

**MASTER AGREEMENT**  
**FOR**  
**ON-CALL SERVICES ( )**  
(ARDOT VERSION – COST PLUS FEE)

**PREAMBLE**

**THIS AGREEMENT**, entered into on [See *DocExpress Signature Sheet for Dates*], by and between the Arkansas State Highway Commission (“Commission”), acting by and through its Director, as authorized by Commission Action on \_\_\_\_\_, and \_\_\_\_\_ (“Consultant”), a corporation existing under the laws of the State of Arkansas, with principal offices at \_\_\_\_\_.

**WITNESSETH:**

**WHEREAS**, it is necessary for the Department to provide \_\_\_\_\_ for the design and construction of highways; and

**WHEREAS**, work performed under on-call service contracts is an effective method of producing timely services and supplementing in-house capabilities.

**WHEREAS**, the Commission’s forces are fully employed on other urgent work that prevents their early assignment to the aforementioned work; and,

**WHEREAS**, in accordance with Minute Order \_\_\_\_\_ passed \_\_\_\_\_, 20\_\_\_\_, the Commission authorized the Department to employ \_\_\_\_\_ firms to provide these services as needs are identified for the years \_\_\_\_ through \_\_\_\_; and,

**WHEREAS**, the Consultant’s staff is adequate and well qualified, and it has been determined that its current workload will permit completion of the project on schedule.

**NOW THEREFORE**, it is considered to be in the best public interest for the Commission to obtain the assistance of the Consultant’s organization in connection with \_\_\_\_\_ services. In consideration of the faithful performance of each party of the mutual covenants and agreements set forth hereinafter, it is mutually agreed as follows:

**1. PRELIMINARY MATTERS**

- 1.1. “Assistant Chief Engineer” means the Assistant Chief Engineer – \_\_\_\_\_ of the Arkansas Department of Transportation.
- 1.2. “Chief Engineer” means the Deputy Director and Chief Engineer of the Arkansas Department of Transportation.
- 1.3. “Consultant’s Representative” shall be \_\_\_\_\_, until written notice is provided to the Owner designating a new representative.
- 1.4. “Contract Ceiling Price.” The Contract Ceiling Price for this Agreement is \$\_\_\_\_\_. The Contract Ceiling Price is the maximum aggregate amount of all payments that the Owner may become obligated to make under this Agreement. In no event, unless modified in writing, shall total payments by the Owner under this Agreement exceed the Contract Ceiling Price. The Consultant shall not be entitled to receive adjustment, reimbursement, or payment, nor shall the Owner, its officers, agents, employees, or representatives, incur any liability for, any fee or cost, exceeding the Contract Ceiling Price.

- 1.5. "Contract Price" is aggregate amount of allowable costs and fees to be paid by the Owner under this Agreement.
- 1.6. "Default" means the failure of the Consultant to perform any of the provisions of this Agreement. *Default includes, but is not limited to, failure to complete phases of the work according to schedule or failure to make progress in the work so as to endanger timely performance of this Agreement, failure to pay subcontractors in a timely manner, failure to comply with federal and state laws, and failure to comply with certifications made in or pursuant to this Agreement.*
- 1.7. "DOT" means the United States Department of Transportation.
- 1.8. "FAR" means the Federal Acquisition Regulations, codified in 48 Code of Federal Regulations (CFR).
- 1.9. "Fee" whether fixed or otherwise is a dollar amount that includes the Consultant's profit on the job.
- 1.10. "FHWA" means the Federal Highway Administration.
- 1.11. "Indirect Cost Rate." The Indirect Cost Rate is defined in the provisions of FAR, and is also subject to any limitations contained herein. At the time of the Master Agreement execution, the Indirect Cost Rate for the Consultant is \_\_\_\_\_(FY 20\_\_). The Indirect Cost Rate will be specified in each specific Task Order and will be based upon the most recently Department approved rate. If applicable, the Indirect Cost Rate for each subconsultant shall be listed in **Appendix B**. Each subconsultant's most recently approved Indirect Cost Rate will also be specified in each Task Order. Modifications to the rate may occur when the Owner and Consultant agree and document the change in writing.
- 1.12. "Owner" means, collectively, the Arkansas State Highway Commission and the Arkansas Department of Transportation ("Department" or "ARDOT").
- 1.13. "Title I Services" are those services provided by the Consultant before the award of the contract for construction of the Project, consisting primarily of engineering services for the planning or design of the Project.
- 1.14. "Title I Services Ceiling Price." The Title I Services Ceiling Price for this Agreement is \$\_\_\_\_\_. The Title I Services Ceiling price is the maximum aggregate amount of all payments that the Owner may become obligated to make under this Agreement for fees and costs related to Title I Services. In no event, unless modified in writing, shall total payments by the Owner related to Title I Services exceed the Title I Services Ceiling Price. The Consultant shall not be entitled to receive adjustment, reimbursement, or payment for, nor shall the Owner, its officers, agents, employees, or representatives, incur any liability for, any fee or cost related to, Title I Services exceeding the Title I Services Ceiling Price.
- 1.15. "Title II Multiplier" (if applicable) is the mark-up by which the fee and indirect costs associated with Title II services are calculated. The Title II Multiplier, which accounts for the fee and indirect costs, is multiplied by the salary rate, as shown on the Schedule of Salary Ranges, of the particular individual(s) performing the Title II services. The Title II Multiplier at the time of execution of this Agreement is \_\_\_\_\_(FY20\_\_). Modifications to this Title II Multiplier may occur when the Owner and Consultant agree, document the change in writing. The Title II Multiplier is based upon the Indirect Cost Rate approved by the Department.
- 1.16. "Title II Services" are those services provided by the Consultant after the award of the contract for construction of the Project, consisting primarily of services during the construction of the Project.

- 1.17. "Title II Services Ceiling Price". The Title II Services Ceiling Price for this Agreement is \_\_\_\_\_. The Title II Services Ceiling price is the maximum aggregate amount of all payments that the Owner may become obligated to make under this Agreement for fees and costs related to Title II Services. In no event, unless modified in writing, shall total payments by the Owner related to Title II Services exceed the Title II Services Ceiling Price. The Consultant shall not be entitled to receive adjustment, reimbursement, or payment for, nor shall the Owner, its officers, agents, employees, or representatives, incur any liability for, any fee or cost related to, Title II Services exceeding the Title II Services Ceiling Price.

## **2. TYPE OF AGREEMENT**

- 2.1. Task Orders issued under this Agreement will be cost-plus-fixed fee or lump-sum.

### **2.1.1. Cost-Plus-Fixed-Fee Contract**

The Consultant is being hired to perform professional engineering services in connection with the Project as set forth herein. In consideration for Title I services performed, the Owner will reimburse the Consultant for allowable direct and indirect costs, as defined herein, and pay the Consultant a fixed fee. If Title II services are to be performed, the Owner will reimburse the Consultant for allowable direct costs and also pay the Consultant an amount determined by multiplying the salary rate of the individual(s) performing the Title II services, as shown on the Schedule of Salary Ranges, by the Title II Multiplier.

### **2.1.2. Lump-Sum Contract**

The Consultant is being hired to perform professional engineering services in connection with the Project as set forth herein. In consideration for the engineering services rendered by the Consultant, the Owner shall pay to the Consultant the Fee as provided herein. The Fee includes compensation for any cost to be incurred by the Consultant and the Consultant shall not be reimbursed for costs incurred. The Consultant shall bear the costs, and resulting risks, of performing this Agreement. The Consultant may only be paid for work actually performed.

- 2.2. Under no circumstances shall the Department be liable for any amounts, including all costs, which exceed the Task Order Contract Ceiling Price that is specified in and set forth in the Task Order.
- 2.3. The Project to be performed under this Agreement is a federally-assisted project and federal funds will be used, in part, to pay the Consultant. Therefore, notwithstanding any provision of this Agreement, all payments, costs, and expenditures are subject to the requirements and limitations of FAR, and the Consultant shall certify the accuracy of all invoices and requests for payment, along with supporting documentation and any information provided in determining the Indirect Cost Rates.

## **3. COSTS, FEES, AND PAYMENT**

- 3.1. *Allowable costs.*

3.1.1. Allowable costs are subject to the limitations, regulations, and cost principles and procedures in FAR and the State of Arkansas Travel Regulations as adopted by the Department Accounting Manual, which are expressly incorporated into this Agreement by reference. For the purpose of reimbursing allowable costs (except as provided in subparagraph 2 below, with respect to pension, deferred profit sharing, and employee stock ownership plan contributions), the term *costs* includes only—

- 3.1.1.1. Those recorded costs that, at the time of the request for reimbursement, the Consultant has paid by cash, check, or other form of actual payment for items or services purchased directly for the Agreement;
- 3.1.1.2. When the Consultant is not delinquent in paying costs of contract performance in the ordinary course of business, costs incurred, but not necessarily paid, for—
- Materials issued from the Consultant's inventory and placed in the production process for use in its performance under this Agreement;
  - Direct labor;
  - Direct travel;
  - Other direct in-house costs; and
  - Properly allocable and allowable indirect costs, as shown in the records maintained by the Consultant for purposes of obtaining reimbursement under government contracts; and
  - The amount of progress payments that have been paid to the Consultant's subcontractors under similar cost standards.
- 3.1.2. Consultant's contributions to any pension or other post-retirement benefit, profit-sharing or employee stock ownership plan funds that are paid quarterly or more often may be included in indirect costs for payment purposes; *provided*, that the Consultant pays the contribution to the fund within 30 days after the close of the period covered. Payments made 30 days or more after the close of a period shall not be included until the Consultant actually makes the payment. Accrued costs for such contributions that are paid less often than quarterly shall be excluded from indirect costs for payment purposes until the Consultant actually makes the payment.
- 3.1.3. Allowable costs for travel are reimbursed for actual expenses incurred and are subject to the limitations, regulations, and cost principals and procedures in FAR and the State of Arkansas Travel Regulations as adopted by the Department Accounting Manual, which are expressly incorporated into this Agreement by reference.
- 3.1.4. Notwithstanding the audit and adjustment of invoices or vouchers, allowable indirect costs under this Agreement shall be obtained by applying Indirect Cost Rates established in accordance with subsection 3.3 below.
- 3.1.5. Any statements in specifications or other documents incorporated in this Agreement by reference designating performance of services or furnishing of materials at the Consultant's expense or at no cost to the Owner shall be disregarded for purposes of cost-reimbursement.
- 3.2. *Salaries*. The following schedule covers the classification of personnel and the salary ranges for all personnel anticipated to be assigned to this project by the Consultant:

3.2.1. SCHEDULE OF SALARY RANGES  
[update]

3.2.2. SCHEDULE OF UNIT RATES FOR SERVICES  
[update]

3.2.3. The Owner shall reimburse the Consultant for overtime costs only when the overtime has been authorized in writing by the Owner. When authorized, overtime shall be reimbursed at the rate of time and one-half for all nonexempt employees. Notwithstanding this provision, the Consultant must comply with all federal and state wage and hour laws and regulations, regardless whether the overtime is considered reimbursable under this Agreement.

3.3. *Indirect Cost Rates.*

3.3.1. Allowable indirect costs incurred by the Consultant shall also be reimbursed by the Owner at the Indirect Cost Rate. The initial Indirect Cost Rate of the Consultant for this Agreement shall be the rate as set forth in **subsection 1.11**. If applicable, the Indirect Cost Rate for subconsultants shall be determined in the same manner and subject to the same limitations as the Consultant, and shall be listed for each subconsultant identified in **Appendix B**. The Indirect Cost Rate, or any adjustment thereto, shall not change any monetary ceiling, contract obligation, or specific cost allowance, or disallowance provided for in this Agreement except as provided for in sections 3.3.4. and 3.3.5. The Indirect Cost Rate must reflect the allowable indirect costs pursuant to FAR.

3.3.2. In establishing the Indirect Cost Rate or proposing any adjustment thereto, the Consultant shall, upon request, submit to the Owner, FHWA, or their representatives an audited indirect cost rate and supporting cost data in accordance with the requirements set forth in the current *Arkansas Department of Transportation Indirect Cost Rate Audit Requirements*.

