupon by letter notify the Design-Builder, with copies to other interested parties, of such acceptance. Prior to the Final Acceptance of the Work by the Commissioner or his/her/their designee, the contract Work may be inspected, accepted and approved by other agencies and/or municipalities who will have jurisdiction of the Work after Final Acceptance.

Final Acceptance shall be final and conclusive except for defects not readily ascertainable by the Department, actual or constructive, fraud, gross mistakes amounting to fraud or other errors which the Design-Builder knew or should have known about as well as the Department's rights under any warranty or guarantee. Final Acceptance may be revoked by the Department at any time prior to the Office of the State Comptroller's approval of the Final Agreement (CONR 46) in instances when the Department discovers such defects, mistakes, fraud, or errors in the Work.

ARTICLE 10. FINAL AGREEMENT. After the Final Acceptance of the Work, the Department's Project Manager shall prepare a Final Agreement of the Work performed and the materials placed and shall determine the value of such Work and materials under and according to the terms of the contract. This Final Agreement shall be certified, as to its correctness, by the Department's Project Manager. Upon approval of such Final Agreement by the Regional Director, it shall be submitted to the Commissioner for final approval. The right, however, is hereby reserved to the Commissioner to reject the whole or any portion of the Final Agreement, should the said certificate

of the Department's Project Manager be found or known to be inconsistent with the terms of the agreement or otherwise improperly given. All certificates upon which partial payments may have been made shall be subject to correction in the final certificate or Final Agreement.

ARTICLE 11. RIGHT TO SUSPEND WORK AND CANCEL CONTRACT. It is further mutually agreed that if at any time during the prosecution of the Work the Commissioner of Transportation shall determine that the Work upon the contract is not being performed according to the contract or for the best interest of the State, the execution of the Work by the Design-Builder may be temporarily suspended by the Commissioner of Transportation, who may then proceed with the Work under his/her/their own direction in such manner as will accord with the contract specifications and be for the best interests of the State; or he/she/they may terminate the Design-Builder's employment under the contract while it is in progress, and thereupon proceed with the Work, in affirmance of the contract, by contract negotiated or publicly let, by the use of his/her/their own forces, by calling upon the surety to complete the Work in accordance with the Contract Documents or by a combination of any such methods; or he/she/they may cancel the contract and either re-advertise as provided in Section 38 of the Highway Law, or complete the Work under its own direction in such a manner as will accord with the contract specifications and be for the interests of the State; Any excess in the cost of completing the contract beyond the price for which it was originally awarded shall be charged to and paid by the Design-Builder failing to perform the Work or its surety; all in pursuance of the provisions of Section 40 of the Highway Law.

Whenever the State determines to suspend or stop Work under the contract, a written notice sent by mail to the Design-Builder at its address and to the sureties at their respective addresses, shall be sufficient notice of its action in the premises.

ARTICLE 12. DETERMINATION AS TO VARIANCES. In any case of any ambiguity in the Contract Documents or between any parts of the Contract Documents, the matter must be immediately submitted to the Commissioner, who shall adjust the same, and his/her/their decision in relation thereto shall be final and conclusive upon the parties.

ARTICLE 13. SUCCESSORS AND ASSIGNS. This Agreement shall bind the successors, assigns and representatives of the parties hereto.

ARTICLE 14. INTERNATIONAL BOYCOTT PROHIBITION. In accordance with §139-h of State Finance Law, the Design-Builder hereby promises, asserts and represents that neither the Design-Builder nor any substantially owned or affiliated person, firm, partnership or corporation has participated, is participating or shall participate in an international boycott in violation of the provisions of the United States Export Administration Act of 1969, as amended, or the United States Export Administration Act of 1979, or the effective Regulations of the United States Department of Commerce promulgated under either act.

It is understood further that the State in awarding a contract does so in material reliance upon the promise and representation made by the Design-Builder in the forgoing paragraph and that such contract shall be rendered forfeit and void by the State Comptroller if subsequent to the bid execution date, the Design-Builder or such owned or affiliated person, firm, partnership or corporation has been convicted of a violation of the aforesaid Acts or Regulations or has been found upon final determination of the United States Commerce Department or any other appropriate agency of the United States to have violated such Acts or Regulations.

The Design-Builder agrees to and shall notify the Commissioner of Transportation, the Director of the Contract Management Bureau and State Expenditures in the Office of the State Comptroller of any such conviction or final determination of violation within five (5) days thereof.

ARTICLE 15. WRITTEN NOTICES.

1. All notices permitted or required hereunder shall be in writing and shall be transmitted either:
   a. via certified or registered United States mail, return receipt requested;
   b. by facsimile transmission;
   c. by personal delivery;
   d. by expedited delivery service; or
   e. by e-mail.

   Such notices shall be addressed to the individuals or titles named in the Contract Documents, or which are designated by the Design-Builder or the State at the pre-construction meeting, or which are designated by the State or the Design-Builder from time to time during the course of the Contract pursuant to Paragraph 3 herein.

2. Any such notice shall be deemed to have been given either at the time of personal delivery or, in the case of expedited delivery service or certified or registered United States mail, as of the date of first attempted delivery at the address and in the manner provided herein, or in the case of facsimile transmission or email, upon receipt.

3. The parties may, from time to time, specify any new or different address in the United States as their address for purpose of receiving notice under this Agreement by giving fifteen (15) days written notice to the other party sent in accordance herewith. The parties agree to mutually designate individuals as their respective representatives for the purposes of receiving notices under this Agreement. Additional individuals may be designated in writing by the parties for purposes of implementation and administration/billing, resolving issues and problems and/or for dispute resolution.

4. The following information is the contact information for the Department's Project Manager. The Department's Project Manager will serve as the main point of contact for the Design-Builder. All notices should be sent to the Department's Project Manager at the following address:

   Name: _____
   Address: _____
   Telephone number: _____
   Email: _____

5. The following information is the contact information for the Design-Builder's Project Manager. The Design-Builder's Project Manager will serve as the main point of contact for the State. All notices should be sent to the Design-Builder's Project Manager at the following address:

   Name: _____
   Address: _____
   Telephone number: _____
   Email: _____

ARTICLE 16. DESIGN-BUILDER RECEIPT OF PAYMENT. The Design-Builder shall provide complete and accurate information and supporting documentation required by the Contract, the Agency and the Office of the State Comptroller (OSC). Payment will only be rendered electronically, unless payment by paper check is expressly authorized by the Commissioner, in the Commissioner's sole discretion, due to extenuating circumstances. Such electronic payment will be made in accordance with ordinary State procedures and practices from the Statewide Financial System (SFS). The Design-Builder shall comply with OSC procedures to authorize

electronic payments. A Design-Builder that has not previously performed Work for New York State shall complete a Substitute Form W9 for processing by the Department in order to obtain an SFS Vendor ID. After obtaining an SFS Vendor ID, the Design-Builder will receive an email from SFS with information which includes a link to the payment portal to track and manage payments. For questions regarding electronic payments, the Design-Builder should contact SFS at (518) 457-7717 or (855) 233-8363. The Design-Builder will not receive payment under this Contract if it does not comply with the State Comptroller's electronic payment procedures, except where the Commissioner has expressly authorized payment by paper check as set forth above.

ARTICLE 17. SUPPLEMENTAL TITLE VI PROVISIONS (CIVIL RIGHTS ACT). During the performance of this contract, the Design-Builder, for itself, its assignees, and successors in interest (herein after referred to as the "Design-Builder") agree as follows:

(1) Compliance with Regulations. The Design-Builder shall comply with the Regulation relative to nondiscrimination in federally-assisted programs of the Department of Transportation of the United States 49 Code of Federal Regulations, Part 21, as they may be amended from time to time, (hereinafter referred to as the Regulations), which are herein incorporated by reference and made a part of this contract.

(2) Nondiscrimination. The Design-Builder, with regard to the Work performed by it during the contract, shall not discriminate on the grounds of race, color, national origin, sex, sexual orientation, gender identity, age, and disability/handicap, or income status in the selection and retention of Subcontractors, including procurements of materials and leases of equipment. The Design-Builder shall not participate either directly or indirectly in the discrimination prohibited by 49 CFR 21.5, including employment practices when the contract covers a program set forth in 49 CFR 21, Appendix B.

(3) Solicitations for Subcontractors, Including Procurements of Materials and Equipment. In all solicitations either by competitive bidding or negotiation made by the Design-Builder for Work to be performed under a subcontract, including procurements of materials or leases of equipment, each potential Subcontractor or supplier shall be notified by the Design-Builder of the Design-Builder's obligations under this contract and 49 CFR 21 relative to nondiscrimination on the grounds of race, color, or national origin, sex, sexual orientation, gender identity, age, and disability/handicap.

(4) Information and Reports. The Design-Builder shall provide all information and reports required by the Regulations or directives issued pursuant thereto, and shall permit access to its books, records, accounts, other sources of information and its facilities as may be determined by NYSDOT or the FHWA to be pertinent to ascertain compliance with such Regulations, orders and instructions. Where any information required of a contractor is in the exclusive possession of another who fails or refuses to furnish this information the Design-Builder shall so certify to NYSDOT, or the FHWA as appropriate, and shall set forth what efforts it has made to obtain the information.

(5) Sanctions for Noncompliance. In the event of the Design-Builder's noncompliance with the nondiscrimination provisions of this contract, NYSDOT shall impose such contract sanctions as it or the FHWA may determine to be appropriate, including, but not limited to: (a.) withholding of payments to the Design-Builder under the contract until the Design-Builder complies, and/or (b.) cancellation, termination or suspension of the contract, in whole or in part.

(6) Incorporation of Provisions: The Design-Builder shall include the provisions of paragraphs (1) through (6) in every subcontract, including procurements of materials and leases of equipment, unless exempt by the Regulations, or directives issued pursuant thereto.

The Design-Builder shall take such action with respect to any subcontract or procurement as NYSDOT or the FHWA may direct as a means of enforcing such provisions, including sanctions for noncompliance, provided, however, that in the event a Design-Builder becomes involved in, or is threatened with, litigation by a subcontractor or supplier as a result of such direction, the Design-Builder may request NYSDOT to enter into such litigation to protect the interests of NYSDOT; and, in addition, the Design-Builder may request the United States to enter into such litigation to protect the interests of the United States.

ARTICLE 18. CONFLICTS OF INTEREST. Included in paragraph 6 of the JURAT submitted with the Proposal, the Design-Builder has provided a *Bidder Assurance of No Conflict of Interest or Detrimental Effect*, signed by an authorized executive or legal representative attesting that the Design-Builder's performance of the services does not and will not create a conflict of interest with, nor position the Design-Builder to breach any other contract currently in force with the State of New York, that the Design-Builder will not act in any manner that is detrimental to any State project on which the Design-Builder is rendering services.

The Design-Builder hereby reaffirms the attestations made in its proposal and covenants and represents that there is and shall be no actual or potential conflict of interest that could prevent the Design-Builder's satisfactory or ethical performance of duties required to be performed pursuant to the terms of this Agreement. The Design-Builder shall have a duty to notify the Department immediately of any actual or potential conflicts of interest.

In conjunction with any subcontract under this Agreement, the Design-Builder shall obtain and deliver to the Department, prior to entering into a subcontract, a *Proposer Assurance of No Conflict of Interest or Detrimental Effect* form, signed by an authorized executive or legal representative of the subcontractor. The Design-Builder shall also require in any subcontracting agreement that the subcontractor, in conjunction with any further subcontracting agreement, obtain and deliver to the Department a signed and completed Vendor Assurance of No Conflict of Interest or Detrimental Effect form for each of its subcontractors prior to entering into a subcontract.

The Department and the Design-Builder recognize that conflicts may occur in the future because the Design-Builder may have existing, or establish new, relationships. The Department will review the nature of any relationships and reserves the right to terminate this Agreement for any reason, or for cause, if, in the judgment of the Department, a real or potential conflict of interest cannot be cured.

As further specified in 23 CFR 1.33 and 23 CFR 636.116, the Design-Builder hereby agrees that this Contract has been secured without any apparent or real conflict of interest that would (1) compromise the integrity and fairness of the procurement process, or (2) create circumstances where the Design-Builder obtained or appeared to obtain an unfair competitive advantage, or (3) compromise the interests of the Department and the People of the State of New York.

The Design-Builder further agrees that the Contract was secured without collusion or fraud and that neither any officer nor employee of the Department of Transportation has or shall have a financial interest in the performance of the Contract or in the supplies, Work or business to which it relates, or in any portion of the profits thereof. Legal requirements to which the Contractor must adhere are set forth in State Finance Law §139-a and §139-b.

ARTICLE 19. ETHICS REQUIREMENTS. The Design-Builder and its Subcontractors shall not engage any person who is, or has been at any time, in the employ of the State to perform services in violation of the provisions of the New York Public Officers Law, other laws applicable to the service of State employees, and the rules, regulations, opinions, guidelines or policies promulgated or issued by the New York State Joint Commission on Public Ethics, or its

predecessors (collectively, the "Ethics Requirements"). The Design-Builder certifies that all of its employees and those of its Subcontractors who are former employees of the State and who are assigned to perform services under this Contract shall be assigned in accordance with all Ethics Requirements. During the Term, no person who is employed by the Design-Builder or its Subcontractors and who is disqualified from providing services under this Contract pursuant to any Ethics Requirements may share in any net revenues of the Design-Builder or its Subcontractors derived from this Contract. The Design-Builder shall identify and provide the State with notice of those employees of the Design-Builder and its Subcontractors who are former employees of the State that will be assigned to perform services under this Contract, and make sure that such employees comply with all applicable laws and prohibitions. The State may request that the Design-Builder provide it with whatever information the State deems appropriate about each such person's engagement, work cooperatively with the State to solicit advice from the New York State Joint Commission on Public Ethics, and, if deemed appropriate by the State, instruct any such person to seek the opinion of the New York State Joint Commission on Public Ethics. The State shall have the right to withdraw or withhold approval of any Subcontractor if utilizing such Subcontractor for any Work performed hereunder would be in conflict with any of the Ethics Requirements. The State shall have the right to terminate this Contract at any time if any Work performed hereunder is in conflict with any of the Ethics Requirements.

The Design-Builder shall establish a practice of obtaining a list of all staff proposed by vendors and reviewing it to identify any former State employees. If a former State employee is identified, the Design-Builder shall review their employment history to ensure their participation is appropriate and allowable under the Public Officers Law. The Proposer shall disclose any existing or contemplated relationship with any other person or entity, including relationships with any member, shareholders of 5% or more, parent, subsidiary, or affiliated firm, which would constitute an actual or potential conflict of interest or appearance of impropriety, relating to other clients/customers of the Respondent or former officers and employees of the Agencies and their Affiliates, in connection with your rendering services enumerated in this solicitation. If a conflict does or might exist, please describe how your firm would eliminate or prevent it. Indicate what procedures will be followed to detect, notify the Agencies of, and resolve any such conflicts.

The Proposer shall disclose whether it, or any of its members, shareholders of 5% or more, parents, affiliates, subsidiaries, have been the subject of any investigation or disciplinary action by the New York State Commission on Public Integrity or its predecessor State entities (collectively, "Commission"), and if so, a brief description must be included indicating how any matter before the Commission was resolved or whether it remains unresolved.

ARTICLE 20. LICENSING. In addition to any required licensure or permit specified in the Contract Documents, any professional services regulated by Articles 145, 147, and 148 of the New York State Education Law performed in furtherance of this Contract shall be performed by a licensed professional in accordance with such laws.

ARTICLE 21. DBE/MBE/WBE/SDVOB GOALS. DBE/MBE/WBE/SDVOB refers to a Disadvantaged Business Enterprise (DBE), Minority Business Enterprise (MBE), Women's Business Enterprise (WBE), or Service-Disabled Veteran-Owned Business (SDVOB). The DBE Program applies to Federal-Aid contracts and the MBE Program, WBE Program and SDVOB Program applies to Non-Federal-Aid contracts. The DBE/MBE/WBE/SDVOB goal(s) for this Contract for design/construction is shown in RFP Part 1 Appendix C Attachment 3. The Design-Builder must make a good faith effort to meet the goal(s). DB §102-12 sets forth requirements related to DBE/MBE/WBE/SDVOB.

ARTICLE 22. INDEMNIFICATION. The Design-Builder shall be responsible for all damage to life and property due to negligent or otherwise tortious acts, errors, or omissions of the Design-Builder in connection with its services under the Contract Documents. To the fullest extent permitted by law: (a) the Design-Builder shall indemnify, hold harmless, and release the Department and/or the State of New York, any municipality in which the Work is being performed; and/or any public benefit corporation, railroad or public utility whose property or facilities are affected by the Work from suits, claims, actions, damages, and costs of every name and description resulting from the Work under this Contract and until the Final Acceptance thereof; (b) with respect to personal injury or property damage occurring after Final Acceptance and not covered by the indemnity in clause Article 22(a), the Design-Builder shall indemnify, hold harmless, and release the Department and/or the State of New York, any municipality in which the Work is being performed; and/or any public benefit corporation, railroad or public utility from suits, claims, actions, damages, and costs of every name and description resulting from negligent or otherwise tortious acts, errors, or omissions of the Design-Builder in connection with its services under the Contract Documents; and (c) the Design-Builder shall indemnify, hold harmless, and release the Department's Inspector from suits, claims, actions, damages, and costs involving personal injury and property damage resulting from the Design-Builder's Work under the Contract during its prosecution and until the Final Acceptance thereof. The Department may retain such monies from the amount due to the Design-Builder as may be necessary to satisfy any claim for damages recovered against the Department. any municipality in which the Work is being performed, any public benefit corporation, railroad, or public utility whose property or facilities are affected by the Work, or the Department's Inspectors. The Design-Builder's obligation under this paragraph shall not be deemed waived by the failure of the Department to retain the whole or any part of such monies due the Design-Builder, or where such suit, action, damages, and/or costs have not been resolved or determined prior to release of any monies to the Design-Builder under the Contract. Such obligation shall not be deemed limited or discharged by the enumeration or procurement of any insurance for liability for damages imposed by law upon the Design-Builder, Subcontractors, the Department, the State, any municipality in which the Work is being performed, any public benefit corporation, railroad, or public utility whose property or facilities are affected by the Work, or any Department consultants or contractors working relative to the Project.

The Design-Builder has the obligation, at its own expense, for the defense of any action or proceeding which may be brought against the parties specified in this Article. This obligation shall include the cost of attorney fees, disbursements, costs, and other expenses incurred in connection with such action or proceeding. The provisions of this Article shall survive the expiration or termination of the Contract.

Without limiting the generality of the foregoing, Design-Builder's obligation to indemnify, save harmless and release the Persons identified in this article specifically includes any suits, claims, actions, damages, and costs of every name and description resulting from any spill or release or threatened spill or release of a Hazardous Material (i) attributable to the negligence, willful misconduct or breach of contract by Design-Builder, its Subcontractors or agents, or (ii) which was brought onto the Site by Design-Builder or any of its Subcontractors or agents.

Notwithstanding the foregoing, the Department reserves the right to join such action, at its sole expense, when it determines there is an issue involving a significant public interest.

Such obligation does not extend to those suits, actions, damages, and costs of every name which arise out of the sole negligence of the Department, the State of New York, any municipality in which the Work is being performed, any public benefit corporation, railroad, or public utility whose property or facilities are affected by the Work of the Project, or any Department consultants or contractors working relative to the Project, their agents, or their employees.

ARTICLE 23. LIQUIDATED DAMAGES. Time is an essential element of the Contract, and the Work shall be pursued vigorously to completion. The public is subject to detriment and inconvenience when full use of infrastructure cannot be made because of an incomplete Project. The Design-Builder agrees to the Liquidated Damages provisions in Request for Proposals Part 5 – Special Provisions, and DB §108-03 *Failure to Complete Work on Time*.

ARTICLE 24. INDEPENDENT CONTRACTOR. The Design-Builder agrees to the terms as an Independent Contractor described in DB §107-01 *Laws, Rules, Regulations and Permits.*

ARTICLE 25. VENDOR RESPONSIBILITY.
The Design-Builder shall comply with Vendor Responsibility requirements as set forth in the DB §105-05 *Vendor Responsibility*.

ARTICLE 26 INSURANCE.
The Design-Builder shall comply with the insurance requirements set forth in DB §107-06 *Insurance*.

IN WITNESS WHEREOF, this Agreement has been executed by the State, acting by and through the Commissioner of Transportation, and the Design-Builder or his appointed representative, who has executed this Agreement on the day and year written below.

[Design-Builder Firm Name]

_____
(Printed Name, Title) Signature

Agency Certification(s)
The New York State Department of Transportation has undertaken an affirmative review of the proposed Design-Builder's responsibility in accordance with the standards outlined Office of the State Comptroller's *Guide to Financial Operations*, Chapter XI.16 and based upon such review, has reasonable assurance that the proposed Design-Builder is responsible.

All information provided with respect to the requirements contained in State Finance Laws 139J and 139K is complete, true and accurate. All requirements for State Finance Laws 139J and 139K have been met and the appropriate documentation is attached.

In addition to the acceptance of this contract, I also certify that original copies of this signature page will be attached to all other exact copies of this contract.

Department of Transportation

Recommended by: Approved by:

_____
Date

ATTORNEY GENERAL: FOR STATE COMPTROLLER:

Approved _____ Approved _____

THIS CONTRACT IS NOT TO BE EXECUTED OR BECOME EFFECTIVE UNTIL IT SHALL FIRST BE APPROVED BY THE STATE COMPTROLLER AND FILED IN HIS OFFICE. (Section 112, State Finance Law.)

(Acknowledgment of Design-Builder, if a Joint Venture)
A Joint Venture shall include a separate, signed and notarized copy of the acknowledgment page for each party in the Joint Venture.

(Acknowledgment of individual Design-Builder)
STATE OF NEW YORK _____ ss.:
COUNTY OF _____

On this _____ day of _____ 20 _____, before me personally came _____ to me known and known to me to be the person described in and who executed the foregoing instrument and acknowledged that he/she/they executed the same.

_____
Notary Public

(Acknowledgment of co-partnership Design-Builder)
STATE OF NEW YORK _____ ss.:
COUNTY OF _____

On this _____ day of _____ 20 _____, before me personally came _____ to me known and known to me to be the person who executed the foregoing instrument, who, being duly sworn by me, did for himself/herself/themself depose and say that he/she/they is a member of the firm of _____, consisting of himself/herself/themself and _____ and that he/she/they executed the foregoing instrument and that he/she/they had authority to sign same, and he/she/they did duly acknowledge to me that he/she/they executed the same as the act and deed of said firm for the uses and purposes mentioned therein.

_____
Notary Public

(Acknowledgment of Design-Builder, if a corporation)
STATE OF NEW YORK _____ ss.:
COUNTY OF _____

On this _____ day of _____ 20 _____, before me personally came _____ to me known, and known to me to be the person who being duly sworn, did depose and say that he/she/they resides in _____ that he/she/they is the _____ of _____ the

corporation described in and which executed the foregoing instrument; and that he/she/they signed his/her/their name thereto by order of the Board of Directors of said Corporation.

_____
Notary Public

(Acknowledgment of Design-Builder, if a limited liability company)
STATE OF NEW YORK _____ ss.: _____
COUNTY OF _____

On this _____ day of _____ 20_____, before me personally came _____ to me known, and known to me to be the person who being duly sworn, did depose and say that he/she/they resides in _____; that he/she/they is the duly authorized member of the limited liability company described in and which executed the foregoing instrument; and that he/she/they executed the foregoing instrument on behalf of the limited liability company for the purposes set forth therein as the act and deed of said limited liability company.

_____

_____
Notary Public

[Appendix A, Standard Clauses for All NYS Contracts inserted here]

~~**STATE OF NEW YORK**~~
~~**DEPARTMENT OF TRANSPORTATION**~~
~~**DB AGREEMENT**~~

~~Contract~~
~~County(ies):~~

~~THIS AGREEMENT, made by and between THE PEOPLE OF THE STATE OF NEW YORK, hereinafter referred to as 'State', acting by and through the Department of Transportation, pursuant to the Highway Law, and~~

~~☐ an individual conducting business as: _____~~
~~☐ a partnership, consisting of: _____~~
~~☐ a corporation organized and existing under the laws of the State of: _____~~
~~☐ a limited liability company (LLC), organized under the laws of the State of: _____~~
~~☐ a joint venture, consisting of: _____~~
~~the location of whose principal office is: _____~~
~~hereinafter called the "Design-Builder".~~

~~WITNESSETH: That the State and the Design-Builder, for the consideration hereinafter named agree as follows:~~

~~**ARTICLE 1. WORK TO BE DONE.** The Design-Builder shall (a) furnish all the materials, appliances, tools and labor of every kind required, and construct and complete in the most substantial and skillful manner, the design, construction, improvement or reconstruction of the project on or before the completion date(s) described in Article 4, and in accordance with the Contract Documents entitled:~~

~~[Contract Description]~~
~~F.A. Project Number:~~
~~in the County(ies) listed above which constitutes contract D900054~~

~~in accordance with DB Section 100 and the "Standard Specifications" of the New York State Department of Transportation, which contain the information for proposers; contract agreement, and bonds; and (b) do everything required by the Contract and/or Contract Documents as defined herein.~~

~~The Design-Builder further agrees their price proposal is not based upon the assumption that any specifications, traffic restrictions, scheduling or phasing/staging requirements will be waived; an extension of Contract Completion Date will be granted; a labor dispensation will be granted; substitution of non-approved products, alternatives or claimed functional equivalents for specified construction materials and methods will be allowed; or any Value Engineering Change Proposals will be approved.~~

~~As full compensation for the Work, the Department will pay the Design-Builder a lump sum of $_____.__, which shall equal the total lump sum proposal price for the Project, as agreed to by the Department, less the unused portion of the lump sum price for the Design-Build – Extra Work (Item 800.0400NN15). See also DB §109-05 B. The Contract Amount may be subject to adjustment from time to time by Change Orders.~~

~~In accordance with Section 41 of the New York State Finance Law, this Contract shall be deemed executory only to the extent of money available to the State for the performance of the terms hereof and no liability on account thereof shall be incurred by the State beyond moneys available for the purpose thereof.~~

~~**ARTICLE 2. DOCUMENTS FORMING THE CONTRACT.** The Contract (and Contract Documents) shall be deemed to include the executed DB Agreement (Appendix A *Standard Clauses for New York State Contracts,* Appendix B Federal Requirements, and Appendix C State Prevailing Wage Rates (RFP Part 1); DB Section 100 General Provisions and the referenced sections of the Standard Specifications of the New York State Department of Transportation, Section 100, effective at the time of the Proposal Due Date, as adopted by the Department (RFP Part 2); the Project Requirements (RFP Part 3); the Utility Requirements (RFP Part 4); the Special Provisions (RFP Part 5); the Directive Plans included in the RFP Plans (RFP Part 6); the Engineering Data (RFP Part 7); the Special Specifications (Part 8 of RFP); and the Design-Builder's Proposal, including all addenda or appendices thereto (RFP Part 9); RFP Addenda (RFP Part 10); the Standard Specifications of the New York State Department of Transportation, Sections 200 through 700, in effect as of the Proposal Due Date, as adopted by the Department, except to the extent that they are modified by the Special Provisions (RFP Part 5); RFP Instructions to Proposers; any supplemental agreements, amendments, Orders on Contract, Contract modifications, including those made after execution of the Contract; and all provisions required by law to be inserted in the Contract, whether actually inserted or not. Whenever separate publications are referenced in the Contract Documents it shall mean those, as amended, which are current as of the Proposal Due Date.~~

~~The components of the Contract Documents are intended to be complementary and to describe and provide for a complete Project. The following components of the Contract Documents complement one another in the following declining order of precedence:~~

~~A. Appendix A, Standard Clauses for New York State Contracts;~~
~~B. Appendix B Federal Requirements (including Attachment 1, FHWA Form 1273; Attachment 2, Federal Prevailing Wage Rate; Attachment 3, Goals for Equal Employment Opportunity (EEO) Participation; Attachment 4, Goals for Disadvantaged/Minority/Women's Business Enterprise (D/M/WBE) Participation; and Attachment 5, Supplemental Title VI Provisions (Civil Rights Act)); and Attachment 6, Cargo Preference Act Requirements.~~
~~C. Appendix C State Prevailing Wage Rates;~~
~~D. DB Agreement (other than Appendix A, B, and C);~~
~~E. Parts 3 through 8 of RFP and Part 10 of RFP;~~
~~F. DB Section 100 General Provisions (Part 2 of RFP);~~
~~G. The Standard Specifications of the New York State Department of Transportation, current on the Proposal Due Date, Sections 200 through 700;~~
~~H. The RFP Instructions to Proposers; any other RFP Addenda; and~~
~~I. Design-Builder's Proposal, including all addenda or appendices thereto (Part 9) (except as provided below).~~

~~However, where the Design-Builder's Proposal presents Work or products of a higher quality than that shown elsewhere in the Contract Documents, and the Department has accepted the proposed change to the Work and products to that of a higher quality, the Design-Builder's Proposal will take precedence for that specific higher quality Work and products, as applicable. Additionally, subject to Part 2, DB Section 100 General Provisions, DB Section 104-11, where the Design-Builder's Proposal includes an approved Alternative Technical Concept, the Design-Builder's Proposal (including the approved Alternative Technical Concept) will take precedence for that specific Work that is the subject of the approved Alternative Technical Concept.~~

~~**ARTICLE 3. EXAMINATION OF DOCUMENTS AND SITE.** The Design-Builder agrees that before making its proposal it carefully examined the contract documents, together with the site of the proposed Work, as well as its surrounding territory, and is informed regarding all of the conditions affecting the Work to be done and labor and materials to be furnished for the completion of this contract, including the existence of poles, wires, pipes and other facilities and structures of municipal and other public service corporations on, over or under the site, except latent conditions that meet the requirements of DB §104-03 *Differing Site Conditions*, and that its information was secured by personal and other investigation and research.~~

~~**ARTICLE 4. DATE OF COMPLETION.** The Design-Builder further agrees that it will begin the Work herein embraced upon receipt of the Notice to Proceed (NTP), unless the consent of the State, in writing, is given to begin at a later date, and that it will prosecute the same so that the Interim Completion Milestone Date(s) shown Article 4.1, if applicable, shall be achieved, and that the project shall be entirely completed and performed on or before the completion date shown in Article 4.2.~~

~~**Article 4.1 Interim Completion Milestone Date(s).** The Project's Interim Completion Milestone Date shall be based on the Design-Builder's Proposal, more specifically the number of calendar days past the Notice to Proceed (NTP) date issued by the Department. The number of calendar days past the NTP is found on the Schedule of Contract Durations form SCD as part of the Design-Builder's Proposal.~~

~~No extension beyond the Interim Completion Milestone Date(s) fixed by the terms of this Contract shall be effective unless in writing signed by the State in accordance with the terms of State Finance Law 112. Any extension shall be for such time and terms and conditions as shall be fixed by the State, which may include the assessment of liquidated damages and a charge for engineering charges associated with Quality Assurance of design and construction activities or other expenses.~~

~~Notice of application for such extension shall be filed with the Department's Project Manager at least 15 days prior to the Interim Completion Milestone Date(s) fixed by the terms of this Contract.~~

