

MICHIGAN DEPARTMENT OF TRANSPORTATION
TERMS AND CONDITIONS FOR
CONSULTANT ENGINEERING SERVICES CONTRACTS

These Terms and Conditions set forth the standard requirements that govern consultant engineering services contracts issued and administered by the Michigan Department of Transportation (MDOT).

1. Definitions

Contract Means the engineering services contract between MDOT and the Consultant.

Exhibit A Means Exhibit A of the Contract.

Services Means the professional engineering work set forth in the Contract between MDOT and the Consultant.

2. Each Contract will define the scope of work, the effective date (on which the Consultant may begin work), the expiration date (on which the work must be completed), the maximum compensation for the work, and the basis of payment. The Contract will define the basis of payment as actual cost plus fixed fee, lump sum, milestone, loaded hourly rate, or unit price per unit of work.
3. The Consultant will not perform services that are not included in the Scope of Services in Exhibit A of the Contract. The Consultant acknowledges that MDOT employees, including any MDOT project manager, do not have the authority to verbally assign work to the Consultant. In the event that any MDOT employee attempts to assign work under the Contract that is not included in the Scope of Services in Exhibit A, the Consultant will refuse to do any such work and will contact MDOT's Contract Administrator.
4. The Consultant will perform all Services in conformity with MDOT's applicable standards and guidelines, including these Terms and Conditions.
5. During the performance of the Services, the Consultant will be responsible for any loss of or damage to original documents belonging to MDOT while they are in the Consultant's possession. Restoration or replacement of lost or damaged original documents will be at the Consultant's expense.

6. The Consultant will maintain the original copies of all documents, calculations, reviews, and reports generated during the performance of the Services (Documents). The Documents will be maintained in a safe and secure place and will be available for review by MDOT or its representative.
7. The Consultant will deliver to MDOT those Documents for which delivery is provided in Exhibit A of the Contract. Any Documents not required for delivery to MDOT will be maintained by the Consultant for at least three (3) years from the date of completion of the construction of the project related to the Services. In the event that such construction is unduly delayed, the Consultant may request permission for exemption from this provision. The Consultant may not discard such Documents prior to the above defined date without prior written approval from MDOT.
8. The Consultant will make such trips to confer with representatives of MDOT and the Federal Highway Administration (FHWA) as may be necessary in the carrying out of the Services set forth in the Contract.
9. Upon completion of the Services, the Consultant will deliver to MDOT the work products defined in Exhibit A.
10. The Consultant will affix its professional endorsement upon all designs, specifications, estimates, and engineering data furnished to MDOT, as applicable, and will comply with all requirements of 1980 PA 299 Article 20, MCL 339.2001 – 339.2014.
11. During the performance of the Services, the Consultant will submit directly to the MDOT Project Manager written progress reports that outline the work accomplished during the reporting period; identify any problems, real or anticipated, associated with the performance of the Services; and identify any deviations from the agreed upon work plan and schedule. In the event the Consultant identifies any problem(s), the Consultant will submit a plan to correct the problem(s) to MDOT for consideration. The content and format of such written progress reports will be as defined in Exhibit A of the Contract. The quantity, timing, period covered, and recipients of the progress reports will be as directed by the Project Manager.

As part of the progress report, the Consultant will report the actual hours of performance, the actual start, and, if necessary, an estimated completion date or an actual completion date. In the event that the Consultant does not submit a progress report for a particular month, the Consultant is still required to submit any report or information required by this section.

12. With regard to record-keeping and audits:
 - a. The Consultant will establish and maintain accurate records, in accordance with generally accepted accounting principles, of all expenses incurred for which payment is sought or made under the Contract (Records). Separate accounts will be established and maintained by job number and/or phase for all costs incurred for Services under the Contract.

- b. The Consultant will maintain the Records for at least three (3) years from the date of final payment made by MDOT under the Contract. In the event of a dispute with regard to the allowable expenses or any other issue under the Contract, the Consultant will thereafter continue to maintain the Records at least until that dispute has been finally decided and the time for all available challenges or appeals of that decision has expired.
 - c. MDOT or its representative may inspect, copy, scan, or audit the Records at any reasonable time after giving reasonable notice.
 - d. If any part of the work is subcontracted, the Consultant will assure compliance with subsections (a), (b), and (c) above for all subcontracted work.
13. The Consultant will provide insurance in the amounts and types set forth below, at a minimum, for the life of the Contract. The Consultant will submit certificates of insurance to MDOT before the award of the Contract, as requested by MDOT. The insurer must provide at least thirty (30) days written notice of cancellation or change to MDOT. The Consultant is responsible for verifying that its subconsultants are in compliance with MDOT's insurance requirements.