3.3.3. During the term of this Agreement, if an audit of a subsequent accounting period of the Consultant demonstrates that the Consultant has incurred allowable indirect costs at a different rate than the Indirect Cost Rate, the Indirect Cost Rate shall be adjusted. Any adjustment is subject to the audit and documentation requirements of the FAR and the current *Arkansas Department of Transportation Indirect Cost Rate Audit Requirements*. Except in the case of a provisional Indirect Cost Rate, as provided in the following subparagraphs, or the disallowance of cost following a subsequent audit, any adjustment to the Indirect Cost Rate shall be effective only prospectively from the date that the adjustment is accepted.

3.3.4. In order to expedite some projects, when an audited indirect cost rate has not yet been submitted and approved, the Owner may extend a temporary waiver and accept a provisional indirect cost rate. This provisional rate must be reviewed by, and receive a positive recommendation from the Arkansas Department of Transportation. The provisional cost proposal must be accompanied by written assurance from an independent CPA that he/she has been engaged to audit the costs in accordance with the above requirements. The anticipated audit must be based on costs incurred in the most recently completed fiscal year for which the cost data is available, with the audit scheduled to begin within a reasonable time frame. If the date of the initial cost proposal is within the last quarter of the current fiscal year, the audit may be delayed until the current fiscal year is closed and the final cost data is available. The written assurance from the CPA that he or she has been engaged to perform the audit at an appropriate time is still required.

3.3.5. Once an audited indirect cost rate is approved, the ceiling prices provided for in the initial agreement using the provisional indirect cost rate will be adjusted with a supplemental agreement to implement the resulting increase or decrease from revising the indirect cost rate, and all amounts paid the consultant prior to receipt and acceptance of an audited indirect cost rate will be retroactively adjusted for changes in the indirect cost rate. However, no changes in hours, fixed fees, or other costs will be allowed as a result of applying the audited indirect cost rate.

3.4. *Fees.* The justification for the fees and cost is contained in Appendix A-1. In addition to reimbursement of the allowable costs as set forth above, the Owner shall pay to the Consultant a fee specified in each individual Task Order for Title I Services. For Title II Services the Owner shall

reimburse the Consultant for allowable direct costs and also pay to the Consultant an amount determined by multiplying the salary rate of the individual(s) performing the Title II Services, as shown on the Schedule of Salary Ranges, by the Title II Multiplier. The Title II Multiplier shall account for all fees and indirect costs associated with Title II services.

3.5. *Invoices, Reimbursement, and Partial Payments.* Submission of invoices and payment of the fees shall be made as follows, unless modified by the written agreement of both parties:

3.5.1. Not more often than once per month and no more than \_\_\_\_ days following the performance of work, the Consultant shall submit to the Owner, in such form and detail as the Owner may require, an invoice or voucher supported by a statement of the claimed allowable costs for performing this Agreement, and estimates of the amount and value of the work accomplished under this Agreement. The invoices for costs and estimates for fees shall be supported by any data requested by the Owner.

3.5.2. In making estimates for fee purposes, such estimates shall include only the amount and value of the work accomplished and performed by the Consultant under this Agreement that meets the standards of quality established under this Agreement. The Consultant shall submit with the estimates any supporting data required by the Owner. At a minimum, the supporting data shall include a progress report in the form and number required by the Owner.

3.5.3. Upon approval of the estimate by the Owner, payment upon properly executed vouchers shall be made to the Consultant, as soon as practicable, of 100 percent of the allowed costs, and of the approved amount of the estimated fee, less all previous payments. Notwithstanding any other provision of this Agreement, only costs and fees determined to be allowable by the Owner in accordance with subpart 31.2 of the FAR in effect on the date of this Agreement and under the terms of this Agreement shall be reimbursed or paid.

3.5.4. Before final payment under the Agreement, and as a condition precedent thereto, the Consultant shall execute and deliver to the Owner a release of all claims which are known or reasonably could have been known to exist against the Owner arising under or by virtue of this Agreement, other than any claims that are specifically excepted by the Consultant from the operation of the release in amounts stated in the release.

3.6. *Title I Services, Title II Services, and Contract Ceiling Prices.* The parties agree that aggregate payments under this Agreement, including all costs and fees, shall not exceed the Contract Ceiling Price. The parties further agree that aggregate payments for Title I and Title II services under this Agreement, including all costs and fees, shall not exceed the Title I and Title II Services Ceiling Price, respectively. No adjustment of the Indirect Cost Rate, other adjustment, claim or dispute shall affect the limits imposed by these ceiling prices. No payment of costs or fees shall be made above these ceiling prices unless the Agreement is modified in writing.

3.7. *Final payment.*

3.7.1. The Consultant shall submit a completion invoice or voucher, designated as such, promptly upon completion of the work, but no later than forty-five (45) days (or longer, as the Owner may approve in writing) after the completion date. Upon approval of the completion invoice or voucher, and upon the Consultant's compliance with all terms of this Agreement, the Owner shall promptly pay any balance of allowable costs and estimated fee owed to the Consultant. After the final release, the Consultant agrees that it will continue to provide consultation services to the Owner as needed through supplemental agreement(s) with respect to the contracted services under this Agreement until all work is completed under both Title I and Title II.

3.7.2. The Consultant shall pay to the Owner any refunds, rebates, credits, or other amounts (including interest, if any) accruing to or received by the Consultant or any assignee under

this Agreement, to the extent that those amounts are properly allocable to costs for which the Consultant has been reimbursed by the Owner. Reasonable expenses incurred by the Consultant for securing refunds, rebates, credits, or other amounts shall be allowable costs if approved by the Owner. Before final payment under this Agreement, the Consultant and each assignee whose assignment is in effect at the time of final payment shall execute and deliver—

- An assignment to the Owner, in form and substance satisfactory to the Owner, of refunds, rebates, credits, or other amounts (including interest, if any) properly allocable to costs for which the Consultant has been reimbursed by the Owner under this Agreement; and
- A release discharging the Owner, its officers, agents, and employees from all liabilities, obligations, and claims which were known or could reasonably have been known to exist arising out of or under this Agreement.

3.8. *Owner's Right to Withhold Payment.* The Owner may withhold payment to such extent as it deems necessary as a result of: (1) third party claims arising out of negligent performance of the services of the Consultant and made against the Owner and which are covered under the indemnity provision of Section 27; (2) evidence of fraud, over-billing, or overpayment; (3) inclusion of non-allowable costs; (4) failure to make prompt payments to subcontractors in the time provided by this Agreement; (5) payment requests received including fees for unapproved subcontractors; and/or (6) unsatisfactory performance of services. The withholding of payment under this provision shall in no way relieve the Consultant of its obligation to continue to perform its services under this Agreement.

#### **4. DISALLOWANCE OF COSTS**

- 4.1. Notwithstanding any other clause of this Agreement, the Owner may at any time issue to the Consultant a written notice of intent to disallow specified costs incurred or planned for incurrence under this Agreement that have been determined not to be allowable under the contract terms.
- 4.2. Failure to issue a notice under this section shall not affect the Owner's rights to take exception to incurred costs.
- 4.3. If a subsequent audit reveals that: (1) items not properly reimbursable have, in fact, been reimbursed as direct costs; or (2) that the Indirect Cost Rate contains items not properly reimbursable under the FAR; then, in the case of indirect costs, the Indirect Cost Rate shall be amended retroactively to reflect the actual allowable indirect costs incurred, and, in the case of both direct and indirect costs, the Owner may offset, or the Consultant shall repay to Owner, any overpayment.

#### **5. RECORDS & AUDITS**

- 5.1. *Records* includes books, documents, accounting procedures and practices, and other data, regardless of type and regardless of whether such items are in written form, in the form of computer data, or in any other form.
- 5.2. *Examination.* The Consultant shall maintain, and the Owner, FHWA, and their authorized representatives shall have the right to examine and audit all records and other evidence sufficient to reflect properly all costs (direct and indirect) claimed to have been incurred or anticipated to be incurred in performance of this Agreement. This right of examination shall also include examination and audit of any records considered, relied upon, or relating to the determination of the Indirect Cost Rate or any certification thereof, including any CPA audit relied upon to establish the rate.

This right of examination shall also include inspection at all reasonable times of the Consultant's offices and facilities, or parts of them, engaged in performing the Agreement.

5.3. *Supporting Data.* If the Consultant has been required to submit data in connection with any action relating to this Agreement, including the negotiation of or pre-negotiation audit of the Indirect Cost Rate, the negotiation of the Fee, request for cost reimbursement, request for payment, request for an adjustment, or assertion of a claim, the Owner, FHWA, or their authorized representatives, in order to evaluate the accuracy, completeness, and accuracy of the data, shall have the right to examine and audit all of the Consultant's records, including computations and projections, related to—

- The determination or certification of the Indirect Cost Rate, including any independent CPA audit or certification thereof;
- Any proposal for the Agreement, subcontract, or modification;
- Discussions conducted on the proposal(s), including those related to negotiating;
- Fees or allowable costs under the Agreement, subcontract, or modification;
- Performance of the Agreement, subcontract or modification; or,
- The amount and basis of any claim or dispute.

5.4. *Audit.* The Owner, FHWA, or their authorized representatives, shall have access to and the right to examine any of the Consultant's records involving transactions related to this Agreement or a subcontract hereunder.

5.5. *Reports.* If the Consultant is required to furnish cost, funding, or performance reports, the Owner, FHWA, or their authorized representatives shall have the right to examine and audit the supporting records and materials, for the purpose of evaluating (1) the effectiveness of the Consultant's policies and procedures to produce data compatible with the objectives of these reports and (2) the data reported.

5.6. *Availability.* The Consultant shall retain and make available at its office at all reasonable times the records, materials, and other evidence described in this section and Section 29, Disputes and Claims, for examination, audit, or reproduction, until six years after final payment under this Agreement, or for any longer period required by statute or by other clauses of this Agreement. In addition—

5.6.1. If this Agreement is completely or partially terminated, the records relating to the work terminated shall be retained and made available for five years after the termination; and,

5.6.2. Records relating to any claim or dispute, or to litigation or the settlement of claims arising under or relating to this Agreement shall be retained and made available until after any such claims or litigation, including appeals, are finally resolved.

5.7. The Consultant shall insert a clause containing all the terms of this section in all subcontracts under this Agreement.

## **6. DESCRIPTION OF THE PROJECT**

6.1. The description of the project will be as stated in each individual Task Order.

**7. INFORMATION AND TITLE I SERVICES TO BE PROVIDED BY CONSULTANT**

7.1. \_\_\_\_\_ services will be stated in each individual Task Order.

**8. INFORMATION TO BE PROVIDED BY THE OWNER**

8.1. Information to be provided by the Owner will be as stated in each individual Task Order.

**9. TITLE II SERVICES TO BE PROVIDED BY CONSULTANT**

9.1. Information and services to be provided will be as stated in each individual Task Order and in accordance with Appendix D.

**10. COORDINATION WITH OWNER**

10.1. Throughout the Project, the **Consultant** shall hold conferences as needed in Little Rock, Arkansas, or such other location as designated by the Owner, with representatives of the Owner and the FHWA so that as the Project progresses, the Consultant shall have full benefit of the Owner's knowledge of existing needs and facilities and be consistent with the Owner's current policies and practices. The extent and character of the work to be done by the Consultant shall be subject to the general oversight and approval of the Owner.

**11. OFFICE LOCATION FOR REVIEW OF WORK**

Review of the work as it progresses and all files and documents produced under this Agreement may be made by representatives of the Owner and the FHWA at the project office of the Consultant located at \_\_\_\_\_, or at the regional offices of the Consultant located at \_\_\_\_\_, or the Consultant's Arkansas office located at \_\_\_\_\_.

**12. ACCESS TO PROPERTY**

12.1. The Consultant's services to the Owner may require entry upon private property. The Consultant will present or mail to private landowners a letter of introduction and explanation, describing the work, which shall be drafted by the Owner. The Consultant will make reasonable attempts to notify resident landowners who are obvious and present when the Consultant is in the field. The Consultant is not expected to provide detailed contact with individual landowners. The Consultant is not expected to obtain entry by means other than the consent of the landowner. If the Consultant is denied entry to private property by the landowner, the Consultant will not enter the property. If denied entry to the property, the Consultant shall notify the Owner and advise the Owner of an alternate evaluation method if one is feasible. The Owner shall decide on the course of action to obtain access to the property.