~~**Article 4.2 Project Completion Date.** The Project's Completion Date shall be based on the Design-Builder's proposal, more specifically the number of calendar days past the Notice to Proceed (NTP) date issued by the Department. The number of calendar days past the NTP is found on the Schedule of Contract Durations form SCD as part of the Design-Builder's Proposal.~~

~~No extension beyond the Project Completion Date fixed by the terms of this Contract shall be effective unless in writing signed by the State. Any extension shall be for such time and terms and conditions as shall be fixed by the State, which may include the assessment of liquidated damages and a charge for engineering, inspection, or other expenses.~~

~~Notice of application for such extension shall be filed with the Department's Project Manager at least 15 days prior to the Project Completion Date fixed by the terms of this Contract.~~

~~**ARTICLE 5. ALTERATIONS AND OMISSIONS.** The said Work shall be performed in accordance with the true intent and meaning of the contract documents without any further expense of any nature whatsoever to the State other than the consideration named in this agreement.~~

~~The State reserves the right, at any time during the progress of the Work, to alter the Scope of Work or omit any portion of the Work as it may deem reasonably necessary for the public interest- making allowances for additions and deductions with compensation made in accordance with the contract. This right includes making allowances for additions and deductions, with compensation made in accordance with the Contract Documents for the altered or omitted Work.~~

~~**ARTICLE 6. NO COLLUSION OR FRAUD.** The Design-Builder hereby agrees that the only person or persons interested as principal or principals in the proposal submitted by the Design-Builder for this contract are named therein, and that no person other than those mentioned therein has any interest in the above mentioned proposal or in securing of the award, and that this contract has been secured without any connection with any person or persons other than those named, and that the proposal is in all respects fair and was prepared and the contract was secured without collusion or fraud and that neither any officer nor employee of the State Department of Transportation has or shall have a financial interest in the performance of the contract or in the supplies, Work or business to which it relates, or in any portion of the profits thereof. (See also §139-a and §139-b of the State Finance Law referred to in the Standard Specifications which are made a part of this contract by reference.)~~

~~**ARTICLE 7. CONTRACT PAYMENTS.** As the Work progresses in accordance with the contract and in a manner that is satisfactory to the State, the State hereby agrees to make payments to the Design-Builder therefore, based upon the proposal attached hereto and made a part hereof, as follows: The State shall once in each month and on such days as it may fix, determine the quantity of work completed and of material which has actually been put in place in accordance with the terms and conditions of the contract, during the preceding month, and compute the value thereof and pay to the Design-Builder the monies due as provided in §38(7) of the Highway Law. No monthly payment shall be rendered unless the value of the work completed equals 5% of the contract amount or $1,000, whichever is the lesser. Semimonthly payments may be rendered provided (a) the value of the work performed in two successive weeks is more than $50,000 or (b) the Commissioner of Transportation deems it to be in the best interests of the State to do so. The Design-Builder shall not hold any retainage from any Subcontractor.~~

~~The Design-Builder agrees to the terms for Periodic Payments described in Part 2, DB Sections 109-01, 109-06.~~

~~**ARTICLE 8. NO PAYMENT DUE TO DESIGN-BUILDER'S NON-COMPLIANCE.** It is further agreed that so long as any lawful or proper direction concerning the Work or material given by the Commissioner of Transportation, or his/her representative, shall remain uncomplied with, the Design-Builder shall not be entitled to have said contract payment processed, nor shall any contract payment(s) be processed for work done or material furnished until such lawful or proper direction aforesaid has been fully and satisfactorily complied with.~~

~~**ARTICLE 9. FINAL ACCEPTANCE OF WORK.** When in the opinion of the Regional Director a Design-Builder has fully performed the Work under the contract, the Regional Director shall recommend to the Commissioner of Transportation the acceptance of the Work so completed. If the Commissioner accepts the recommendation of the Regional Director, he/she shall thereupon by letter notify the Design-Builder, with copies to other interested parties, of such acceptance. Prior to the final acceptance of the Work by the Commissioner or his/her designee, the contract work may be inspected, accepted and approved by other agencies and/or municipalities who will have jurisdiction of the Work after final acceptance.~~

~~Final acceptance shall be final and conclusive except for defects not readily ascertainable by the Department, actual or constructive, fraud, gross mistakes amounting to fraud or other errors which the Design-Builder knew or should have known about as well as the Department's rights under any warranty or guarantee. Final acceptance may be revoked by the Department at any time prior to the issuance of the final check by the Comptroller upon the Department's discovery of such defects, mistakes, fraud or errors in the work.~~

~~**ARTICLE 10. FINAL PAYMENT.** After the final acceptance of the Work, the Department's Project Manager shall prepare a final agreement of the Work performed and the materials placed and shall determine the value of such work and materials under and according to the terms of the contract. This final agreement shall be certified, as to its correctness, by the Department's Project Manager. Upon approval of such final agreement by the Regional Director, it shall be submitted to the Commissioner for final approval. The right, however, is hereby reserved to the Commissioner to reject the whole or any portion of the final agreement, should the said certificate of the Department's Project Manager be found or known to be inconsistent with the terms of the agreement or otherwise improperly given. All certificates upon which partial payments may have been made shall be subject to~~

~~correction in the final certificate or final agreement.~~

~~**ARTICLE 11. RIGHT TO SUSPEND WORK AND CANCEL CONTRACT.** It is further mutually agreed that if at any time during the prosecution of the Work the Commissioner of Transportation shall determine that the Work upon the contract is not being performed according to the contract or for the best interest of the State, the execution of the Work by the Design-Builder may be temporarily suspended by the Commissioner of Transportation, who may then proceed with the work under his/her own direction in such manner as will accord with the contract specifications and be for the best interests of the State; or he/she may terminate the Design-Builder's employment under the contract while it is in progress, and thereupon proceed with the Work, in affirmance of the contract, by contract negotiated or publicly let, by the use of his/her own forces, by calling upon the surety to complete the Work in accordance with the contract documents or by a combination of any such methods; or he/she may cancel the contract and either readvertise as provided in Section 38 of the Highway Law, or complete the Work under its own direction in such a manner as will accord with the contract specifications and be for the interests of the State; Any excess in the cost of completing the contract beyond the price for which it was originally awarded shall be charged to and paid by the Design-Builder failing to perform the Work or its surety; all in pursuance of the provisions of Section 40 of the Highway Law.~~

~~In the event of suspension or termination the Design-Builder shall be paid its costs, including contract close-out costs, and profit on work satisfactorily performed and project design costs actually incurred up to the time of termination, less an amount necessary to satisfy any claims, liens or judgments against the Design-Builder. The Design-Builder shall promptly submit its termination claim. The Design-Builder will only be paid the contract price for materials delivered and accepted, or services performed in accordance with the manner or performance set forth in this contract, less an amount necessary to satisfy any claims, liens or judgments against the Design-Builder.~~

~~Whenever the State determines to suspend or stop work under the contract, a written notice sent by mail to the Design-Builder at its address and to the sureties at their respective addresses, shall be sufficient notice of its action in the premises.~~

~~**ARTICLE 12. DETERMINATION AS TO VARIANCES.** In any case of any ambiguity in the Contract Documents or between any parts of the Contract Documents, the matter must be immediately submitted to the Department's Project Manager, who shall adjust the same, and his/her decision in relation thereto shall be final and conclusive upon the parties.~~

~~**ARTICLE 13. SUCCESSORS AND ASSIGNS.** This agreement shall bind the successors, assigns and representatives of the parties hereto.~~

~~**ARTICLE 14. INTERNATIONAL BOYCOTT PROHIBITION.** In accordance with §139-h of State Finance Law, the Design-Builder hereby promises, asserts and represents that neither the Design-Builder nor any substantially owned or affiliated person, firm, partnership or corporation has participated, is participating or shall participate in an international boycott in violation of the provisions of the United States Export Administration Act of 1969, as amended, or the United States Export Administration Act of 1979, or the effective Regulations of the United States Department of Commerce promulgated under either act.~~

~~It is understood further that the State in awarding a contract does so in material reliance upon the promise and representation made by the Design-Builder in the forgoing paragraph and that such contract shall be rendered forfeit and void by the State Comptroller if subsequent to the bid execution date, the Design-Builder or such owned or affiliated person, firm, partnership or corporation has been convicted of a violation of the aforesaid Acts or Regulations or has been found upon final determination of the United States Commerce Department or any other appropriate agency of the United States to have violated such Acts or Regulations.~~

~~The Design-Builder agrees to and shall notify the Commissioner of Transportation, the Director of the Contract Management Bureau and State Expenditures in the Office of the State Comptroller of any such conviction or final determination of violation within five (5) days thereof.~~

~~**ARTICLE 15. WRITTEN NOTICES.**~~

~~1. All notices permitted or required hereunder shall be in writing and shall be transmitted either:~~

~~a. via certified or registered United States mail, return receipt requested;~~

~~b. by facsimile transmission;~~

~~c. by personal delivery;~~

~~d. by expedited delivery service; or~~

~~e. by e-mail.~~

~~Such notices shall be addressed to the individuals or titles named in the contract documents, or which are designated by the Design-Builder or the State at the pre-construction meeting, or which are designated by the State or the Design-Builder from time to time during the course of the Contract pursuant to Paragraph 3 herein.~~

~~2. Any such notice shall be deemed to have been given either at the time of personal delivery or, in the case of expedited delivery service or certified or registered United States mail, as of the date of first attempted delivery at the address and in the manner provided herein, or in the case of facsimile transmission or email, upon receipt.~~

~~3. The parties may, from time to time, specify any new or different address in the United States as their address for purpose of receiving notice under this Agreement by giving fifteen (15) days written notice to the other party sent in accordance herewith. The parties agree to mutually designate individuals as their respective representatives for the purposes of receiving notices under this Agreement. Additional individuals may be designated in writing by the parties for purposes of implementation and administration/billing, resolving issues and problems and/or for dispute resolution.~~

~~4. The following information is the contact information for the Department's Project Manager. The Department's Project Manager will serve as the main point of contact for the Design-Builder. All notices should be sent to the Department's Project Manager at the following address:~~

~~*Name:* _____~~

~~*Address:* _____~~

~~*Telephone number:* _____~~

~~*Email:* _____~~

~~5. The following information is the contact information for the Design-Builder's Project Manager. The Design-Builder's Project Manager will serve as the main point of contact for the State. All notices should be sent to the Design-Builder's Project Manager at the following address:~~

~~*Name:* _____~~

~~*Address:* _____~~

~~*Telephone number:* _____~~

~~*Email:* _____~~

~~**ARTICLE 16. DESIGN-BUILDER RECEIPT OF PAYMENT.** The Design-Builder shall provide complete and accurate information and supporting documentation required by the Contract, the Agency and the Office of the State Comptroller (OSC). Payment will only be rendered electronically, unless payment by paper check is expressly authorized by the Commissioner, in the Commissioner's sole discretion, due to extenuating circumstances. Such electronic payment will be made in accordance with ordinary State procedures and practices from the Statewide Financial System (SFS). The Design-Builder shall comply with OSC procedures to authorize electronic payments. Authorization forms are available at OSC's website at www.osc.state.ny.us/epay/index.htm, by e-mail at epunit@osc.state.ny.us, or by telephone at 855-233-8363. A Design-Builder that has not previously performed work for New York State will be provided a SFS Vendor ID. After obtaining a SFS Vendor ID, the Design-Builder shall contact the OSC Vendor Management Unit at www.osc.state.ny.us/vendor_management/index.htm to set up an eSupplier account, in order to track and manage payments. The Design-Builder will not receive payment under this Contract if it does not comply with the State Comptroller's electronic payment procedures, except where the Commissioner has expressly authorized payment by paper check as set forth above.~~

~~**ARTICLE 17. SUPPLEMENTAL TITLE VI PROVISIONS (CIVIL RIGHTS ACT).** During the performance of this contract, the Design-Builder, for itself, its assignees, and successors in interest (herein after referred to as the "Design-Builder") agree as follows:~~

~~1. Compliance with Regulations. The Design-Builder shall comply with the Regulation relative to nondiscrimination in federally-assisted programs of the Department of Transportation of the United States 49 Code of Federal Regulations, Part 21, as they may be amended from time to time, (hereinafter referred to as the Regulations), which are herein incorporated by reference and made a part of this contract.~~

~~2. Nondiscrimination. The Design-Builder, with regard to the Work performed by it during the contract, shall not discriminate on the grounds of race, color, national origin, sex, age, and disability/handicap, or income status in the selection and retention of~~

~~Subcontractors, including procurements of materials and leases of equipment The Design-Builder shall not participate either directly or indirectly in the discrimination prohibited by 49 CFR 21.5, including employment practices when the contract covers a program set forth in 49 CFR 21Appendix B.~~

~~3. Solicitations for Subcontractors, Including Procurements of Materials and Equipment. In all solicitations either by competitive bidding or negotiation made by the Design-Builder for work to be performed under a subcontract, including procurements of materials or leases of equipment, each potential Subcontractor or supplier shall be notified by the Design-Builder of the Design-Builder's obligations under this contract and 49 CFR 21 relative to nondiscrimination on the grounds of race, color, or national origin, sex, age, and disability/handicap.~~

~~4. Information and Reports. The Design-Builder shall provide all information and reports required by the Regulations or directives issued pursuant thereto, and shall permit access to its books, records, accounts, other sources of information and its facilities as may be determined by NYSDOT or the FHWA to be pertinent to ascertain compliance with such Regulations, orders and instructions. Where any information required of a contractor is in the exclusive possession of another who fails or refuses to furnish this information the Design-Builder shall so certify to NYSDOT, or the FHWA as appropriate, and shall set forth what efforts it has made to obtain the information.~~

~~5. Sanctions for Noncompliance. In the event of the Design-Builder's noncompliance with the nondiscrimination provisions of this contract, NYSDOT shall impose such contract sanctions as it or the FHWA may determine to be appropriate, including, but not limited to: (a.) withholding of payments to the Design-Builder under the contract until the Design-Builder complies, and/or (b.) cancellation, termination or suspension of the contract, in whole or in part.~~

~~6. Incorporation of Provisions: The Design-Builder shall include the provisions of paragraphs (1) through (6) in every subcontract, including procurements of materials and leases of equipment, unless exempt by the Regulations, or directives issued pursuant thereto.~~

~~The Design-Builder shall take such action with respect to any subcontract or procurement as NYSDOT or the FHWA may direct as a means of enforcing such provisions, including sanctions for noncompliance, provided, however, that in the event a Design-Builder becomes involved in, or is threatened with, litigation by a subcontractor or supplier as a result of such direction, the Design-Builder may request NYSDOT to enter into such litigation to protect the interests of NYSDOT; and, in addition, the Design-Builder may request the United States to enter into such litigation to protect the interests of the United States.~~

~~ARTICLE 18 CONFLICTS OF INTEREST.~~ ~~Included in paragraph 6 of the JURAT submitted with the Proposal, the Design-Builder has provided a Proposer Assurance of No Conflict of Interest or Detrimental Effect, signed by an authorized executive or legal representative attesting that the Design-Builder's performance of the services does not and will not create a conflict of interest with, nor position the Design-Builder to breach any other contract currently in force with the State of New York, that the Design-Builder will not act in any manner that is detrimental to any State project on which the Design-Builder is rendering services.~~

~~The Design-Builder hereby reaffirms the attestations made in its proposal and covenants and represents that there is and shall be no actual or potential conflict of interest that could prevent the Design-Builder's satisfactory or ethical performance of duties required to be performed pursuant to the terms of this Agreement. The Design-Builder shall have a duty to notify the Department immediately of any actual or potential conflicts of interest.~~

~~In conjunction with any subcontract under this Agreement, the Design-Builder shall obtain and deliver to the Department, prior to entering into a subcontract, a Vendor Assurance of No Conflict of Interest or Detrimental Effect form, signed by an authorized executive or legal representative of the subcontractor. The Design-Builder shall also require in any subcontracting agreement that the subcontractor, in conjunction with any further subcontracting agreement, obtain and deliver to the Department a signed and completed Vendor Assurance of No Conflict of Interest or Detrimental Effect form for each of its subcontractors prior to entering into a subcontract.~~

~~The Department and the Design-Builder recognize that conflicts may occur in the future because the Design-Builder may have existing, or establish new, relationships. The Department will review the nature of any relationships and reserves the right to terminate this Agreement for any reason, or for cause, if, in the judgment of the Department, a real or potential conflict of interest cannot be cured.~~

~~ARTICLE 19 ETHICS REQUIREMENTS.~~ ~~The Design-Builder and its Subcontractors shall not engage any person who is, or has been at any time, in the employ of the State to perform services in violation of the provisions of the New York Public Officers Law,~~

~~other laws applicable to the service of State employees, and the rules, regulations, opinions, guidelines or policies promulgated or issued by the New York State Joint Commission on Public Ethics, or its predecessors (collectively, the "Ethics Requirements"). The Design-Builder certifies that all of its employees and those of its Subcontractors who are former employees of the State and who are assigned to perform services under this Contract shall be assigned in accordance with all Ethics Requirements. During the Term, no person who is employed by the Design-Builder or its Subcontractors and who is disqualified from providing services under this Contract pursuant to any Ethics Requirements may share in any net revenues of the Design-Builder or its Subcontractors derived from this Contract. The Design-Builder shall identify and provide the State with notice of those employees of the Design-Builder and its Subcontractors who are former employees of the State that will be assigned to perform services under this Contract, and make sure that such employees comply with all applicable laws and prohibitions. The State may request that the Design-Builder provide it with whatever information the State deems appropriate about each such person's engagement, work cooperatively with the State to solicit advice from the New York State Joint Commission on Public Ethics, and, if deemed appropriate by the State, instruct any such person to seek the opinion of the New York State Joint Commission on Public Ethics. The State shall have the right to withdraw or withhold approval of any Subcontractor if utilizing such Subcontractor for any work performed hereunder would be in conflict with any of the Ethics Requirements. The State shall have the right to terminate this Contract at any time if any work performed hereunder is in conflict with any of the Ethics Requirements.~~

~~Establish a practice of obtaining a list of all staff proposed by vendors and reviewing it to identify any former State employees. If a former State employee is identified, review his/her employment history to ensure it is appropriate and allowable under the Public Officers Law.~~

~~A. Disclose any existing or contemplated relationship with any other person or entity, including relationships with any member, shareholders of 5% or more, parent, subsidiary, or affiliated firm, which would constitute an actual or potential conflict of interest or appearance of impropriety, relating to other clients/customers of the Respondent or former officers and employees of the Agencies and their Affiliates, in connection with your rendering services enumerated in this solicitation. If a conflict does or might exist, please describe how your firm would eliminate or prevent it. Indicate what procedures will be followed to detect, notify the Agencies of, and resolve any such conflicts.~~

~~B. The Proposer shall disclose whether it, or any of its members, shareholders of 5% or more, parents, affiliates, or subsidiaries, have been the subject of any investigation or disciplinary action by the New York State Commission on Public Integrity or its predecessor State entities (collectively, "Commission"), and if so, a brief description must be included indicating how any matter before the Commission was resolved or whether it remains unresolved.~~

~~**ARTICLE 20 LICENSING.** Any professional services regulated by Articles 145, 147, and 148 of the New York State Education Law to be performed under this Contract shall be performed by a professional licensed in accordance with such articles.~~

~~**ARTICLE 21 DISADVANTAGED BUSINESS ENTERPRISE GOALS.** D/M/WBE is a general term that refers to a Disadvantaged Business Enterprise (DBE), a Minority Business Enterprise (MBE), or a Women's Business Enterprise (WBE). The DBE Program applies to Federal-Aid contracts, and the MBE/WBE (M/WBE) Program applies to Non-Federal-Aid contracts. The D/M/WBE goal for this Contract for design/construction is shown in the RFP Part 1 Appendix B Attachment 4. The Design-Builder must make a good faith effort to meet this goal. See DB §102-12 *D/M/WBE Utilization* for more information on the D/M/WBE Program.~~

~~**ARTICLE 22 INDEMNIFICATION.** The Design-Builder shall be responsible for all damage to life and property due to negligent or otherwise tortious acts, errors or omissions of the Design-Builder in connection with its services under the Contract Documents. To the fullest extent permitted by law: (a) the Design-Builder shall indemnify, hold harmless, and release the Department and/or the State of New York, any municipality in which the Work is being performed; and/or any public benefit corporation, railroad or public utility whose property or facilities are affected by the Work from suits, claims, actions, damages, and costs of every name and description resulting from the Work under this Contract and until the Final Acceptance thereof; (b) with respect to personal injury or property damage occurring after Final Acceptance and not covered by the indemnity in clause Article 22(a), the Design-Builder shall indemnify, hold harmless, and release the Department and/or the State of New York, any municipality in which the Work is being performed; and/or any public benefit corporation, railroad or public utility from suits, claims, actions, damages, and costs of every name and description resulting from negligent or otherwise tortious acts, errors or omissions of the Design-Builder in connection with its services under the Contract Documents; and (c) the Design-Builder shall indemnify, hold harmless, and release the~~

~~Department's Inspector from suits, claims, actions, damages, and costs involving personal injury and property damage resulting from the Design-Builder's Work under the Contract during its prosecution and until the Final Acceptance thereof. The Department may retain such monies from the amount due the Design-Builder as may be necessary to satisfy any claim for damages recovered against the Department. any municipality in which the Work is being performed, any public benefit corporation, railroad, or public utility whose property or facilities are affected by the Work, or the Department's Inspectors. The Design-Builder's obligation under this paragraph shall not be deemed waived by the failure of the Department to retain the whole or any part of such monies due the Design-Builder, or where such suit, action, damages, and/or costs have not been resolved or determined prior to release of any monies to the Design-Builder under the Contract. Such obligation shall not be deemed limited or discharged by the enumeration or procurement of any insurance for liability for damages imposed by law upon the Design-Builder, Subcontractors, the Department, the State, any municipality in which the Work is being performed, any public benefit corporation, railroad, or public utility whose property or facilities are affected by the Work, or any Department consultants or contractors working relative to the Project.~~

~~The Design-Builder has the obligation, at its own expense, for the defense of any action or proceeding which may be brought against the parties specified in this Article. This obligation shall include the cost of attorney fees, disbursements, costs, and other expenses incurred in connection with such action or proceeding. The provisions of this Article shall survive the expiration or termination of the Contract.~~

~~Without limiting the generality of the foregoing, Design-Builder's obligation to indemnify, save harmless and release the Persons identified in this article specifically includes any suits, claims, actions, damages, and costs of every name and description resulting from any spill or release or threatened spill or release of a Hazardous Material (i) attributable to the negligence, willful misconduct or breach of contract by Design-Builder, its Subcontractors or agents, or (ii) which was brought onto the Site by Design-Builder or any of its Subcontractors or agents.~~

~~Notwithstanding the foregoing, the Department reserves the right to join such action, at its sole expense, when it determines there is an issue involving a significant public interest.~~

~~Such obligation does not extend to those suits, actions, damages, and costs of every name which arise out of the sole negligence of the Department, the State of New York, any municipality in which the Work is being performed, any public benefit corporation, railroad, or public utility whose property or facilities are affected by the Work of the Project, or any Department consultants or contractors working relative to the Project, their agents, or their employees.~~

~~**ARTICLE 23 LIQUIDATED DAMAGES.** Time is an essential element of the Contract, and it is important that the Work be pursued vigorously to completion. The public is subject to detriment and inconvenience when full use of infrastructure cannot be made because of an incomplete Project. The Design-Builder agrees to the liquidated damages provisions in the Contract Documents, Part 5 – Special Provisions, SP-6, and Contract Document, Part 2, DB §108-03.~~

~~**ARTICLE 24 INDEPENDENT CONTRACTOR.** The Design-Builder agrees to the terms as an Independent Contractor described in Part 2, DB §107-01 B.~~

~~**ARTICLE 25 NO CONFLICT OF INTEREST.** The Design-Builder hereby agrees that this Contract has been secured without any apparent or real conflict of interest that would (1) compromise the integrity and fairness of the procurement process; (2) create circumstances where the Design-Builder obtained or appeared to obtain an unfair competitive advantage in accordance with 23 CFR 1.33 and 23 CFR 636.116; or (3) compromise the interests of the Department and the People of the State of New York.~~

~~The Design-Builder further agrees that the Contract was secured without collusion or fraud and that neither any officer nor employee of the Department of Transportation has or shall have a financial interest in the performance of the Contract or in the supplies, Work or business to which it relates, or in any portion of the profits thereof. (See also §139-a and §139-b of the State Finance Law.)~~

~~**ARTICLE 26 FEDERAL REQUIREMENTS.** For Federal-Aid contracts, refer to RFP Part 1 Appendix B for the required federal requirements (including Attachment 1, FHWA Form 1273; Attachment 2, Federal Prevailing Wage Rate; Attachment 3, Goals for Equal Employment Opportunity (EEO) Participation; and Attachment 4, Goals for Disadvantaged Business Enterprise (DBE) Participation). *See also* Article 2 regarding the precedence of the federal requirements to the rest of the Contract Documents.~~

~~**ARTICLE 27 DESIGN-BUILDER LIABILITY.** 1. The Design-Builder shall at all times during the contract term remain responsible. The Design-Builder agrees, if requested by the Commissioner of Transportation or his or her designee, to present evidence of its continuing legal authority to do business in New York State, integrity, experience, ability, prior performance, and organizational and financial capacity.~~

~~2. In addition to any and all other suspension rights provided elsewhere in this Contract, the Commissioner of Transportation or his or her designee, in his or her sole discretion, reserves the right to suspend any or all activities under this Contract, at any time, when he or she discovers information that calls into question the responsibility of the Design-Builder. In the event of such suspension, the Design-Builder will be given written notice outlining the particulars of such suspension. Upon issuance of such notice, the Design-Builder must comply with the terms of the suspension order. Contract activity may resume at such time as the Commissioner of Transportation or his or her designee issues a written notice authorizing a resumption of performance under the Contract.~~

~~3. In addition to any and all other termination rights provided elsewhere in this Contract, upon written notice to the Design-Builder and a reasonable opportunity to be heard with appropriate Department officials or staff, the Contract may be terminated by the Commissioner of Transportation or his or her designee at the Design-Builder's expense where the Design-Builder is determined by the Commissioner of Transportation or his or her designee to be non-responsible. In such event, the Commissioner of Transportation or his or her designee may complete the contractual requirements in any manner he or she may deem advisable and pursue available legal or equitable remedies for breach.~~

~~**ARTICLE 28. INSURANCE PROGRAM**~~

~~The Design-Builder shall procure, at its own sole cost and expense, and shall maintain in force at all times during the term of this contract including any extensions or renewals until Contract Final Acceptance, the policies of insurance covering all operations under the contract whether performed by it or its subcontractors as herein below set forth, written by companies authorized by the New York State Insurance Department to issue insurance in the State of New York and that have an A.M. Best Company rating of (A -) or better or approved by the Department. The Department may, at its sole discretion, permit the placement of policies with a non-authorized carrier or carriers upon request by the Design-Builder accompanied by the documentation required by 11 NYCRR §27.0 et seq.; provided that nothing herein shall be construed to require the Department to accept insurance placed with a non-authorized carrier under any circumstances. The Design-Builder shall deliver to the Department evidence of such policies as the Department deems necessary to verify that the required insurance is in effect.~~

~~***Conditions Applicable to Insurance.*** All policies of insurance required by this agreement must meet the following requirements:~~

~~***Coverage Types and Policy Limits.*** The types of coverage and policy limits required from the Design-Builder are specified in Paragraph B Insurance Requirements below. General liability insurance shall apply separately on a per-job or per-project basis.~~

~~***Policy Forms.*** Except as may be otherwise specifically provided herein or agreed in writing by the Department, policies must be written on an occurrence basis. In the event that occurrence-based coverage is not commercially available, claims-made policy forms will be considered provided that, at minimum, it includes provisions that allow for (a) reporting circumstances or incidents that may give rise to future claims and (b) an extended reporting period of not less than three (3) years with respect to events that occurred but were not reported during the term of the policy. ***Insurance policies that remove or restrict blanket contractual liability located in the "insured contract" definition (as stated in Section V, Number 9, Item f in the ISO CGL policy) or that remove or modify the "insured contract" exception to the employer's liability exclusion so as to limit coverage for claims that arise out of contract work, or that do not cover the additional insured for claims involving injury to employees of the named insured or Subcontractors, are not acceptable.*** Policy forms must be provided to the Department upon request.~~

~~***Certificates of Insurance/Notices.*** Design-Builder shall provide a Certificate or Certificates of Insurance, in a form~~

~~satisfactory to the Commissioner, before commencing any work under this contract. Certificates or transmittal correspondence shall reference the NYSDOT Contract D Number and the name of the contractor in the Subject Line, by email to: Insur.constr.contr@dot.ny.gov~~

~~Certificates shall be mailed to the:~~
~~**New York State Department of Transportation Contract Management Bureau**~~
~~50 Wolf Road, First Floor, Suite 1CM Albany, NY 12232~~

~~Unless otherwise agreed, policies shall be written so as to require that the policy will not be (i) canceled, (ii) materially changed or (iii) permitted to expire or lapse for any reason except upon ten (10) days' prior written notice to the Department by Certified Mail, Return Receipt Requested at the address stated above. In addition, if required by the Department, the Design-Builder shall deliver to the Department within ten (10) work days of such request a copy of any or all policies of insurance not previously provided, certified by the insurance carrier as true and complete. Certificates of Insurance shall:~~
~~Be in a form satisfactory to the Department. The ACORD 25 Certificate must be accompanied by an ACORD 855 "New York Construction Addendum" completed to indicate information about the liability insurance of Insurance.~~
~~Be signed and dated by an authorized representative of the insurance carrier or producer.~~
~~Disclose any deductible, self-insured retention, aggregate limit.~~
~~Refer to this Contract by number on the face of the certificate.~~

~~If at any time during the term of this contract, it shall come to the attention of the Department that required insurance is not in effect or that adequate proof of insurance has not been provided, the Department may, at its option:~~

~~Direct the Design-Builder to suspend work and not re-enter the premises with no additional payment or extension of time due on account thereof, or~~
~~May withhold further contract payments in accordance with Article 8 No Payment Due to Design-Builder's Non-Compliance of the contract agreement, or~~
~~Treat such failure as a breach or default of the contract.~~

~~***Additional Insureds.*** All insurance policies required by these specifications, except workers' compensation and professional liability shall be endorsed to provide coverage to **"The State of New York/New York State Department of Transportation, any municipality in which the Work is being performed, any public benefit corporation, railroad, or public utility whose property or facilities are affected by the Work, and any consultants working for or on the project, and their agents or employees"** with respect to any claim arising from the Design-Builder's Work under this contract or as a result of the Design-Builder's activities. The endorsement shall be affected by endorsement of the applicable policy using ISO form CG 20 10 11 85, CG 20 37 07 04, CG 20 33 07 98 when used in combination with CG 20 37 07 04, or CG 20 33 10 01 or a form(s) that provides equivalent coverage~~

~~***Primary Coverage.*** The liability and protective liability insurance policies shall provide primary and non-contributory coverage to the Department for any claim arising from the Design-Builder's Work under this contract, or as a result of the Design-Builder's activities.~~