Required Limits	Additional Requirements
Commercial General Liability Insurance	
<u>Minimal Limits:</u> \$1,000,000 Each Occurrence Limit \$1,000,000 Personal & Advertising Injury Limit \$2,000,000 General Aggregate Limit \$2,000,000 Products/Completed Operations	The Consultant must have its policy endorsed to add "the State of Michigan, its departments, divisions, agencies, offices, commissions, officers, employees, and agents" as additional insureds.
Automobile Liability Insurance	
<u>Minimal Limits:</u> \$1,000,000 Per Occurrence	
Workers' Compensation Insurance	
<u>Minimal Limits:</u> Coverage according to applicable laws governing work activities.	Waiver of subrogation, except where waiver is prohibited by law.
Employers Liability Insurance	
<u>Minimal Limits:</u> \$500,000 Each Accident \$500,000 Each Employee by Disease \$500,000 Aggregate Disease.	
Professional Liability (Errors and Omissions) Insurance	
<u>Minimal Limits:</u> \$1,000,000 Per Claim	

14. If MDOT discloses its confidential information to the Consultant, the Consultant will maintain such information as confidential. Information provided by MDOT will be

deemed confidential if it is marked confidential or stated in writing to be confidential. The above obligations of confidentiality will not apply to:

- a. Information for which MDOT gives prior written permission for publication or use.
- b. Information that is required to be disclosed based on court order.

A violation of this provision will be considered a breach of the Contract, and MDOT may terminate the Contract under the provisions of Section 26(b).

News releases pertaining to the Contract or the Services to which it relates will not be made without prior written approval from MDOT, and then only in accordance with explicit instructions from MDOT. News releases made without MDOT's approval will be considered a breach of the Contract, and MDOT may terminate the Contract under the provisions of Section 26(b).

15. The Consultant will submit billings to MDOT for the Services performed in accordance with the following:
 - a. Billings for the Services will be on an actual cost plus fixed fee basis; a lump sum basis; a milestone basis, with lump sum payments to be made upon the accomplishment of defined milestones; a loaded hourly rate plus direct expenses basis; or a unit price per unit of work basis. (Unit prices may be bid or agreed upon.) The billings for Services on an actual cost plus fixed fee basis will be as defined in Section 20. The billings for Services on a lump sum basis will be in accordance with the lump sum schedule in Exhibit A. The billings for Services on a milestone basis will be in accordance with the milestone schedule in Exhibit A. Each billing for milestone payment will only occur upon acceptance of all work detailed in the milestone description in Exhibit A for the specific milestone. The billings for Services on a loaded hourly rate basis will be in accordance with the defined rates detailed in Exhibit A. The billings for Services on a unit price per unit of work basis will be in accordance with the unit prices defined in Exhibit A.
 - b. The billings for Services on an actual cost plus fixed fee basis, a loaded hourly rate basis, or a unit price per unit of work basis will not be submitted more often than once per month without prior written approval from MDOT. Each billing will be submitted promptly, no more than sixty (60) days after completion of the Services for that billing. All billings for Services provided prior to September 30 of any year must be received by MDOT in accordance with MDOT's annual fiscal year end instructions or a significant delay in payment may occur.
 - c. The final billing for the Services must be received within sixty (60) days of completion of the Services. MDOT may close the Contract after the sixty (60)

days have passed. Costs provided to MDOT after this sixty (60) day period may be denied by MDOT.

- d. The Consultant agrees that the costs reported to MDOT for the Contract will represent only those items that are properly chargeable in accordance with the Contract. The Consultant also certifies that it has read the Contract terms and has made itself aware of the applicable laws, regulations, and terms of the Contract that apply to the reporting of costs incurred under the terms of the Contract.
16. MDOT will provide the Consultant with access to MDOT standards and information in its possession and related to the Services that the Consultant specifically requests, except for such standards and information as the Consultant is specifically required to provide.
 17. MDOT will make payment to the Consultant after receipt of billings, subject to verification of progress, in accordance with the provisions enumerated below.
 - a. Within thirty (30) days of the receipt of the billing from the Consultant, MDOT will either approve the billing for payment or, in lieu of such approval, inform the Consultant that such approval has not been given. Additionally, MDOT will inform the Consultant why the billing has not been approved and the actions, if any, required of the Consultant to obtain such approval. Upon approval by the Project Manager, the billing will be submitted for payment. This subsequent payment process requires up to an additional thirty (30) days.
 - b. Compensation for Services that will be reimbursed on an actual cost plus fixed fee basis will be in accordance with the definition of such cost set forth in Section 20 and will not exceed the maximum amount set forth in the Contract. Progress payments will include direct salary costs, other direct costs, MDOT-approved amounts for overhead, facilities cost of capital, and fixed fee. The portion of the fixed fee that may be included in progress payments will be equal to the total fixed fee multiplied by the percentage of the work that has been completed to date of billing. Progress payments will not be made more often than once per month without prior written approval from MDOT.
 - c. Compensation for Services that will be reimbursed on a lump sum basis will be in accordance with the lump sum payment schedule in Exhibit A and will not exceed the maximum amount set forth in the Contract.
 - d. Compensation for Services that will be reimbursed on a milestone basis will be in accordance with the milestone payment schedule in Exhibit A and will not exceed the maximum amount set forth in the Contract.
 - e. Compensation for Services that will be reimbursed on a loaded hourly rate basis will be in accordance with the defined rates detailed in Exhibit A and will not exceed the maximum amount set forth in the Contract. Progress payments will

not be made more often than once per month without prior written approval from MDOT.