**13. DELIVERABLES**

13.1. Deliverables will be provided in accordance with each individual Task Order.

**14. SUBCONTRACTING**

- 14.1. Unless expressly disclosed in Appendix B, the Consultant may not subcontract any of the services to be provided herein without the express written approval of the Owner. All subcontractors, including those listed in Appendix B, shall be bound by the terms of this Agreement. All subcontractors shall be subject to all contractual and legal restrictions concerning payment and determination of allowable costs, and subject to all disclosure and audit provisions contained herein and in any applicable federal or state law.
- 14.2. Unless the consent or approval specifically provides otherwise, neither consent by the Owner to any subcontract nor approval of the Consultant's purchasing system shall constitute a determination (1) of the acceptability of any subcontract terms or conditions, (2) of the acceptability of any subcontract price or of any amount paid under any subcontract, or (3) to relieve the Consultant of any responsibility, obligation, or duty under this Agreement.
- 14.3. No subcontract placed under this Agreement shall provide for payment on a cost-plus-a-percentage-of-cost basis, and any fee payable under cost-reimbursement subcontracts shall not exceed the fee limitations of the FAR.
- 14.4. Furthermore, notwithstanding any other provision within this Agreement, no reimbursement or payment for any markup of the cost of any subcontract shall be considered by the Owner without the express written agreement of the Owner.
- 14.5. *Prompt Payment.* The Consultant shall pay subcontractors for satisfactory performance of their subcontracts within 30 days of receipt of each payment by the Owner to the Consultant. Any retainage payments held by the Consultant must be returned to the subcontractor within 30 days after the subcontractor's work is completed. Failure to comply with this provision shall be considered a Default by the Consultant. If the Consultant fails to comply with this provision, in addition to any other rights or remedies provided under this Agreement, the Owner, at its sole option and discretion, may:
- make payments directly to the subcontractor and offset such payments, along with any administrative costs incurred by the Owner, against reimbursements or payments otherwise due the Consultant;
  - notify any sureties; and/or,
  - withhold any or all reimbursements or payments otherwise due to the Consultant until the Consultant ensures that the subcontractors have been and will be promptly paid for work performed.
- 14.6. The Consultant shall insert a clause containing all the terms of this section in all subcontracts under this Agreement.

## **15. RESPONSIBILITY OF THE CONSULTANT**

- 15.1. Neither the employees of the Consultant, or of its subcontractors, shall be deemed employees of the Owner for the purposes of this Agreement.
- 15.2. The Consultant and its subcontractors agree that it will have no interest, direct or indirect, that would conflict in any manner or degree with the performance of its obligations under this Agreement. Furthermore, the Consultant and its subcontractors shall not enter into any other contract during the term of this Agreement, which would create or involve a conflict of interest with the services provided herein or other contracts that may be adverse to the Owner, State, City or County as it relates to this Agreement.

- 15.3. Notwithstanding any review, approval, acceptance or payment by the Owner, the Consultant shall be responsible for the professional quality, technical accuracy, and the coordination of all designs, drawings, specifications, and other services furnished by the Consultant under this Agreement. The Consultant shall, without additional compensation above the Contract Price, correct or revise any errors or deficiencies in its surveys, drawings, specifications, and other services.
- 15.4. The Consultant shall demonstrate to the Owner's Representative the presence and implementation of quality assurance in the performance of the Consultant's work. The Consultant shall identify individual(s) responsible, as well as methods used to determine the completeness and accuracy of drawings, specifications, and cost estimates.
- 15.5. The Consultant further agrees that in its performance of its work under this Agreement, it shall adhere to the requirements in the Design Standards of the Department and FHWA, which shall be incorporated herein by reference.
- 15.6. The Owner shall have the right at any time and in its sole discretion to submit for review all or any portion of the Consultant's work to consulting engineers engaged by the Owner for that purpose. The Consultant shall fully cooperate with any such review.
- 15.7. The Consultant and any subcontractor shall employ qualified and competent personnel to perform the work under this Agreement.
- 15.8. Neither the Owner's review, approval or acceptance of, nor payment for, the services required under this Agreement shall be construed to operate as a waiver of any rights under this Agreement, or of any cause of action arising out of the performance of this Agreement. The Consultant shall be and remain liable to the Owner for all damages to the Owner to the extent caused by the Consultant's negligent performance of any of the services furnished under this Agreement.
- 15.9. The rights and remedies of the Owner provided for under this Agreement are in addition to any other rights and remedies provided by law.
- 15.10. If the Consultant is comprised of more than one legal entity, each such entity shall be jointly and severally liable hereunder.

## **16. WARRANTY OF SERVICES**

- 16.1. *Definitions.* *Acceptance*, as used in this Agreement, means the act of an authorized representative of the Owner by which the Owner approves specific services, as partial or complete performance of the Agreement. *Correction*, as used in this Agreement, means the elimination of a defect.
- 16.2. Notwithstanding inspection and acceptance by the Owner or any provision concerning the conclusiveness thereof, the Consultant warrants that all services performed and work product under this Agreement will, at the time of acceptance, conform to the requirements of this Agreement, meet the satisfaction of the Owner, and are performed in accordance to the prevailing industry standards, including standards of conduct and care, format and content.
- 16.3. If the Consultant is required to correct or re-perform, it shall be at no additional cost to the Owner above the Contract Price, and any services corrected or re-performed by the Consultant shall be subject to this section to the same extent as work initially performed. If the Consultant fails or refuses to correct or re-perform, the Owner may, by contract or otherwise, correct or replace with similar services and charge to the Consultant the cost occasioned to the Owner thereby, or make an equitable adjustment in the Contract Price.

- 16.4. If the Owner does not require correction or re-performance, the Owner shall make an equitable adjustment in the Contract Price.
- 16.5. Nothing within this section shall constitute a waiver or exclusion of any other right or remedy that the Owner may possess at law or under this Agreement.

## **17. TERM, COMMENCEMENT, AND COMPLETION**

- 17.1. This Agreement shall commence on the effective date set forth above and remain in effect until the completion of the Consultant's Scope of Services in Task Orders issued under this Agreement. All Task Orders issued under this Agreement must be executed on or before \_\_\_\_\_, unless extended or terminated by the Owner in accordance with this Agreement. This Agreement will remain in effect for the period stated as long as the Consultant maintains registration as a Professional Engineer, licensed in the State of Arkansas.
- 17.2. The Consultant shall begin work under the terms of this Agreement within ten (10) days of receiving written notice to proceed. [If services are to be performed in subsequent phases, then each phase shall be commenced upon the Owner's approval of the previous phase. The Consultant shall not be entitled to any compensation or reimbursement for services performed in a phase unless and until it has received approval from the Owner to proceed with such services.]
- 17.3. It is further agreed that time is of the essence in performance of this Agreement. The Consultant shall complete the work, or each phase, as scheduled, and the Owner shall provide any required approval of the work or phase meeting the requirements contained herein in a reasonable and timely manner. The Project shall be completed as stated in each individual Task Order.

## **18. TERMINATION**

- 18.1. The Owner may terminate this Agreement in whole or, from time to time, in part, for the Owner's convenience or because of the Default of the Consultant.
- 18.2. The Owner shall terminate this Agreement by delivering to the Consultant written notice of the termination.
- 18.3. Upon receipt of the notice, the Consultant shall:
- Immediately discontinue all services affected (unless the notice directs otherwise).
  - Deliver to the Owner all data, drawings, specifications, reports, estimates, summaries, and other information and materials accumulated in performing this Agreement, whether completed or in process.
  - Terminate all subcontracts to the extent they relate to the work terminated.
  - In the sole discretion and option of the Owner, and if and only if requested to do so, assign to the Owner all right, title, and interest of the Consultant under the subcontracts terminated, in which case the Owner shall have the right to settle any claim or dispute arising out of those subcontracts without waiver of any right or claim the Owner may possess against the Consultant.
  - With approval or ratification by the Owner, settle all outstanding liabilities arising from the termination of subcontracts, the cost of which would be allowable in whole or in part, under this Agreement.

- Complete performance of the work not terminated.
- Take any action that may be necessary, or that the Owner may direct, for the protection and preservation of the property related to this Agreement that is in the possession of the Consultant and in which the Owner has or may acquire an interest.

18.4. If the termination is for the convenience of the Owner, the Owner shall make an equitable adjustment in the Contract Price, subject to the Ceiling Prices and Funding Limitations provisions, *but shall allow no anticipated fee or profit on unperformed services*. The Owner, upon its own determination, shall pay the Consultant in addition to payment for services rendered and reimbursable costs incurred, for all expenses the Owner determines to have been reasonably incurred by the Consultant in connection with the orderly termination of this Agreement including but not limited to demobilization, reassignment of personnel, associated indirect costs and all other expenses directly resulting from termination.

18.5. If the termination is for the Consultant's Default, the Owner may complete the work by contract or otherwise and the Consultant shall be liable for any reasonable and necessary additional cost incurred by the Owner to the extent caused by Consultant's default.

18.6. Disputes and claims arising from termination of this Agreement shall be governed by Section 29, Disputes and Claims.

18.7. The rights and remedies of the Owner provided in this section are in addition to any other rights and remedies provided by law or under this Agreement, and shall not constitute a waiver of any other such right or remedy.

## **19. STOP WORK ORDERS**

19.1. The Owner may, at any time, by written order to the Consultant, require the Consultant to stop all, or any part, of the work called for by this Agreement for a period of up to 90 days after the order is delivered to the Consultant, and for any further period to which the parties may agree. Upon receipt of the order, the Consultant shall immediately comply with its terms and take all reasonable steps to minimize the incurrence of costs allocable to the work covered by the order during the period of work stoppage. Within a period of 90 days after a stop work order is delivered to the Consultant, or within any extension of that period to which the parties shall have agreed, the Owner shall either—

19.1.1. Cancel the stop work order; or

19.1.2. Terminate the work pursuant to Section 18, Termination.

19.2. If a stop work order issued under this section is canceled or the period of the order or any extension thereof expires, the Consultant shall resume work. The Owner shall make an equitable adjustment in the delivery schedule or Contract Price, or both, and the Agreement shall be modified in writing accordingly, if—

- The stop work order was not issued because of Consultant's Default in its performance of its obligations under any part of this Agreement;
- The stop work order results in an increase in the time required for, or in the Consultant's cost properly allocable to, the performance of any part of this Agreement; and,
- The Consultant provides Notice of Potential Claim pursuant to Section 29, Disputes and Claims.

## **20. CHANGES**

- 20.1. The Owner may at any time, by written order, and without notice to the sureties, if any, make changes within the general scope of this Agreement, including but not limited to: (1) drawings, surveys, or specifications; (2) time of performance (i.e., hours of the day, days of the week, etc.); and (3) places of inspection, delivery, or acceptance.
- 20.2. If any such change causes an increase or decrease in the cost of, or the time required for, performance of any part of the work under this Agreement, whether or not changed by the order, the Owner shall make an equitable adjustment in the (1) estimated cost, delivery or completion schedule, or both; (2) amount of any fee; and (3) other affected terms.
- 20.3. All claims and disputes shall be governed by the Section 29, Disputes and Claims. As provided in Section 29, the Consultant must provide written notice of its intention to make a claim for additional compensation before beginning the work on which the claim is based. If such notice is not given, the Consultant hereby agrees to waive any claim for such additional compensation.
- 20.4. Failure to agree to any adjustment shall be a dispute under Section 29, Disputes and Claims. *However, nothing in this section or any other provision of this Agreement shall excuse the Consultant from proceeding with the Agreement as changed.*

## **21. OWNERSHIP OF DOCUMENTS & DATA**

- 21.1. Except for any pre-existing intellectual property, all project documents and data, regardless of form and including but not limited to original drawings, disks of CADD drawings, cross-sections, estimates, files, field notes, and data, shall be the property of the Owner. The Consultant shall further provide all documents and data at no cost to the Owner upon the Owner's request. The Consultant may retain reproduced copies of drawings and other documents. In the event that any patent rights or copyrights are created in any of the documents, data compilations, or any other work product, the Owner shall have an irrevocable license to use such documents, or data compilations, or work product. Any Owner use of the Consultant's work product for the purposes other than intended by this Agreement will be without risk to the Consultant.