~~***Waiver of Subrogation.*** As to every type and form of insurance coverage required from the Design-Builder, there shall be no right of subrogation against **the State of New York/New York State Department of Transportation**, its agents or employees. To the extent that any of Design-Builder's policies of insurance prohibit such a waiver of subrogation, Design-Builder shall secure the necessary permission to make this waiver.~~

~~***Policy Renewal/Expiration.*** At least ten (10) calendar days prior to the expiration of any policy required by this contract, evidence of renewal or replacement policies of insurance with terms no less favorable to the Department than the expiring policies shall be delivered to the Department in the manner required for service of notice in Paragraph A.3. Certificates~~

~~of Insurance/Notices above.~~

~~***Self-Insured Retention/Deductibles.*** Design-Builders utilizing self-insurance programs are required to provide a description of the program for Department approval. Collateralized deductible and self-insured retention programs administered by a third party may be approved. Except as may be specifically provided in the Contract Documents of a particular project, the Design-Builder or third-party-administered insurance deductible shall be limited to the amount of the bid deposit or $1,000,000, whichever is less. Security is not required if it is otherwise provided to an administrator for an approved risk management program. The Department will not accept a self- insured retention program without security being posted to assure payment of both the self-insured retention limit and the cost of adjusting claims. The Design-Builder shall be solely responsible for all claim expense and loss payments within any permitted deductible or self-insured retention. If the Design-Builder's deductible in a self- administered program exceeds the amount of the bid deposit, the Design-Builder shall furnish an irrevocable Letter of Credit as collateral to guarantee its obligations. Such Letter of Credit or other collateral as may be approved by Department must be issued by a guarantor or surety with an AM Best Company rating of (A-) or better. If, at any time during the term of this agreement, the Department, in its sole discretion, determines that the Design-Builder is not paying its deductible, it may require the Design-Builder to collateralize all or any part of the deductible or self-insured retention on any or all policies of insurance or, upon failure to promptly do so, the same may be withheld from payments due the Design-Builder.~~

~~***Waiver of Indemnities.*** The Design-Builder waives any right of action it and/or its insurance carrier might have against the Department (including its employees, officers, commissioners, or agents) for any loss that is covered by a policy of insurance that is required by this contract. The Design-Builder waives any right of action it and/or its insurance carrier might have against the Department (including its employees, officers, commissioners, or agents) for any loss, whether or not such loss is insured.~~

~~***Subcontractor's Liability Insurance.*** In the event that any portion of the Work described in this contract is performed by an approved subcontractor, the insurance requirements of this Article shall be incorporated into the subcontract agreement. Subcontractor insurance requirements shall include the requirements for Workers' Compensation, Commercial General Liability, and, if applicable, Commercial Auto and/or Professional Liability. Excess or umbrella insurance is not required for subcontractors. Design-Builder shall require that Certificates of Insurance, meeting the requirements of the Department are provided to the Department documenting the insurance coverage for each and every subcontractor employed by them to do work under this contract.~~

~~***Insurance Requirements.*** The types of insurance and minimum policy limits shall be as follows:~~

~~***Workers' Compensation and Disability Insurance.*** As required by State Finance Law §142, the Design-Builder shall maintain in force workers' compensation insurance upon forms required by or acceptable to the Workers Compensation Board for all of Design-Builder's employees. Design-Builder shall also maintain disability insurance as required by the Disability Benefits Law of the State of New York.~~

~~***Commercial General Liability Insurance.*** The Design-Builder shall maintain an occurrence form commercial general liability policy or policies insuring against liability arising from premises (including loss of use thereof), personal injury or death, advertising injury, liability insured under an insured contract (including the tort liability of another assumed in a business contract) occurring on or in any way related to the premises or occasioned by reason of the operations of Design-Builder. Such coverage shall be written on an ISO occurrence form (ISO Form CG 00 01 12 07 or a policy form providing equivalent coverage) in an amount of not less than the amounts called for in Table 107-1. Unless otherwise provided, the policy or policies of insurance providing the liability coverage shall include:~~

~~Coverage for contractual liability assumed by the Design-Builder insured under an insured contract (including the tort liability of another assumed in a business contract).~~

~~All insurance policies required by these specifications except workers' compensation and professional liability shall be endorsed to provide coverage to **"the State of New York/New York State Department of Transportation, any municipality in which the work is being performed, any public benefit corporation, railroad, or public utility whose property or facilities are affected by the Work, or any consultant inspecting engineer or inspector working for or on the project, and their agents or employees"** using ISO form CG 20 10 11 85, CG 20 37 07 04, CG 20 33 07 98 when used in combination with CG 20 37 07 04, or CG 20 33 10 01 or a policy form or forms providing equivalent coverage.~~

~~Products-Completed Operations Coverage, as provided in the General Liability Policy, or in certain instances through ISO form CG 26 11 09 99 or suitable equivalent.~~

~~Where contract work will be performed by unregistered off-road equipment, Design-Builder shall provide documentation of a blanket Pollution Liability policy, or an endorsement to cover short-term pollution events, ISO form CG 04 33 10 01 or equivalent.~~

~~Coverage for claims for bodily injury asserted by an employee of an additional insured and any Employer Liability Exclusion which may otherwise operate to exclude such coverage shall be voided in this respect.~~

~~Explosion, Collapse and Underground Hazards coverage ("XCU") (for contracts that call for the performance of excavating, underground work, and/or the use of blasting equipment).~~

~~**Commercial Automobile Insurance including liability and required coverage for New York.** (applicable to any project where automobiles or other vehicles will be employed to complete the Work). In the event that automobiles are used in connection with Design-Builder's business or operations with the Department, the Design-Builder shall maintain a commercial or other automobile policy or policies insuring against liability for bodily injury, death, or damage to property and other mandatory coverages, relating to the use, operation, loading or unloading of any of Design-Builder's automobiles (including owned, hired and non-owned vehicles) on and around the project. This should be ISO form CA 00 01 10 01, CA 00 01 01 87 or a policy form providing equivalent coverage along with mandatory New York endorsements. Coverage shall be in an amount of not less than $1,000,000. each accident.~~

~~**Umbrella or Excess Liability Insurance.** The Design-Builder shall maintain an occurrence form umbrella liability policy or policies insuring against liability arising from premises (including loss of use thereof), operations, independent Contractors, products- completed operations, personal injury and advertising injury, and liability insured under an insured contract (including the tort liability of another assumed in a business contract) occurring on or in any way related to the premises or occasioned by reason of the operations of Design-Builder or arising from automobile liability as described above. Such coverage shall be written on an ISO occurrence form CU 00 01 12 07 or a policy form providing equivalent coverage. In the event that umbrella coverage is unavailable, equivalent excess coverage may be substituted. The minimum required limits for the umbrella/excess coverage shall be sufficient to provide, when combined with the Commercial General Liability Insurance, a total of not less than the amount called for in Table 107-1.~~

~~**Special Protective and Highway Liability Policy.** The Design-Builder shall maintain, separate and apart from its umbrella policy, a policy issued to and covering the liability of the People of the State of New York, The State of New York, the Commissioner of Transportation, all employees of the Department of Transportation, any municipality in which the Work is being performed, any public benefit corporation, railroad, or public utility whose property or facilities are affected by the Work, against damages that the insureds may be held legally liable to pay for property damage, personal injuries, or death that is caused by any occurrence that takes place within any location where work is to be or is being performed by Design-Builder, including at the location of any of the Work. This should be ISO form CG 00 14 12 or a policy form providing equivalent coverage along with mandatory New York endorsements. Coverage shall be in an amount of not less than the amount(s) called for in Table 107-1.~~

Contractor's Risks *(applicable to all contracts).* The Design-Builder shall be responsible for obtaining any insurance it deems necessary to cover its own risks, including without limitation: (a) business interruption, such as gross earnings, extra expense, or similar coverage, (b) personal property, and/or (c) automobile physical damage and/or theft. In no event, shall the Department be liable for any damage to, or loss of, personal property, or damage to, or loss of, an automobile that is covered by a policy of insurance that is required by this agreement, even if such loss is caused by the negligence of the Department.

Professional Liability/ Errors and Omissions. *(applicable to professional services requiring the signature, stamp or certification of a licensed professional, including, without limitation, erection plans, demolition plans, containment plans, coffer dams, and temporary sheeting.)* The Design-Builder shall maintain at its own expense or shall require to be maintained, such insurance as is customary to compensate the Department for any claims or losses that occur because of Design-Builder's errors, omissions malpractice or breach of professional obligations. Such policy or policies may be written on a claims-made form so long as coverage is maintained to be in effect to cover claims arising from the performance of services under this contract. Said coverage may be subject to a deductible or self-insured retention level of no more than $500,000. subject to approval by the Department, such approval not to be unreasonably withheld, except that it is also agreed that the Department may withhold payment for services rendered under this contract in the event, and to the extent of any deductible in the event that a claim is asserted. Such coverage shall be written on a claims-made basis (or a policy form providing equivalent coverage) in an amount of no less than the amount(s) called for in Table 107-1.

Railroad Protective Liability Insurance. *(applicable to any Work Affecting Railroads as described in §105-09.)* The Design-Builder shall maintain at its own expense railroad protective liability policy of insurance in the name of the affected railroad and with limits of coverage as specified in the Special Notes on Railroad Insurance, or if no limits of coverage are specified, the limits shall be not less than the amount(s) called for in Table 107-1. Aggregate Limit applying separately to each annual period. Said policy shall be subject to the approval of the railroad and comply with 23 CFR 646 Subpart A.

Marine Protection & Indemnity. *(applicable to any Work performed on a navigable waterway using barges or another watercraft).* Anytime the activity involves work on navigable water or the Work is connected to water related activities, Marine Protection & Indemnity and Hull and Machinery coverage is required. Hull and Machinery coverage shall be provided for the total value of the watercraft or equipment. The Design-Builder shall obtain Protective and Indemnity Liability insurance for all marine operations under the Agreement, with a minimum ($1,000,000.) limit. The policy shall be endorsed to add he Department as an Additional Insured.

Pollution Liability Insurance. *(applicable where the Design-Builder will employ mobile equipment or tanks or facilities for fueling vehicles or equipment on-site).* The Design-Builder shall procure and maintain, either through an endorsement to a commercial general liability policy or through a separate policy, insurance protecting Design-Builder and the Department from the liability and financial loss relating to Design- Builder's contamination of soil and the accidental release of petroleum products, chemicals and/or toxic gases from broken pipelines, utilities and stationary and mobile fuel tanks that can result from Design-Builder's operations. Such coverage shall be written on policy form providing coverage for contamination both on and off the leased premises and shall provide coverage in an amount of not less than the amount(s) called for in Table 107-1.

Builder's Risk Policy*. (applicable to projects that call for the construction of any "Structure" or building, including, but not limited to pump stations and in connection with such projects, as part of a project valued at $10,000,000 or more and then only to the extent of the value associated with such construction).* The Design-Builder shall procure and maintain a Builder's Risk policy in a form such as ISO form CP 00 20 10 90 or a policy form providing equivalent coverage, covering the perils insured under and including the

~~special causes of loss form, including collapse. Subject to the allowances stated in Paragraph A. 8. Self-Insured Retention/Deductibles, above, the deductible not to exceed the amount called for in Table 107-1 covering the total value of work performed and equipment, supplies and materials at the location of the Work as well as at any off-site storage locations. Policy shall cover the structures and buildings, supplies and materials at the location of the Work as well as at any off-site storage locations. Sub-limits for loss caused by Flood and Earthquake are acceptable. The policy shall cover the cost of removing debris, including demolition as may be legally necessary by the operation of any law, ordinance or regulation, and for loss or damage to any owned, borrowed, leased or rented capital equipment, tools, including tools of their agents and employees, staging towers and forms, and property of Department held in their care, custody and/or control. Such policy shall name the Design-Builder as insured, and The People of the State of New York and Subcontractors as additional insureds.~~

~~Table of Insurance Requirements~~

~~TABLE 107-1 INSURANCE FOR DESIGN-BUILD CONTRACTS~~					
~~Insurance Type~~	~~Contract Value (Millions)~~				
	~~$10-$25~~	~~$25-$50~~	~~$50-$100~~	~~$100-$250~~	~~Over $250~~
~~Commercial General Liability (CGL)~~	~~$2 million per occurrence; $4 million aggregate~~	~~$2 million per occurrence; $4 million aggregate~~	~~$3 million per occurrence; $6 million aggregate~~	~~$5 million per occurrence; $10 million aggregate~~	~~$5 million per occurrence; $10 million aggregate~~
~~Commercial Auto~~	~~$1 million per accident~~	~~$1 million per accident~~	~~$1 million per accident~~	~~$1 million per accident~~	~~$1 million per accident~~
~~Umbrella / Excess Liability~~	~~At least $5 million when combined with the CGL~~	~~At least $5 million when combined with the CGL~~	~~At least $10 million when combined with the CGL~~	~~At least $25 million when combined with the CGL~~	~~At least $50 million when combined with the CGL~~
~~Special Protective & Highway Liability Policy~~	~~$2 million per occurrence; $4 million aggregate~~	~~$2 million per occurrence; $4 million aggregate~~	~~$3 million per occurrence; $6 million aggregate~~	~~$5 million per occurrence; $10 million aggregate~~	~~$5 million per occurrence; $10 million aggregate~~
~~Professional Liability/ Errors & Omissions~~	~~$2 million per occurrence; $2 million aggregate~~	~~$3 million per occurrence; $3 million aggregate~~	~~$4 million per occurrence; $4 million aggregate~~	~~$5 million per occurrence; $5 million aggregate~~	~~$10 million per occurrence; $10 million aggregate~~
~~Railroad Protective~~	~~$ 5 million per occurrence; $ 10 million aggregate~~	~~$ 5 million per occurrence; $ 10 million aggregate~~	~~$5 million per occurrence; $ 10 million aggregate~~	~~$ 5 million per occurrence; $ 10 million aggregate~~	~~$5 million per occurrence; $ 10 million aggregate~~

~~TABLE 107-1 INSURANCE FOR DESIGN-BUILD CONTRACTS~~					
~~Insurance Type~~	~~Contract Value (Millions)~~				
	~~$10-$25~~	~~$25-$50~~	~~$50-$100~~	~~$100-$250~~	~~Over $250~~
~~Marine Protective~~	~~$1 million~~	~~$1 million~~	~~$1 million~~	~~$1 million~~	~~$1 million~~

Pollution Legal Liability	$1 million per occurrence; $1 million aggregate	$1 million per occurrence; $1 million aggregate	$1 million per occurrence; $1 million aggregate	$1 million per occurrence; $1 million aggregate	$1 million per occurrence; $1 million aggregate
Builder's Risk	$1 million (Deductible $25,000)	$2.5 million (Deductible $50,000)	$5 million (Deductible $100,000)	$10 million (Deductible $200,000)	$25 million (Deductible $500,000)

ARTICLE 29. NON-ASSIGNMENT CLAUSE

In accordance with Section 138 of the New York State Finance Law, this Contract may not be assigned by the Design-Builder, or its right, title, or interest therein assigned, transferred, conveyed, sublet, or disposed of without the previous consent, in writing, of the State. Any attempts to assign the Contract without the State's written consent are null and void. The Design-Builder may, however, assign its right to receive payment without the State's prior written consent unless this Contract concerns certificates of participation pursuant to Article 5-A of the New York State Finance Law.

ARTICLE 30. SELF PERFORMANCE.

Design-Builder self performance.

The Design-Builder shall perform with its own organization Contract Work amounting to not less than 30 percent of the original total Contract Price. The Design-Builder's own organization shall be construed to include only Workers employed and paid directly by the Design-Builder and Equipment owned or rented by it, with or without operators. The Design-Builder's own organization does not include employees or Equipment of a Subcontractor, assignee, or agent of the Design-Builder and/or its Principal Participants, and any firm(s) performing Design, Construction Inspection and Quality Control Services. The Contract amount upon which the 30 percent requirement is computed includes the cost of Materials and manufactured products which are to be purchased or produced by the Design-Builder under the Contract provisions.

IN WITNESS WHEREOF, this agreement has been executed by the State, acting by and through the Commissioner of Transportation, and the Design-Builder or his appointed representative, who has executed this agreement on the day and year written below.

[Design-Builder Firm Name]

(Printed Name, Title) Signature

Agency Certification(s)

The New York State Department of Transportation has undertaken an affirmative review of the proposed Design-Builder's responsibility in accordance with the standards outlined Office of the State Comptroller's *Guide to Financial Operations*, Chapter XI.16 and based upon such review, has reasonable assurance that the proposed Design-Builder is responsible.

All information provided with respect to the requirements contained in state Finance Laws 139J and 139K is

complete, true and accurate. All requirements for state Finance Laws 139J and 139K have been met and the appropriate documentation is attached.

In addition to the acceptance of this contract, I also certify that original copies of this signature page will be attached to all
other exact copies of this contract.

Department of Transportation

Recommended by: Approved by:
_____ _____
_____

Date ----------
ATTORNEY GENERAL: FOR STATE COMPTROLLER:

Approved _____ Approved _____

THIS CONTRACT IS NOT TO BE EXECUTED OR BECOME EFFECTIVE UNTIL IT SHALL FIRST BE APPROVED BY THE STATE COMPTROLLER AND FILED IN HIS OFFICE. (Section 112, State Finance Law.)

(Acknowledgment of Design-Builder, if a Joint Venture)
A Joint Venture shall include a separate, signed and notarized copy of the acknowledgment page for each party in the joint
venture.

(Acknowledgment of individual Design-Builder)
STATE OF NEW YORK ss.:
COUNTY OF _____
_____
On this _____ day of _____ 20 ____, before me personally came _____ to me known and
known to me to be the person described in and who executed the foregoing instrument, and acknowledged that he/she
executed the same.
_____
_____ _____
_____ Notary Public
__

(Acknowledgment of co-partnership Design-Builder)
STATE OF NEW YORK ss.:
COUNTY OF _____

~~On this _____ day of _____ 20 ____, before me personally came _____ to me known and~~
~~known to me to be the person who executed the foregoing instrument, who, being duly sworn by me, did for himself/herself depose and say that he/she is a member of the firm of _____, consisting of himself/herself and _____ and that he/she executed the foregoing instrument and that he/she had authority to sign same, and he/she did duly acknowledge to me that he/she executed the same as the act and deed of said firm for the uses and purposes mentioned therein.~~

~~_____ _____~~
~~Notary Public~~

~~(Acknowledgment of Design-Builder, if a corporation)~~
~~STATE OF NEW YORK ss.:~~
~~COUNTY OF _____ _____~~

~~On this ____ day of _____ 20 ____, before me personally came _____ to me known, and known to me to be the person who being duly sworn, did depose and say that he/she resides in _____ that he/she is the _____ of _____ the~~
~~corporation described in and which executed the foregoing instrument; and that he/she signed his/her name thereto by order of the Board of Directors of said Corporation.~~

~~_____ _____~~
~~Notary Public~~

~~(Acknowledgment of Design-Builder, if a limited liability company)~~
~~STATE OF NEW YORK ss.:~~
~~COUNTY OF _____~~

~~On this ____ day of _____ 20 ____, before me personally came _____ to me known, and known to me to be the person who being duly sworn, did depose and say that he/she resides in _____; that he/she is the duly authorized member of the limited liability company described in and which executed the foregoing instrument; and that he/she executed the foregoing instrument on behalf of the limited liability company for the purposes set forth therein as the act and deed of said limited liability company.~~

~~_____ _____~~
~~Notary Public~~

~~[Appendix A, Standard Clauses for All NYS Contracts inserted here]~~

DB 103-07 SAMPLE FORM OF FAITHFUL PERFORMANCE BOND.

NYSDOT Standard Specification §103-07 shall apply.

DB 103-08 SAMPLE FORM OF LABOR AND MATERIAL BOND.

NYSDOT Standard Specification §103-08 shall apply.

DB 103-09 SAMPLE EXECUTIVE ORDER 177 CERTIFICATION.

NYSDOT Standard Specification §103-09 shall apply.

DB SECTION 104
SCOPE OF WORK

DB 104-01 WORK REQUIRED.

The Design-Builder shall begin work within ten days of the date of the contract award notification by the Department, unless written consent of the Department is given to begin at a later date. Contract awards are posted by the Office of the State Comptroller on www.openbooknewyork.com. The Design-Builder shall perform all work enumerated under the terms of the contract and shall protect all adjoining properties, utility facilities and existing highway facilities within the right of way. The Design-Builder shall repair and/or replace any property, utility facility or highway facility damaged or destroyed by it or its employees through construction operations, within and adjacent to the right of way.

The Design-Builder shall coordinate the work of its Subcontractors, Manufacturers, Fabricators and Material Suppliers. Their operations shall be arranged and conducted so that delays will be avoided. Where the Work of the Design-Builder, or Subcontractors, overlaps or dovetails with that of other Contractors, materials shall be delivered and operations shall be conducted so as to carry on the work continuously in an efficient and workmanlike manner.

During the life of this contract, Utilities may make changes in their facilities. These changes may be made by the Utility employees or by contract within the limits of or adjacent to this contract and may be temporary and/or permanent.

Delays or oversights on the part of the Design-Builder, Subcontractors or Utilities in properly completing any work, thereby requiring the removal and replacement of work already in place, will not be the basis for a claim of extra compensation. Such work will be performed at the cost and expense of the responsible Design-Builder, Contractor, Subcontractor or Utility. Reference is made to General Obligations Law §11-102, which concerns the interference and/or delay of the Design-Builder's progress of work by Utilities.

DB 104-02 CHANGES, CONTINGENCIES, EXTRA WORK AND DEDUCTIONS.

Whenever the Department determines that from any unforeseen cause the terms of any contract should be altered to provide for changes, contingencies, extra work, or the deletion of work, a Change Order may be issued to the Design-Builder. Upon direction by the Department, the Design-Builder shall then promptly proceed with the Work in accordance with the pertinent specifications. Such changes in quantities and alterations shall not invalidate the contract nor release the Surety, and the Design-Builder shall perform the Work as altered.

No instructions, either written or verbal from any Department employee or agent shall be construed as an order for changes until receipt by the Design-Builder of written notification that a Change Order has been approved by the Department and filed by the Office of the State Comptroller (OSC), or written notification from the Engineer that changes in the Work are eligible and authorized for payment in accord with Section 697 Field Change Payment. The Design-Builder may proceed with the Work in advance of the approved change order if the Design-Builder has received an approved Authorization of Extra Work.

The Design-Builder shall provide a report of outstanding Change Order requests containing the following:

A. The Design-Builder’s and Department’s Change Order identification numbers and/or coding;
B. The issue title;
C. A brief description of the change;
D. Any outstanding issues to be resolved;
E. The estimated cost and time implications; and

F. The projected resolution date.

DB 104-03 DIFFERING SITE CONDITIONS.

In accordance with 23 CFR 635.109(a)(1):

During the progress of the work, if subsurface or latent physical conditions are encountered at the site differing materially from those indicated in the contract or if unknown physical conditions of an unusual nature, differing materially from those ordinarily encountered and generally recognized as inherent in the work provided for in the contract, are encountered at the site, the party discovering such conditions shall promptly notify the other party of the specific differing site conditions before the site is further disturbed and before the affected work is performed.

Upon written notification, the Department will investigate the site conditions, and if it is determined that the conditions materially differ and cause an increase or decrease in the cost or time required for the performance of any work under the contract, an adjustment, excluding anticipated profits, will be made and the contract modified in writing accordingly. The Department's Project Manager will notify the Design-Builder, of the determination whether or not an adjustment to the contract is warranted.

No contract adjustment which results in a benefit to the Design-Builder will be allowed unless the Design-Builder has provided the required written notice.

The Department will administer the above Federal regulations as follows:

During the progress of the Work, if subsurface or latent physical conditions are encountered at the site differing materially from those indicated in the contract or if unknown physical conditions of an unusual nature, differing materially from those ordinarily encountered and generally recognized as inherent in the work provided for in the contract, the party discovering such conditions shall promptly notify the other party of the specific differing site conditions before the site is further disturbed and before the affected work is performed, with subsequent written notice to be provided later. The Design-Builder shall comply with the notice and recordkeeping provisions of §104-06 *Notice and Recordkeeping*.

The Design-Builder or the State, as the case may be, must make written notice to the other party of the existence of apparent subsurface or latent physical conditions if that party wishes to adjust the contract price or time of performance, including direct costs and/or time related compensation, if applicable. Such notice shall be given within 15 calendar days of the time at which the party had knowledge, or should have had knowledge of the differing site condition. The Department will have no liability and no adjustment will be made for any damages which accrued more than 15 calendar days prior to the filing of such a notice with the Department's Project Manager.

Upon written notice, the Department will investigate the site conditions, and if it is determined that the conditions materially differ and cause an increase or decrease in the cost or time required for the performance of the Work, an adjustment, excluding anticipated profits, will be made to the contract. The Department's Project Manager will make an initial response in writing to the Design-Builder, within 21 calendar days, with a determination whether or not an adjustment to the contract is warranted. Situations requiring examination of the site or input from other Department personnel may require additional time to resolve. No contract adjustment will be allowed unless the Design-Builder has provided the required written notice, or written notice was provided to the Design-Builder by the State.

If an agreement on an adjusted price has not been reached before the work begins, the Design-Builder shall keep daily records and make reports of all labor, material and equipment used in connection with such work and the cost thereof as specified in §109-05C *Force Account Report*. Compensation for increased costs of the work resulting from the differing site conditions will be made in accordance with §109-05 *Extra Work and Time Related Compensation*.

Compensation for time related costs, if any, will be made in accordance with §109-05D *Time Related Dispute Compensation*.

Except as specified in this section, the Proposal Price includes all costs of management of impacted Hazardous Materials located in, on or under the property within the Project Limits (excluding any additional parcels designated by the Design-Builder) as of the date the Department makes such property available to Design-Builder. A Change Order may be issued for costs of management of such pre-existing Hazardous Materials if they are of a type, quantity or location that differs materially from the types, quantities or locations of Hazardous Materials identified in the RFP or the Contract Documents as potentially present at the Site, and for costs and expenses due to Critical Path delays directly attributable to discovery of such pre-existing Hazardous Materials, except to the extent that Design-Builder is responsible for such Hazardous Materials as specified in this section. A Change Order may also be issued for costs of management of third party Hazardous Materials spills that affect the work within the Project Limits.

A Change Order will not be issued if the Design-Builder had actual or constructive knowledge of such materials as of the Proposal Due Date and time. In addition, a Change Order will ~~be~~ not be issued for any costs that could reasonably have been avoided if the Design-Builder could have discovered the existence of such materials through a reasonable site investigation, exploration and desktop documentary study prior to the date of Award of the Contract. Furthermore, the Design-Builder bears full responsibility for all costs and expenses, including costs and expenses due to Critical Path delays, for any release or threatened release of Hazardous Material (i) brought onto the Site by Design-Builder or Subcontractors, or (ii) negligently removed or handled by Design-Builder or Subcontractors, regardless of the source, origin or method of deposit of such Hazardous Materials. Except with respect to Hazardous Materials that are Design-Builder's responsibility as described in the preceding sentence, Design-Builder shall not be required to execute any hazardous waste manifests as a "generator" with respect to Hazardous Materials encountered within the Project Limits, and Hazardous Materials encountered within the Project Limits shall be disposed of, if at all, utilizing an EPA identification number or other appropriate legal device obtained by, and carried in the name of, Department or another Person designated by the Department.

The Design-Builder shall utilize the services of previously qualified, trained, and/or appropriately certified personnel and Subcontractors for Hazardous Materials management. No training costs (or costs for physical examinations or medical monitoring of workers) will be allowed in any Change Orders for Hazardous Materials management services.

DB 104-04 SIGNIFICANT CHANGES IN THE CHARACTER OF THE WORK.

A. Changes in Basic Project Configuration. The Department acknowledges and agrees that the Design-Builder's Proposal was based on certain basic information presented by the Department regarding the nature of the Project to be constructed as documented in the RFP. This basic information is considered the Basic Project Configuration. Except as authorized by a Change Order or approved Alternative Technical Concept, the Design-Builder shall not make any material change in the Basic Project Configuration. Non-material Department-Directed Changes may be covered by a Change Order whether they are within the parameters of the Basic Project Configuration or not. Non-material Department-Directed Changes may be ordered without any change in the Contract Price or extension of the Contract Time, provided the change is ordered prior to completion of the Definitive Design Review for the affected Design Unit(s).

1. Necessary Basic Project Configuration Change. Notwithstanding the fact that this Contract generally obligates the Design-Builder to undertake all Work necessary to complete the Project without changes in the Contract Price, this DB §104-04.A.1.

provides for a change in the Contract Price to be made in conjunction with necessary basic project configuration changes. If any necessary basic project configuration change increases or decreases the cost of performing the Work, then the Department will issue a Change Order to adjust the Contract Price accordingly. Furthermore, if the Design-Builder commences any construction Work affected by the change prior to delivery of appropriate notice of the change to the Department under this DB Section 104, the Change Order shall allow the Department a credit for the cost of any unnecessary Work performed and/or shall exclude any additional costs associated with redoing the Work already performed. The Change Order shall also account for any offsets from Change Orders previously issued.

In the event that the Department approves a necessary basic project configuration change that reduces the Design-Builder's costs, the Change Order shall note the amount of cost decrease.

If a necessary basic project configuration change results in a Critical Path delay, the Change Order may include an appropriate extension of time and/or time-related damages. If a necessary basic project configuration change creates float in the schedule thus allowing early completion without additional cost, the Change Order shall include an appropriate modification of the contract deadlines accelerating the time for completion.

The notice, recordkeeping and other requirements of DB §104-06, §105-14, and § 109-05 shall apply with respect to any request to adjust the Contract Price or the Contract Time due to a necessary basic project configuration change.

2. Relationship to VECP. If a Value Engineering Change Proposal (VECP) results in a material change in Basic Project Configuration, any cost savings from such VECP shall be shared in accordance with DB §104-10.

3. Inaccuracies in RFP Plan. The Design-Builder shall be responsible for any cost increases and/or delays resulting from inaccuracies in the RFP Plans other than an error, omission, or defect in the Directive Plans constituting or requiring a material change in the Basic Project Configuration. If any such changes occur, no change in the Work shall be deemed to have occurred and no Change Order will be issued for any such cost increases and/or delays, unless the change qualifies as a Necessary Basic Project Configuration Change. Accordingly, any non-material changes in the Basic Project Configuration shall be the responsibility of the Design-Builder.

4. Applicability of Change Orders. In general, the Design-Builder may implement non-material changes in the Basic Project Configuration without a Change Order, unless the change involves a circumstance for which a Change Order is specifically required hereunder.

B. Changes Applicable to Utility Relocations. All public and private Utilities within or adjacent to the Work Sites, that are known to the Department, are described in the Contract Documents. The Design-Builder is cautioned that the number, type, size, location and configuration of the Utilities are not guaranteed; nor is there a guarantee that all existing Utilities are described in the Contract Documents.

The following provisions govern entitlement to Change Orders with respect to Relocation of Utilities.

1. Inaccuracy of Utility Information.

a. If any underground utility requiring Relocation by the Design-Builder is not indicated at all in the Contract Documents, or is materially inaccurately indicated therein (as specified in Part 4 – Utility Requirements), then the Design-Builder may be entitled to a Change Order with respect to any increase in the Design-Builder's costs of performing the Work that is directly attributable thereto. Notwithstanding the foregoing, the Design-Builder shall be fully liable for, and no Change Order shall be issued under this DB §104-04B with respect to, any such underground utility that was known to the Design-Builder prior to the Proposal Date or that would have been known to the Design-Builder by undertaking a reasonable investigation prior to the Proposal Date, including any utility as to which surface inspection of the area would have shown its existence or the likelihood of its existence in the correct location, size, and/or material, as applicable, by reason of the existence of above-ground facilities, such as buildings, meters, junction boxes, or identifying markers.

b. If any underground utility identified in the Contract Documents as requiring Relocation by the Design-Builder is not accurately indicated therein (as specified in Part 4 – Utility Requirements), and if as a result Relocation of such utility is not necessary or there is a reduction in the Relocation Work for such utility, then the Department shall be entitled to a Change Order reducing the Contract Price to reflect the value of the reduction in the Work directly attributable to the correction of such inaccurate information.

c. No change in "conflict/no conflict" status between information represented in the Contract Documents, Design Plans, and/or as-built conditions shall be grounds for a Change Order under this DB §104-04B, except to the extent that the change in "conflict/no conflict" status is the result of inaccuracies (per Part 4 – Utility Requirements) in the locations of utilities shown in the Contract Documents for which the Design-Builder is otherwise entitled to a Change Order pursuant to this DB §104-04B.

2. Change in Allocation of Duties in DB Utility Work Agreements. If a DB Utility Work Agreement allocates responsibility for Relocation to the Utility Owner and provides that the utility owner is entitled to be paid its costs for Relocation, the Department shall make such payments directly to the utility owner. If the DB Utility Work Agreement allocates responsibility for Relocation to the Design-Builder, the cost of Relocation is included in the Proposal Price. Change Orders resulting from a reallocation of duties between the Design-Builder and the utility owner from that found in the DB Utility Work Agreements shall be governed by this DB §104-04B.2.

a. <u>Change in Allocation of Duties from the Utility Owner to the Design-Builder</u>.

If the DB Utility Work Agreement allocates to the utility owner the responsibility to perform design and/or construction for the Relocation of a particular utility, and after the Proposal Date the Department gives notice to the Design-Builder that all or part of such Work is being reallocated to the Design-Builder, then effective immediately upon the Design-Builder's receipt of a proceed order to that effect, the scope of the Design-Builder's duties for such utility shall be expanded to include those duties specifically reallocated to the Design-Builder as described in said notice. The Design-Builder shall be entitled to a Change Order increasing the Contract Price to reflect the Design-Builder's additional costs incurred which are directly attributable to such additional duties and are not subject to direct reimbursement from the utility owner. If the change in allocation of duties impacts the Baseline Progress Schedule Critical Path, an adjustment in time will be included in the Change Order.

b. <u>Change in Allocation of Duties from the Design-Builder to the Utility Owner</u>.

If the DB Utility Work Agreement allocates to the Design-Builder the responsibility to perform either design and/or construction for the Relocation of a particular utility, and after the Proposal Date, the Department gives notice to the Design-Builder that all or part of such Work is being reallocated to the utility owner, then effective immediately upon the Design-Builder's receipt of a proceed order to that effect, the scope of the Design-Builder's duties with respect to such utility shall be reduced to exclude those duties specifically reallocated to the utility owner as described in said notice. The Department shall be entitled to issue a Change Order reducing the Contract Price to reflect the value of the reduction in the Work directly attributable to such reduced duties. In the event that the parties cannot negotiate such value in advance, the amount of the Change Order shall be an amount equal to the actual cost to the utility owner of the Work reallocated to the utility owner plus a mark-up on such costs as described in DB §109-05(B)(1)(e). If the change in allocation of duties impacts the Baseline Progress Schedule Critical Path, an adjustment in time may be included in the Change Order.

3. Utility Delays. The term "Utility Delay" shall mean Critical Path delay directly attributable to any of the following, subject to the limitations set forth below: (a) inability of Department and the Design-Builder, after diligent efforts, to reach agreement with a utility owner on a necessary DB Utility Work Agreement, within a reasonable time, (b) failure by a utility owner to meet any time parameters for performance by such utility owner which are set forth in the applicable DB Utility Work Agreement, and (c) utility owner decision to implement a Betterment with respect to any its facilities requiring relocation.

With respect to any claim that a Utility Delay has occurred under item (b) of the definition of the term: (1) a Utility Delay shall not include any failure or delay that is excused under a "force majeure" provision in the applicable DB Utility Work Agreement; (2) once the Design-Builder has reviewed and agreed to the design furnished by a particular utility owner, any subsequent delay in the Critical Path due to failure of such design to comply with the requirements of the Contract shall not constitute a Utility Delay; and (3) once the Design-Builder has reviewed and agreed to construction work performed by or on behalf of a particular Utility Owner, any subsequent delay in the Critical Path due to any failure of such construction to comply with the requirements of the Contract shall not constitute a Utility Delay.

The Design-Builder shall not be entitled to an extension of any Contract Deadline on account of any Utility Delay except as provided in this DB §104-04B.3. The Design-Builder shall give written notice to the Department of any circumstance which may lead to such a request for time extension, within five days after the Design-Builder becomes aware that such circumstance has occurred or is likely to occur.

The Design-Builder shall not be entitled to an extension of any Contract Deadline on account of the Design-Builder's failure to fully cooperate in good faith with the Department and the Utility Owners in providing the Design-Builder's Plan and Schedules for performing Work that could be impacted by the utility relocations.

The Design-Builder shall be responsible for all costs that result from the Design-Builder's failure to cooperate with the Department and Utility Owners and shall be prepared to modify the Work and schedule to accommodate any Utility relocation(s) required as part of the DB Utility Work Agreement(s) at no additional cost to the Department.

Damages or delays caused by a Utility, which results in interference with and/or delay of progress of Work, may be recovered by the Design-Builder in accordance with

all remedies provided by law including but not limited to General Obligations Law Section 11-102.

4. Conditions and Restrictions on Time Extensions for Utility Delay. The Design-Builder shall not be entitled to any extension of any Contract Deadline(s) pursuant to this DB §104-04B.4., unless all of the following conditions are satisfied:

a. The Design-Builder has provided evidence reasonably satisfactory to the Department that (i) the Design-Builder has fulfilled its obligation under the Contract to coordinate with the utility owner to prevent or reduce such delay, and (ii) the Design-Builder has otherwise made diligent efforts to obtain the timely cooperation of the utility owner but has been unable to obtain such timely cooperation;

b. If applicable, the Design-Builder has provided a reasonable Relocation plan to the utility owner;

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

The restrictions set forth in DB §104-04B.6. shall also apply with respect to Change Orders relating to time extensions for Utility Delays.

5. Betterments. If the Department agrees to the addition of any Betterments to the Work with respect to facilities covered by the DB Utility Work Agreements, the Department will issue a Change Order pursuant to DB §104-02 with respect thereto. The Design-Builder shall not be entitled to an increase in the Contract Price with respect to any Betterments except as allowed under DB §104.04B.3. and this DB §104-04B.5.

6. Impact of Design Changes on Relocations. Inasmuch as the Design-Builder is both furnishing the design of and constructing the Project, the Design-Builder shall at all times consider the impact of design changes on Relocations of utilities with the overall goal of minimizing the necessity for Relocations of such utilities to the extent practicable, as specified in Part 4, Section 4-2.7. If the Design-Builder elects to deviate from the design set forth in the Indicative Plans, and such deviation either (1) reduces the costs of any Relocation of a utility (including by avoiding Relocation of a utility shown as requiring Relocation in the Contract Documents), or (2) requires new Relocations or otherwise increases Relocation costs, then the following shall apply to any resulting cost increases or decreases affecting the Design-Builder and/or the Department:

a. The Design-Builder shall not be entitled to a Change Order for any such additional costs which it incurs, including both additional Relocation costs and the costs of any additional Work on other aspects of the Project undertaken in order to facilitate the avoidance or reduction of Relocation costs;

b. The Design-Builder shall reimburse the Department for any such additional expenses which the Department incurs, including any net increase in amounts owed by the Department to any utility owner under a DB Utility Work Agreement attributable to such design changes or any payment owing to a utility owner for work which is unusable or which must be redone as a result of such design changes; and

c. Except as accounted for in determining the net increase in costs as specified in (B), the Design-Builder shall have no obligation to provide a credit to the Department on account of reductions in the cost of the Work due to any such avoided or reduced Relocation.

7. Additional Restrictions on Utility-Related Change Orders. Whenever the Design-Builder claims entitlement to a Change Order under this DB §104-04B:

a. Avoidance of Relocations. The Design-Builder shall bear the burden of (i) proving that the Utility Relocation could not reasonably have been avoided and (ii) proving and justifying the amount of any costs and/or delays claimed by the Design-Builder, including demonstrating that the timing and nature of the investigations undertaken by the Design-Builder were appropriate and that the increased costs and/or time could not have been avoided by more timely and appropriate investigation. No Change Order under this DB §104-04B may be made if a reasonable Site investigation and exploration during the pre-construction phase would have indicated the location of the utility and the Utility Relocation could reasonably have been avoided.

b. Incremental Costs Only. The Change Order shall allow a price increase only for the Incremental Costs arising from the circumstances giving rise to such Change Order.

c. Coordination Costs. The Design-Builder will not be awarded any increase in the Contract Price for any costs of negotiating or coordinating with utility owners.

d. Timing of Change Orders. In general, the parties anticipate that Change Orders for utility Relocations will be executed as the changes occur. However, the Department and the Design-Builder may agree to consolidate certain changes into a single Change Order. The Design-Builder's mark-ups under DB §109-05(B)(1)(e) shall be deemed to include compensation for all costs associated with any time differential between performance of the Relocation Work and the date of issuance of the Change Order.

e. Incidental Utility Work. The Design-Builder shall not be entitled to a Change Order for increased costs of the Work resulting from, or for any extension of time for, delays associated with Incidental Utility Work. Incidental Utility Work includes the following:

1. Any Relocation of any utility service connections,
2. Any Temporary Relocations of utilities implemented for the convenience of the Design-Builder's own construction operations,
3. Protections in place,
4. The adjustment of utility appurtenances (e.g., manholes, valve boxes, and vaults) for line and grade upon completion of roadway work,
5. All work necessary to remove any utilities (whether or not in use as of the Proposal Date) in situations for which leaving the utilities in place is not feasible or not permitted, or for facilities which the Design-Builder proposes be removed to accommodate or permit construction of the Project, regardless of whether replacements for such utilities are being installed in other locations, and/or
6. All work necessary to abandon in place any utility in accordance with proper procedures (e.g., flushing, capping, slurry backfill, etc.).

f. The Design-Builder bears full responsibility for identifying conflicts between the Project and any appurtenances to utility facilities as well as utility service connections, and any omissions or other inaccuracies in information provided by the Department or any other Person regarding such utility service connections or appurtenances shall not be considered material and shall not be grounds for a Change Order.

g. Voluntary Action. If the Design-Builder elects to make payments to utility owners or to undertake any other efforts which are not required by the terms of the Contract Documents (including any agreement by the Design-Builder to make payment to a

utility owner on account of a Betterment or to perform Betterment Work without reimbursement from the utility owner), the Design-Builder shall not be entitled to a Change Order in connection therewith. The Design-Builder shall promptly notify the Department of the terms of any such arrangements.

C. Changes in Environmental Performance Commitments. If any Final Environmental Impact Statement (FEIS), Record of Decision and/or secured permits and permit conditions result in changes to the scope of the Environmental Performance Commitments or the Design-Builder's obligations with respect to Environmental Approvals as set forth in Part 3, Section 7 – Environmental, the Design-Builder shall be entitled to a negotiated Change Order addressing the changes. Compensation is allowed only for the Incremental Costs associated with compliance with the new requirements, and no additional compensation will be made for Work relating to such compliance that was included in its original scope, including any commitments made in Design-Builder's Proposal or changes negotiated with the Design-Builder prior to award of the Contract.

Notwithstanding the foregoing, the Design-Builder will bear full responsibility for obtaining any new Environmental Approvals or changes to existing Environmental Approvals and performance of any mitigation measures required as the result of its design decisions or construction methodologies, or material / equipment staging areas beyond the project right of way limits, including reimbursement of incremental costs incurred by the Department as a result thereof.

D. Change Orders for Change in Law. Changes in the scope of the Work may occur as the result of a change in law. The Design-Builder shall notify the Department within 10 days after the Design-Builder first discovers (or should have discovered in the exercise of reasonable prudence) that a change in law has occurred, providing details regarding the Governmental Rule that has changed and describing how the scope of the Work is impacted. Upon receipt of such notice the Department shall promptly investigate the matter, and if he/she finds that a change in law has occurred, an equitable adjustment may be made and the Contract modified in writing accordingly, as specified herein. Design-Builder shall be entitled to compensation only for the Incremental Costs associated with the change in law, and shall not be entitled to additional compensation in connection with a change in law for any Work that was included in its original scope, including any commitments made in Design-Builder's Proposal, nor shall the Design-Builder be entitled to compensation for any change in a Governmental Rule not falling within the definition of change in law. A Change Order for a change in law resulting from changes to the sales and use tax exemption described in DB §102-13 shall adjust the Contract Price to account for such costs, without markup.

Notwithstanding anything to the contrary in the Contract Documents, the Design-Builder shall implement changes in Standards attributable to a change in law only if required to do so by the Department by a Change Order. Upon receipt of notification from the Design-Builder regarding such a change in law, the Department will determine whether to issue a Change Order implementing the change in Standards. In addition to the other limitations specified herein, with respect to changes in law resulting in modification of Standards, the Design-Builder shall not be entitled to any compensation for costs that could have been avoided had the Design-Builder timely notified the Department of the change in law. Design-Builder may request a time extension if the Change in Law, through no fault of Design-Builder, adversely affects the Critical Path, provided that no extension of time shall be allowed for delays that could have been avoided had the Design-Builder timely notified the Department of the change in law.

DB 104-05 SUSPENSION OF WORK DIRECTED BY THE ENGINEER.
NYSDOT Standard Specification §104-05 shall apply.

DB 104-06 NOTICE AND RECORD KEEPING.
NYSDOT Standard Specification §104-06 shall apply.

DB 104-07 SITE HOUSEKEEPING.
NYSDOT Standard Specification §104-07 shall apply.

DB 104-08 MAINTAINING TRAFFIC.
NYSDOT Standard Specification §104-08 shall apply.

DB 104-09 CONTRACTOR'S RETENTION OF RECORDS.
NYSDOT Standard Specification §104-09 shall apply.

DB 104-10 VALUE ENGINEERING CHANGE PROPOSAL (VECP).
NYSDOT Standard Specification §104-10 shall apply.

DB 104-11 ALTERNATIVE TECHNICAL CONCEPTS.

The Design-Builder acknowledges that, subject to the allocation of responsibilities set forth in the Contract Documents, any approvals from Persons other than the Department required to implement approved Alternative Technical Concepts incorporated in the Contract Documents are Design-Builder's sole responsibility to obtain. Design-Builder agrees that if any condition set forth in the Department's pre-approval of an ATC included in its Proposal has not been met as of the Proposal Date, the Design-Builder shall be responsible for ensuring that such condition is satisfied before implementing the ATC. If the Design-Builder fails to obtain any required approval, fails to satisfy any such condition, or fails in any other way to implement the approved Alternative Technical Concept, it shall comply with the corresponding baseline requirements (unmodified by the Alternative Technical Concept) without any increase in the Contract Price or extension of the Contract Deadlines.

The Design-Builder acknowledges and agrees that, to the extent that the Design-Builder uses any technical concept submitted by an unsuccessful proposer and provided to Design-Builder by the Department, the Design-Builder shall do so at the sole risk of Design-Builder, and such use shall in no way confer or be deemed to confer liability upon the Department or the unsuccessful proposer(s).

DB SECTION 105
CONTROL OF WORK

DB 105-01 ENGINEER'S AUTHORITY.

As designee of the Department, the Engineer (The Department's Project Manager) has immediate charge of the Project. The Department's Project Manager is responsible for the administration and satisfactory completion of the Project. The Department's Project Manager will be delegated authority commensurate with that responsibility, including the authority to reject defective material and construction and disapprove and reject Design Documents that do not comply with Contract requirements.

Except as otherwise expressly provided in the Contract, the Design-Builder is required to submit all issues related to the Project through the Department's Project Manager. All communications by the Design-Builder with the Department, written or verbal, shall be in English. All references to costs, changes, prices, etc. shall be in United States dollars. Except as otherwise expressly provided in the Contract, the Department's Project Manager, designated representative, Construction Quality Assurance Engineer, or Design Quality Assurance Engineer will address all questions that may arise under the Contract, including the following topics:

A. Acceptability of Design Documents;
B. The quality and acceptability of material furnished;
C. Work performed;
D. The rate of progress of the Work;
E. Interpretation of the Contract;
F. Acceptable performance of the Contract requirements; and
G. Administration of monthly progress payments.

In addition to the authority to administer the Contract, modify the Contract by Change Order, and oversee and terminate the Contract as expressly provided in other Sections of the Contract, the Department's Project Manager or designated representative will have the authority to suspend the Work, wholly or in part, or withhold progress payments due to the following:

A. Conditions such that unsatisfactory Work might result;
B. Improper material or procedures being used;
C. Unsafe conditions for the workers or the general public as a result of the failure of the Design-Builder to correct those conditions;
D. The Design-Builder's failure to carry out provisions of the Contract;
E. The Design-Builder's failure to carry out directions of the Department's Project Manager;
F. The Design-Builder's failure to comply with applicable Governmental Rules;
G. The Design-Builder's non-conformance with the Work Zone Traffic Control (WZTC) provisions of the Contract, causing serious disruptions to traffic operations; or
H. The Department's Project Manager's determination that suspension is necessary because of unsuitable weather.

DB 105-02 CHARACTER OF WORKERS.

NYSDOT Standard Specification §105-02 shall apply.

DB 105-03 METHODS AND EQUIPMENT.

Construction operations requiring soil compaction performed from November 1st thru April 1st requires modifications to standard compaction procedures, changes to material requirements, and/or additional equipment and structure assembly for controlling the weather effects on the material and existing ground conditions. If the air temperature, ground temperature, or material temperature is at or below 32° F, earthwork may only proceed using material that meets the requirements of §733-16 *Winter Earthwork* and/or standard earthwork material placement utilizing modified methods and procedures (i.e. insulation, enclosures, canvas and framework). Modifications to compaction procedures, including but not limited to the use of thinner lifts, may be required when the temperatures are above 32° F but below 40° F at the time of placement.

In all Work incorporated into the final product, the Design-Builder shall not place material that is frozen, or place fill material on ground that is frozen to any depth regardless of the date. The Design-Builder shall institute procedures to ensure the existing ground is not frozen to any depth (e.g. test pits) and to address freeze-thaw action in earthwork that has remained idle during temperature fluctuations (e.g. re-roll and seal the surface prior to placement of succeeding lift).

DB 105-04 CONTRACT DOCUMENTS.

NYSDOT Standard Specification §105-04 shall apply.

DB 105-05 VENDOR RESPONSIBILITY.

NYSDOT Standard Specification §105-05 shall apply.

DB 105-06 COOPERATION WITH UTILITIES AND OTHER CONTRACTORS.

The Design-Builder shall coordinate all design and construction, including that of any Subcontractors, with other designers, contractors, the utility owners, governmental agencies, Department's personnel, and operating personnel concerning Site access, establishment and use of temporary facilities, work schedules, and all other elements of the specified Work, which require interfacing with others. The Design-Builder shall coordinate with the railroad company in carrying out any railroad Force Account Work. When the Work of the Design-Builder or Subcontractor dovetails with the railroad Force Account Work, the material shall be delivered and the operations conducted so as to carry on the Work continuously in an efficient and skillful order.

The Department shall have the right, at any time, to contract for and perform other work on, adjacent to, near, over or under the Work covered by this Contract. In addition, other work may be performed under the jurisdiction of another department, State agency, or public owner. In such cases, when a dispute arises among contractors, the Department will decide which agency will have jurisdiction over said dispute. The Design-Builder shall cooperate fully with such other contractors and carefully fit its own work to such other work as may be directed by the Department.

The need to oversee and coordinate with Work performed by others, including removal and replacement of Work already in place if needed, will not be the basis for a claim for extra compensation. Such Work shall be done at the cost and expense of the Design-Builder or Subcontractor, as applicable.

The Design-Builder and each other contractor shall assume all liability, financial or otherwise, in connection with their respective contracts, and shall protect and save the Department harmless from any and all damages or claims that may arise because of inconvenience, delay, or loss experienced by the Design-Builder or other contractors because of the presence and operations of other contractors and utilities working within the limits of this Project.

DB 105-07 TERMNATION.

NYSDOT Standard Specification §105-07 shall apply.

DB 105-08 REMOVAL OF UNACCEPTABLE AND UNAUTHORIZED WORK.

NYSDOT Standard Specification §105-08 shall apply.

DB 105-09 WORK AFFECTING RAILROADS.

NYSDOT Standard Specification §105-09 shall apply.

DB 105-10 SURVEY AND STAKEOUT.

NYSDOT Standard Specification §105-10 shall apply.

DB 105-11 INSPECTION.

The Design-Builder shall have the responsibility for QC inspection of all Work. See Part 3, Section 4 - Design-Builder's Quality Control Program, Section 5 - Design, Design Quality Assurance and Quality Control, and Section 6 - Construction Quality Control and Quality Assurance for the specific Design-Builder QC Inspection and QC responsibilities.

A. Authority and Duties of Department's Oversight Staff. The Department's Construction Quality Assurance Engineer, and associated construction staff shall be authorized to inspect all Work done and material furnished, including all or any part of the Work and the preparation, fabrication, or manufacture of the material to be used. The Construction Quality Assurance Engineer, and associated construction inspectors may be Department employees or agents acting for the Department. Inspection shall include the Design-Builder's compliance with applicable safety requirements set forth in DB §107-05. The Construction Quality Assurance Engineer and associated construction inspectors are not authorized to either alter or waive requirements of the Contract Documents, nor are they authorized to issue instructions contrary to the Design Plans and Project Specifications without written approval of the Department's Project Manager. Further, the Construction Quality Engineer and associated staff are not authorized to act as a foreman for the Design-Builder.

Oversight is for the sole benefit of the Department and does not:

1. Relieve the Design-Builder of responsibility for providing adequate QC measures;
2. Relieve the Design-Builder of responsibility for damage to or loss of the material/Work before Project Completion;
3. Obligate the Department to determine that Substantial Completion of the Project, Project Completion or Final Acceptance have occurred; or
4. Affect the continuing rights of the Department hereunder.

B. Department's Inspection of Work. All material and each part or detail of the Work may be subject to Inspection by the Construction Quality Assurance Engineer, and associated staff and the Department's Project Manager. The Department's Project Manager and Department staff shall be allowed full access to the Work and shall be furnished with necessary information and assistance by the Design-Builder to make a complete and detailed Inspection.

If the Department's Project Manager requests it, the Design-Builder, at any time before Final Acceptance of the Work, shall remove or uncover such portions of the finished Work as may be directed. After examination, the Design-Builder shall restore said portions of the Work to the standard required by the Project Specifications. If the Work thus exposed or examined proves acceptable, the uncovering or removing and the replacing of the covering or making good of the parts removed may be paid for as Extra Work under DB §104-02 and §109-05. But, if the Work so exposed or examined proves unacceptable, or if the Design-Builder failed to document its Work according to the requirements of the Quality Control Plan, the uncovering or removing and the replacing of the covering or making good of the parts removed will be at the Design-Builder's expense. Furthermore, any Work done or materials used without adequate notice to and opportunity for prior inspection by the Department and others as specified herein may be ordered uncovered, removed or restored at the Design-Builder's cost, even if the Work proves acceptable after uncovering. Except with respect to Work done or materials used as described in the foregoing sentence, if Work exposed or examined under this DB §105-11B is in conformance with the requirements of the Contract Documents, then any delay in the Critical Path from uncovering, removing and restoring Work shall be considered a Department-Caused Delay, and a Change Order may be issued to the Design-Builder for the cost of such efforts and recovery of any delay to any Critical Path occasioned thereby.

The Design-Builder shall provide at least a 24-hour notice, or such other notice to which the parties have agreed, before beginning Work on any item and before resumption of Work on an item after an extended suspension.

When a unit of government, political subdivision, or railroad is to pay a portion of the cost of the Work covered by this Contract, its representative(s) shall have the right to inspect the Work. Such inspection shall not make such unit of government, political subdivision, or railroad a party to this Contract in any manner of form, and shall in no way interfere with the rights of either party hereunder.

The above paragraphs shall not apply to pavement or sub-base rejected as a result of core tests. Work so rejected shall be removed and replaced at the expense of the Design-Builder.

The Design-Builder shall transmit a copy of any audit or inspection report conducted by SSPC, OSHA, or EPA, or any other government agency to the Department's Project Manager within seven days of receiving such a report. If any Subcontractor responsible for painting structural steel has been disciplined by SSPC or placed on warning, probation, suspended or revoked status from the Painting Contractor Certification Program during the past 24 months, the Design-Builder shall provide a written explanation of the cause for such action, the corrective measures enacted, and the Subcontractor's PCCP status.

C. Correction of Unacceptable Work. All Work which does not conform to the requirements of the Contract shall be considered unacceptable unless otherwise determined acceptable under the provisions in DB §105-08.

Unacceptable Work, whether caused by poor workmanship, defective material, damage through carelessness, or any other cause found to exist prior to the Final Acceptance of the Work shall be documented via a Non-Conformance Report. Such Unacceptable Work shall

be corrected in a manner acceptable to the Design-Builders Responsible Engineer and the Department irrespective of the presence of, or lack of, a CQAE or a representative of the Department at the time the Work was originally completed. The fact that Department representatives may have previously overlooked such defective Work shall not constitute an approval or acceptance of any part of it.

DB 105-12 LOAD RESTRICTIONS.

NYSDOT Standard Specification §105-12 shall apply.

DB 105-13 WORK ZONE TRAFFIC CONTROL FOR MOBILE OPERATIONS.

NYSDOT Standard Specification §105-13 shall apply.

DB 105-14 DISPUTED WORK AND DISPUTE RESOLUTION.

NYSDOT Standard Specification §105-14 shall apply.

~~The dispute resolution process involves the following levels of review / appeals: (1) Project Manager; (2) Regional Director; (3) Director of Project Management Office / Chief Engineer; and (4) Commissioner.~~

DB 105-15 FURNISHING RIGHT OF WAY.

NYSDOT Standard Specification §105-15 shall apply.

DB 105-16 SHOP DRAWING ACCEPTANCE.

A shop drawing is a drawing, diagram, illustration, test data, performance chart, catalog cut, brochure and other data prepared by the Design-Builder, Subcontractor, Manufacturer, Fabricator or Material Supplier for submission to the Department as an illustration of a portion of the work. The Department's acceptance of shop drawings does not relieve the Design-Builder of the responsibility to satisfactorily complete the Work in accordance with the Contract requirements.

Unless otherwise stated in the Contract documents, no portion of the Work requiring shop drawings or a sample of the Work shall be commenced until the submission has been approved by the Design-Builder's Designer of Record and accepted by the Design Quality Assurance Engineer.

Department review of shop drawings will begin only after the submission of a complete set of information required to complete a discrete item of work. Unless stated elsewhere in the Standard Specifications, the review process will allow two work days per drawing submitted or a minimum of 10 days. Submission of materials directly to the Department shall be done only with the approval of the Design-Builder. Complete copies of all submissions shall be provided to the Department's Project Manager and Design Quality Assurance Engineer.

DB 105-17 CONTRACT RECORDS.

NYSDOT Standard Specification §105-17 shall apply.

DB 105-18 MANUFACTURER WARRANTIES AND GUARANTEES.

NYSDOT Standard Specification §105-18 shall apply.

DB 105-19 DESIGN-BUILDER WARRANTIES AND GUARANTEES.

A. Warranties. The Design-Builder warrants as follows:

1. That all design Work performed pursuant to the Contract Documents, including that done by its Subcontractors and manufacturers, shall conform to all professional engineering principles generally accepted as standards of the industry;
2. That all non-design Work shall be free of defects and that the Project shall be fit for use for the intended function; and
3. That all materials and equipment furnished under the Contract Documents shall be of good quality and new.

In addition, the Department may require, subject to express agreement in writing between the Department and the Design-Builder, with approval from the FHWA when required, warranties associated with the contract for limited circumstances. A prototype warranty specification is available from the Department for the purpose of the Design-Builder's providing a warranty for a particular item, as opposed to providing a warranty for an entire contract. The product warranty will be developed between the Department and the Design-Builder with input from appropriate technical experts and the Office of Legal Affairs in conjunction with the Office of Construction and Project Management Office, and incorporated into the contract via Change Order. The warranty may be used in situations including, but not limited to, work performed not in full compliance with the contract documents, where initial testing does not indicate any deficiency in the end product.

Within seven days of receipt by the Design-Builder of notice from the Department that any of the Work fails to satisfy the Design-Builder's Warranties, or of any Subcontractor representation, warranty, guarantee, or obligation which the Design-Builder is responsible to enforce, the Design-Builder and the Department shall mutually agree when and how the Design-Builder shall remedy such violation, provided, however, that in case of an emergency requiring immediate curative action, the Design-Builder shall implement such action as it deems necessary and shall notify the Department of the urgency of a decision. The Design-Builder and the Department shall agree on a remedy immediately upon notice by or to the Department of such emergency. If the Design-Builder does not use its best efforts to proceed to effectuate such remedy within the agreed time, or if the Design-Builder and the Department fail to reach such an agreement within such seven-day period (or immediately, in the case of emergency conditions), then the Department, upon notice to the Design-Builder, shall have the right to order the Design-Builder to perform the Work or to perform or have performed by third parties the necessary Department-approved remedy, and the costs thereof shall be borne by the Design-Builder.

B. Warranty Period. Warranties for all Work shall commence upon Project Completion and shall remain in effect until two years after the date that Final Acceptance is achieved. If the Department determines that any of the Work has not met the standards set forth in this DB §105-19 at any time during the Warranty period for such Work, then the Design-Builder shall correct such Work as specified below even if the performance of such correction Work extends beyond the stated Warranty period.

C. Non-Exclusive Remedy. Any Warranties shall be in addition to all rights and remedies available under the Contract Documents or applicable law, and shall not limit the Design-Builder's liability or responsibility imposed by the Contract Documents or applicable law with respect to the Work, including liability for design defects, latent construction defects, strict liability, negligence, or fraud provided.

D. Damages for Breach of Warranty. In addition to all rights and remedies available under the Contract Documents or applicable law, if the Design-Builder fails or refuses to provide the Warranty remedy described in this DB §105-19, notwithstanding a valid request by the Department, the Design-Builder shall be liable for the cost of performance of the Warranty Work by others. The Department may also call on the Surety and/or Guarantor to perform the warranty obligations.