## **22. PATENT AND COPYRIGHT INFRINGEMENT**

- 22.1. The Consultant shall report to the Owner, promptly and in reasonable written detail, each notice or claim of patent or copyright infringement based on the performance of this Agreement of which the Consultant has knowledge.
- 22.2. In the event of any claim or suit against the Owner on account of any alleged patent or copyright infringement arising out of the performance of this Agreement or out of the use of any supplies furnished or work or services performed under this Agreement, the Consultant shall furnish to the Owner, when requested by the Owner, all evidence and information in possession of the Consultant pertaining to such suit or claim. Such evidence and information shall be furnished at the expense of the Consultant.
- 22.3. The Consultant agrees to include, and require inclusion of, the provisions of this section in all subcontracts at any tier for supplies or services.
- 22.4. The Consultant shall indemnify the Owner and its officers, agents, and employees against liability, including costs and attorneys' fees, for infringement of any United States patent or copyright arising from the manufacture or delivery of supplies, the performance of services, or the

construction, alteration, modification, or repair of real property under this Agreement, or out of the use or disposal by or for the account of the Owner of such supplies or construction work.

22.5. This indemnity shall not apply unless the Consultant shall have been informed within ten (10) business days following the Owner's receipt of legal notice of any suit alleging such infringement and shall have been given such opportunity as is afforded by applicable laws, rules, or regulations to participate in its defense. Further, this indemnity shall not apply to (1) an infringement resulting from compliance with specific written instructions of the Owner directing a change in the supplies to be delivered or in the materials or equipment to be used, or directing a manner of performance of the Agreement not normally used by the Consultant, (2) an infringement resulting from addition to or change in supplies or components furnished or construction work performed that was made subsequent to delivery or performance, or (3) a claimed infringement that is unreasonably settled without the consent of the Consultant, unless required by final decree of a court of competent jurisdiction.

### **23. BANKRUPTCY**

23.1. In the event the Consultant enters into proceedings relating to bankruptcy, whether voluntary or involuntary, the Consultant agrees to furnish, by certified mail, written notice of the bankruptcy to the Owner. This notice shall be furnished within five days of the initiation of the proceedings relating to bankruptcy filing. This notice shall include the date on which the bankruptcy petition was filed, the identity of the court in which the bankruptcy petition was filed, and a listing of ARDOT job numbers and FAP numbers for all contracts with Owner against which final payment has not been made. This obligation remains in effect until final payment under this Agreement.

### **24. FUNDING LIMITATIONS**

24.1. The Owner's obligations under this Agreement are contingent upon the availability of appropriated funds from which payments under the terms of this Agreement can be made in this and each subsequent fiscal year for the duration of the Agreement. No legal liability on the part of the Owner of any kind whatsoever under this Agreement shall arise until funds are made available to the Owner for performance of this Agreement, including those to be appropriated by the State of Arkansas and those to be provided by the United States.

### **25. RESTRICTIONS ON EMPLOYMENT OF PRESENT AND FORMER EMPLOYEES**

25.1. The Consultant shall not be permitted to employ or make an offer of employment, for regular or part-time work related to any Department projects during the term of this Agreement, to any person who:

- is a present employee of the Department;
- is a former employee of the Department and at any time during the person's employment with the Department, the person participated personally and substantially through decision, approval, disapproval, recommendation, rendering of advice, investigation, or otherwise while an employee, on any particular matter pertaining to this Agreement;
- is a former employee of the Department within the twelve (12) months of employment cessation, and under this Agreement will knowingly act as a principal or as an agent in matters which were within this person's official responsibility; or
- is a former employee of the Department within the twelve (12) months of employment cessation will engage in selling or attempting to sell commodities or services, including technical or

professional consultant services to the Department, unless the former employee's last annual salary with the Department did not exceed ten thousand five hundred dollars (\$10,500).

- is a former employee of the Department and at any time was terminated with cause or allowed to resign/retire in lieu of termination with cause.

25.2. Any individual or entity acting as a principal or agent on behalf of any person disqualified pursuant to the terms of provision 25.1 shall not be permitted to perform any work related to any Department project for the Consultant during the term of this Agreement.

25.3. This section is not intended to preclude a former employee from accepting employment with the Consultant solely because the Consultant has entered into this Agreement with the Owner.

## **26. SUCCESSORS AND ASSIGNS**

26.1. This Agreement shall be binding upon the parties and their successors and assigns, and except as expressly set forth herein, neither the Owner nor the Consultant may assign, delegate, or transfer any benefit or obligation under this Agreement without the express written consent of the other party. Nothing herein shall be construed as a waiver of any immunity or as creating any personal liability on the part of any officer or agent of the Owner or any other governmental entity either made a party to, or possessing any interest in, this Agreement.

## **27. INDEMNITY AND RESPONSIBILITY FOR CLAIMS AND LIABILITY**

27.1. *Indemnity.* The Consultant shall hold harmless and indemnify the Owner, Owner's officers, employees, and agents, and all other governmental agencies with an interest in the Project, from and for all claims and liabilities stemming from any negligent acts, errors or omissions in the services performed in this Agreement on the part of the Consultant and its subcontractors, and their agents and employees.

27.2. *No Personal Liability.* No director, officer, manager, employee, agent, assign, or representative of the Owner shall be liable to the Consultant in a personal or individual capacity under any term of this Agreement, because of any breach thereof, or for any act or omission in its execution or performance.

27.3. *Independent Consultant Relationship.* The parties intend that the Consultant shall be an independent consultant of the Owner and that the Consultant shall be solely liable for any act or omission of the Consultant or its agents, employees, or subcontractors arising under or occurring during the performance of this Agreement. No act or direction of the Owner shall be deemed to be an exercise of supervision or control of the Consultant's performance.

## **28. INSURANCE**

28.1. *Professional Liability Insurance Coverage.* The Consultant shall maintain at all times during the performance of services under this Agreement professional liability insurance coverage for errors, omissions, and negligent acts to the extent caused by the performance of professional services under this Agreement in an amount per claim of not less than five (5) times the original Contract Ceiling Price or \$2,000,000 per claim and aggregate, whichever is less. Such insurance shall extend to the Consultant and to its legal representatives in the event of death, dissolution, or bankruptcy, and shall cover the errors, omissions, or negligent acts of the Consultant's subcontractors, agents, and employees. Such insurance shall extend to any errors, omissions, and negligent acts in the performance of services under this Agreement committed by the Consultant or alleged to have been committed by the Consultant subject to the terms of the policy.

- 28.2. *Deductible.* The Consultant may maintain a professional liability insurance policy with a deductible clause in an amount approved by the Owner if, in the judgment and opinion of the Owner, the Consultant's financial resources are sufficient to adequately cover possible liability in the amount of the deductible. The Consultant shall submit promptly to the Owner, upon request as often as quarterly, detailed financial statements and any other information requested by the Owner to reasonably determine whether or not the Consultant's financial resources are sufficient to adequately cover possible liability in the amount of the deductible.
- 28.3. *Worker's Compensation Insurance.* The Consultant shall at all times during the Term of this Agreement maintain Worker's Compensation and Employers Liability Insurance as required under Arkansas law.
- 28.4. *Automobile and General Liability Insurance.* The Consultant shall at all times during the term of this Agreement maintain commercial general liability insurance coverage for bodily injury and property damage in the combined single limit of \$1,000,000 per occurrence and aggregate, and comprehensive automobile liability insurance coverage for bodily injury and property damage in the combined single limit of \$1,000,000, which shall cover all owned, hired, and non-owned vehicles.
- 28.5. *Valuable Papers Insurance.* The Consultant shall at all times during the term of this Agreement maintain Valuable Papers Insurance, whether as a part of the General Liability Insurances referenced above or as a separate insurance, in an amount sufficient to cover all costs associated with repairing, restoring, or replacing any plans, drawings, field notes, and other documents kept or created by the Consultant as part of the services under this Agreement, in the event of casualty to, or loss or theft of such papers.
- 28.6. *Insurance Policies and Certificates.* The Consultant shall allow the Owner upon request the right to examine or inspect its insurance policies and evidence satisfactory to the Owner concerning the effectiveness and the specific terms of the insurance. Prior to the execution of this Agreement, the Consultant shall furnish to the Owner certificates of insurance reflecting policies in force, and it shall also provide certificates evidencing all renewals of any expiring insurance policy required hereunder within thirty (30) days of the expiration thereof. The Consultant's failure to provide and continue in force and effect any insurance required under this Article shall be deemed a Default for which Owner, in its sole discretion, may terminate this Agreement immediately or on such other terms as it sees fit.
- 28.7. *Additional Insurance Requirements.* All insurance maintained by the Consultant pursuant to this Section shall be written by insurance companies authorized to do business in Arkansas, in form and substance satisfactory to the Owner, and shall provide that the insurance will not be subject to cancellation, termination, or reduction in limits of liability insurance during its term except upon thirty (30) days prior written notice to the Owner. In the event that the insurance is cancelled, terminated, or changed during its term and thirty (30) days written notice cannot be provided to the Owner, the Consultant shall provide any insurance required under this Article for continual coverage upon expiration of the existing policy or become financially responsible for any claims associated with the expired period.
- 28.8. *Duration of Insurance Obligations.* The Consultant shall maintain its professional insurance coverage required under this Agreement in force and effect for a period not less than five years after the final acceptance of the project or the completion of the Consultant's services under this Agreement, whichever comes later. Commercial General Liability Insurance Coverage and Valuable Papers Insurance Coverage required under this Agreement shall be in full force and effect until the final acceptance or the completion of the Consultant's services, whichever comes later. All other insurance shall be maintained in full force and effect until final acceptance of the project or completion of the Consultant's services, whichever comes first.

28.9. *Consultant's Insurance Primary.* All insurance policies maintained by the Consultant pursuant to this Agreement shall provide that the consultant's insurance shall be primary and the Owner's own insurance shall be non-contributing.

28.10. *Additional Insured.* All liability insurance policies, except the professional liability policy, worker's compensation and valuable papers maintained by the Consultant pursuant to this Agreement shall be endorsed to include the Owner, its officers, directors, managers, employees, agents, assigns and representatives, individually and collectively, as additional insured, and all property damage insurance shall be endorsed with a waiver of subrogation by the insurer as to the Owner.

## **29. DISPUTES AND CLAIMS**

29.1. *Notice of Potential Claim.* Whenever a Consultant deems that any additional compensation is due, the Consultant shall notify the Assistant Chief Engineer in writing of its intention to make a claim for additional compensation ("Notice of Potential Claim") **before beginning the work that gives rise to the claim.**

29.2. *Time & Manner for Submitting Claim.* All disputes and claims shall first be submitted in writing to the Assistant Chief Engineer within 45 calendar days after the completion or termination date. **The Consultant hereby agrees that the failure to submit the dispute or claim to the Assistant Chief Engineer prior to 45 calendar days after the completion or termination date shall constitute a waiver of the dispute or claim.**

29.3. *Form.* All disputes and claims must be submitted in writing and in sufficient detail to permit the Owner to determine the basis for entitlement and the actual allowable costs incurred. Each claim must contain:

- A detailed factual statement of the claim providing all necessary dates, locations, and items of work affected by the claim;
- The date the actions resulting in the claim occurred or conditions resulting in the claim became evident;
- A copy of the "Notice of Potential Claim";
- The name, title, and activity of each Department employee knowledgeable about the facts that gave rise to such claim;
- The name, title, and activity of each Consultant, Subcontractor, or employee knowledgeable about the facts that gave rise to the claim;
- The specific provisions of the Agreement that support the claim and a statement why such provisions support the claim;
- The identification and substance of any relevant documents, things, or oral communications related to the claim;
- A statement whether the claim is based on provisions of the Agreement or an alleged breach of the Agreement;
- If an extension of time is sought, the specific number of days sought and the basis for the extension;

- The amount of additional compensation sought and a specific cost breakdown of the amount claimed; and,
- Any other information or documents that are relevant to the claim.