E. Exclusions. The Warranties shall not require the Design-Builder to perform repair or replacement work to the extent necessitated by the following:

1. Normal wear and tear, provided that damage and/or deterioration outside allowable limits specified in the Contract Documents shall not be considered normal wear and tear;
2. Failure to perform routine maintenance consistent with polices and/or procedures established by the Department or other maintenance agencies, including Utility Owners, or in the absence of such policies and/or procedures, in accordance with industry standards of maintenance for similar projects in the United States;
3. Rebellion, war, riot, act of sabotage, civil commotion, acts of vandalism, acts of terrorism, nuclear events or ionizing radiation causing direct physical damage;
4. Wind, flood and/or earthquakes and other acts of God which exceed the severity or intensity specified in the Standards applicable to the design as specified in the Contract Documents;
5. Fire, except when fire results from, or is exacerbated by, failure of a component otherwise covered by the Warranty provisions of this DB §105-19E; and/or
6. Spill or release of hazardous or contaminated substances, unless caused by the Design-Builder's organization or otherwise considered the Design-Builder's responsibility under DB §104-03.

DB 105-20 OPENING HIGHWAY TO TRAFFIC PRIOR TO CONTRACT FINAL. ACCEPTANCE

NYSDOT Standard Specification §105-20 shall apply.

DB 105-21 CIVIL RIGHTS MONITORING AND REPORTING.

NYSDOT Standard Specification §105-21 as supplemented by the following shall apply.

The Design Builder's Civil Rights Compliance Manager will submit documentation of D/M/WBE participation to date, as well as any and all efforts taken in solicitation for D/M/WBE participation, including but not limited to, the information provided in Form LDB.

DB 105-22 MAINTENANCE DURING CONSTRUCTION.

The Design-Builder shall maintain the Work during and after construction until Project Completion, except as may be provided elsewhere in the Contract Documents. The maintenance shall constitute continuous and effective Work prosecuted day by day, with adequate equipment and forces such that the roadway or structures are kept in satisfactory condition at all times.

In the case of a contract for the placing of a course upon a course or subgrade previously constructed, the Design-Builder shall maintain the previous course or subgrade during all construction operations, including when the plan calls for placing traffic on the unfinished roadway.

The Department or its agents shall provide snow and ice control for state owned highways and bridges that are opened to traffic.

All costs of maintenance Work during and after construction until Project Completion are included in the Proposal Price and the Design-Builder will not be paid an additional amount for such Work.

If the Design-Builder, at any time, fails to comply with the provisions of DB §105-03 or this DB §105-22, the Department's Project Manager will promptly notify the Design-Builder of such noncompliance. If the Design-Builder fails to commence to remedy unsatisfactory maintenance immediately after receipt of such notice and prosecute the remedial action with diligence, the Department's Project Manager may immediately proceed to maintain the Project, and the entire cost of the maintenance will be deducted from monies due or to become due to the Design-Builder.

DB 105-23 CONSULTATION AND WRITTEN COMMENT.

Except for items specifically designated for "approval" in the Contract Documents, the Design-Builder shall be responsible for determining how to address written comments and other input received from the Department during the consultation process concerning reviews, observations and/or inspections regarding Design Documents, Working Plans, other required submittals and construction means and methods. While the Design-Builder is not required to revise its Work in response to such comments, the Design-Builder shall develop designs that are code compliant and conform to all Project Requirements and provide a timely written response to the Department's Project Manager, or person designated by the Department's Project Manager, regarding its disposition of all such comments. Any issues raised during consultation and written comment by the Department, if not properly addressed by the Design-Builder, could affect the Department's Final Acceptance of the Project.

DB SECTION 106
CONTROL OF MATERIAL

DB 106-01 SOURCES OF SUPPLY.

Within seven (7) days of contract award, the Design-Builder shall notify the Department's Project Manager and the Construction Quality Assurance Engineer of the name and address of the fabricator of materials contained in the following sections:

Section 551 *Piles and Pile Driving Equipment,*
Section 562 *Reinforced Concrete Three-Sided Structures,*
Section 563 *Prestressed Concrete Units (Structural),*
Section 564 *Structural Steel,*
Section 565 *Bridge Bearings,*
Section 566 *Modular Expansion Joint Systems,*
Section 567 *Bridge Joint Systems,*
Section 568 *Bridge Railing,*
Section 576 *Bridge Drainage System,*
Section 587 *Bridge Railing Reconstruction,*
Section 594 *Timber and Lumber,*
Section 596 *Open Steel Floor,*
Section 597 *Timber Bridge Railing and Transitions,*
Section 644 *Overhead Sign Structures,* and
Section 656 *Miscellaneous Metals.*

The above list is those that commonly require source of supply notification to the Department. The list may not be all inclusive, and does not supersede requirements found elsewhere in the Standard Specifications, Steel Construction Manual, or Prestressed Concrete Construction Manual. The source of supply notification shall list the shop or shops in which the materials will be manufactured and/or fabricated. The Design-Builder shall notify the Department's Project Manager and the Construction Quality Assurance Engineer a minimum of 7 calendar days prior to any changes in the scheduled start of fabrication or changes in shop location in order to ensure that appropriate staff are available and present to perform shop inspections.

At the Pre-work Meeting, the Design-Builder shall furnish the sources of supply, and types of all other materials that require testing or other prior acceptance which it proposes to use in the Work, to the Department's Project Manager and the Construction Quality Assurance Engineer in writing. The Design-Builder shall notify the Department's Project Manager and the Construction Quality Assurance Engineer a minimum of 7 calendar days prior to any changes in sources of supply in order to ensure that the materials are obtained from approved sources or that required inspection or approval will be completed in a timely manner.

DB 106-02 QUALITY REQUIREMENTS.

All materials permanently incorporated into the Work shall meet the quality requirements described in Section 700 *Materials and Manufacturing*, unless the requirements are altered by a contract pay item specification or the Contract Documents. Materials shall be inspected, sampled, and tested by the Design-Builder as described in Section 700 *Materials and Manufacturing*, as indicated in the contract documents, or by procedural directives issued by the Department.

Safety Data Sheets, catalog cuts, manufacturer's directions and other documents prepared for general use may use U.S. Customary (USC) or International System of Units (SI)

measurement units, or units from both systems. In drawings and documents containing dual units, the USC units shall be the primary units, and the USC units will be reviewed. The Design-Builder shall be responsible for all annotations on the source documents, conversions between the measurement systems and all errors resulting therefrom.

Measurements, dimensions, and all other numerical data included in contract specific documents such as Material Acceptance Records, shop drawings, computations, and Material Details shall be presented in USC units, but they may also include SI units within parenthesis. The USC units shall be listed first, will take precedence and reviews will be based on these units. Documents that fail to adhere to this convention will be rejected.

When a reference is made to a specification or test designation of the AASHTO, ASTM, Federal Specifications, or any other recognized nonproprietary national organization, it shall mean the specification or test method (including Provisional AASHTO and Tentative ASTM) which is current on the date of advertisement for bids.

The Design-Builder shall provide to the Construction Quality Assurance Engineer a Safety Data Sheet (SDS) in accordance with 29 CFR 1926 Subpart D, for materials to be incorporated into the Work and products that are used at the contract site. The instructions for the use of all materials and products, as well as all identifying information required by the specifications (i.e. labels, tags, certifications, etc.) shall be in the English language.

Samples for testing shall be selected in the presence of the Department representative, prepared for testing, and shipped as directed by the Department. The cost of all samples; shipment of samples; and any other expenses incurred in making materials or products ready for inspection, sampling and/or testing; shall be included in the lump sum prices bid for the various items in the contract. Where testing methods used by the Department are not described in the specifications, details of test methods may be obtained by application to the Department.

Material shall be used so long as the quality remains equal to that of an accepted sample. Initial acceptance of a material will in no way preclude further examination and testing of a material at any time it appears that the material quality is no longer represented by an accepted sample. The acceptance at any time of any materials will not bar its future rejection if it is subsequently found to be defective in quality, uniformity or ability to meet the material specification.

Documents relevant to the production and acceptance of Hot Mix Asphalt (HMA) and Portland Cement Concrete (PCC) mixtures, including mix design forms, Quality Control (QC) forms, batching tickets, delivery tickets, and other documents shall be submitted in USC units. All materials requiring gradation tests shall be evaluated using U.S. Standard Screen Sieves meeting the requirements of ASTM E11.

The cost of all Department QA activities, including inspections, sampling, and testing, and oversight performed in the 48 contiguous states of the United States and the provinces of Canada, including the shipment of samples by the most economical means, shall be paid for by the Department unless specifically excluded elsewhere in the Contract Documents or procedural directives.

The Design-Builder shall submit monthly a certificate signed by the Design Quality Control Engineer and the Construction Quality Control Engineer certifying the following for the previous month:

1. That all Work, including that of the Designer and all other designers, Subcontractors at all tiers, and vendors has been checked and/or inspected by the Design-Builder's QC staff, that all documentation regarding this QC effort is in place, and that all Work, except as specifically noted in the certification, conforms to the requirements of the Contract; and
2. That the Quality Control Plan and all measures and procedures provided therein are functioning properly and are being followed, except as specifically noted in the certification.

3.

DB 106-03 PLANT INSPECTED MATERIALS.
NYSDOT Standard Specification §106-03 shall apply.

DB 106-04 MATERIAL CERTIFICATION AND APPROVED LIST.
NYSDOT Standard Specification §106-04 shall apply.

DB 106-05 RECYCLED MATERIALS.
NYSDOT Standard Specification §106-05 shall apply.

DB 106-06 STORAGE AND HANDLING OF MATERIALS.
NYSDOT Standard Specification §106-06 shall apply.

DB 106-07 BASIS FOR MEASUREMENT.
NYSDOT Standard Specification §106-07 shall apply.

DB 106-08 REJECTED MATERIALS.
NYSDOT Standard Specification §106-08 shall apply.

DB 106-09 EQUIVALENTS.
NYSDOT Standard Specification §106-09 shall apply.

DB 106-10 QUALITY ASSURANCE.
NYSDOT Standard Specification §106-10 shall apply.

DB 106-11 BUY AMERICA.
NYSDOT Standard Specification §106-11 shall apply.

DB 106-12 DEPARTMENT-FURNISHED MATERIAL.
The Design-Builder shall furnish all material required to complete the Work, except those items specified to be furnished by the Department.

Material furnished by the Department will be delivered or made available to the Design-Builder at the times specified in the Contract.

The cost of handling and placing all material after it is delivered to the Design-Builder shall be considered as included in the Price for the item in connection with which it is used. The Design-Builder will be held responsible for all material delivered to the Design-Builder, and deductions will be made from monies due to the Design-Builder to make good on shortages and deficiencies from any cause whatsoever, for damage which may occur after such delivery, and for demurrage charges.

DB SECTION 107
LEGAL RELATIONS AND RESPONSIBILITY TO THE PUBLIC

DB 107-01 LAWS, RULES, REGULATIONS AND PERMITS.
NYSDOT Standard Specification §107-01 shall apply.

DB 107-02 PATENTED DEVICES, MATERIAL, AND PROCESSES.
NYSDOT Standard Specification §107-02 shall apply.

DB 107-03 FEDERAL-AID PARTICIPATION.
NYSDOT Standard Specification §107-03 shall apply.

DB 107-04 PUBLIC NOTICES.
NYSDOT Standard Specification §107-04 shall apply.

DB 107-05 SAFETY AND HEALTH REQUIREMENTS.
NYSDOT Standard Specification §107-05 shall apply.

DB 107-06 INSURANCE.
NYSDOT Standard Specification §107-06 shall apply.

Any reference to a Note in the "Contract Proposal" shall be replaced with in the "Request for Proposals Part 5 Special Provisions".

~~The Design-Builder shall procure, at its own sole cost and expense, and shall maintain in force at all times during the term of this contract including any extensions or renewals until Contract Final Acceptance, the policies of insurance covering all operations under the contract whether performed by it or its subcontractors as herein below set forth, written by companies authorized by the New York State Insurance Department to issue insurance in the State of New York and that have an A.M. Best Company rating of (A -) or better or approved by the Department. The Department may, at its sole discretion, permit the placement of policies with a non-authorized carrier or carriers upon request by the Design-Builder accompanied by the documentation required by 11 NYCRR §27.0 *et seq.*; provided that nothing herein shall be construed to require the Department to accept insurance placed with a non-authorized carrier under any circumstances. The Design-Builder shall deliver to the Department evidence of such policies as the Department deems necessary to verify that the required insurance is in effect.~~

~~***A. Conditions Applicable to Insurance.*** All policies of insurance required by this agreement must meet the following requirements:~~

~~***1. Coverage Types and Policy Limits.*** The types of coverage and policy limits required from the Design-Builder are specified in Paragraph B *Insurance Requirements* below. General liability insurance shall apply separately on a per-job or per-project basis.~~

~~***2. Policy Forms.*** Except as may be otherwise specifically provided herein or agreed in writing by the Department, policies must be written on an **occurrence** basis. In the event that occurrence-based coverage is not commercially available, claims-made policy forms will be considered provided that, at minimum, it includes provisions that allow for (a) reporting circumstances or incidents that may give rise to future claims and (b) an~~

~~extended reporting period of not less than three (3) years with respect to events that occurred but were not reported during the term of the policy. ***Insurance policies that remove or restrict blanket contractual liability located in the "insured contract" definition (as stated in Section V, Number 9, Item f in the ISO CGL policy) or that remove or modify the "insured contract" exception to the employer's liability exclusion so as to limit coverage for claims that arise out of contract work, or that do not cover the additional insured for claims involving injury to employees of the named insured or subcontractors, are not acceptable.*** Policy forms must be provided to the Department upon request.~~

~~***3. Certificates of Insurance/Notices.*** Design-Builder shall provide a Certificate or Certificates of Insurance, in a form satisfactory to the Commissioner, before commencing any work under this contract. Certificates or transmittal correspondence shall reference the NYSDOT Contract D Number and the name of the contractor in the Subject Line, by email to:~~

~~*Insur.constr.contr@dot.ny.gov*~~

~~Certificates shall be mailed to the:~~

~~**New York State Department of Transportation**~~
~~**Contract Management Bureau**~~
~~50 Wolf Road, First Floor, Suite 1CM~~
~~Albany, NY 12232~~

~~Unless otherwise agreed, policies shall be written so as to require that the policy will not be (i) canceled, (ii) materially changed or (iii) permitted to expire or lapse for any reason except upon ten (10) days' prior written notice to the Department by Certified Mail, Return Receipt Requested at the address stated above. In addition, if required by the Department, the Design-Builder shall deliver to the Department within ten (10) work days of such request a copy of any or all policies of insurance not previously provided, certified by the insurance carrier as true and complete. Certificates of Insurance shall:~~

~~a. Be in a form satisfactory to the Department. The ACORD 25 Certificate must be accompanied by an ACORD 855 "New York Construction Addendum" completed to indicate information about the liability insurance of Insurance.~~
~~b. Be signed and dated by an authorized representative of the insurance carrier or producer.~~
~~c. Disclose any deductible, self-insured retention, aggregate limit.~~
~~d. Refer to this Contract by number on the face of the certificate.~~

~~If at any time during the term of this contract, it shall come to the attention of the Department that required insurance is not in effect or that adequate proof of insurance has not been provided, the Department may, at its option:~~

~~a. Direct the Design-Builder to suspend work and not re-enter the premises with no additional payment or extension of time due on account thereof, or~~
~~b. May withhold further contract payments in accordance with Article 8 *No Payment Due to Design-Builder's Non-Compliance* of the contract agreement, or~~
~~c. Treat such failure as a breach or default of the contract.~~

4. Additional Insureds. All insurance policies required by these specifications, except workers' compensation and professional liability shall be endorsed to provide coverage to "**The State of New York/New York State Department of Transportation, any municipality in which the Work is being performed, any public benefit corporation, railroad, or public utility whose property or facilities are affected by the Work, and any consultants working for or on the project, and their agents or employees"** with respect to any claim arising from the Design-Builder's Work under this contract or as a result of the Design-Builder's activities. The endorsement shall be affected by endorsement of the applicable policy using ISO form CG 20 10 11 85, CG 20 37 07 04, CG 20 33 07 98 when used in combination with CG 20 37 07 04, or CG 20 33 10 01 or a form(s) that provides equivalent coverage.

5. Primary Coverage. The liability and protective liability insurance policies shall provide primary and non-contributory coverage to the Department for any claim arising from the Design-Builder's Work under this contract, or as a result of the Design-Builder's activities.

6. Waiver of Subrogation. As to every type and form of insurance coverage required from the Design-Builder, there shall be no right of subrogation against **the State of New York/New York State Department of Transportation, its agents or employees.** To the extent that any of Design-Builder's policies of insurance prohibit such a waiver of subrogation, Design-Builder shall secure the necessary permission to make this waiver.

7. Policy Renewal/Expiration. At least ten (10) calendar days prior to the expiration of any policy required by this contract, evidence of renewal or replacement policies of insurance with terms no less favorable to the Department than the expiring policies shall be delivered to the Department in the manner required for service of notice in Paragraph A.3. *Certificates of Insurance/Notices* above.

8. Self-Insured Retention/Deductibles. Design-Builders utilizing self-insurance programs are required to provide a description of the program for Department approval. Collateralized deductible and self-insured retention programs administered by a third party may be approved. Except as may be specifically provided in the Contract Documents of a particular project, the Design-Builder or third-party-administered insurance deductible shall be limited to the amount of the bid deposit or $100,000, whichever is less. Security is not required if it is otherwise provided to an administrator for an approved risk management program. The Department will not accept a self-insured retention program without security being posted to assure payment of both the self-insured retention limit and the cost of adjusting claims. The Design-Builder shall be solely responsible for all claim expense and loss payments within any permitted deductible or self-insured retention. If the Design-Builder's deductible in a self-administered program exceeds the amount of the bid deposit, the Design-Builder shall furnish an irrevocable Letter of Credit as collateral to guarantee its obligations. Such Letter of Credit or other collateral as may be approved by Department must be issued by a guarantor or surety with an AM Best Company rating of (A -) or better. If, at any time during the term of this agreement, the Department, in its sole discretion, determines that the Design-Builder is not paying its deductible, it may require the Design-Builder to collateralize all or any part of the deductible or self-insured retention on any or all policies of insurance or, upon failure to promptly do so, the same may be withheld from payments due the Design-Builder.

9. Waiver of Indemnities. The Design-Builder waives any right of action it and/or its insurance carrier might have against the Department (including its employees, officers, commissioners, or agents) for any loss that is covered by a policy of insurance that is required by this contract. The Design-Builder waives any right of action it and/or its insurance carrier might have against the Department (including its employees, officers, commissioners, or agents) for any loss, whether or not such loss is insured.

10. Subcontractor's Liability Insurance. In the event that any portion of the Work described in this contract is performed by an approved subcontractor, the insurance requirements of this Article shall be incorporated into the subcontract agreement. Subcontractor insurance requirements shall include the requirements for Workers' Compensation, Commercial General Liability, and, if applicable, Commercial Auto and/or Professional Liability. Excess or umbrella insurance is not required for subcontractors. Design-Builder shall require that Certificates of Insurance, meeting the requirements of the Department are provided to the Department documenting the insurance coverage for each and every subcontractor employed by them to do work under this contract.

B. Insurance Requirements. The types of insurance and minimum policy limits shall be as follows:

1. Workers' Compensation and Disability Insurance. As required by State Finance Law §142, the Design-Builder shall maintain in force workers' compensation insurance upon forms required by or acceptable to the Workers Compensation Board for all of Design-Builder's employees. Design-Builder shall also maintain disability insurance as required by the Disability Benefits Law of the State of New York.

2. Commercial General Liability Insurance. The Design-Builder shall maintain an occurrence form commercial general liability policy or policies insuring against liability arising from premises (including loss of use thereof), personal injury or death, advertising injury, liability insured under an insured contract (including the tort liability of another assumed in a business contract) occurring on or in any way related to the premises or occasioned by reason of the operations of Design-Builder. Such coverage shall be written on an ISO occurrence form (ISO Form CG 00 01 12 07 or a policy form providing equivalent coverage) in an amount of not less than the amounts called for in Table 107-1. Unless otherwise provided, the policy or policies of insurance providing the liability coverage shall include:

a. Coverage for contractual liability assumed by the Design-Builder insured under an insured contract (including the tort liability of another assumed in a business contract).
b. All insurance policies required by these specifications except workers' compensation and professional liability shall be endorsed to provide coverage to "**the State of New York/New York State Department of Transportation, any municipality in which the work is being performed, any public benefit corporation, railroad, or public utility whose property or facilities are affected by the Work, or any consultant inspecting engineer or inspector working for or on the project, and their agents or employees"** using ISO form CG 20 10 11 85, CG 20 37 07 04, CG 20 33 07 98 when used in combination with CG 20 37 07 04, or CG 20 33 10 01 or a policy form or forms providing equivalent coverage.

c. Products-Completed Operations Coverage, as provided in the General Liability Policy, or in certain instances through ISO form CG 26 11 09 99 or suitable equivalent.

d. Where contract work will be performed by unregistered off-road equipment, Design-Builder shall provide documentation of a blanket Pollution Liability policy, or an endorsement to cover short-term pollution events, ISO form CG 04 33 10 01 or equivalent.

e. Coverage for claims for bodily injury asserted by an employee of an additional insured and any Employer Liability Exclusion which may otherwise operate to exclude such coverage shall be voided in this respect.

f. Explosion, Collapse and Underground Hazards coverage ("XCU") (for contracts that call for the performance of excavating, underground work, and/or the use of blasting equipment).

3. Commercial Automobile Insurance including liability and required coverage for New York. (*applicable to any project where automobiles or other vehicles will be employed to complete the Work*). In the event that automobiles are used in connection with Design-Builder's business or operations with the Department, the Design-Builder shall maintain a commercial or other automobile policy or policies insuring against liability for bodily injury, death, or damage to property and other mandatory coverages, relating to the use, operation, loading or unloading of any of Design-Builder's automobiles (including owned, hired and non-owned vehicles) on and around the project. This should be ISO form CA 00 01 10 01, CA 00 01 01 87 or a policy form providing equivalent coverage along with mandatory New York endorsements. Coverage shall be in an amount of not less than $1,000,000. each accident.

4. Umbrella or Excess Liability Insurance. The Design-Builder shall maintain an occurrence form umbrella liability policy or policies insuring against liability arising from premises (including loss of use thereof), operations, independent Contractors, products-completed operations, personal injury and advertising injury, and liability insured under an insured contract (including the tort liability of another assumed in a business contract) occurring on or in any way related to the premises or occasioned by reason of the operations of Design-Builder or arising from automobile liability as described above. Such coverage shall be written on an ISO occurrence form CU 00 01 12 07 or a policy form providing equivalent coverage. In the event that umbrella coverage is unavailable, equivalent excess coverage may be substituted. The minimum required limits for the umbrella/excess coverage shall be sufficient to provide, when combined with the Commercial General Liability Insurance, a total of not less than the amount called for in Table 107-1.

5. Special Protective and Highway Liability Policy. The Design-Builder shall maintain, separate and apart from its umbrella policy, a policy issued to and covering the liability of the People of the State of New York, The State of New York, the Commissioner of Transportation, all employees of the Department of Transportation, any municipality in which the Work is being performed, any public benefit corporation, railroad, or public utility whose property or facilities are affected by the Work, against damages that the insureds may be held legally liable to pay for property damage, personal injuries, or death that is caused by any occurrence that takes place within any location where work is to be or is being performed by Design-Builder, including at the location of any of the Work. This should be ISO form CG 00 14 12 or a policy form

providing equivalent coverage along with mandatory New York endorsements. Coverage shall be in an amount of not less than the amount(s) called for in Table 107-1.

6. Contractor's Risks *(applicable to all contracts).* The Design-Builder shall be responsible for obtaining any insurance it deems necessary to cover its own risks, including without limitation: (a) business interruption, such as gross earnings, extra expense, or similar coverage, (b) personal property, and/or (c) automobile physical damage and/or theft. In no event shall the Department be liable for any damage to, or loss of, personal property, or damage to, or loss of, an automobile that is covered by a policy of insurance that is required by this agreement, even if such loss is caused by the negligence of the Department.

7. Professional Liability/ Errors and Omissions. (*applicable to professional services requiring the signature, stamp or certification of a licensed professional, including, without limitation, erection plans, demolition plans, containment plans, coffer dams, and temporary sheeting*.) The Design-Builder shall maintain at its own expense or shall require to be maintained, such insurance as is customary to compensate the Department for any claims or losses that occur because of Design-Builder's errors, omissions malpractice or breach of professional obligations. Such policy or policies may be written on a claims-made form so long as coverage is maintained to be in effect to cover claims arising from the performance of services under this contract. Said coverage may be subject to a deductible or self-insured retention level of no more than $250,000. subject to approval by the Department, such approval not to be unreasonably withheld, except that it is also agreed that the Department may withhold payment for services rendered under this contract in the event, and to the extent of any deductible in the event that a claim is asserted. Such coverage shall be written on a claims-made basis (or a policy form providing equivalent coverage) in an amount of no less than the amount(s) called for in Table 107-1.

8. Railroad Protective Liability Insurance. (*applicable to any Work Affecting Railroads as described in §105-09.)* The Design-Builder shall maintain at its own expense railroad protective liability policy of insurance in the name of the affected railroad and with limits of coverage as specified in the Special Notes on Railroad Insurance, or if no limits of coverage are specified, the limits shall be not less than the amount(s) called for in Table 107-1. Aggregate Limit applying separately to each annual period. Said policy shall be subject to the approval of the railroad and comply with 23 CFR 646 Subpart A.

9. Marine Protection & Indemnity. *(applicable to any Work performed on a navigable waterway using barges or other watercraft).* Anytime the activity involves work on navigable water or the Work is connected to water related activities, Marine Protection & Indemnity and Hull and Machinery coverage is required. Hull and Machinery coverage shall be provided for the total value of the watercraft or equipment. The Design-Builder shall obtain Protective and Indemnity Liability insurance for all marine operations under the Agreement, with a minimum ($1,000,000.) limit. The policy shall be endorsed to add the Department as an Additional Insured.

10. Pollution Liability Insurance. (*applicable where the Design-Builder will employ mobile equipment or tanks or facilities for fueling vehicles or equipment on-site*). The Design-Builder shall procure and maintain, either through an endorsement to a commercial general liability policy or through a separate policy, insurance protecting Design-Builder and the Department from the liability and financial loss relating to Design-Builder's contamination of soil and the accidental release of petroleum products, chemicals and/or toxic gases from broken pipelines, utilities and

~~stationary and mobile fuel tanks that can result from Design-Builder's operations. Such coverage shall be written on policy form providing coverage for contamination both on and off the leased premises and shall provide coverage in an amount of not less than the amount(s) called for in Table 107-1.~~

~~***11. Builder's Risk Policy.*** (*applicable to projects that call for the construction of any "Structure" or building, including, but not limited to pump stations and in connection with such projects, as part of a project valued at $10,000,000 or more and then only to the extent of the value associated with such construction*). The Design-Builder shall procure and maintain a Builder's Risk policy in a form such as ISO form CP 00 20 10 90 or a policy form providing equivalent coverage, covering the perils insured under and including the special causes of loss form, including collapse. Subject to the allowances stated in Paragraph A. 8. *Self-Insured Retention/Deductibles*, above, the deductible not to exceed the amount called for in Table 107-1 covering the total value of work performed and equipment, supplies and materials at the location of the Work as well as at any off-site storage locations. Policy shall cover the structures and buildings, supplies and materials at the location of the Work as well as at any off-site storage locations. Sub-limits for loss caused by Flood and Earthquake are acceptable. The policy shall cover the cost of removing debris, including demolition as may be legally necessary by the operation of any law, ordinance or regulation, and for loss or damage to any owned, borrowed, leased or rented capital equipment, tools, including tools of their agents and employees, staging towers and forms, and property of Department held in their care, custody and/or control. Such policy shall name the Design-Builder as insured, and The People of the State of New York and Subcontractors as additional insureds.~~

~~*C. Table of Insurance Requirements*~~

~~**TABLE 107-1 INSURANCE FOR DESIGN-BUILD CONTRACTS**~~					
~~**Insurance Type**~~	~~**Contract Value (Millions)**~~				
	~~**$10-$25**~~	~~**$25-$50**~~	~~**$50-$100**~~	~~**$100-$250**~~	~~**Over $250**~~
~~**Commercial General Liability (CGL)**~~	~~$2 million per occurrence; $4 million aggregate~~	~~$2 million per occurrence; $4 million aggregate~~	~~$3 million per occurrence; $6 million aggregate~~	~~$5 million per occurrence; $10 million aggregate~~	~~$5 million per occurrence; $10 million aggregate~~
~~**Commercial Auto**~~	~~$1 million per accident~~	~~$1 million per accident~~	~~$1 million per accident~~	~~$1 million per accident~~	~~$1 million per accident~~
~~**Umbrella / Excess Liability**~~	~~At least $5 million when combined with the CGL~~	~~At least $5 million when combined with the CGL~~	~~At least $10 million when combined with the CGL~~	~~At least $25 million when combined with the CGL~~	~~At least $50 million when combined with the CGL~~
~~**Special Protective & Highway Liability Policy**~~	~~$2 million per occurrence; $4 million aggregate~~	~~$2 million per occurrence; $4 million aggregate~~	~~$3 million per occurrence; $6 million aggregate~~	~~$5 million per occurrence; $10 million aggregate~~	~~$5 million per occurrence; $10 million aggregate~~
~~**Professional Liability / Errors & Omissions**~~	~~$2 million per occurrence; $2 million aggregate~~	~~$3 million per occurrence; $3 million aggregate~~	~~$4 million per occurrence; $4 million aggregate~~	~~$5 million per occurrence; $5 million aggregate~~	~~$10 million per occurrence; $10 million aggregate~~
~~**Railroad Protective**~~	~~$ 5 million per occurrence; $ 10 million aggregate~~	~~$ 5 million per occurrence; $ 10 million aggregate~~	~~$5 million per occurrence; $ 10 million aggregate~~	~~$ 5 million per occurrence; $ 10 million aggregate~~	~~$5 million per occurrence; $ 10 million aggregate~~

~~TABLE 107-1 INSURANCE FOR DESIGN-BUILD CONTRACTS~~					
~~Insurance Type~~	~~Contract Value (Millions)~~				
	~~$10-$25~~	~~$25-$50~~	~~$50-$100~~	~~$100-$250~~	~~Over $250~~
~~Marine Protective~~	~~$1 million~~	~~$1 million~~	~~$1 million~~	~~$1 million~~	~~$1 million~~
~~Pollution Legal Liability~~	~~$1 million per occurrence; $1 million aggregate~~	~~$1 million per occurrence; $1 million aggregate~~	~~$1 million per occurrence; $1 million aggregate~~	~~$1 million per occurrence; $1 million aggregate~~	~~$1 million per occurrence; $1 million aggregate~~
~~Builder's Risk~~	~~$1 million (Deductible $25,000)~~	~~$2.5 million (Deductible $50,000)~~	~~$5 million (Deductible $100,000)~~	~~$10 million (Deductible $200,000)~~	~~$25 million (Deductible $500,000)~~

DB 107-07 PROTECTION OF UNDERGROUND FACILITIES.

NYSDOT Standard Specification §107-07 shall apply.

DB 107-08 PROTECTION AND RESTORATION OF PROPERTY AND LANDSCAPE.

NYSDOT Standard Specification §107-08 shall apply.

DB 107-09 DAMAGE.

All damage, direct or indirect, of whatever nature resulting from the performance of the Work or resulting to the Work during its progress from whatever cause, including omissions and supervisory acts of the State, shall be borne and sustained by the Design-Builder, and all Work shall be solely at its risk until it has been finally inspected and accepted by the State except that:

A. Damage by Public Traffic. Payment shall be made to the Design-Builder for repair or replacement of any permanent element of the highway which is completed to the stage of serving its intended function and is subsequently damaged by accident by public traffic. The Design-Builder must supply satisfactory evidence that such damage was caused by a public traffic accident and not by vandalism or by the Design-Builder's equipment. Satisfactory evidence shall generally be limited to: accident reports filed with the NYS Department of Motor Vehicles, police agencies or insurance companies; statements by reliable, unbiased eye witnesses; or identification of the vehicle involved in the accident. Physical evidence that the damage was caused by a motor vehicle (such as tire marks or broken headlight glass) will not be sufficient unless it can be shown that the damage was not caused by the Design-Builder's vehicles or by vandalism. Payment for damage by public traffic will be made only after the Design-Builder has demonstrated to the satisfaction of the Department's Project Manager that it had made every reasonable effort to collect the costs from the person or persons responsible for damage.

Work for which there is an item in the contract will be paid for at the unit price for that contract pay item as shown in the Backup for the Design-Builder's Price Proposal kept in escrow. Work for which there is no item in the Backup for the Design-Builder's Price Proposal will be paid for at an agreed price or by means of force account. Payment will not be made for repair or replacement in any way connected with untimely failure of any portion of the highway under public traffic, and the determination regarding this matter shall be made by the Department's Project Manager, taking into consideration the normal life and the amount of normal wear of the element involved. This provision does not relieve the Design-Builder of the responsibility of work zone traffic control for the contract or the responsibility of having wholly complete and acceptable Work at the time of final inspection and contract acceptance.

The Design-Builder shall not be responsible for damages resulting from faulty designs as shown in the Directive Drawings that may be included in the contract documents nor damages resulting from willful acts of Department officials or employees and nothing in this paragraph or contract shall create or give to third parties any claim or right of action against the Design-Builder or State beyond such as may legally exist irrespective of this paragraph or contract.

B. Damage by Occurrence. The term "Occurrence" shall include only those floods, droughts, tidal waves, fires, hurricanes, earthquakes, windstorms or other storms, landslides or other catastrophes when such occurrences or conditions and effects have been proclaimed a disaster or state of emergency by the President of the United States, or the Governor of New York State, or the Federal Highway Administrator, or the chief executive of a county or city.

If damage to the Work in progress is caused by an Occurrence, and to the extent that such damage has been determined by the Department to be beyond that which may be anticipated from heavy storms, and also to the extent that such damage is not reimbursable by insurance carried by the Design-Builder, the Design-Builder may apply to the State to pay or participate in the cost of repairing the damage to the Work, unless such damage is caused by the Design-Builder's action or inaction or the Design-Builder's means and methods of construction.

The Design-Builder's written request for the State to pay or participate in the cost of rebuilding, repairing, restoring or otherwise remedying damage to the Work caused by an Occurrence shall be submitted to and approved by the Department's Project Manager before performing any Work other than emergency work, including emergency work necessary to provide for passage of public traffic.

At the sole discretion of the Department, the contract may be terminated and the Design-Builder relieved of further obligation to perform the Work.

C. Obligation to Indemnify by the Design-Builder. To the fullest extent permitted by law, the Design-Builder shall indemnify and save harmless the State, any municipality in which the Work is being performed, and/or any public benefit corporation, railroad, or public utility whose property or facilities are affected by the Work, from suits, claims, actions, damages and costs, of every name and description arising from the Work under its contract during its prosecution and until the final acceptance thereof. The Design-Builder and any assigns, heirs, or successors in interest shall also indemnify and save harmless, to the fullest extent permitted by law, any consultant working for or on the project from suits, claims, actions, damages and costs involving personal injury and property damage arising from the Design-Builder's work under the contract during its prosecution and until the final acceptance thereof. The State may retain such monies from the amount due the Design-Builder as may be necessary to satisfy any claim for damages recovered against the State, any municipality in which the Work is being performed, and/or any public benefit corporation, railroad or public utility whose property or facilities are affected by the Work, or consultants working for the State on or for the project. The Design-Builder's obligation under this paragraph shall not be deemed waived by the failure of the State to retain the whole or any part of such monies due the Design-Builder, nor where such suit, action, damages and/or costs have not been resolved or determined prior to release of any monies to the Design-Builder under the contract, nor shall such obligation be deemed limited or discharged by the enumeration or procurement of any insurance for liability for damages imposed by law upon the Design-Builder, Subcontractor or the State, any municipality in which the Work is being performed, and/or any public benefit corporation, railroad or public utility whose property or facilities are affected by the Work, or any consultants working for the State on or for the project.

The Design-Builder has the obligation, at its own expense, for the defense of any action or proceeding which may be brought against the parties specified in paragraph §107-09C. This obligation shall include the cost of attorneys' fees, disbursements, costs and other expenses incurred in connection with such action or proceeding.

Such obligation does not extend to those suits, actions, damages and costs of every name that arise out of the sole negligence of the State, any municipality in which the Work is being performed, and/or any public benefit corporation, railroad or public utility whose property or facilities are affected by the contract work, or any consultants working for the State, their agents or employees, relative to the construction, alteration, or repair or maintenance of a building, highway or structure and appurtenances and appliances thereof including moving, demolition and excavating connected therewith.

The State reserves the right to join such action, at its sole expense, when it determines there is an issue involving a significant public interest.

D. Prompt Response to Claims by the Public. The Design-Builder's responsibility for the contract site applies to the full limits of the contract regardless of the extent or nature of contract work at a particular location. This obligation begins when the contract is awarded and continues until contract final acceptance. The Design-Builder shall promptly address all written damage claims of the public and, if not addressed directly, claims shall be promptly turned over to the Design-Builder's insurance carrier without prejudicing the validity of the claim. There should be an interval of no more than 10 work days between receipt of a written claim by the Design-Builder and receipt by the carrier. The Design-Builder and/or the Insurance Carrier are expected to investigate, determine and adjust such claims promptly and fairly with notice to the Engineer. The Engineer will monitor claims by the public. If the Design-Builder fails to provide satisfactory resolution through a timely claims adjustment process or denies the claim without proper cause and justification, the Department may invoke Article 8 No *Payment Due to the Design-Builder's Non-Compliance* of the contract agreement or utilize other remedies.

DB 107-10 MANAGING SURPLUS MATERIALS AND WASTE.

NYSDOT Standard Specification §107-10 shall apply.

DB 107-11 AIR QUALITY PROTECTION.

NYSDOT Standard Specification §107-11 shall apply.

DB 107-12 WATER QUALITY PROTECTION.

NYSDOT Standard Specification §107-12 shall apply:

DB 107-13 POLLUTION PREVENTION AND SPILL RESPONSE.

NYSDOT Standard Specification §107-13 shall apply, as supplemented by the following:

The Design-Builder shall be responsible for reporting and cleaning up spills associated with construction of the contract, and shall report and respond to spills of Hazardous Materials such as gasoline, diesel fuel, motor oils, solvents, chemicals, toxic and corrosive substances, and other material that are a threat to public health or the environment. The Design-Builder shall be responsible for reporting historic spills encountered during construction and current spills not associated with construction. Reports shall be made immediately to the Department's Project Manager if on State ROW or to the property owner if outside of State ROW. Unreported spills identified after construction and associated with construction of the Project shall be cleaned up

by the Design-Builder. Failure to report or respond to a spill shall result in the Design-Builder bearing the full cost of remediation of clean-up of such unreported spills. The Design-Builder shall also submit a monthly summary of activities related to hazardous and contaminated substances. If there is no activity, the report shall indicate such.

The Department shall be responsible for any costs and expenses due to Critical Path delays directly attributable to any new discovery of Hazardous Materials that are of a type, quantity or location that differs materially from the types, quantities or locations of Hazardous Materials identified in the RFP or the Contract Documents as potentially present at the Site and that the Design-Builder is not otherwise responsible for as provided in DB §104-03 and this DB §107-13. The Design-Builder is responsible for all costs and expenses, including costs and expenses due to Critical Path delays, for any release or threatened release of Hazardous Material (i) which was brought onto the Site by the Design-Builder or Subcontractors, or (ii) which was negligently removed or handled by the Design-Builder or Subcontractors, regardless of the source, origin or method of deposit of such Hazardous Materials. Except with respect to Hazardous Materials as described in the preceding sentence, the Design-Builder shall not be required to execute any hazardous waste manifests as a “generator,” and Hazardous Materials encountered in the performance of the Work shall be disposed of, if at all, utilizing an EPA identification number or other appropriate legal device obtained by, and carried in the name of, the Department or another Person designated by the Department.

DB 107-14 ENVIRONMENTAL AND CULTURAL RESOURCES.

Before construction, the Department shall obtain the Environmental Resource and Cultural Resource approvals for the Project area included in the Contract Documents. Special Environmental Resource and Cultural Resource requirements developed to protect resources shall be described in the Contract Documents. The Design-Builder shall comply with all Environmental and Cultural Resource management requirements. The Department’s Project Manager and environmental staff are available to assist the Design-Builder in the area of Environmental Resource and Cultural Resource management.

A. Environmental and Cultural Resource Discoveries

If the Design-Builder encounters an Environmental Resource or Cultural Resource that is not included in the Contract Documents, the Design-Builder shall stop work in the immediate area until the Department’s Project Manager determines that appropriate environmental staff of the Department and regulatory authorities have had the opportunity to review the location and complete appropriate mitigation actions. This shall not preclude Work in other areas.

B. Responsibility for Damage to Environmental and Cultural Resources

The Design-Builder shall repair, at its expense, all damage to Environmental Resources or Cultural Resources caused by failure to comply with requirements included in the Contract Documents to protect resources identified during the Environmental Resources and Cultural Resources evaluation. The extent of such an action shall be determined in coordination with the Design-Builder, Department’s representatives, and the regulatory authorities with management jurisdiction over the subject resources.

The Design-Builder shall be responsible for time and cost impacts of any delays resulting from the Design-Builder’s non-compliance with Governmental Rules or other Contract requirements related to Environmental Resources and Cultural Resources issues.

C. The Design-Builder’s Responsibility for Environmental and Cultural Resources Approval

Before beginning soil-disturbing activities at areas such as camp sites, plant sites, crusher sites, stockpile sites, equipment yards, borrow pits, and surfacing pits, as well as for any construction area obtained by the Design-Builder that is not included in the Contract Documents, the Design-Builder shall employ a qualified environmental scientist and Cultural Resource professional to conduct an Environmental Resources and Cultural Resources study. The environmental scientist and Cultural Resource professional must have appropriate resource study permits and meet the professional qualifications established by regulatory authorities to conduct the required studies. The documentation prepared must meet the standards of the Department and regulatory authorities. The documentation must also meet the standards of State, tribal, or federal land managing agencies if the proposed activity is located on land under their jurisdiction. The studies are required regardless of land ownership, and they must be in conformance with the requirements included in NEPA and the National Historic Preservation Act.

The Cultural Resources review must meet standards established by the State Historic Preservation Officer (the Commissioner of Parks, Recreation and Historic Preservation) and, if applicable, the appropriate land-managing agency. A State, tribal, or federal agency with jurisdiction over the property may also establish other Environmental Resources and Cultural Resources study requirements. The documentation prepared for the Environmental Resources and Cultural Resources studies shall be submitted to the Department's Project Manager and, if required, to other regulatory authorities with jurisdiction over the land or resources that are present. Copies shall also be submitted to the Department's appropriate environmental staff. The Department's environmental staff shall submit the Cultural Resources studies to the New York State Office of Parks, Recreation and Historic Preservation (SHPO). The Design-Builder shall complete any other coordination required. The Department's Project Manager shall notify the Design-Builder when Cultural Resources approval from the Department's environmental staff and SHPO has been obtained. The coordination may take 30 days from the date it is delivered to the Department's staff.

The Department will be responsible for any costs and expenses due to Critical Path delays directly attributable to discovery of Environmental Resources or Cultural Resources that are not identified in the RFP or the Contract Documents. The Design-Builder is responsible for all costs and expenses, including costs and expenses due to Critical Path delays, for all Environmental Resources or Cultural Resources that are identified in the RFP or the Contract Documents.

Approval of the State, tribal, or federal land-managing agency, if applicable, and coordination with regulatory authorities and the State Historic Preservation Officer must be completed before the Design-Builder initiates any soil-disturbing activities at the locations subject to this requirement. The Design-Builder shall abide by all Environmental Resource and Cultural Resource requirements for protection of resources identified during the Environmental Resources and Cultural Resources studies.

1. Previously completed Environmental Resources and Cultural Resources investigations. Environmental Resources and Cultural Resources investigations previously completed by others for the same location to be used by the Design-Builder can be used for the Environmental Resources and Cultural Resources requirements described in this Section so long as those previously completed investigations meet the standards identified here. The Design-Builder shall obtain copies of the Environmental Resources and Cultural Resources documentation and submit them to the Department's Project Manager and, if required to do so, to other regulatory authorities with jurisdiction over the land or resources that are present. Copies shall also be submitted to the appropriate environmental staff of the Department. The Department's environmental staff and the Department's Project Manager shall determine if the documentation meets the standards identified in this Section and is acceptable. If the previously completed

studies do not meet the Referenced Standards, then new Environmental Resources and Cultural Resources studies must be completed.

Parking Equipment in Highway ROW. Environmental Resources and Cultural Resources inventories may not be completed by the Department for some projects when construction is confined to the existing paved surface of the road. In these situations, as shall be noted in the Contract Documents, the Design-Builder shall identify all locations along the Project corridor where equipment shall be parked during construction. The Environmental Resources and Cultural Resources requirements of this Section must be completed by the Design-Builder if any of the designated locations are in areas where previously undisturbed soils are present.

DB 107-15 USE OF UNITED STATES-FLAG VESSELS.

NYSDOT Standard Specification §107-15 shall apply.

DB 107-16 ENSURING PAY EQUITY BY STATE CONTRACTORS.

NYSDOT Standard Specification §107-16 shall apply.

DB SECTION 108
PROSECUTION AND PROGRESS

DB 108-01 PROGRESS SCHEDULE.

The Design-Builder shall create, provide and maintain a progress schedule on the Department's Enterprise network using Oracle/Primavera scheduling software. This progress schedule shall be prepared using the critical-path method (CPM) and based on the principles in the latest edition of the Construction Planning and Scheduling Manual published by the Associated General Contractors of America, except where superseded by the Contract Documents. The Design-Builder and the Department shall use this schedule to manage the Work, including the activities of Subcontractors, fabricators, the Department, other involved Governmental Persons, other entities such as utilities and municipalities, and all other relevant parties.

Acceptance of a Progress Schedule by the Department's Project Manager shall not be construed to imply approval of any particular method or sequence of construction or to relieve the Design-Builder of providing sufficient materials, equipment, and labor to guarantee completion of the Project in accordance with the Contract. Acceptance shall not be construed to modify or amend the agreement or the date(s) of completion therein.

Failure by the Design-Builder to include in the Progress Schedule any element of Work required for the performance of the Contract shall not excuse the Design-Builder from completing all Work required within the completion date(s) specified in the Contract, notwithstanding acceptance of the schedule by the Department's Project Manager.

Float contained in the Progress Schedule is not for the exclusive use and benefit of either the Department or the Design-Builder.

Events, actions, and progress that cause delays or gains to the Progress Schedule will be analyzed solely by the "Contemporaneous Period Analysis" method.

In developing the schedule, with respect to any submittals requiring a response from the Department for which the Contract Documents do not specify a time for the Department's response, the Design-Builder shall include a reasonable time for the Department to provide a response.

All costs related to developing, updating, revising and submitting the Progress Schedule shall be solely the Design-Builder's obligation and will be at no additional cost to the Department unless specifically provided for in other Contract provisions.

The purpose of the Progress Schedule is to ensure adequate design, planning and execution of the Work and to evaluate the progress of the Work.

A. Progress Schedule Submittals

The Design-Builder shall submit the Progress Schedule Submittals in accordance with Special Provision SP-3, including:

1. Draft Baseline Progress Schedule
2. Baseline Progress Schedule
3. Final Baseline Progress Schedule
4. Monthly, Bi-Weekly, or Weekly Progress Schedule
5. As-Built Progress Schedule

In addition, the Design-Builder shall submit regularly Look-Ahead Schedules to Department's Project Manager in accordance with Special Provision SP-3.

B. Review of the Progress Schedule

The Department's Project Manager, or his/her designee, will review the Progress Schedule submissions and then hold a discussion meeting with the Design-Builder after each submission. The Department will endeavor to provide review comments within ten days for a Baseline Progress Schedule submission and five days for a regular Progress Schedule submission. Within two weeks of this meeting, the Design-Builder shall adjust the Progress Schedule to resolve any issues noted by the Department's Project Manager. The Design-Builder shall submit for review the revised schedule materials as described above.

Upon completion of the final review by the Department's Project Manager, or his/her designee, the Design-Builder shall incorporate the final revisions and submit the Progress Schedule within one week of the Design-Builder's receipt of the Department's comments.

Changes to the Progress Schedule: The Progress Schedule shall accurately reflect the manner in which the Design-Builder intends to proceed with the Project and shall incorporate the impact of delays and Change Orders when these factors can be accurately determined. All changes to the schedule, e.g., the addition of activities, changes in logic, or changes in activity durations, shall be identified in the monthly narrative report for review by the Department's Project Manager.

C. Progress Schedule Updates

The Design-Builder shall update the Progress Schedule, at a minimum, on a weekly basis. Each update shall show changes to the Progress Schedule that reflect the status of activities that have commenced or have been completed, including the following items: (a) Actual Start date and or Actual Finish date as appropriate; (b) Remaining Duration for activities commenced and not complete; and (c) Suspend or Resume dates for activities commenced and not complete.

The updated schedule data shall be submitted to the Department's Project Manager electronically and on printed charts in the format specified by the Department's Project Manager, along with a narrative report per Part 5, Special Provision, SP-3 – Critical Path Method Schedule.

The Department's Project Manager will discuss schedule submissions and updates at the regularly scheduled progress meetings. The Design-Builder's appropriate design, construction, and scheduling personnel shall attend.

D. Progress Schedule Narrative

The Design-Builder shall submit, with each Progress Schedule submission, a Progress Schedule Narrative in Microsoft Word, or Adobe Acrobat format. The Progress Schedule Narrative shall summarize the following information, at a minimum:

1. The contract D number, project name, project location, and name of the Design-Builder.
2. Actual contract Award Date, current contract Completion Date, and scheduled completion of all project work.
3. Any contract Interim Milestone dates (I/D, B-Clock, LD, etc.), and scheduled Start and Finish dates for those Milestone activities.
4. A list of all activities on the Critical Path (include Activity ID's and Activity Descriptions) where Work is currently being delayed, and for each such activity provide detailed information including:
   - the events that caused the delay.
   - the party(s) responsible for the delay event(s).
   - the number of days the activity has been delayed (negative float).
   - the activities in the construction schedule affected by the events.

- the reasonable steps needed to minimize the impact of the delay, and which party needs to take the action(s).

5. A list of any other problems experienced during this Progress Schedule submission period, the party responsible for the problems, and the Design-Builder's intentions to resolve the problems.
6. A list of all activities for procurement of long lead time materials that are behind schedule and the reason(s) why.
7. For major work items describe the differences between the actual work performed and the work planned for the period as represented in the preceding Progress Schedule submission, including explanations for the deviations.
8. For all suspended work activities that could otherwise logically be progressed, identify the responsible party prohibiting the progression of the Work, as well as the detailed reasons why.
9. Description of any changes to the Critical Path since the last Progress Schedule submission and the impacts of such changes.
10. A list of all added or deleted activities included in this Progress Schedule submission, and the reason(s) for and the impact(s) of such changes.
11. A list of all changes in activity Original Durations, the justification for such change(s), and the impact(s) of such changes.
12. A list of all changes in relationships between activities included in this Progress Schedule submission, and the reason(s) for and the impact(s) of such changes.
13. A list of any addition or deletion of activity or project constraints, and the reason(s) for and the impact(s) of such changes.
14. A list of all changes to the project calendars, and the reason(s) for and the impact(s) of such changes.
15. The major work elements, as defined in the Work Breakdown Structure, to be accomplished during the next monthly work period.
16. Any potential problems that are anticipated for the next monthly work period and the proposed solutions to such problems. Identify potential problems or risks that either the Department or Design-Builder may be potentially responsible for. Explain what action the responsible party (i.e. - Department or Design-Builder) needs to take and the date by which time the action needs to be taken to avoid the problem.
17. Any planned acceleration of activities that the Design-Builder anticipates undertaking within the next work period that either the Department directed, or that the Design-Builder believes is necessary.
18. Quality Control efforts, including results of any Design Reviews and/or quality audits; and status of all design & construction NCRs issued and outstanding status of NCR dispositions.
19. Issues which may need the Department's Project Manager's attention or action for the next month, including Design Reviews.
20. If the Work falls behind the Progress Schedule such that the scheduled completion of the Work is beyond the Contract Time, the Design-Builder shall take such actions as necessary to improve its progress and shall indicate what measures it will take in the next 30 days to put the Work back on schedule so as to meet all milestone dates specified in the Contract. In preparing the revised schedule, the Design-Builder shall consider increasing its work force, construction plant and equipment, the number of work shifts, etc. If the Department's Project Manager finds the proposed schedule not acceptable, he/she may require the Design-Builder to submit a new schedule.

E. Monthly Progress Report

The Design-Builder shall submit a monthly progress report with each payment request, consisting of the following:

1. Quality Requirements (DB §106-02);
2. An Accident Report (DB §107-05);
3. A Security Report (Part 3 – Project Requirements, Section 22), if required;
4. A monthly Progress Schedule update (DB §108-01A.4);
5. A Change Order Status Report (DB §104-02);
6. A monthly Subcontract report, including Civil Rights Reporting (DB §105-21);
7. Updated Submittals List (Part 5, SP-3, 3.3.4.2 (d) xxi); and
8. A summary of hazardous and contaminated substance activities (DB §107-13).

DB 108-02 COMPLETION DATE.

NYSDOT Standard Specification §108-02 shall apply.

DB 108-03 FAILURE TO COMPLETE WORK ON TIME.

For each calendar day, or any portion thereof, that any Work remains uncompleted after the contract completion date specified in the contract agreement, Liquidated Damages and/or Engineering Charges from the contract completion date to the final date of completion of the Work will be assessed against the Design-Builder. When specified in the contract documents, Liquidated Damages may also be assessed for each calendar day, or any portion thereof, for failure to complete certain portions of work, or for failure to comply with requirements shown in the contract documents including in-stream or in-water work restriction dates specified by environmental regulatory agencies. Liquidated Damages will be assessed not as a penalty, but as liquidated damages; provided however that due account shall be taken of any adjustment of the contract time for completion of the Work as provided for elsewhere in the specifications.

The Design-Builder shall pay liquidated damages to compensate the public for detriment experienced by the public as defined in Part 5 – Special Provisions and/or specified in this DB §108-03.

The Department shall have the right to deduct any amount owed by the Design-Builder to the Department under the Contract Documents, including liquidated damages, from any amounts owed by the Department to the Design-Builder. Liquidated damages, shall be payable by the Design-Builder to the Department within 10 days after the Design-Builder's receipt of an invoice therefore from the Department.

A. Engineering Charges. Engineering Charges include all appropriate engineering and inspection expenses incurred by the State, its consultants and inspection agencies, and by railroad companies.

Engineering Charges will be assessed in cases where the Work has been unduly delayed by the Design-Builder because of unwarranted reasons, inefficient operation, or for any other reason for which the Department determines the Design-Builder to be responsible. Reasonable time necessary for reviews of shop drawings by the State or its agents, for changes or additions to the Work to meet field conditions which do not significantly affect the scheduled completion of the contract, delays incurred by seasonal and weather limitations, localized labor actions and shortages of supplies or materials, and other situations which should be anticipated are neither compensatory nor eligible for extensions of time without the assessment of Engineering Charges, except as provided for under DB §108-04 *Delay Provisions*.

Before assessing Engineering Charges, the Department will give due consideration to factors attributing to such delay due to extenuating circumstances beyond the control of the Design-Builder limited to the following:

1. The Work or the presence on the contract site of any third party, including but not limited to that of other contractors or personnel employed by the State, by other public bodies, by railroad, transportation or utility companies or corporations, or by private enterprises, or any delay in progressing such work by any third party except as indicated or disclosed in the contract documents or ordinarily encountered or generally recognized as inherent in the Work.
2. The existence of any facility or appurtenance owned, operated, or maintained by any third party, except as indicated or disclosed in the contract documents or ordinarily encountered or generally recognized as inherent in the Work.
3. The act, or failure to act, of any public or governmental body, railroad, transportation or utility companies or corporations, including, but not limited to, approvals, permits, restrictions, regulations or ordinances not attributable to a Design-Builder's submission, action or inaction or Design-Builder's means and methods of construction.
4. Restraining orders, injunctions, or judgments issued by a court not caused by a Design-Builder's submission, action or inaction or Design-Builder's means and methods of construction.
5. Any industry-wide labor boycotts, strikes, picketing or similar situations, as differentiated from jurisdictional disputes or labor actions affecting a single or small group of contractors or suppliers.
6. Any industry-wide shortages of supplies or materials required by the contract work, as differentiated from delays in delivery by a specific or small group of suppliers.
7. Damage by Occurrence as defined in DB §107-09B.
8. Decisions by the Department to open certain sections of the contract to traffic before the entire work is completed.
9. Major extra contract work, delays in the review or issuance of Change Orders, or delays beyond the established time periods for review and acceptance of RFC Design Units, which significantly affect the overall completion of the contract.
10. Failure of the State to provide individual rights-of-way parcels for an extended period of time beyond that indicated by the contract if such unavailability, as determined by the Commissioner, significantly affects the scheduled completion of the contract.
11. Award of the contract by the State more than 45 days beyond the letting date.
12. Situations covered by DB §104-03 *Differing Site Conditions*, DB §104-04 *Significant Changes in the Character of Work* and DB §104-05 *Suspensions of Work Directed by the Engineer*.

B. Liquidated Damages. Liquidated damages will be in the amount per calendar day specified in Table 108-1 Schedule of Liquidated Damages, in addition to Engineering Charges as provided for in DB §108-03A *Engineering Charges*. Liquidated Damages for special or very large contracts may be specified in the contract proposal. Liquidated Damages will not apply to contracts containing no work within the roadway limits. The Commissioner may waive such portions of the liquidated damages as may accrue if the Work is deemed to be in such condition as to be safe and convenient for use by the traveling public.

Permitting the Design-Builder to continue and finish the Work or any part of it after the time fixed for its completion or after the date to which the time for completion may have been extended, will in no way constitute a waiver on the part of the State of any of its rights under the contract.

The Design-Builder is responsible and liable for said liquidated damages even in the event that the Design-Builder abandons the performance of the contract or the Design-Builder's employment is terminated pursuant to the provisions of this contract.

TABLE 108-1 SCHEDULE OF LIQUIDATED DAMAGES		
Original Total Contract Price		Liquidated Damages per Calendar Day
From More Than	To and Including	
$10,000,000	$20,000,000	$4,000
$20,000,000	$100,000,000	$7,000
$100,000,000	$500,000,000	$15,000
$500,000,000	-	$25,000

DB 108-04 DELAY PROVISIONS.

A. Compensable Delays. The Department may provide monetary compensation for delays and interference in certain defined instances. The Design-Builder will only be eligible for extra compensation caused by delay or interference affecting the performance or the scheduling of contract work for those instances arising out of:

1. DB §104-03 *Differing Site Conditions*;
2. DB §104-04 *Significant Changes in the Character of the Work*;
3. DB §104-05 *Suspension of Work Directed by the Engineer*; and
4. Utility Delays, to the extent additional compensation is allowed for such delays under DB 104-04.2~~B.3~~.

These aforementioned provisions may also form the basis for extra work compensation pursuant to DB §105-14 *Disputed Work and Dispute Resolution* and DB §109-05 *Extra Work and Time Related Compensation*. Failure of the Design-Builder to adequately progress completion of the Work will be considered in determining whether the aforementioned instances are the primary causes of delay. In all such instances, for any requests made under this subsection, the Design-Builder shall keep detailed written records of the costs in accordance with DB §104-06 *Notice and Recordkeeping*. Any dispute shall be promptly submitted to the Department's Project Manager in writing, pursuant to DB §105-14 *Disputed Work and Dispute Resolution*.

B. Non-Compensable Delays. The Design-Builder agrees to make no monetary request for, and has included in its bid prices for the various items of the contract, any extra/additional costs attributable to any delays, inefficiencies or interferences in the performance of the contract caused by or attributable to the items set forth below. The Design-Builder shall be compensated solely by an extension of time, with or without engineering charges as appropriate, to complete the performance of the Work in accordance with the provisions of DB §108-02 *Completion Date*.

1. The Work, or the presence on the contract site, of any third party, including but not limited to personnel or other contractors employed by the State, by other public bodies, by railroad, transportation or utility companies or corporations, or by private enterprises.
2. Any delay in progressing work by any third party as indicated or disclosed in the contract documents or ordinarily encountered or generally recognized as inherent in the Work.
3. The existence of any facility or appurtenance owned, operated, or maintained by any third party, as indicated or disclosed in the contract documents or ordinarily encountered or generally recognized as inherent in the Work.
4. The act, or failure to act, of any other public or governmental body, railroad, transportation or utility companies or corporations, including, but not limited to, approvals, permits, restrictions, regulations or ordinances attributable to the Design-Builder's design, submission, action or inaction or the Design-Builder's means and method of construction.
5. Restraining orders, injunctions, or judgments issued by a court which were caused by Design-Builder's submission, action or inaction or means and method of construction.
6. Any labor boycott, strike, picketing or similar situation.
7. Any shortages of supplies of materials required by the contract work.
8. Climatic conditions, storms, floods, droughts, tidal waves, fires, hurricanes, earthquakes, landslides, acts of terrorism, nuclear events, or other catastrophes causing direct physical

damage. However, payment may be made for repairing damage to the Work caused by an "occurrence" as provided in DB §107-09 *Damage*.

9. Additional Contract Work or Extra Work which does not impact the Critical Path or affect the overall completion of the Contract, delays in the review or issuance of Change Orders, or field change sheets or delays within the established time periods for consultation and written comment for Design Documents, Working Plans, other submittals and construction details, means and methods.

10. Any situation which was within the contemplation of the parties at the time of entering into the contract.

11. Award of the contract by the State more than forty-five (45) days beyond the letting date.

12. Correcting any materials or Work rejected either by the Design-Builder or the Department~~,~~ or Work unsatisfactory to the Department for which payment has been withheld. Refer to DB §104-05; and DB §106-08.

13. Any other matters not caused by the Department or beyond its control.

DB 108-05 SUBLETTING OR ASSIGNING THE CONTRACT.