29.4. *Decision and Appeal.* If an adverse decision is rendered by the Assistant Chief Engineer, the Consultant shall submit the claim or dispute in writing to the Chief Engineer within 60 days from the date of the decision the Assistant Chief Engineer. The decision of the Chief Engineer shall be final and conclusive unless, within 60 calendar days from the date of receipt of the Chief Engineer's decision, the Consultant files a claim with the Arkansas State Claims Commission ("Claims Commission") appealing the decision of the Chief Engineer. The Consultant will be afforded an opportunity to be heard and offer evidence in support of its appeal before the Claims Commission, subject to the rules and regulations of the Claims Commission, including Ark. Code Ann. § 19-10-302, which requires pursuit and exhaustion of all remedies against responsible third parties and insurance coverage.

29.5. *Continued Performance.* Pending final resolution of a dispute or claim, unless the Owner has terminated this Agreement pursuant to Section 18 or issued a stop work order pursuant to Section 19, the Consultant shall proceed diligently with the performance of this Agreement in accordance with the Assistant Chief Engineer's and Chief Engineer's decisions.

29.6. *Nonexclusive Remedies.* The rights and remedies of the Owner provided in this section are in addition to any other rights and remedies provided by law or under this Agreement, and shall not constitute a waiver of any other such right or remedy. If the Owner decides the facts justify the action, the Owner may, at its sole option and discretion, receive and act upon a proposal, dispute, or claim submitted at any time before final payment under this Agreement.

### **30. COVENANT AGAINST CONTINGENCY FEES**

30.1. The Consultant warrants that no person or agency has been employed or retained to solicit or obtain this Agreement upon an agreement or understanding for a contingent fee, except a bona fide employee or agency. For breach or violation of this warranty, the Owner shall have the right to annul this Agreement without liability or, in its discretion, to deduct from the Contract Price or consideration, or otherwise recover, the full amount of the contingent fee.

30.2. *Bona fide agency*, as used in this section, means an established commercial or selling agency, maintained by the Consultant for the purpose of securing business, that neither exerts nor proposes to exert improper influence to solicit or obtain government contracts nor holds itself out as being able to obtain any government contract or contracts through improper influence.

30.3. *Bona fide employee*, as used in this section, means a person, employed by the Consultant and subject to the Consultant's supervision and control as to time, place, and manner of performance, who neither exerts nor proposes to exert improper influence to solicit or obtain government contracts nor holds out as being able to obtain any government contract or contracts through improper influence.

30.4. *Contingent fee*, as used in this section, means any commission, percentage, brokerage, or other fee that is contingent upon the success that a person or concern has in securing a government contract.

30.5. *Improper influence*, as used in this section, means any influence that induces or tends to induce a government employee or officer to give consideration or to act regarding a government contract on any basis other than the merits of the matter.

### **31. TITLE VI ASSURANCES (NONDISCRIMINATION)**

During the performance of this Agreement, the Consultant, for itself, successors, and assigns, certifies and agrees as follows:

- 31.1. *Compliance with Regulations.* The Consultant shall comply with the Regulations relative to Title VI (Nondiscrimination in Federally-assisted programs of the Department of Transportation and its operating elements, especially Title 49, CFR, Part 21, as amended, and hereinafter referred to as the Regulations). These regulations are herein incorporated by reference and made a part of this Agreement. Title VI provides that the recipients of Federal financial assistance will maintain and implement a policy of nondiscrimination in which no person shall, on the basis of race, color, or national origin, be excluded from participation in, denied the benefits of, or subject to discrimination under any program or activity by recipients of Federal financial assistance or their assignees and successors in interest.
- 31.2. *Nondiscrimination.* The Consultant, with regard to the work performed by it during the term of this Agreement, shall not discriminate on the basis of race, color, or national origin in the selection and retention of subcontractors, including procurements of materials and leases of equipment. The Consultant shall not participate either directly or indirectly in the discrimination prohibited by Section 21.5 of the Regulations, including employment practices when the agreement covers a program set forth in Appendix B of the USDOT Regulations.
- 31.3. *Solicitations for Subcontracts, Including Procurements of Materials & Equipment.* In all solicitations, either by competitive bidding or negotiation, made by the Consultant or 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 Consultant of the Consultant's obligations under this Agreement and the Regulations relative to nondiscrimination on the grounds of race, color, or national origin.
- 31.4. *Information and Reports.* The Consultant 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 by the Owner or the USDOT and its Affiliated Modes to be pertinent to ascertain compliance with such regulations or directives. Where any information required of the Consultant is in the exclusive possession of another who fails or refuses to furnish this information, the Consultant shall so certify to the Department or the USDOT and its Affiliated Modes, as appropriate, and shall set forth what efforts it has made to obtain the information.
- 31.5. *Sanctions for Noncompliance.* In the event of the Consultant's noncompliance with the nondiscrimination provisions of this Agreement, the Owner shall impose such contract sanctions as it or the USDOT and its Affiliated Modes may determine to be appropriate, including but not limited to, withholding of payments to the Consultant under the Agreement until the Consultant complies with the provisions and/or cancellation, termination, or suspension of the Agreement, in whole or in part.
- 31.6. *Incorporation of Provisions.* The Consultant shall include the terms and conditions of this section in every subcontract including procurements of materials and leases of equipment, unless exempt by the Regulations, or directives issued pursuant thereto. The Consultant shall take such action with respect to any subcontract or procurement as the Owner or the USDOT and its Affiliated Modes may direct as a means of enforcing such provisions, including sanctions for noncompliance; *provided*, however that, in the event the Consultant becomes involved in, or is threatened with, litigation with a subcontractor or vendor as a result of any direction, the Consultant may request the Owner to enter into such litigation to protect the interests of the State and litigation to protect the interest of the United States.

### **32. DBE CLAUSE**

- 32.1. The Consultant or subcontractor shall not discriminate on the basis of race, color, sex, or national origin, in the performance of this Agreement. The Consultant shall comply with the applicable requirements of 49 CFR Part 26 and perform any actions necessary to maintain compliance in the award and administration of DOT-assisted contracts. Failure by the Consultant to comply with or perform these requirements is a material breach of this Agreement, which may result in the cancellation, termination, or suspension of this Agreement in whole or in part, or such other remedy that the Owner may determine appropriate.
- 32.2. The Consultant shall insert a clause containing all the terms of this section in all subcontracts under this Agreement.

### **33. COMPLIANCE WITH ALL OTHER LAWS REGARDING NONDISCRIMINATION**

- 33.1. The Consultant will comply with the provisions of the Americans with Disabilities Act (ADA), Section 504 of the Rehabilitation Act, Title VI of the Civil Rights Act of 1964, FHWA Federal Aid Project Guidance, and any other Federal, State, and/or local laws, rules and/or regulations.
- 33.2. The Consultant, during the term of this Agreement, shall not discriminate on the basis of race, color, sex, national origin, age, religion, disability, or any other protected classes, in admission or access to and treatment in programs and activities associated with this Agreement, or in the selection and retention of subcontractors, including procurement of material and leases of equipment. The Consultant shall not participate either directly or indirectly in any discrimination prohibited by the Regulations, including employment practices.
- 33.3. In accordance with Section 504 regulations 49 CFR Part 27.15, the Owner's Notice of Nondiscrimination is required in any bulletins, announcements, handbooks, pamphlets, brochures, and any other publications associated with this Agreement that are made available to the public, program participants, applicants or employees.

### **34. CERTIFICATION REGARDING LOBBYING**

- 34.1. The Consultant certifies, to the best of their knowledge and belief, that:
- 34.1.1. No Federal appropriated funds have been paid or will be paid, by or on behalf of the undersigned, to any person for influencing or attempting to influence an officer or employee of an agency, a Member of Congress, an officer or employee of Congress, or an employee of a Member of Congress in connection with the awarding of any Federal contract, the making of any Federal grant, the making of any Federal loan, the entering into of any cooperative agreement, and the extension, continuation, renewal, amendment, or modification of any Federal contract, grant, loan, or cooperative agreement.
- 34.1.2. If any funds other than Federal appropriated funds have been paid or will be paid to any person for influencing or attempting to influence an officer or employee of any agency, a Member of Congress, an officer or employee of Congress, or an employee of a Member of Congress in connection with this Federal contract, grant, loan, or cooperative agreement, the undersigned shall complete and submit Standard Form-LLL, "Disclosure Form to Report Lobbying".
- 34.1.3. The Consultant shall require that the language of this certification be included in the agreement for all subcontracts and that all subcontractors shall certify and disclose accordingly.

**35. CERTIFICATION REGARDING DEBARMENT, SUSPENSION, PROPOSED DEBARMENT, AND OTHER RESPONSIBILITY MATTERS**

35.1. The Consultant certifies, to the best of its knowledge and belief, that—

35.1.1. The Consultant and any of its Principals—

35.1.1.1. Are not presently debarred, suspended, proposed for debarment, or declared ineligible for the award of contracts by any federal or state agency;

35.1.1.2. Have not, within a 3-year period preceding this offer, been convicted of or had a civil judgment rendered against them for: commission of fraud or a criminal offense in connection with obtaining, attempting to obtain, or performing a public (federal, state, or local) contract or subcontract; violation of federal or state antitrust statutes relating to the submission of offers; or commission of embezzlement, theft, forgery, bribery, falsification or destruction of records, making false statements, or receiving stolen property;

35.1.1.3. Are not presently indicted for, or otherwise criminally or civilly charged by a governmental entity with, commission of any of the offenses enumerated in subsection 35.1.1.2; and,

35.1.1.4. The Consultant has not within a 3-year period preceding this offer, had one or more contracts terminated for default by any federal or state agency.

35.2. *Principals*, for the purposes of this certification, means officers; directors; owners; partners; and, persons having primary management or supervisory responsibilities within a business entity (e.g., general manager; plant manager; head of a subsidiary, division, or business segment, and similar positions). This certification concerns a matter within the jurisdiction of an agency of the United States and the making of a false, fictitious, or fraudulent certification may render the maker subject to prosecution under section 1001, title 18, United States Code, as well as any other applicable federal and state laws.

35.3. The Consultant shall provide immediate written notice to the Owner if, at any time prior to contract award, the Consultant learns that its certification was erroneous when submitted or has become erroneous by reason of changed circumstances.

35.4. The certification in subsection 35.1 is a material representation of fact upon which reliance was placed when making award. If it is later determined that the Consultant knowingly rendered an erroneous certification, the Owner may terminate the contract resulting from this solicitation for default in addition to any other remedies available to the Owner.

**36. MISCELLANEOUS**

36.1. *General Compliance with Laws.* The Consultant shall comply with all Federal, State, and local codes, laws, regulations, standards, and ordinances applicable to the work, including but not limited to, the Americans with Disabilities Act and Occupational Safety and Health Act as amended.

36.2. *Choice of Law.* This Agreement shall be governed by the laws of the State of Arkansas without consideration of its choice of law provisions.

36.3. *Choice of Forum.* The Consultant agrees that any cause of action stemming from or related to this Agreement, including but not limited to disputes or claims arising under this Agreement, for acts or omissions in the performance, suspension, or termination of this Agreement, whether sounding in contract or tort, equity or law, may only be brought in the appropriate forum within State

of Arkansas. The Consultant's sole remedy following the decision of the Chief Engineer regarding any claim or dispute, pursuant to Section 29, Disputes and Claims, shall be before the Arkansas State Claims Commission.

- 36.4. *No Waiver of Immunity.* The Owner expressly does not waive any defense of immunity that it may possess under either federal or state law, and no provision in this Agreement shall be construed to constitute such a waiver in whole or in part.
- 36.5. *Conflicts Between Laws, Regulations, and Provisions.* In the event of conflicting provisions of law, the interpretation shall be governed by the following in this order, from most controlling to least: Federal law and regulations, Arkansas law and regulations, Department and FHWA Design Standards, and this Agreement.
- 36.6. *Severability.* If any term or condition of this Agreement shall be held invalid, illegal, or unenforceable by a court of competent jurisdiction, all remaining terms of this Agreement shall remain valid and enforceable unless one or both of the parties would be materially prejudiced.
- 36.7. *No-Waiver.* The failure of the Owner to strictly enforce any term of this Agreement shall not be construed as a waiver of the Owner's right to require the Consultant's subsequent performance of the same or similar obligation or duty.
- 36.8. *Modification and Merger.* This written Agreement and any provisions incorporated by reference reflect the entire agreement of the parties and may be modified only by the express written agreement of both parties.
- 36.9. *Force Majeure Clause.* Neither party to this Agreement shall be liable for any delay direct or indirect in performance caused by an unforeseen event such as acts of God, acts of governmental authorities, extraordinary weather conditions or other natural catastrophes, or any other cause beyond the reasonable control or contemplation of either party beyond such party's reasonable control. Each party will take reasonable steps to mitigate the impact of any force majeure.
- 36.10. *Authorization to Proceed.* Execution of this Agreement by the Owner will be made by written authorization to the Consultant. The Consultant and Subcontractors shall not seek reimbursement for work initiated prior to receiving written notice to proceed or work order authorization.

### **37. CERTIFICATION OF AUTHORIZED REPRESENTATIVES**

- 37.1. This Agreement and the certifications contained herein or attached hereto constitute the whole Agreement of the parties, and each party certifies that this Agreement and any attached certification have been executed by their duly authorized representatives.

### **38. CERTIFICATION REGARDING CONFLICT OF INTEREST**

- 38.1. The Consultant certifies, that it has no financial interest in the proposed project or construction of the proposed project
- 38.1.1. The Consultant nor any of its Principals have no known conflicts with any of the following:
- 38.1.1.1. No financial interest in work associated with this contract;
  - 38.1.1.2. No ownership interest in work associated with this contract;
  - 38.1.1.3. No Financial interest in the results of any agency decisions regarding approvals for work associated with this project;

38.1.1.4. Policies and procedures (provided statutory framework permits) for a contracting agency to pursue a range of civil actions and penalties including fines, suspension, or debarment associated with fraud, waste, abuse, and identified conflict of interest which were not disclosed.

38.2. For the duration of the contract, except for work expressly defined in this contract, the Consultant shall not be party to third party agreements for design or construction on projects associated with contract.

38.3. For the duration of the contract, except for work expressly defined in this contract, the Consultant shall not be party to enforceable promises or guarantees of future work associated with this contract.

**39. NOTICE**

39.1. All notices, approvals, requests, consents, or other communications required or permitted under this Agreement shall be addressed to either the Owner's Assistant Chief Engineer – Operations or the Consultant's Representative, and mailed or hand-delivered to:

39.1.1. To the Owner:

Arkansas Department of Transportation Department  
10324 Interstate 30  
Post Office Box 2261  
Little Rock, AR 72203

39.1.2. To the Consultant:

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

**IN WITNESS WHEREOF**, the parties execute this Agreement, to be effective upon the date set out above.

(CONSULTANT NAME)

ARKANSAS STATE  
HIGHWAY COMMISSION

BY: \_\_\_\_\_  
Name  
Title

BY: \_\_\_\_\_  
Scott E. Bennett, P.E.  
Director

Disclaimer: This contract is being electronically signed. The DocExpress Document Signing History will be located on the final page of the executed contract. This document will have all dates and electronic signatures applicable to the execution of this contract.

## **APPENDICES**

APPENDIX A-1	PROJECT SPECIFIC SCOPE OF WORK – <i>Will be stated in each individual Task Order.</i>
APPENDIX A-2	JUSTIFICATION OF FEES AND COSTS – <i>Will be stated in each individual Task Order.</i>
APPENDIX A-3	UNIT PRICES FOR SERVICES
APPENDIX B	SUBCONTRACTS
APPENDIX C	STANDARD CERTIFICATIONS
APPENDIX D	GENERAL SCOPE OF WORK

**SUBCONSULTANT MASTER AGREEMENT**  
**FOR**  
**ON-CALL SERVICES ( )**  
(ARDOT VERSION)

**1. SUBCONSULTANT AGREEMENT**

- 1.1. The services to be performed under this Subconsultant Agreement will be performed in connection with the Agreement for \_\_\_\_\_ Services ("Prime Agreement") between the Consultant and the Arkansas State Highway Commission ("Commission"), dated \_\_\_\_\_ ("Consultant") and \_\_\_\_\_ ("Subconsultant") hereby agree that the Subconsultant shall perform the professional and related services as described herein. In consideration for the performance of the professional services the Consultant agrees to compensate (and reimburse, if applicable) the Subconsultant in the manner and at the rate(s) provided herein.
- 1.2. The definitions of the Prime Agreement, and its provisions relating to the obligations, duties, and rights of subcontractors, *or which are otherwise required to be inserted into any subcontracting agreements*, are deemed to be part of, and are hereby incorporated by reference into, this Subconsultant Agreement and made binding upon the Subconsultant.
- 1.3. "Title I Services" are those services provided by the Subconsultant before the award of the contract for construction of the Projects, consisting primarily of services for the planning or design of the Project.
- 1.4. "Title I Services Ceiling Price" The Title I Services Ceiling Price for this Subconsultant is \_\_\_\_\_. The Title I Services Ceiling Prices is the maximum aggregate amount of all payments that the Consultant may become obligated to make to the Subconsultant.
- 1.5. "Title II Services" are those services provided by the Subconsultant after the award of the contract for the construction of the Project consisting primarily of \_\_\_\_\_ services during the construction of the Project.
- 1.6. "Title II Services Ceiling Price" The Title II Services Ceiling Price for this Agreement is \_\_\_\_\_. The Title II Services Ceiling Price is the maximum aggregate amount of all payments that the Consultant may become obligated to make to the Subconsultant for fees and costs related to Title II Services. In no event, unless modified in writing, shall total payments by the Consultant related to Title II Services exceed the Title II Services Ceiling Price. The Subconsultant shall not be entitled to receive adjustment, reimbursement, or payment for, nor shall the Consultant, Owner, or their officers, agents, employees, or representatives, incur any liability for, any fee or cost related to, Title II Services exceeding the Title II Services Ceiling Price.
- 1.7. "Owner" means collectively, the Arkansas State Highway Commission and the Arkansas Department of Transportation ("Department" or "ARDOT") regardless of how referenced.
- 1.8. "DOT" means the United States Department of Transportation.
- 1.9. "FAR" means the Federal Acquisition Regulations, codified in 48 Code of Federal Regulations (CFR).
- 1.10. "FHWA" means the Federal Highway Administration.

1.11. "Indirect Cost Rate." The Indirect Cost Rate is defined in the provisions of FAR, and is also subject to any limitations contained herein. At the time of execution of this Subconsultant Agreement, the Indirect Cost Rate for the Subconsultant is \_\_\_\_ percent plus facilities capital cost of money (FCCM) of \_\_\_\_\_ percent (FY20\_\_).

## **2. DESCRIPTION OF PROJECT AND SERVICES TO BE PROVIDED**

2.1. [update]

## **3. COSTS, FEES, PAYMENTS, AND RATE SCHEDULES**

[update below as needed]

### **3.1.1. Cost-Plus-Fixed-Fee Contract**

The Subconsultant is being hired to perform professional \_\_\_\_\_ services in connection with the Project as set forth herein. In consideration for Title I services performed, the Consultant will reimburse the Subconsultant for allowable direct and indirect costs, as defined herein, and pay the Subconsultant a fixed fee. If Title II services are to be performed, the Consultant will reimburse the Subconsultant for allowable direct costs and also pay the Subconsultant an amount determined by multiplying the salary rate of the individual(s) performing the Title II services, as shown on the Schedule of Salary Ranges, by the Title II Multiplier.

### **3.1.2. Lump-Sum Contract**

The Subconsultant is being hired to perform professional \_\_\_\_\_ services in connection with the Project as set forth herein. In consideration for the \_\_\_\_\_ services performed, the Consultant shall pay to the subconsultant the Fee as provided herein. The Fee includes compensation for any cost to be incurred by the subconsultant, and the subconsultant shall not be reimbursed for costs incurred outside of the agreed-upon Fee. The subconsultant shall bear the costs, and resulting risks, of performing this Agreement. The subconsultant may only be paid for work actually performed.

### **3.1.3. Specific Rate of Compensation Contract**

The subconsultant is being hired to perform professional \_\_\_\_\_ services in connection with the Project as set forth herein. In consideration for the \_\_\_\_\_ services rendered by the subconsultant, the Consultant shall pay to the subconsultant the Fee, to be determined according to the labor and activity rates as set forth in Section 3, Fees and Payment. The Fee includes compensation for any cost to be incurred by the subconsultant, and the subconsultant shall not be reimbursed for costs incurred outside of the agreed-upon Fee. The Subconsultant shall bear the costs, and resulting risks, of performing this Agreement.

3.1. Under no circumstances shall the Department be liable for any amounts, including all costs, which exceed the Contract Ceiling Price.

3.2. *Salaries.* The following schedule covers the classification of personnel and the salary ranges for all personnel anticipated to be assigned to this project by the Subconsultant:

3.2.1. SCHEDULE OF SALARY RANGES

[update]

3.2.2. The Consultant shall reimburse the Subconsultant for overtime costs only when the overtime has been authorized in writing by the Owner. When authorized, overtime shall be reimbursed at the rate of time and on-half for all nonexempt employees. Notwithstanding this provision, the Subconsultant must comply with all federal and state wage and hour laws and regulations, regardless whether the overtime is considered reimbursable under this Agreement.

**4. COMPENSATION SUBJECT TO LIMITATIONS OF FEDERAL AND STATE LAW**

4.1. The Project (as defined in the Prime Agreement), part of which is to be performed under this Subconsultant Agreement, is a federally-assisted project, and federal funds will be used, in part, to pay the Consultant and Subconsultant. Therefore, notwithstanding any provision of this Subconsultant Agreement or the Prime Agreement, all payments, costs, and expenditures are subject to the requirements and limitations of 48 CFR Part 31, including those relating to determination of indirect cost rates, if applicable. The Subconsultant shall certify the accuracy of all invoices, requests for payment, and cost rates (if applicable), along with supporting documentation and any supporting information or records provided prior to, during, or after the term of this Subconsultant Agreement.

**5. COMMISSION, ARDOT, AND FHWA AS THIRD PARTY BENEFICIARIES**

5.1. This Subconsultant Agreement is between and binding upon only the Consultant and Subconsultant. The Commission, ARDOT, and FHWA are not parties to this Subconsultant Agreement, but are expressly made third-party beneficiaries of this Subconsultant Agreement and shall be entitled to enforce any obligation of the Subconsultant owed to the Consultant. No provision of this Subconsultant Agreement or the Prime Agreement, nor the exercise of any right thereunder, shall be construed as creating any obligation or any liability on the part of, or operating as a waiver of any immunity of, the Commission, the ARDOT, the FHWA, or any of their employees, officers, or agents.

5.2. The Subconsultant's sole recourse, if any, for any injury arising under or related to this Subconsultant Agreement, the performance of services hereunder, or compensation or claims hereunder, shall be against the Consultant.

5.3. The Disputes and Claims provisions of the Prime Agreement shall not apply to this Subconsultant Agreement. However, the Subconsultant shall provide the Consultant all necessary information and assistance to enable Consultant to comply with the Disputes and Claims provisions.

**6. RECORDS & AUDITS**

6.1. Records includes books, documents, accounting procedures and practices, and other data, regardless of type and regardless of whether such items are in written form, in the form of computer data, or in any other form.

6.2. Examination. The Subconsultant shall maintain, and the Owner, FHWA, and their authorized representatives shall have the right to examine and audit all records and other evidence sufficient to reflect properly all costs (direct and indirect) claimed to have been

incurred or anticipated to be incurred in performance of this Agreement. This right of examination shall also include examination and audit of any records considered, relied upon, or relating to the determination of the Indirect Cost Rate or any certification thereof, including any CPA audit relied upon to establish the rate. This right of examination shall also include inspection at all reasonable times of the Subconsultant's offices and facilities, or parts of them, engaged in performing the Agreement.