Unless indicated otherwise in a Project Labor Agreement, the Design-Builder shall perform Work with a value of at least 30% of the Contract Price with its own forces. Work performed by any Principal Participant, including any of the Design-Builder's joint venture members, general partner(s), subconsultants, and their affiliates, is considered Work with the Design-Builder's own force. However, the Design Services cost, the Construction Inspection cost, and the Materials Testing cost will be excluded from the calculation of the 30%.

The Design-Builder is responsible for all work performed by Subcontractors, Trucking Firms, Manufacturers, Fabricators, Material Suppliers, Services and any other parties in the performance of the contract, regardless of whether Department approval has been obtained. The Design-Builder shall not enter into any subcontract with any person or firm listed as debarred from government contracts by the New York State Department of Labor on https://applications.labor.ny.gov/EDList/searchPage.do or by the Federal Government, General Services Administration on https://www.sam.gov/SAM/ .Work shall be performed only by Subcontractors and Truckers specifically approved by the Department's Project Manager, and work shall not begin prior to approval by the Department's Project Manager. Subcontractors are permitted to subcontract any part of the contract to a second-tier Subcontractor. However, work shall not be assigned by a second-tier Subcontractor to a lower tier ~~s~~Subcontractor (i.e., no third-tier subcontracting permitted). Work shall not be assigned by a Trucking Firm to a lower tier trucking firm or trucking broker. Work by a non-approved Subcontractor or Trucking~~er~~ Firm will be suspended by the Engineer and payment for work by a non-approved Subcontractor or Trucking Firm may be withheld.

~~**A. Subcontractors.** Except as provided below, Subcontractor approval is required for:~~

- ~~Firms performing on-site work as defined in the contract documents.~~
- ~~Firms performing the on-site maintenance of previously furnished and installed products.~~
- ~~Firms delivering materials to the contract site and incorporating them directly into the Work by the firm's on-site work force.~~

~~Subcontractor approval is not required for:~~

- ~~Manufacturers, Fabricators and Material Suppliers who do not incorporate supplies or materials directly into the contract work.~~
- ~~Service Work which is not accounted through labor, equipment and materials, including, but not limited to Work Services and Professional Services.~~
- ~~Off-Site Trucking and Material Delivery.~~
- ~~Owner/Operator Trucking, both on-site and off-site.~~

~~**A. Subcontractor Approval.** Prior to approval of a Subcontractor by the Department, the Subcontractor shall file and have approved a completed Form CCA-2 New York State Vendor Responsibility Questionnaire - For Profit Construction with the Contract Management Bureau.~~

~~If a Design-Builder is not SSPC certified, Subcontractors performing structural paint removal operations and painting work shall be SSPC certified or alternatively certified by the Department in accordance with DB §105-03 *Methods and Equipment*.~~

~~The Design-Builder shall submit Subcontractor approval requests to the Regional Construction Group for approval by the Department's Project Manager. For each Subcontractor, the Design-Builder shall submit the following:~~

- ~~AAP20 *D/M/WBE Participation Worksheet* (if applicable)~~
- ~~CONR89 *Approval to Subcontract*~~
- ~~Labor affidavit Form AC 2948 *Subcontractor's Certification*~~
- ~~HC108 *Subcontractor's Certification - Project Specific Safety and Health Plan*;~~
- ~~Proof of Insurance in accordance with DB §107-06 *Insurance*;~~
- ~~*Design-Builder/Subcontractor SPDES Permit Certification* (if there is a contract SPDES Permit)~~
- ~~*CONR1 Vendor Assurance of No Conflict of Interest or Detrimental Effect*, signed by an authorized executive or legal representative of the firm.~~

~~The Department reserves the right to suspend or withdraw its approval of subcontractors where the Department determines it is in the best interest of the State to do so, including, but not limited to a Subcontractor's failure to comply with Health and Safety requirements, failure to comply with the terms of the Contract, and/or failure to remain a responsible subcontractor for the entire duration of the Contract.~~

~~B.~~A. Subcontract Provisions. The Design-Builder shall incorporate by reference or otherwise include these provisions in every Subcontract and shall require that the same reference or inclusion be contained in every Subcontract entered into by any Subcontractor. All Subcontracts shall be in writing and shall contain all pertinent provisions of the contract including ~~regard to~~ Federal and State Laws and Regulations. Upon request, the Design-Builder shall provide a copy of any requested written subcontract. All Subcontractors, Trucking Firms, and Professional Services shall maintain insurance coverages as required by DB §107-06 *Insurance*.

All subcontracts, supply or equipment contracts in excess of $10,000 shall incorporate the provisions of DB §102-11 *Equal Employment Opportunity Requirements*. The provisions may be incorporated by reference.

All subcontracts shall incorporate the provisions of DB §105-21 *Civil Rights Monitoring and Reporting*. The provisions may be incorporated by reference.

All subcontracts shall incorporate the provisions of DB §107-16 *Ensuring Pay Equity by State Contractors*. The provisions may be incorporated by reference.

All subcontracts shall incorporate the provisions of DB §108-05D. *Title VI Assurance*, including supply and equipment contracts, unless exempt by 49 CFR 21, or directives issued pursuant thereto. The provisions may be incorporated by reference.

All subcontracts, supply or equipment contracts shall incorporate the provisions of DB §105-14 *Disputed Work and Dispute Resolution*. The provisions may be incorporated by reference. If such subcontracts or supply or equipment contracts do not have similar provisions, then the State payments to the Design-Builder for such subcontract or supply or equipment work shall be limited to only that which are provided by the provisions of DB §105-14 *Disputed Work and Dispute Resolution* as if it were in effect for such subcontract or supply or equipment contract.

All Subcontractors and Trucking Firms working within the contract limits or at a facility dedicated to the contract shall have a written Project Safety and Health Plan in accordance with DB §107-05 *Safety and Health Requirements* or shall have a copy of the Design-Builder's written Project Safety and Health Plan and shall confirm by written agreement with the Design-Builder that all construction operations are adequately addressed. If a Subcontractor or Trucking Firm are following their own written Health and Safety Plan, ~~T~~the Design-Builder shall have a copy ~~of each Subcontractor's written Safety and Health Plan,~~ and shall ensure that the Subcontractor's and Trucking Firm's plans are not in conflict with the Design-Builder's written Safety and Health Plan.

All Subcontractors shall have a written policy addressing sexual harassment prevention in the workplace and provide annual sexual harassment prevention training to all of its employees. Such policy shall, at a minimum, meet the requirements of Section 201-G of the New York State Labor Law.

For Federal-Aid contracts the Design-Builder shall insert~~directly incorporate all the provisions of~~ Form FHWA-1273 *Required Contract Provisions Federal-Aid Construction Contracts*~~,~~ into all subcontracts (excluding purchase orders, rental agreements, and other agreements for supplies or services). The Contractor (or Subcontractor) shall~~, supply or equipment contracts; the provisions may not be~~ incorporate~~d~~ by reference the applicable requirements of Form-1273 for work done under any purchase order, rental agreement, or agreement for other services.

For Federal-Aid contracts, the Design-Builder shall directly incorporate the provisions of DB §108-05C *DBE Program Assurance* in every subcontract. The provisions may not be incorporated by reference.

For Federal-Aid contracts, the Design-Builder shall directly incorporate the provisions of DB §107-15 *Use of United States-Flag Vessels* in every subcontract. The provisions may not be incorporated by reference.

B. Subcontractors.

1. Subcontractor approval is required for:

- Firms performing on-site work as defined in the contract documents.
- Firms performing the on-site maintenance of previously furnished and installed products.
- Firms delivering materials to the contract site and incorporating them directly into the Work by the firm's on-site work force.

2. Subcontractors do not include the following:
   - Manufacturers, Fabricators and Material Suppliers who do not incorporate supplies or materials directly into the contract work.
   - Work Services and Professional Services not accounted through labor, equipment and materials.
   - On-Site Trucking, Off-Site Trucking Owner-Operator Trucking, and Material Delivery. (For Trucking Firm approval, see §108-05D Trucking Firms)
3. **Subcontractor Approval.** Prior to approval of a Subcontractor by the Department, the Subcontractor shall file and have approved a completed Form CCA-2 New York State Vendor Responsibility Questionnaire - For Profit Construction with the Office of Contract Management.

If a Design-Builder is not SSPC certified, Subcontractors performing structural paint removal operations and painting work shall be SSPC certified or alternatively certified by the Department in accordance with DB §105-03 Methods and Equipment.

The Design-Builder shall submit Subcontractor approval requests to the Regional Construction Group for approval by the Department's Project Manager. For each Subcontractor approval request, the Design-Builder shall submit the following:

- CONR89 *Approval to Subcontract*
- AAP20 *DBE/MBE/WBE/SDVOB Participation Worksheet* (required for all DBE/MBE/WBE/SDVOB firms)
- Labor affidavit Form AC 2948 *Subcontractor's Certification*
- HC-108 *Subcontractor's Certification - Project Specific Safety and Health Plan*;
- CONR2 *Prime Contractor's Certification* for proof of insurance for Subcontractors;
- CONR5 *Design-Builder/Subcontractor SPDES Permit Certification* (if there is a contract SPDES Permit)
- *CONR1 Vendor Assurance of No Conflict of Interest or Detrimental Effect*, signed by an authorized executive or legal representative of the firm.

The Department reserves the right to suspend or withdraw its approval of Subcontractors where the Department determines it is in the best interest of the State to do so, including, but not limited to a Subcontractor's failure to comply with Health and Safety requirements, failure to comply with the terms of the Contract, and/or failure to remain a responsible subcontractor for the entire duration of the Contract.

~~2.~~4. **Subcontract Report.**

As part of the monthly progress report, the Design-Builder shall submit a Subcontract report providing the Department with an updated list of Subcontractors (design and construction, at all tiers, including labor only). The Design-Builder shall specifically identify DBE/MBE/WBE/SDVOBs in the report. The location where the Subcontractors worked shall also be shown.

The Design-Builder shall also report the results of all procurements consummated in the previous month, including those procured competitively and by other means. The Design-Builder shall indicate the type of Work or product procured and size of the procurement (in dollars), and the name of the successful Subcontractor.

The report shall indicate the total number of Subcontractors and the total dollar value of all Subcontracts awarded to date. The report shall show the total number of Subcontracts and the total value of Subcontracts awarded to DBE/MBE/WBE/SDVOB firms to date.

The report shall indicate, for each Subcontract, the following:

1. The original Subcontract amount;
2. The value of any modifications to date; and
3. Payments made to date.

C. Professional Services. Professional Services provide specialized technical work to the Contractor for a fee or other basis not generally accounted for through labor, materials, and equipment billing. For definition of Professional Services, see §101-02 *Definitions.*

For each Professional Service requiring the signature, stamp or certification of a licensed professional, the Contractor shall submit the following:

- CONR2 *Prime Contractor's Certification* for proof of insurance for the Professional Service in accordance with §107-06 *Insurance.*
- AAP20 *DBE/MBE/WBE/SDVOB Participation Worksheet* (required for all DBE/MBE/WBE/SDVOB firms)

D. Trucking Firms. Trucking approval is required for On-Site Trucking, Off-Site Trucking, and Owner-Operators. Material Delivery does not require approval by the Department. The Contractor shall submit approval requests to the Regional Construction Group for approval by the Regional Construction Engineer. Work shall not be assigned or delegated by a Trucking Firm to a separate (lower-tiered) trucking firm or trucking broker(s).

The Department reserves the right to withhold, suspend or withdraw its approval of Trucking Firms where the Department determines it is in the best interest of the State to do so, including, but not limited to, a Trucking Firm's failure to comply with the terms of the Contract and/or failure to remain a responsible firm for the entire duration of the Contract.

1. On-Site Trucking. On-Site Trucking involves trucking operations where the truck driver is required to be paid prevailing wages (see DB §102-10 *Labor and Employment*). Certified payrolls are required to be submitted to the Engineer on a weekly basis.

For each On-Site Trucking approval request, the Contractor shall submit the following:

- CONR90 *Trucking Firm Approval;*
- AAP20 *DBE/MBE/WBE/SDVOB Participation Worksheet* (required for all DBE/MBE/WBE/SDVOB firms);
- AAP23 *DBE/MBE/WBE/SDVOB Trucking Form* (required for all DBE/MBE/WBE/SDVOB firms);
- Labor affidavit Form AC 2948 *Subcontractor's Certification* (Owner/Operator excluded);
- HC-108 *Subcontractor's Certification - Project Specific Safety and Health Plan* or *Certification - Trucking Safety and Health Plan (for On-Site Owner/Operator Trucking Firms);*
- CONR2 *Prime Contractor's Certification* for proof of insurance for Trucking Firms in accordance with §107-06 *Insurance.*

2. Off-Site Trucking. Off-Site Trucking involves trucking operations where the truck driver is not required to be paid prevailing wages (see DB §102-10 *Labor and Employment*).

For each Off-Site Trucking approval request, the Contractor shall submit the following:

- CONR90 *Trucking Firm Approval;*
- AAP20 *DBE/MBE/WBE/SDVOB Participation Worksheet* (required for all DBE/MBE/WBE/SDVOB firms);
- AAP23 *DBE/MBE/WBE/SDVOB Trucking Form* (required for all DBE/MBE/WBE/SDVOB firms);
- HC-108 *Subcontractor's Certification - Project Specific Safety and Health Plan* or *Certification - Trucking Safety and Health Plan (for On-Site Owner/Operator Trucking Firms);*
- CONR2 *Prime Contractor's Certification* for proof of insurance for Trucking Firms in accordance with §107-06 *Insurance.*

~~1.~~**3. *Owner/Operator~~s~~ Trucking.*** Owner/Operators are ~~defined as~~ individual businesses operated by the owner, who do not have any other employees, and therefore are not subject to prevailing wage rates. ~~Prior to performance of on-site work or trucking by an Owner/Operator, the Design-Builder shall submit proof of commercial automobile insurance and a Subcontractor's Certification - Project Specific Safety and Health Plan or Certification - Trucking Safety and Health Plan to the Engineer.~~
In order to be an Owner/Operator, the following conditions shall be met:

a. The operator shall be the ~~registered~~ owner of the business~~vehicle, and the name of the operator shall match the name of the owner on the vehicle registration; or, If the registered owner of the vehicle is a firm or corporation, typically a finance or leasing company, the operator shall furnish a lease or purchase agreement for the vehicle~~.
b. The registration of the vehicle shall be in the Owner/Operator's legal business name.
c. Insurance for the vehicle shall~~ould~~ be ~~carried~~ in the Owner/Operator's legal business name~~, or in the name of the registered owner~~.

For each Owner/Operator Trucking approval request, the Contractor shall submit the following:

- CONR90 *Trucking Firm Approval;*
- AAP20 *DBE/MBE/WBE/SDVOB Participation Worksheet* (required for all DBE/MBE/WBE/SDVOB firms);

- AAP23 *DBE/MBE/WBE/SDVOB Trucking Form* (required for all DBE/MBE/WBE/SDVOB firms);
- HC-108 *Subcontractor's Certification - Project Specific Safety and Health Plan* or *Certification - Trucking Safety and Health Plan (for On-Site Owner/Operator Trucking Firms);*
- CONR2 *Prime Contractor's Certification* for proof of insurance for Trucking Firms in accordance with §107-06 *Insurance.*

~~2.~~4. ***Material Delivery.*** Material Delivery includes delivery of materials or supplies to a public worksite to drop or stockpile. Material delivery does not include the "delivery to and hauling from such worksites of aggregate supply construction materials" as specified in NYS Labor Law Section 220. Material Delivery does not require approval by the Department.

~~C.~~E. DBE Program Assurance. The Design-Builder shall carry out the applicable requirements of 49 CFR 26 in the award and administration of Federal-Aid contracts. Failure by the Design-Builder to carry out these requirements is a material breach of this contract, which may result in the termination of this contract or such other remedy as the Department deems appropriate.

~~D.~~F. Title VI Assurance.

1. Compliance with Regulations. The Subcontractor shall comply with the Regulation relative to nondiscrimination in federally -assisted programs of the USDOT 49 CFR 21, as they may be amended from time to time, (hereinafter referred to as the Regulations), which are herein incorporated by reference and made a part of this contract.

2. Nondiscrimination. The Subcontractor, with regard to the Work performed by it during the contract, shall not discriminate on the grounds of race, color, or national origin in the selection and retention of ~~s~~Subcontractors, including procurements of materials and leases of equipment The Subcontractor shall not participate either directly or indirectly in the discrimination prohibited by 49 CFR 21.5, including employment practices when the contract covers a program set forth in 49 CFR 21 Appendix B.

3. Solicitations for Subcontractors, Including Procurements of Materials and Equipment. In all solicitations either by competitive bidding or negotiation made by the Design-Builder for work to be performed under a subcontract, including procurements of materials or leases of equipment, each potential Subcontractor or supplier shall be notified by the Design-Builder of the Design-Builder's obligations under this contract and 49 CFR 21 relative to nondiscrimination on the grounds of race, color, or national origin.

4. Information and Reports. The Subcontractor shall provide all information and reports required by the Regulations or directives issued pursuant thereto, and shall permit access to its books, records, accounts, other sources of information and its facilities as may be determined by the Department or the Federal Highway Administration to be pertinent to ascertain compliance with such Regulations, orders and instructions. Where any information required of a ~~s~~Subcontractor is in the exclusive possession of another who fails or refuses to furnish this information the ~~s~~Subcontractor shall so certify to the Department, or the Federal Highway Administration as appropriate, and shall set forth what efforts it has made to obtain the information.

5. Sanctions for Noncompliance. In the event of the Subcontractor's noncompliance with the nondiscrimination provisions of this contract, the Department shall impose such contract sanctions as it or the Federal Highway Administration may determine to be appropriate, including, but not limited to:

a. withholding of payments to the Design-Builder under the contract until the Subcontractor complies, and/or

b. cancellation, termination or suspension of the contract, in whole or in part

DB 108-06 COMMENCEMENT OF ACTIONS ON STATE PUBLIC WORKS CONTRACTS.

NYSDOT Standard Specification §108-06 shall apply.

DB 108-07 SEASONAL SHUTDOWN.

NYSDOT Standard Specification §108-07 shall apply.

DB SECTION 109
MEASUREMENT AND PAYMENT

This DB Section 109 describes the pricing concept, specifies the means of determining the Work progress, and establishes the procedures for requesting and making payments. In addition, this DB Section 109 also describe Extra Work, Force Account Work, Record Keeping, Dispute Resolution, Acceptance and Substantial Completion, Final Payment, Change Conditions and Delay Provisions and Non-Compensable Delays.

DB 109-01 MEASURING QUANTITIES.

For all Work paid on a lump-sum basis, progress and payment shall be determined as follows:

A. Construction Progress Payment. Except for payment of mobilization and any Force Account Work, payment will be made monthly for the portions of Work Items identified in Contract Document, Part 3 – Project Requirements, that have been completed that month. To be considered complete all the tests, certifications and approvals of that portion of the Work Item as required by the Contract and the Specifications shall have been performed, documented and accepted by the Department's Construction Quality Assurance Engineer and the Department's Project Manager. Any inspections or tests required to be performed by the Department's Quality Assurance Engineer or other Department staff to verify the Work has been completed in conformance with the contract requirements shall also have been completed and documented.

Where the Contract requires the submittal of a specified Plan or similar document prior to payments, the requirement is met when the Plan has been submitted and the Department's Project Manager acknowledges in writing that the Plan or document meets Contract requirements.

Where the Contract requires an audit and/or update of a specified Plan prior to payments, the requirement is met when the report of the audit and/or Plan update is submitted to the Department's Project Manager and the Department's Project Manager acknowledges or Approves (if specified) in writing, after receipt of the report or update, that it meets the Contract requirements.

If the Design-Builder and the Department's Project Manager cannot come to agreement on the percent complete of a Work Item or the amount due, the determination of the Department's Project Manager shall be used as the basis of the request for periodic payment. The Department's Project Manager shall submit a written statement to the Design-Builder outlining the rationale behind any substantial adjustment.

Payment will be based on the Price Proposal (which has been incorporated into the Contract – Design-Builder's Proposal, upon Award of the Contract).

B. Engineering, Construction Inspection and Testing Services Payments. Payment for Design Engineering Services shall be on a Lump Sum basis. The schedule for the payments shall be: 25% of the lump Sum amount paid the first month after the Notice to proceed. The remaining payments shall be structured as follows, provided the Design-Builder can establish equal percentage of design completion and it is verified by the Department's Project Manager: 15% following the second month after Notice to Proceed; 10% following the third month after Notice to Proceed, and 5% of the Lump Sum amount paid upon the Final Acceptance of the Project which includes delivery of all engineering drawings, calculations, shop drawings, as-built drawings, quality control documents and all

other design documents pertaining to the Project. The remaining 45% of the Lump Sum amount shall be paid in equal amounts per month over the established duration of the Contract. However, if the design drawings, specifications and calculations are completed and accepted by the Department, sooner than the scheduled Project Completion Date, the unpaid portion of the remaining 45% of the Lump Sum amount shall be paid.

Payment for the Independent Professional Engineering Construction Inspection Services shall be on a Lump Sum Basis. The schedule for the payments shall be: 10% of the lump Sum amount paid the first month after Design-Builder mobilization and the beginning of construction work, and 10% of the Lump Sum amount paid upon the Final Acceptance of the Project which includes delivery of all engineering drawings, calculations, shop drawings, as-built drawings, quality control documents and all other construction inspection, MURK, and other required documents pertaining to the Project. The remaining 80% of the Lump Sum amount shall be paid in equal amounts per month, from Design-Builder mobilization and the beginning of construction work to the scheduled Project Completion Date. If the Final Acceptance occurs sooner than the scheduled Project Completion Date, all remaining payments shall be made upon Final Acceptance of the Project.

Payment for the Independent Quality Control Services Firm (Materials Testing / Laboratory Services Firm) shall be on a Lump Sum basis. The payments shall be made in equal amounts per month, following the time of first laboratory or field test performed by the Independent Quality Control Services Firm (Materials Testing / Laboratory Services Firm) to the scheduled Project Completion Date. If the Final Acceptance occurs sooner than the scheduled Project Completion Date, all remaining payments shall be made upon Final Acceptance of the Project.

C. Periodic Payments. As the Work progresses in accordance with this Contract and in a manner that is satisfactory to the State, the State hereby agrees to make payments to the Design-Builder for Work completed, based upon the Project Scope and Design-Builder's Proposal that are attached hereto and made a part hereof, as follows:

1. The Design-Builder shall, upon such schedule or upon the completion of such Work as may be fixed by the Design-Builder and the State, make a progress report of work done and of Material which has actually been put in place in accordance with the terms and conditions of the Contract during the preceding period, and compute the value thereof in accordance with the Design-Build Contract documents and this DB Section 109.
2. The State will pay to the Design-Builder the monies due as provided in subdivision 7 of Section 38 of the New York State Highway Law.

Timeliness of payment and any interest to be paid to the Design-Builder for late payment shall be governed by Article XI-A of the New York State Finance Law to the extent required by that law.

D. Requests for Periodic Payment. The Design-Builder shall submit all requests for periodic payment to the Department's Project Manager with the monthly progress report (see DB §108-01E) signed by the Design-Builder's Project Manager or Deputy Project Manager, except that the Final Invoice must be signed by the Design-Builder's Project Manager. The Design-Builder shall submit the request by the fifth day of each month (if a holiday, the next work day) or other mutually agreed date.

The Design-Builder's Project Manager or Deputy Project Manager and the Design-Builder's Quality Manager shall sign the draft request for payment, which will have no effect until countersigned by the Department's Project Manager pursuant to DB §109-07.
Each request for Periodic Payment shall contain the following:

1. The amount claimed to be payable, including amounts due under Force Account and/or Change Orders;
2. Any other amount claimed to be payable or deducted pursuant to a determination of the Department's Project Manager, identifying the relevant determination; and
3. A certificate certifying progress reported and compliance with Contract requirements. The certification shall be signed by the Design-Builder's Project Manager/Deputy Project Manager, Quality Manager, and Design Manager.

E. Unit Price Work. If any Work is performed on a Unit Price basis, the Design-Builder shall perform the Work in accordance with the requirements set forth in the Contract Documents or the Change Order for such Work.

DB 109-02 VACANT.

DB 109-03 SCOPE OF PAYMENT.

NYSDOT Standard Specification §109-03 shall apply.

DB 109-04 PARTIAL PAYMENTS.

NYSDOT Standard Specification §109-04 shall apply.

DB 109-05 EXTRA WORK AND TIME RELATED COMPENSATION.

The Department reserves the right to order changes in the scope of the Contract Work as is necessary to complete the Project, in accord with the intent of the Contract Documents. Adjustments to the Contract Price shall be based on negotiations between the Design-Builder and the Department.

The Design-Builder will be compensated for ~~e~~Extra ~~w~~Work under existing unit prices, by agreed price in accordance with DB §109-05A *Agreed Price Work*, or by force account in accordance with DB §109-05B *Force Account Work*.

A. Agreed Price Work. Agreed prices for new items of work or materials in accordance with one of the methods outlined below may be accepted by the Department's Project Manager and incorporated into a change order as the Department may deem them to be just and fair and beneficial to the State. An agreed price may be offered by the Design-Builder, and accepted by the Department for a defined quantity of additional work. The Design-Builder shall provide an agreed price proposal generally not later than 7 calendar days prior to beginning the Work. If a price has not been agreed to, in writing, prior to starting the Work, the Design-Builder shall keep and submit daily records to document all labor, material and equipment used to complete the Work in accordance with DB §109-05C.1 *Daily Summary*. A change order containing an agreed price not supported by one of the following may be subsequently rejected by the Department or the Office of the State Comptroller.

1. Weighted Average Price. The statewide or regional weighted average price (WAP) for a contract pay item for minimum of 3 contracts of similar type, quantity, and/or location of work over a one to two-year period; as shown in the Pay Item Catalog (PIC). The Department may adjust the WAP for documented increase or decrease in labor, materials, equipment, mobilization, and/or site conditions.

2. Price Analysis. A price analysis shall be based on an estimated breakdown of charges listed in DB §109-05B *Force Account Work,* using the labor, equipment and other rates available when the agreed price is developed by the Design-Builder. The

analysis shall be based on crew composition, material prices, equipment production and overall production rates that are reasonable. Price analyses shall be submitted in a format acceptable to the Department. Price Analysis forms are available from the Department's website at:

www.dot.ny.gov/main/business-center/contractors/construction-division/forms

The Design-Builder will be reimbursed for labor in accordance with DB §109-05B.1.a. *Labor*. The Design-Builder will be reimbursed for each class of labor, not individual workers, at the prevailing wage rate for that trade and classification.

The Design-Builder will be reimbursed for materials in accordance with DB §109-05B.1.b. *Materials*.

The Design-Builder will be reimbursed for equipment in accordance with DB §109-05B.1.c. *Equipment*.

Equipment rates shall be used with no rate adjustment factor and no regional adjustment factor. An appropriate type and size of equipment similar to that available on the contract site, if present, shall be used.

The Design-Builder will be reimbursed for required insurances in accordance with DB §109-05B.1.d. *Insurance*.

The Design-Builder will be reimbursed for overhead at 10% of items DB §109-05B.1.a. *Labor*, and DB §109-05B.1.b. *Materials* and DB §109-05B.1.c. *Equipment*.

The Design-Builder will be reimbursed for profit at 10% of items DB §109-05B.1.a. *Labor*, DB §109-05B.1.b. *Materials* and DB §109-05B.1.c. *Equipment*.

Due to the cost and effort associated with development, a price analysis should generally be reserved for ~~e~~Extra ~~w~~Work under an individual contract pay item or a single price analysis, of more than $5,000.

B. Force Account Work. Where there are no applicable unit prices for ~~e~~Extra ~~w~~Work and agreed prices cannot be readily established or substantiated, the Design-Builder will be reimbursed by Force Account for the actual, reasonable and verifiable cost of the items listed below. The Design-Builder shall maintain and submit force account records in accordance with DB §109-05C *Force Account Report*.

1. Design-Builder Construction Costs. At the preconstruction meeting, the Design-Builder should provide the Department's Project Manager documentation supporting its insurance rates for the current period, and provide updates within 30 days after the renewal date, to assist in timely preparation and review of force account reports. All rates will be those in effect at the time the Work is performed.

a. Labor. Necessary labor costs include wages, supplemental (fringe) benefits, FICA, Medicare, Federal Unemployment Tax (FUTA), State Unemployment Insurance (SUI), paid holidays, Workers Compensation insurance and other such reasonable charges that are paid by the Design-Builder pursuant to existing written agreements with its employees and/or labor organizations. Labor shall be recorded in hours to the nearest half hour.

1.) Wages and Fringe Benefits. The Design-Builder will be reimbursed for each worker separately at the actual payroll rate, an average rate based on different workers will not be accepted. The wage rate for an individual worker may be up to 150% of the prevailing wage and 100% of the supplemental (fringe) benefits, provided the Design-Builder documents through certified payrolls that the worker has and continues to be paid more than the prevailing wage for contract work. The Design-Builder shall obtain the approval of the Department's Project

Manager for wage rates for individual workers over 110% of the prevailing wage prior to that individual starting work.

There are no prevailing wage rates for foremen/forewomen. Foremen/forewomen are typically paid at a higher rate than the trades they supervise, due to additional responsibilities. The reimbursement for foremen/forewomen will be based on previous certified payrolls or other payroll records for that individual, if available, provided crew composition and overall production rates are reasonable.

If the Design-Builder is obligated by a labor agreement to pay a full day's pay for an individual in a required labor classification, and cannot find other work on that day for that individual, the Design-Builder will be reimbursed for a full day's pay for that individual.

Professional or technical personnel specifically required or agreed to by the Department, in writing, to be present for specific critical work operations will be reimbursed as a direct labor cost. The reimbursement for these professional or technical personnel will be based on previous payrolls for that individual, as certified by the employer, or by comparison to costs for similarly qualified personnel.

No reimbursement will be made for travel, lodging, bonuses, or other similar payments made to workers.

2.) Standard Markups. The Design-Builder will be reimbursed for FICA, Medicare, Federal Unemployment Tax (FUTA), State Unemployment Insurance (SUI), and paid holidays using the Standard Labor Markup Rate, on all wages, not including supplemental (fringe) benefits. The Standard Labor Markup Rate, initially 12.5%, may be modified by the Department via Official Issuance.

The Design-Builder will be reimbursed for FICA and Medicare using the Standard Fringe Markup Rate on all supplemental (fringe) benefits paid in a payroll check or in cash to the employee. The Standard Fringe Markup Rate, initially 6.4%, may be modified by the Department via Official Issuance.