- 6.3. **Supporting Data.** If the Subconsultant has been required to submit data in connection with any action relating to this Agreement, including the negotiation of or pre-negotiation audit of the Indirect Cost Rate, the negotiation of the Fee, request for cost reimbursement, request for payment, request for an adjustment, or assertion of a claim, the Owner, FHWA, or their authorized representatives, in order to evaluate the accuracy, completeness, and accuracy of the data, shall have the right to examine and audit all of the Subconsultant's records, including computations and projections, related to—
- The determination or certification of the Indirect Cost Rate, including any independent CPA audit or certification thereof;
  - Any proposal for the Agreement, subcontract, or modification;
  - Discussions conducted on the proposal(s), including those related to negotiating;
  - Fees or allowable costs under the Agreement, subcontract, or modification;
  - Performance of the Agreement, subcontract or modification; or,
  - The amount and basis of any claim or dispute.
- 6.4. **Audit.** The Owner, FHWA, or their authorized representatives, shall have access to and the right to examine any of the Subconsultant's records involving transactions related to this Agreement or a subcontract hereunder.
- 6.5. **Reports.** If the Subconsultant is required to furnish cost, funding, or performance reports, the Owner, FHWA, or their authorized representatives shall have the right to examine and audit the supporting records and materials, for the purpose of evaluating (1) the effectiveness of the Subconsultant's policies and procedures to produce data compatible with the objectives of these reports and (2) the data reported.
- 6.6. **Availability.** The Subconsultant shall retain and make available at its office at all reasonable times the records, materials, and other evidence described in this section and Section 29, Disputes and Claims, for examination, audit, or reproduction, until five years after final payment under this Agreement, or for any longer period required by statute or by other clauses of this Agreement. In addition—
- 6.7. If this Agreement is completely or partially terminated, the records relating to the work terminated shall be retained and made available for five years after the termination; and,
- 6.8. Records relating to any claim or dispute, or to litigation or the settlement of claims arising under or relating to this Agreement shall be retained and made available until after any such claims or litigation, including appeals, are finally resolved.
- 6.9. The Subconsultant shall insert a clause containing all the terms of this section in all subcontracts under this Agreement.

## **7. PATENT AND COPYRIGHT INFRINGEMENT**

- 7.1. The Subconsultant shall report to the Consultant and Owner, promptly and in reasonable written detail, each notice or claim of patent or copyright infringement based on the performance of this Agreement of which the Subconsultant has knowledge.
- 7.2. In the event of any claim or suit against the Owner on account of any alleged patent or copyright infringement arising out of the performance of this Agreement or out of the use of any supplies furnished or work or services performed under this Agreement, the Subconsultant shall furnish to the Consultant and Owner, when requested, all evidence and information in possession of the Subconsultant pertaining to such suit or claim. Such evidence and information shall be furnished at the expense of the Subconsultant.
- 7.3. The Subconsultant agrees to include, and require inclusion of, the provisions of this section in all subcontracts at any tier for supplies or services.
- 7.4. The Subconsultant shall indemnify the Consultant and Owner and its officers, agents, and employees against liability, including costs and attorneys' fees, for infringement of any United States patent or copyright arising from the manufacture or delivery of supplies, the performance of services, or the construction, alteration, modification, or repair of real property under this Agreement, or out of the use or disposal by or for the account of the Consultant or Owner of such supplies or construction work.
- 7.5. This indemnity shall not apply unless the Subconsultant shall have been informed within ten (10) business days following the Consultant's or Owner's receipt of legal notice of any suit alleging such infringement and shall have been given such opportunity as is afforded by applicable laws, rules, or regulations to participate in its defense. Further, this indemnity shall not apply to (1) an infringement resulting from compliance with specific written instructions of the Consultant or Owner directing a change in the supplies to be delivered or in the materials or equipment to be used, or directing a manner of performance of the Agreement not normally used by the Subconsultant, (2) an infringement resulting from addition to or change in supplies or components furnished or construction work performed that was made subsequent to delivery or performance, or (3) a claimed infringement that is unreasonably settled without the consent of the Subconsultant, unless required by final decree of a court of competent jurisdiction.

## **8. SUBCONTRACTING**

- 8.1. Unless expressly disclosed in Appendix B, the Subconsultant may not subcontract any of the services to be provided herein without the express written approval of the Consultant and Owner. All subcontractors, including those listed in Appendix B, shall be bound by the terms of this Agreement. All subcontractors shall be subject to all contractual and legal restrictions concerning payment and determination of allowable costs, and subject to all disclosure and audit provisions contained herein and in any applicable federal or state law.
- 8.2. Unless the consent or approval specifically provides otherwise, neither consent by the Consultant or Owner to any subcontract nor approval of the Subconsultant's purchasing system shall constitute a determination (1) of the acceptability of any subcontract terms or conditions, (2) of the acceptability of any subcontract price or of any amount paid under any subcontract, or (3) to relieve the Subconsultant of any responsibility, obligation, or duty under this Agreement.
- 8.3. No subcontract placed under this Agreement shall provide for payment on a cost-plus-a-percentage-of-cost basis, and any fee payable under cost-reimbursement subcontracts shall not exceed the fee limitations of the FAR.

8.4. Furthermore, notwithstanding any other provision within this Agreement, no reimbursement or payment for any markup of the cost of any subcontract shall be considered by the Consultant or Owner without the express written agreement of the Consultant and Owner.

8.5. Prompt Payment. The Subconsultant shall pay subcontractors for satisfactory performance of their subcontracts within 30 days of receipt of each payment by the Consultant to the Subconsultant. Any retainage payments held by the Subconsultant must be returned to the subcontractor within 30 days after the subcontractor's work is completed. Failure to comply with this provision shall be considered a Default by the Subconsultant. If the Subconsultant fails to comply with this provision, in addition to any other rights or remedies provided under this Agreement, the Consultant, at its sole option and discretion, may:

- make payments directly to the subcontractor and offset such payments, along with any administrative costs incurred by the Consultant, against reimbursements or payments otherwise due the Subconsultant;
- notify any sureties; and/or,
- withhold any or all reimbursements or payments otherwise due to the Subconsultant until the Subconsultant ensures that the subcontractors have been and will be promptly paid for work performed.

## **9. RESTRICTIONS ON EMPLOYMENT OF PRESENT AND FORMER EMPLOYEES**

9.1. The Subconsultant shall not be permitted to employ or make an offer of employment, for regular or part-time work related to any Department projects during the term of this Agreement, to any person who:

- is a present employee of the Department;
- is a former employee of the Department and at any time during the person's employment with the Department, the person participated personally and substantially through decision, approval, disapproval, recommendation, rendering of advice, investigation, or otherwise while an employee, on any particular matter pertaining to this Agreement;
- is a former employee of the Department within the twelve (12) months of employment cessation, and under this Agreement will knowingly act as a principal or as an agent in matters which were within this person's official responsibility; or
- is a former employee of the Department within the twelve (12) months of employment cessation will engage in selling or attempting to sell commodities or services, including technical or professional consultant services to the Department, unless the former employee's last annual salary with the Department did not exceed ten thousand five hundred dollars (\$10,500).
- is a former employee of the Department and at any time was terminated with cause or allowed to resign/retire in lieu of termination with cause.

9.2. Any individual or entity acting as a principal or agent on behalf of any person disqualified pursuant to the terms of provision 9.1 shall not be permitted to perform any

work related to any Department project for the Subconsultant during the term of this Agreement.

- 9.3. This section is not intended to preclude a former employee from accepting employment with the Subconsultant solely because the Subconsultant has entered into this Agreement with the Consultant.

## **10. INSURANCE**

- 10.1. [Consultant may insert Insurance requirements as necessary.]

## **11. COVENANT AGAINST CONTINGENCY FEES**

- 11.1. The Subconsultant warrants that no person or agency has been employed or retained to solicit or obtain this Subconsultant Agreement upon an agreement or understanding for a contingent fee, except a bona fide employee or agency. For breach or violation of this warranty, the ARDOT and Consultant shall have the right to annul this Subconsultant Agreement without liability or, in its discretion, to deduct from the Contract Price or consideration, or otherwise recover, the full amount of the contingent fee.
- 11.2. Bona fide agency, as used in this section, means an established commercial or selling agency, maintained by the Subconsultant for the purpose of securing business, that neither exerts nor proposes to exert improper influence to solicit or obtain government contracts nor holds itself out as being able to obtain any government contract or contracts through improper influence.
- 11.3. Bona fide employee, as used in this section, means a person, employed by the Subconsultant and subject to the Subconsultant's supervision and control as to time, place, and manner of performance, who neither exerts nor proposes to exert improper influence to solicit or obtain government contracts nor holds out as being able to obtain any government contract or contracts through improper influence.
- 11.4. Contingent fee, as used in this section, means any commission, percentage, brokerage, or other fee that is contingent upon the success that a person or concern has in securing a government contract.
- 11.5. Improper influence, as used in this section, means any influence that induces or tends to induce a government employee or officer to give consideration or to act regarding a government contract on any basis other than the merits of the matter.

## **12. TITLE VI ASSURANCES (NONDISCRIMINATION)**

During the performance of this Subconsultant Agreement, the Subconsultant, for itself, successors, and assigns, certifies and agrees as follows:

- 12.1. Compliance with Regulations. The Subconsultant shall comply with the Regulations relative to Title VI (Nondiscrimination in Federally-assisted programs of the Department of Transportation and its operating elements, especially Title 49, Code of Federal Regulations, Part 21 and 23 Code of Federal Regulations, as amended, and hereinafter referred to as the Regulations). These regulations are herein incorporated by reference and made a part of this Subconsultant Agreement. Title VI provides that the recipients of Federal financial assistance will maintain and implement a policy of nondiscrimination in which no person shall, on the basis of race, color, or national origin be excluded from

participation in, denied the benefits of, or subject to discrimination under any program or activity by recipients of Federal financial assistance or their assignees and successors in interest.

- 12.2. Nondiscrimination. The Subconsultant, with regard to the work performed by it during the term of this Subconsultant Agreement, shall not discriminate on the basis of race, color, or national origin in the selection and retention of subcontractors, including procurement of material and leases of equipment. The Subconsultant shall not participate either directly or indirectly in any discrimination prohibited by Section 21.5 of the Regulations, including employment practices.
- 12.3. Solicitations for Subcontracts, Including Procurements of Material & Equipment. In all solicitations, either by competitive bidding or negotiation, made by the Subconsultant for work to be performed under a subcontract, including procurement of materials and leases of equipment, each potential subcontractor or supplier shall be notified by the Subconsultant of the Subconsultant's obligations under this Subconsultant Agreement and the Regulations relative to nondiscrimination on the grounds of race, color, or national origin.
- 12.4. Information and Reports. The Subconsultant shall provide all information and reports required by the Regulations, or directives issued pursuant thereto, and shall permit access to its books, records, and accounts, other sources of information, and its facilities by the Owner or the USDOT and its Affiliated Modes to be pertinent to ascertain compliance with such regulations and directives. Where any information required of the Consultant is in the exclusive possession of another who fails or refuses to furnish this information, the Subconsultant shall so certify to the Owner or the USDOT and its Affiliated Modes, as appropriate, and shall set forth the efforts made by the Subconsultant to obtain the records or information.
- 12.5. Sanctions for Noncompliance. In the event of the Subconsultant's noncompliance with the nondiscrimination provisions of this Subconsultant Agreement, the Owner shall impose such contract sanctions as it or the USDOT and its Affiliated Modes may determine to be appropriate, including but not limited to, withholding of payments to the Consultant or Subconsultant under the Agreement until the Subconsultant complies with the provisions and cancellation, termination, or suspension of the Subconsultant Agreement, in whole or in part.
- 12.6. Incorporation of Provisions. The Subconsultant shall include the terms and conditions of this section in every subcontract including procurements of materials and leases of equipment, unless exempt by the Regulations, or directives issued pursuant thereto. The Subconsultant shall take such action with respect to any subcontract or procurement as the Owner or USDOT and its Affiliated Modes may direct as a means of enforcing these terms and conditions, including sanctions for noncompliance; provided, however that, in the event the Subconsultant becomes involved in, or is threatened with, litigation with a subcontractor or vendor as a result of any direction, the Subconsultant may request the Owner or the United States to enter into the litigation to protect the interests of the State and the United States, respectively.

### **13. DBE CLAUSE**

- 13.1. The Subconsultant shall not discriminate on the basis of race, color, sex, or national origin in the performance of this Subconsultant Agreement. The Subconsultant shall comply with the applicable requirements of 49 CFR Part 26 and perform any actions necessary to maintain compliance in the award and administration of DOT-assisted contracts. Failure by the Subconsultant to comply with or perform these requirements is

a material breach of this Subconsultant Agreement, which may result in the cancellation, termination, or suspension of this Subconsultant Agreement in whole or in part, or such other remedy that the Owner may determine appropriate.