~~*3.) Workers Compensation Insurance*. The Workers Compensation insurance rate will be the statutory loss cost rate established by the NYS Workers Compensation Insurance Rating Board, with the insurer's approved lost cost multiplier, all assessments and credits, and an experience modifier of 1.00, subject to the Construction Employment Payroll Limitation (CEPL) Program limits where applicable. The Design-Builder shall submit an insurance policy declaration/rate page from its insurer to validate the Workers Compensation insurance rate.~~

~~Where the Longshore and Harbor Workers' Compensation Act, Jones Act, Federal Employees Liability Act or other legal requirements impose additional liability on the Design-Builder, additional differentials will be added to the Worker's Compensation insurance rate.~~

~~For Design-Builder that obtain Workers Compensation insurance through a pooled fund or similar arrangement, the Design-Builder shall supply documentation from the Design-Builder's insurance carrier detailing the rate and basis for application.~~

~~The Design-Builder will be reimbursed for Workers Compensation insurance based on the Workers Compensation insurance rate described above, multiplied by gross wages, not including the premium portion of overtime nor supplemental (fringe) benefits, except when supplemental benefits are paid directly to the employee, up to the CEPL wage limit, where applicable.~~

b. Materials. Materials are necessary products incorporated in the temporary or permanent work. The Design-Builder will be reimbursed for the costs of materials, including transportation to the site and sales taxes for materials not permanently incorporated into the Work. Material transportation may be accounted for as part of the material unit price, a material unit price for transportation, a fee for transportation, or equipment and operator charges. Design-Builder or Subcontractor costs for transportation of materials shall be accounted for as labor and equipment in accordance with DB §109-05B.1.a. *Labor* and DB §109-05B.1.c. *Equipment* respectively. Because force account work has no associated pay lines/limits, materials will be measured as actual quantities delivered and incorporated, including any required overlap, and appropriate allowances for waste and/or disposal due to construction operations and/or installation practices.

The Design-Builder will be reimbursed, including sales taxes when applicable, for expendable materials such as oxygen, acetylene, propane, welding rods, form lumber, form oil, grinding wheels, saw blades, hammer and drill bits, drill steel, and tooth-bits consumed in progressing the Work. Other small tools and tool/equipment supplies used or consumed in progressing the Work are considered to be included in overhead and no separate reimbursement will be made.

Material acquired by direct purchase shall be documented by bills or acceptable invoices. All prices on used material incorporated in either temporary or permanent work shall be billed at a fair value, less than the original cost when new. A reasonable salvage credit will be determined by the Engineer in coordination with the Design-Builder for substantial salvageable material recovered.

c. Equipment. Equipment, other than small tools, used by the Design-Builder shall be of suitable size and suitable capacity required for the Work to be performed. If the Design-Builder elects to use equipment of a higher rate than the equipment suitable for the Work, payment will be made at the rate applicable to the suitable equipment. The equipment actually used and the suitable equipment upon which the rate is based will be recorded as a part of the Force Account Report. Usage ~~wi~~shall be recorded in hours to the nearest half hour to align with the recorded labor for the associated work. The Department's Project Manager will verify the suitability of the equipment. If there is a differential in the rate of pay of the operator of oversize or higher rate equipment, the rate paid for the operator will likewise be related to the suitable equipment.

1) *Mobilization Costs.* If the Design-Builder does not have a needed type or piece of equipment on the contract site or the equipment is not available to perform the ~~e~~Extra ~~w~~Work, the Design-Builder will be reimbursed for the reasonable cost of mobilization to and demobilization away from the work site. Mobilization and demobilization include~~s~~ the cost of transporting equipment; 50% of the hourly ownership rate of transported equipment during transportation, including loading, unloading, assembly, and disassembly; and fees for any required regulatory permits. Costs for demobilization away from the work site will not be paid if the equipment is kept on the site and performs additional contract work.

2) *Ownership Costs*. The Design-Builder will be reimbursed for its costs for providing equipment at the rates listed in the Rental Blue Book Rate software produced by Equipment Watch (hereafter referred to as Blue Book). The hourly

ownership rates will reimburse the Design-Builder for all non-operating costs of providing equipment, including depreciation on the original purchase, costs of major overhaul repairs, facilities capital, normal risk insurance, property taxes, storage, licenses, security, record keeping, and mechanic's supervision.

The hourly ownership rate will be the Blue Book monthly rate divided by 176, multiplied by the rate adjustment factor for the equipment model year and then multiplied by the regional adjustment factor. If the Design-Builder has a piece of equipment remanufactured, rebuilt, or significantly altered, the rate adjustment factor may be modified, as documented by Equipment Watch.

For equipment required to be present and operating, the Design-Builder will be reimbursed for the product of the hours of actual use, multiplied by the hourly ownership rate.

For equipment required to be present; dedicated exclusively to the force account, not available for mobilization elsewhere, and not used on contract bid price work that day; the Design-Builder will be reimbursed for the product of the remaining non-operating hours in the shift, multiplied by 50% of the hourly ownership rate.

Equipment that is not required to be present will not be eligible for reimbursement of non-operating hours. If the Department's Project Manager agrees that equipment mobilized for the operation is no longer required to be present, the Design-Builder may demobilize the equipment. If the equipment is demobilized, and subsequently determined to be required to be present, the Design-Builder will be reimbursed for remobilization.

For equipment without an operator that is designed to operate on a continuous long-term basis, such as a pump, portable variable message sign (PVMS), or temporary traffic signal, the Design-Builder will be reimbursed for a maximum of 176 hours a month. Equipment with an hourly ownership rate of less than $2 or a current purchase price of less than $500 will be considered as small tools and equipment, and will not be directly reimbursed.

3) *Operating Costs*. The hourly operating rate includes preventative and field maintenance, fuel, lubricants, and other operating expenses as outlined in Blue Book, not including consumables or the operator's wages. The Design-Builder will be reimbursed for the product of the number of hours of actual use multiplied by the hourly operating rate. No reimbursement for operating costs will be made for equipment that is not operating.

4) *No Established Rate*. If rates are not established in Blue Book for a particular piece of equipment, the Design-Builder shall contact the Blue Book publisher, Equipment Watch to establish rates. If Equipment Watch will not establish rates, the Department, in coordination with the Design-Builder, may establish rates for ownership costs and operating costs for that piece of equipment consistent with its cost and expected life.

5) *Maximum Ownership Costs.* The maximum amount reimbursed for ownership costs of equipment, is limited, on a contract basis, to the original purchase price as listed in the Equipment Watch Retail Rental software. The Design-Builder shall not exchange equipment for a similar item for the purpose of extending the maximum ownership cost. Exchange of equipment for an engineering or mechanical reason shall be approved by the Department's Project Manager, or the maximum ownership cost will be limited to that reimbursed for the original

piece of equipment. If the ownership cost is limited by the original purchase price, the Design-Builder will continue to be reimbursed for the operating cost for hours of actual use.

6) *Backup Equipment*. The Design-Builder will be reimbursed at 50% of the hourly ownership rate for redundant/backup equipment specifically required, or agreed to by the Department in writing, to be present for specific critical work operations.

7) *Owner/Operator Equipment*. Equipment Owner/Operators utilized by the Design-Builder in the performance of Work shall be accounted for as a service charge in accordance with DB §109-05B.3. *Service Charges*.

d. Insurance. The Design-Builder will be reimbursed for Commercial General Liability (CGL), Umbrella or Excess Liability, Special Protective and Highway Liability, ~~Design-Builder Risks,~~ Professional Liability/Errors and Omissions, Railroad Protective Liability, Marine Protection and Indemnity, and Pollution Liability insurances required in accordance with DB §107-06 *Insurance*, at the rate paid by the Design-Builder, in accordance with the method procured from its insurer(s), to the extent the insurance costs are attributable to the force account work.

1) Design-Builders or Subcontractors that pay insurances on the basis of a percentage of payroll will be reimbursed that percentage of the portion of item DB §109-05B.1.a~~.~~ *Labor* specified in the Design-Builder's insurance policy.

2) Design-Builder's or Subcontractors that pay insurances on the basis of a percentage of gross sales will be reimbursed that percentage of the total of items DB §109-05B.1.a~~.~~ *Labor*,~~through~~ DB §109-05B.1.b *Materials,* DB §109-05B.1.c *Equipment, DB* §109-05B.1.e *Overhead,* and DB §109-05B.1.f *Profit*.

3) *Workers Compensation Insurance.* The Workers Compensation insurance rate will be the statutory loss cost rate established by the NYS Workers Compensation Insurance Rating Board, with the insurer's approved lost cost multiplier, all assessments and credits, and an experience modifier of 1.00, subject to the Construction Employment Payroll Limitation (CEPL) Program limits where applicable. The Design-Builder shall submit an insurance policy declaration/rate page from its insurer to validate the Workers Compensation insurance rate.

Where the Longshore and Harbor Workers' Compensation Act, Jones Act, Federal Employees Liability Act or other legal requirements impose additional liability on the Design-Builder, additional differentials will be added to the Worker's Compensation insurance rate.

For Design-Builder that obtain Workers Compensation insurance through a pooled fund or similar arrangement, the Design-Builder shall supply documentation from the Design-Builder's insurance carrier detailing the rate and basis for application.

The Design-Builder will be reimbursed for Workers Compensation insurance based on the Workers Compensation insurance rate described above, multiplied by gross wages, not including the premium portion of overtime nor supplemental (fringe) benefits, except when supplemental benefits are paid directly to the employee, up to the CEPL wage limit, where applicable.

e. Overhead. The Design-Builder will be reimbursed for overhead at 10% of items DB §109-05B.1.a~~.~~ *Labor*, ~~(but not including the premium portion of overtime) and~~ DB §109-05B.1.b~~.~~ *Materials* and DB §109-05B.1.c~~.~~ *Equipment*~~, to the extent they are attributable to the force account work~~. Overhead will be defined to include the following:

1) Additional costs for bond(s), Disability Benefits and Commercial Automobile insurance;

2) All salary, benefits and expenses of executive officers, supervising officers/employees, superintendents, project engineers, office engineers, CPM Schedulers, clerical or administrative employees, and other project level staff, but not including working forepersons; including payroll taxes, unemployment insurance, workers compensation insurance, and charges that are paid by the Design-Builder to or on behalf of those employees pursuant to written agreement with its employee(s) and/or labor organizations;

3) Small tools and small tool/equipment supplies, including shovels, picks, axes, saws, bars, sledges, lanterns, etc.;

4) Design-Builder's field office rental, utility charges, potable water, sanitation, cleaning, computers, CADD equipment, office equipment, office supplies, reproduction costs, etc.;

5) Administrative or other efforts required to maintain records and produce force account reports.

f. Profit. The Design-Builder will be reimbursed for profit at 10% of items DB §109-05B.1.a~~.~~ *Labor* ~~(but not including the premium portion of overtime)~~, ~~and~~ DB §109-05B.1.b~~.~~ *Materials*, and DB §109-05B.1.c *Equipment*.

2. Design-Builder Design Costs. When Extra Work, as directed by the Department, is performed by a Designer, the Design-Builder will be reimbursed the actual, reasonable and verifiable cost of such work as calculated using the following formula:

Design Services Extra Work Cost = Direct Technical Labor (DTL) + Overhead (OH) + Profit

a. *Direct Technical Labor (DTL)*. The Design-Builder will be reimbursed for the design firm's Direct Technical Labor for each worker separately at the actual payroll rate, up to a maximum of the Department's Chief Engineer's rate.

b. *Overhead (OH)*. The Design-Builder will be reimbursed for overhead at 150% of the total amount of item DB §109-05B.2.a *Direct Technical Labor*, but not including the premium portion of overtime, to the extent it is attributable to the force account work.

c. *Profit*. The Design-Builder will be reimbursed for profit at 10% of item DB §109-05B.2.a *Direct Technical Labor* but not including the premium portion of overtime.

3. Subcontractor Costs. When Extra~~the~~ Work is performed by a Subcontractor (Excluding the Principal Participants), the Design-Builder will be reimbursed the actual, reasonable and verifiable cost of such subcontracted work as outlined above in DB §109-05B.1. *Design-Builder Construction Costs or DB* §109-05B.2 *Design-Builder Design Costs*, plus an additional 5% for subcontract administration, and the Design-Builder's costs for insurance in accordance with DB §109-05B.1.d~~.~~ *Insurance*.

Specialty Subcontractors are Subcontractors that are experts in a unique trade or are trained to perform very specialized work (i.e., pipe jacking, soil nail walls, fiber wrapping, pile installation, etc.). Only when the Deputy Chief Engineer (Construction) has given advanced approval of projected actual costs, the Department will reimburse the actual, reasonable and verifiable costs for tolls, mileage, lodging, and meals for Specialty Subcontractors required to perform the work when such costs are deemed necessary due to the Specialty Subcontractor's considerable distance from the location of the work and consideration of alternative Specialty Subcontractors. The reimbursement amount will be the lesser of: (1) the advanced approved actual costs; (2) actual incurred charges; or (3) the current maximum per diem and mileage rates for the contract location within New York State as posted on www.gsa.gov. Specialty Subcontractors shall

maintain all records of costs and provide them to the Department upon request. Any extra or unapproved expense to include personal travel or other non-NYSDOT business travel in the official transportation ticket shall be borne by the traveler. This shall include costs as a result of indirect-route or interrupted travel.

4.~~3.~~ Service Charges. When Extra Work is performed by, and a fee is paid to a ~~p~~Professional ~~s~~Service, a ~~w~~Work ~~s~~Service, or an equipment owner/operator (~~E~~excluding Principal Participants), the Design-Builder will be reimbursed the actual cost of the service fee plus 5% for service administration. This 5% will be applied only once to the service fee regardless of the firm making direct payments.

The rate for equipment with an operator shall not exceed the total of the Blue Book ownership rate, the Blue Book operating rate, and the wages for an appropriate operator. For specialized equipment or circumstances, the wages for an appropriate operator may be up to 150% of the prevailing wage rate.

C. Force Account Report. Payment for force account work will be made on the basis of the following reports. Reports shall be submitted in a format acceptable to the Department. Force Account MURK forms are available from the Department's website at: *www.dot.ny.gov/main/business-center/contractors/construction-division/forms*.

If the Department's Project Manager or his/her representative disagrees with the accuracy, applicability, or reasonableness of any portion of a Design-Builder's submission, he/she will promptly notify the Design-Builder.

1. Daily Summary. The Design-Builder shall deliver a daily summary of force account work to the Department's Project Manager in a format acceptable to the Department, not later than close of business on the work day following that for which the Work is reported. The daily summary shall be dated and signed by the Design-Builder's authorized representative.

The Department Project Manager's signature indicates that the record, as modified, is contemporaneous and accurate, but does not indicate concurrence with any dispute. The Department's Project Manager will annotate the record as necessary, sign and date, and provide a copy to the Design-Builder.

The summary shall contain:

a. The contract number, other contract information, and the Design-Builder name/information.

b. A brief description of the Work performed and the work location for that day.

c. A list of personnel by name, including the hours worked, and labor classification.

d. A list of materials used indicating the quantity and nature. The cost shall be documented later by proper receipts.

e. A list of equipment used indicating the number of hours used and the type, manufacturer, model, model year, size of equipment, and any required attachments.

2. Labor Summary. If there is an approved Force Account Estimate, in order to receive progress payments, the Design-Builder shall deliver to the Department's Project Manager a summary of labor used on the Work. The Design-Builder shall provide the Weekly Summary of Force Account Labor using forms provided by the Department, and shall include the first and last name, labor classification, regular and premium hourly rates of pay, supplemental (fringe) benefit hourly rates, regular and premium hours worked, supplemental (fringe) benefit amounts paid in cash, workers compensation percentage rates and limits, and/or other items necessary to calculate the amount due to the Design-Builder. Progress payments on the force account will not be made until the Design-Builder provides required documentation to the Department's Project Manager.

3. Force Account Report Submission. On completion of the specific force account work, the Design-Builder shall deliver to the Department's Project Manager a Force Account Report, wherein all labor, materials, equipment, and other charges are shown and totaled using forms provided by the Department. The Force Account Report shall be dated and signed by the Design-

Builder's authorized representative. When the Design-Builder and the Department's Project Manager agree on the Force Account Report, the Department's Project Manager will prepare and submit a change order containing the Force Account Report to the Regional Construction Engineer for approval.

4. Force Account Review. The Regional Construction Engineer, or designee, will review the Force Account Report and make any notations, remarks or comments on this form that may assist in final payments. The emphasis of this review will be on labor rates, markups, workers compensation limits, material costs, equipment rates, insurance rates, and overall documentation. The Regional Construction Engineer will forward the change order to the Director of the Project Management Office (DPMO). The DPMO, after review and approval, will forward the change order to the Office of the State Comptroller (OSC) for review and filing. Only after filing by OSC may the Department's Project Manager begin to process contract payments based on the change order, as the Work is completed.

D. Time Related Dispute Compensation. The Design-Builder will only be eligible for extra compensation for expenses or costs which are identified as compensable under DB §108-04A *Compensable Delays*. In the event any legal action is instituted against the State by the Design-Builder due to any such dispute for additional compensation, whether due to time related dispute, delay, acceleration, breach of contract, or otherwise, the State's liability will be limited to those items which are specifically identified as compensable under DB §109-05D.1. *Recoverable Design-Builder Costs*. Nothing in this subsection is intended to create any liability of the State not existing at common law or pursuant to the terms of this contract or to prevent the Design-Builder from filing a claim in the New York State Court of Claims. The remedies contained herein are exclusive.

1. Recoverable Design-Builder Costs. Only the following elements will be recoverable by the Design-Builder as "time related dispute compensation" provided that they are actual, reasonable and verifiable. Any such adjustment will be made via change order. Escalated costs will include unanticipated higher or lower costs attributable, with appropriate credits, to the performance of work or portions of work in an extended time period due to extenuating circumstances beyond the control of the Design-Builder.

a. Extra ~~w~~Work. The Design-Builder will be reimbursed for ~~e~~Extra ~~w~~Work required due to a time related dispute in accordance with DB §109-05B *Force Account Work*, less any appropriate credit.

b. Labor. The Design-Builder will be reimbursed for documented escalated labor costs determined in accordance with DB §109-05B.1.a~~.~~ *Labor*.

c. Materials. The Design-Builder will be reimbursed for documented escalated material costs determined in accordance with DB §109-05B.1.b~~.~~ *Materials*.

d. Equipment. The Design-Builder will be reimbursed for documented escalated equipment costs less appropriate credits, determined in accordance with DB §109-05B.1.c~~.~~ *Equipment*. The costs for idle equipment will be 50% of the ownership rate set forth in DB §109-05B.1.c~~.~~ *Equipment*. Idle time shall not exceed 8 hours per day, 40 hours per week, or the annual usage hours established in the Equipment Watch Blue Book software. The Design-Builder will be reimbursed for backup equipment costs, in accordance with DB §109-05B.1.c.6~~.~~ *Backup Equipment*. Equipment with an hourly ownership rate of less than $2 or a current purchase price of less than $500 will be considered as small tools and equipment~~,~~ and will not be directly reimbursed. No operating costs will be paid for idle equipment.

e. Insurance. The Design-Builder will be reimbursed for documented additional or escalated insurance costs during the extended period.

f. Extended Contract Site Supervision and Management. The Design-Builder will be reimbursed for documented additional or escalated contract site overhead costs during the extended period, including those for superintendents, project engineers, office engineers, CPM schedulers, clerical

and other project level staff, but not including working forepersons. Allowable costs will include salary, Standard Labor Markup on salary, benefits not included in the Standard Labor Markup, and workers compensation insurance.

g. Extended Design-Builder's Field Office Costs. The Design-Builder will be reimbursed for fees paid to service provider(s) during the extended period, for required Design-Builder's field office rental, utility charges, potable water, sanitation, cleaning, etc.

h. Bond Costs. The Design-Builder will be reimbursed for documented additional or escalated bond costs during the extended period.

i. Home Office Overhead. The Design-Builder will be reimbursed for home office overhead at 10% of items DB §109-05D.1.b~~.~~ *Labor* and DB §109-05D.1.c~~.~~ *Materials*. The Design-Builder will be reimbursed for home office overhead at 10% of documented escalated equipment costs under DB §109-05D.1.d~~.~~ *Equipment*. No home office overhead will be paid for idle equipment.

j. Profit. The Design-Builder will be reimbursed for profit at 10% of items DB §109-05D.1.b~~.~~ *Labor* and DB §109-05D.1.c~~.~~ *Materials*, except when DB §104-05 *Suspensions of Work Ordered by the Engineer* applies, no profit will be allowed. The Design-Builder will be reimbursed for profit at 10% of documented escalated equipment costs under DB §109-05D.1.d *Equipment*. No profit will be paid for idle equipment.

2. Recoverable Subcontractor Costs. When costs are recoverable by a Subcontractor as "time related dispute compensation", the Design-Builder will be reimbursed the actual, reasonable and verifiable ~~s~~Subcontractor costs as outlined above in DB §109-05D.1~~.~~ *Recoverable Design-Builder Costs*, an additional 5% of those costs for subcontract administration, and costs for Design-Builder insurances in accordance with DB §109-05D.1.e~~.~~ *Insurance*.

3. Non-Recoverable Costs. In any dispute for time related compensation, the Department will have no liability for the following items and the Design-Builder shall make no claim for the following items:

a. Home office overhead in excess of that provided in DB §109-05D.1.i~~.~~ *Home Office Overhead*;
b. Profit, in excess of that provided in DB §109-05D.1.j~~.~~ *Profit;*
c. Loss of anticipated or unanticipated profit;
d. Labor inefficiencies and loss of productivity;
e. Consequential damages, including but not limited to interest on monies in dispute, including interest which is paid on such monies, loss of bonding capacity, bidding opportunities, or interest on investment, or any resultant insolvency;
f. Indirect costs or expenses of any nature;
g. Direct or indirect costs attributable to performance of Work where the Design-Builder, because of situations or conditions within its control, has not progressed the Work in a satisfactory manner.
h. Attorney's fees and dispute or claims preparation expenses

E. Acceleration Compensation. The Design-Builder will be reimbursed for additional costs associated with acceleration directed by the Department in writing.

1. Recoverable Contractor Costs. The following elements will be recoverable by the Design-Builder as compensation for acceleration, provided that they are actual, reasonable and verifiable. Recoverable costs include costs attributable, with appropriate credits, to the performance of Work or portions of work during the original contract period, but at an accelerated rate, attributable to the Department's directed acceleration.

a. Labor. The Design-Builder will be reimbursed for additional labor costs, primarily the premium portion of overtime;

b. Materials. The Design-Builder will be reimbursed for additional material costs, primarily costs for accelerated production and delivery costs or additional fabrication costs associated with a revised delivery schedule;

c. Equipment. The Design-Builder will be reimbursed for additional equipment costs, primarily costs for mobilization and demobilization of additional equipment required;

d. Insurance. The Design-Builder will be reimbursed for additional insurance costs, including Commercial General Liability (CGL), Umbrella or Excess Liability, Special Protective and Highway Liability, ~~Design-Builder's Risks,~~ Professional Liability/Errors and Omissions, Railroad Protective Liability, Marine Protection and Indemnity, and Pollution Liability insurances required in accordance with DB §107-06 *Insurance*, at the rate paid by the Design-Builder, in accordance with the method procured from its insurer(s).

1) Design-Builders or Subcontractors that pay insurances on the basis of a percentage of payroll will be paid that percentage of the portion of item DB §109-05E.1.a~~.~~ *Labor* specified in the Design-Builder's insurance policy.

2) Design-Builders or Subcontractors that pay insurances on the basis of a percentage of gross sales will be paid that percentage of the total of items DB §109-05E.1.a~~.~~ *Labor*, DB §109-05E.1.b~~.~~ *Materials*, DB §109-05E.1.c~~.~~ *Equipment*, ~~and~~ DB §109-05E.1.e~~.~~ *Overhead*, and DB §109-05E.1.f *Profit*.

e. Overhead. The Design-Builder will be reimbursed for overhead at 10% of items DB §109-05E.1.a~~.~~ *Labor*, DB §109-05E.1.b~~.~~ *Materials* and DB §109-05E.1.c~~.~~ *Equipment*.

f. Profit. The Design-Builder will be reimbursed for profit at 10% of items DB §109-05E.1.a~~.~~ *Labor*, DB §109-05E.1.b~~.~~ *Materials* and DB §109-05E.1.c~~.~~ *Equipment*.

2. Recoverable Subcontractor Costs. When costs are recoverable by a Subcontractor as acceleration compensation, the Design-Builder will be reimbursed the actual, reasonable and verifiable ~~s~~Subcontractor costs as outlined in DB §109-05E.1. *Recoverable Design-Builder Costs*, an additional 5% of those costs for subcontract administration, and the Design-Builder's costs for insurance in accordance with DB §109-05E.1.d~~.~~ *Insurance*.

DB 109-06 CONTRACT PAYMENTS.

NYSDOT Standard Specification §109-06 shall apply.

DB 109-07 PROMPT PAYMENTS BY THE CONTRACTOR.

NYSDOT Standard Specification §109-07 shall apply.

DB 109-08 ELIMINATED MATERIALS.

NYSDOT Standard Specification §109-08 shall apply.

DB 109-09 FINAL ACCEPTANCE AND FINAL AGREEMENT.

A. Partial Acceptance.

If at any time during the prosecution of the Project the Design-Builder satisfactorily completes a unit or portion of the Project, the Design-Builder may request the Department's Project Manager to make a detailed Inspection of that unit to determine whether it is substantially complete. A copy of the detailed Inspection list will be furnished to the Design-Builder. When this Inspection progresses over any length of time, copies of the list will be furnished as the Inspection progresses so that the Design-Builder may proceed with the required Work without delay. If the Department's Project Manager finds upon Inspection that the unit has been satisfactorily completed in compliance with the Contract, the Department's Project Manager may issue a notice of Substantial Completion.

Following Substantial Completion of any unit, the Department may accept that unit as being completed, and relieve the Design-Builder of maintenance responsibility with respect to such unit. Such agreement shall in no way void or alter the terms of this Contract. The Design-Builder will remain responsible for correction of any defects discovered prior to Project Completion of the Work, and will also remain responsible for Warranties with respect to such Work hereunder. Devices intended to be used for traffic safety and control that are

permanently installed in their final position with all ancillary components and being used by the traveling public shall be accepted when installed in accordance with the Design Plans and Project Specifications, prior to completion of the remaining Work on the job.

Permanently installed items accepted on this basis are limited to guardrails, impact attenuators, traffic signal systems, signs, lighting, raised pavement markers, concrete wall barriers, concrete bridge parapets, bridge railings, guard cable, guardrail anchorages, permanent pavement markings, and fencing. All required performance tests and guarantees shall remain applicable.

The Design-Builder shall erect the items in a logical sequence and time frame within the life of the Project, and items constructed prematurely will not be accepted until such time in the life of the Project that the device becomes effective for its intended use.

If the Department accepts any items for maintenance prior to Project Completion, and such items are thereafter damaged, stolen or vandalized by the public, such items will be repaired or replaced either by the Department or by the Design-Builder pursuant to Change Order issued under DB §104-02. If the damage to such an item requires only partial repair or replacement and the Work is to be done by the Design-Builder, payment shall be made as provided in DB §109-05B. Items damaged due to negligence of the Design-Builder shall be repaired or replaced at no cost to the Department.

B. Contract Final Acceptance.

Prior to the Final Acceptance of the Work by the Commissioner or his/her designee, the contract work may be inspected, accepted and approved by other agencies and/or municipalities who will have jurisdiction of the Work after Final Acceptance.

Promptly after Project Completion has occurred, the Design-Builder shall perform all remaining Work required hereunder and satisfy all of its other obligations under the Contract Documents, including:

1. Design Acceptance;
2. Delivery of all Design Documents, right-of-way record maps, surveys, material certifications, test data and other deliverables required under the Contract Documents, including as-built plans, in electronic format on digital media and one reproducible hard copy set;
3. Delivery of all certifications from Design-Builder's Design Manager, Project Manager and Quality Manager required under the Contract Documents;
4. Delivery of all written warranties required under the Contract Documents;
5. Delivery of all manuals required under the Contract Documents;
6. All of Design-Builder's other obligations under the Contract Documents (other than obligations which by their nature are required to be performed after Final Acceptance as determined by the Department) have been satisfied in full or waived in writing by the Department; and
7. Design-Builder has identified a single point of contact to address the Warranty requirements hereunder throughout the duration of the Warranty period.

C. Final Payment.

Section 179 of the State Finance Law requires the Department to make final payment on highway construction contracts within seventy-five (75) calendar days after Final Acceptance by the Commissioner. If the Department unjustifiably fails to pay the final payment within the prescribed 75 calendar days, it may be required to pay interest for each day in excess of the 75 calendar days. The Department, in accordance with Section 179 of the State Finance Law, has determined that a thirty (30) calendar day inspection period after contract Final Acceptance is required for final payments, after which time the 75-day interest-free processing period will commence.

D. Final Agreement.

The final agreement will not be drawn and finalized until all Work required under the Contract has been satisfactorily completed, all disputes presented and all accounts for Extra Work and materials have been rendered, considered, and if agreed to, incorporated by Change Order or made a part of such final agreement. Work remaining to be accomplished under an Uncompleted Work Agreement shall be considered as completed work for the purpose of the final agreement, provided the Uncompleted Work Agreement has been executed in accordance with DB §109-10 *Uncompleted Work Agreements*. Work accomplished under a warranty agreement shall be considered as completed work for the purpose of the final agreement, provided the warranty agreement has been executed and any required bond deposited by the Design-Builder.

The Commissioner, or his/her designee, will approve a final agreement as prepared and approved by the Department's Project Manager less any and all deductions authorized to be made by the Commissioner under the contract. Payment pursuant to such final agreement less any deductions authorized to be made by the Comptroller shall constitute the final payment to the Design-Builder.

In order to enable the Department to process the final agreement properly and expeditiously, the Design-Builder shall submit the following documents, as may be appropriate, to enable the processing of the final payment as described above.

1. Certified Payrolls;
2. Final Labor Affidavits;
3. Final Agreement;
4. Release from any Outstanding Disputes;
5. Electronic RFC and Working Drawings (In MicroStation Format);
6. Approved As-Built Drawings Field Change Sheets (From VECP or other Design-Builder Proposals); See CAM 91 and Part 3, Section 5.7.7, As-Built Design, for format;
7. Material Certifications;
8. Final documentation to support any outstanding claims and Disputes filed during the progress of the Work;
9. Extra Work Cost Accounts; back-up of actual, verifiable, and reasonable costs.

Any time taken beyond the date of Final Acceptance to satisfy or furnish the above information shall extend the required payment date by an equal period of time.

E. Initiation of Claim

The signature by the Design-Builder of the final agreement; shall constitute and operate as a release to the State from any and all claims of any liability to the Design-Builder for anything theretofore done or furnished for or relating to or arising out of the Work done under the Contract, and for any prior act, neglect, or default on the part of the State or any of its officers, agents, or employees, unless the Design-Builder serves a detailed and verified statement of claim upon the NYS Department of Transportation not later than 40 days after the signature of the final agreement by the Design-Builder. As contract payments are routinely made via electronic funds transfer, and final agreements do not include any further payment to the Design-Builder, for the purposes of State Finance Law Section 145, acceptance of final payment shall be deemed to be signature of the final agreement by the Design-Builder, or signature of the final agreement by the Commissioner or designee if the Design-Builder has failed to respond within 180 days after being provided the final agreement. Such statement of claim shall specify the items and details upon which the claim will be based and any such claim shall be limited to such items. Should the Design-Builder

refuse to accept the final payment as tendered by the Office of the State Comptroller, it shall constitute a waiver of any right to interest thereon.

DB 109-10 UNCOMPLETED WORK AGREEMENTS.

NYSDOT Standard Specification §109-10 shall apply.