- 13.2. The Subconsultant shall insert a clause containing all the terms of this section in all subcontracts under this Agreement.

#### **14. COMPLIANCE WITH ALL OTHER LAWS REGARDING NONDISCRIMINATION**

- 14.1. The Subconsultant will comply with the provisions of the Americans with Disabilities Act (ADA), Section 504 of the Rehabilitation Act, Title VI of the Civil Rights Act of 1964, FHWA Federal Aid Project Guidance, and any other Federal, State, and/or local laws, rules and/or regulations.
- 14.2. The Subconsultant, during the term of this Agreement, shall not discriminate on the basis of race, color, sex, national origin, age, religion, disability, or any other protected classes, in admission or access to and treatment in programs and activities associated with this Agreement, or in the selection and retention of subcontractors, including procurement of material and leases of equipment. The Subconsultant shall not participate either directly or indirectly in any discrimination prohibited by the Regulations, including employment practices.
- 14.3. In accordance with Section 504 regulations 49 CFR Part 27.15, the Owner's Notice of Nondiscrimination is required in any bulletins, announcements, handbooks, pamphlets, brochures, and any other publications associated with this Agreement that are made available to the public, program participants, applicants or employees.

#### **15. CERTIFICATION REGARDING LOBBYING**

- 15.1. The Subconsultant certifies, to the best of their knowledge and belief, that:
- 15.1.1. No Federal appropriated funds have been paid or will be paid, by or on behalf of the undersigned, to any person for influencing or attempting to influence an officer or employee of an agency, a Member of Congress, an officer or employee of Congress, or an employee of a Member of Congress in connection with the awarding of any Federal contract, the making of any Federal grant, the making of any Federal loan, the entering into of any cooperative agreement, and the extension, continuation, renewal, amendment, or modification of any Federal contract, grant, loan, or cooperative agreement.
- 15.1.2. If any funds other than Federal appropriated funds have been paid or will be paid to any person for influencing or attempting to influence an officer or employee of any agency, a Member of Congress, an officer or employee of Congress, or an employee of a Member of Congress in connection with this Federal contract, grant, loan, or cooperative agreement, the undersigned shall complete and submit Standard Form-LLL, "Disclosure Form to Report Lobbying".
- 15.1.3. The Subconsultant shall require that the language of this certification be included in the agreement for all subcontracts and that all subcontractors shall certify and disclose accordingly.

#### **16. CERTIFICATION REGARDING DEBARMENT, SUSPENSION, PROPOSED DEBARMENT, AND OTHER RESPONSIBILITY MATTERS**

- 16.1. The Subconsultant certifies, to the best of its knowledge and belief, that—
- 16.1.1. The Subconsultant and any of its Principals—
- 16.1.1.1. Are not presently debarred, suspended, proposed for debarment, or declared ineligible for the award of contracts by any federal or state agency;
- 16.1.1.2. Have not, within a 3-year period preceding this offer, been convicted of or had a civil judgment rendered against them for: commission of fraud or a criminal offense in connection with obtaining, attempting to obtain, or performing a public (federal, state, or local) contract or subcontract; violation of federal or state antitrust statutes relating to the submission of offers; or commission of embezzlement, theft, forgery, bribery, falsification or destruction of records, making false statements, or receiving stolen property;
- 16.1.1.3. Are not presently indicted for, or otherwise criminally or civilly charged by a governmental entity with, commission of any of the offenses enumerated in subsection 16.1.1.2; and,
- 16.1.1.4. The Subconsultant has not within a 3-year period preceding this offer, had one or more contracts terminated for default by any federal or state agency.
- 16.2. Principals, for the purposes of this certification, means officers; directors; owners; partners; and, persons having primary management or supervisory responsibilities within a business entity (e.g., general manager; plant manager; head of a subsidiary, division, or business segment, and similar positions). This certification concerns a matter within the jurisdiction of an agency of the United States and the making of a false, fictitious, or fraudulent certification may render the maker subject to prosecution under section 1001, title 18, United States Code, as well as any other applicable federal and state laws.
- 16.3. The Subconsultant shall provide immediate written notice to the ARDOT if, at any time prior to contract award, the Subconsultant learns that its certification was erroneous when submitted or has become erroneous by reason of changed circumstances.
- 16.4. The certification in subsection 16.1 is a material representation of fact upon which reliance was placed when making award. If it is later determined that the Subconsultant knowingly rendered an erroneous certification, the ARDOT may terminate the contract resulting from this solicitation for default in addition to any other remedies available to the ARDOT.

## **17. CERTIFICATION REGARDING CONFLICT OF INTEREST**

- 17.1. The Subconsultant certifies that it has no financial interest in the proposed project or construction of the proposed project.
- 17.1.1. The Subconsultant nor any of its Principals have no known conflicts with any of the following:
- 17.1.1.1. No financial interest in work associated with this contract;
- 17.1.1.2. No ownership interest in work associated with this contract;
- 17.1.1.3. No Financial interest in the results of any agency decisions regarding approvals for work associated with this project;

17.1.1.4. Policies and procedures (provided statutory framework permits) for a contracting agency to pursue a range of civil actions and penalties including fines, suspension, or debarment associated with fraud, waste, abuse, and identified conflict of interest which were not disclosed.

17.2. For the duration of the contract, except for work expressly defined in this contract, the Subconsultant shall not be party to third party agreements for design or construction on projects associated with contract.

17.3. For the duration of the contract, except for work expressly defined in this contract, the Subconsultant shall not be party to enforceable promises or guarantees of future work associated with this contract.

**18. NOTICE**

18.1. All notices, approvals, requests, consents, or other communications required or permitted under this Agreement shall be mailed or hand-delivered to:

18.1.1. To the Subconsultant:

Subconsultant firm name  
Point of Contact  
Address for Firm/point of contact  
Address for Firm/point of contact  
Address for Firm/point of contact

18.1.2. To the Consultant:

Consultant firm name  
Point of Contact  
Address for Firm/point of contact  
Address for Firm/point of contact  
Address for Firm/point of contact

**IN WITNESS WHEREOF**, the parties execute this Subconsultant Agreement, to be effective \_\_\_\_\_.

CONSULTANT FIRM NAME

SUBCONSULTANT NAME

BY: \_\_\_\_\_  
NAME  
TITLE

BY: \_\_\_\_\_  
NAME  
TITLE

**CERTIFICATION OF CONSULTANT**

I hereby certify that I, \_\_\_\_\_ am the President and duly authorized representative of the firm \_\_\_\_\_, Inc. whose headquarters address is \_\_\_\_\_, and that neither I nor the above firm I here represent has:

- (a) employed or retained for a commission, brokerage, contingent fee, or other considerations, any firm or person (other than a bona fide employee working solely for me) to solicit or secure this contract,
- (b) agreed, as an express or implied condition for obtaining this contract, to employ or retain the services of any firm or person in connection with carrying out the contract, or
- (c) paid or agreed to pay, to any firm, organization or person (other than a bona fide employee working solely for me) any fee contribution, donation or consideration of any kind for, or in connection with, procuring or carrying out the contract;
- (d) included any costs which are not expressly allowable under the cost principles of the FAR of 48 CFR 31, whether direct or indirect. All known material transactions or events that have occurred affecting the firm's ownership, organization and indirect cost rates have been disclosed.

except as here expressly stated (if any):

I acknowledge that this certificate is to be furnished to the Arkansas Department of Transportation and the Federal Highway Administration, U.S. Department of Transportation, in connection with this contract involving participation of Federal Aid Highway Funds, and is subject to applicable State and Federal laws, both criminal and civil.

Furthermore, as a recipient of Federal Aid Highway Funds, I certify and hereby agree to the conditions of Assurances as outlined in Section 31 of this Agreement and shall insert the Notice of Nondiscrimination Statement as shown below in all solicitation of work or procurement of materials or equipment. I certify and hereby agree to the conditions of Certification Regarding Lobbying as outlined in Section 34 of this Agreement and shall insert the Certification Regarding Lobbying in all solicitation of work or procurement of materials or equipment. I certify and hereby agree to the conditions of Certification Regarding Conflict of Interest as outlined in Section 38 of this Agreement and shall insert the Certification Regarding Conflict of Interest in all solicitation of work or procurement of materials or equipment.

**NOTICE OF NONDISCRIMINATION STATEMENT**

\_\_\_\_\_ ("Consultant"), complies with all civil rights provisions of federal statutes and related authorities that prohibited discrimination in programs and activities receiving federal financial assistance. Therefore, the Consultant does not discriminate on the basis of race, sex, color, age, national origin, or disability, in the admission, access to and treatment in Consultant's programs and activities, as well as the Consultant's hiring or employment practices. Complaints of alleged discrimination and inquiries regarding the Consultant's nondiscrimination policies may be directed to [Name, address, phone number] or the following e-mail address: \_\_\_\_\_.

\_\_\_\_\_  
Authorized Firm Representative

\_\_\_\_\_  
Date

**CERTIFICATION OF SUBCONSULTANT**

I hereby certify that I, \_\_\_\_\_ am the President and duly authorized representative of the firm \_\_\_\_\_, Inc. whose headquarters address is \_\_\_\_\_, and that neither I nor the above firm I here represent has:

(a) employed or retained for a commission, brokerage, contingent fee, or other considerations, any firm or person (other than a bona fide employee working solely for me) to solicit or secure this contract,

(b) agreed, as an express or implied condition for obtaining this contract, to employ or retain the services of any firm or person in connection with carrying out the contract, or

(c) paid or agreed to pay, to any firm, organization or person (other than a bona fide employee working solely for me) any fee contribution, donation or consideration of any kind for, or in connection with, procuring or carrying out the contract;

(d) included any costs which are not expressly allowable under the cost principles of the FAR of 48 CFR 31, whether direct or indirect. All known material transactions or events that have occurred affecting the firm's ownership, organization and indirect cost rates have been disclosed.

except as here expressly stated (if any):

I acknowledge that this certificate is to be furnished to the Arkansas Department of Transportation and the Federal Highway Administration, U.S. Department of Transportation, in connection with this contract involving participation of Federal Aid Highway Funds, and is subject to applicable State and Federal laws, both criminal and civil.

Furthermore, as a recipient of Federal Aid Highway Funds, I certify and hereby agree to the conditions of Title VI Assurances as outlined in Section 12 of this Agreement and shall insert the Notice of Nondiscrimination Statement as shown below in all solicitation of work or procurement of materials or equipment. I certify and hereby agree to the conditions of Certification Regarding Lobbying as outlined in Section 15 of this Agreement and shall insert the Certification Regarding Lobbying in all solicitation of work or procurement of materials or equipment. I certify and hereby agree to the conditions of Certification Regarding Conflict of Interest as outlined in Section 17 of this Agreement and shall insert the Certification Regarding Conflict of Interest in all solicitation of work or procurement of materials or equipment.

**NOTICE OF NONDISCRIMINATION STATEMENT**

\_\_\_\_\_ ("Subconsultant"), complies with all civil rights provisions of federal statutes and related authorities that prohibited discrimination in programs and activities receiving federal financial assistance. Therefore, the Consultant does not discriminate on the basis of race, sex, color, age, national origin, or disability, in the admission, access to and treatment in Consultant's programs and activities, as well as the Consultant's hiring or employment practices. Complaints of alleged discrimination and inquiries regarding the Consultant's nondiscrimination policies may be directed to [Name, address, phone number] or the following e-mail address: \_\_\_\_\_.

\_\_\_\_\_  
Authorized Firm Representative

\_\_\_\_\_  
Date

**CERTIFICATION OF ARKANSAS STATE HIGHWAY COMMISSION**

I hereby certify that I am the Director of the Arkansas Department of Transportation, and that the aforementioned consulting firm or its representative has not been required, directly or indirectly as an express or implied condition in connection with obtaining or carrying out this contract to:

- (a) employ or retain, or agree to employ or retain, any firm or person, or
- (b) pay, or agree to pay, to any firm, person, or organization, any fee contributions donation, or consideration of any kind:

except as here expressly stated (if any):

\_\_\_\_\_  
Scott E. Bennett, P.E.  
Director

\_\_\_\_\_  
Date