- f. Compensation for Services that will be reimbursed on a unit price per unit of work basis will be in accordance with the defined unit prices detailed in Exhibit A and will not exceed the maximum amount set forth in the Contract. Progress payments will not be made more often than once per month without prior written approval from MDOT.
 - g. Payment for reimbursement for a proportionate share of the work performed as determined by the dispute resolution process (DRP) will be paid in accordance with the provisions of Section 19 and after the thirty (30) day acceptance period defined in Exhibit C.
 - h. Reimbursement of actual costs pursuant to this section will not constitute a final determination by MDOT of the allowability of such costs and will not constitute a waiver by MDOT of any violation of the terms of the Contract committed by the Consultant.
 - i. The Consultant will not be paid for costs arising from the correction of errors and omissions attributable to the Consultant.
 - j. MDOT will not reimburse or be responsible for any costs incurred by the Consultant prior to the award or subsequent to the expiration of the Contract.
18. MDOT funds in the Contract made available through legislative appropriations are based on projected revenue estimates. MDOT may reduce the amount of the Contract if the revenue actually received is insufficient to support the appropriation under which the Contract is made.
19. Proportional compensation for work performed as a result of the DRP will be on the basis of actual cost and a fixed fee for profit. The proportion of such costs incurred that will be reimbursed, if any, will be as determined by the DRP. MDOT and the Consultant will maintain separate Records by job number for the costs incurred relative to the DRP. The allowability of such costs will be as determined by MDOT's auditor. The determination of allowability under the provisions of this section is limited to the acceptability of the expense relative to 48 CFR, Federal Acquisition Regulations, Part 31. Such determination by MDOT's auditor does not apply to the acceptability or completeness of work as determined by the DRP.
20. MDOT will determine that payment for the costs of Services required and performed that will be reimbursed on an actual cost plus fixed fee basis is in accordance with the following:
- a. Direct Salary Costs: Actual labor costs of personnel performing the Services. This cost will be based on the employees' actual hourly rates of pay and the actual

hours of performance on the Services, as supported by employee time and earning records. MDOT will not reimburse the Consultant for the premium portion of overtime pay unless the Consultant has obtained prior written approval for such overtime from MDOT.

MDOT will pay overtime in accordance with MDOT's Overtime Reimbursement Guidelines, dated May 1, 2013. The guidelines can be found at http://www.michigan.gov/documents/mdot/Final_Overtime_Guidelines_05-01-13_420286_7.pdf?20130509081848. MDOT's overtime reimbursement policies are intended primarily for construction engineering work. Overtime reimbursement for all other types of work will be approved on a case by case basis.

- b. Other Direct Costs: Actual costs of materials that may be required hereunder but that are not normally provided as part of the overhead of the Consultant. All actual costs in excess of Two Thousand Five Hundred Dollars (\$2,500.00) per other direct costs category will be supported by proper receipts and proof of payments.
- c. Overhead Costs: The actual overhead costs incurred by the Consultant at the MDOT-accepted rate during work, computed as set forth in 48 CFR, Federal Acquisition Regulations, Part 31. The amount of overhead payment, including payroll overhead, will be calculated as applied rates to direct labor costs. Alternatively, if approved, the Consultant may be reimbursed using the safe harbor rate applied to direct labor costs. Overhead costs will include those costs that, because of their incurrence for common or joint objectives, are not readily subject to treatment as direct costs.
- d. Facilities Cost of Capital: A pro-rated portion of the actual facilities cost of capital incurred by the Consultant during work if the estimated facilities cost of capital was specifically identified in the cost proposal for this work.
- e. Subconsultant Costs: Actual costs of subconsultants performing Services under the Contract. Amounts for fixed fees paid by the Consultant to the subconsultant will not be considered an actual cost of the Consultant but will be considered a part of the fixed fee of the Consultant.
- f. Travel and Subsistence: Actual costs in accordance with and not to exceed the amounts set forth in the current State of Michigan Standardized Travel Regulations, incorporated herein by reference.

MDOT will reimburse the Consultant for vehicle expenses and the costs of travel to and from project sites in accordance with MDOT's Travel and Vehicle Expense Reimbursement Guidelines, dated May 1, 2013. The guidelines can be found at http://www.michigan.gov/documents/mdot/Final_Travel_Guidelines_05-01-13_420289_7.pdf?20130509082418. MDOT's travel and vehicle expense

reimbursement policies are intended primarily for construction engineering work. Reimbursement for travel to and from project sites and for vehicle expenses for all other types of work will be approved on a case by case basis.

- g. Fixed Fee: In addition to payments set forth under subsections (a), (b), (c), (d), (e), and (f) above, MDOT agrees to pay the Consultant a fixed fee. It is agreed and understood that such amount will constitute full compensation to the Consultant for profit and will not vary because of any differences between the estimated cost and the actual cost. Overruns in the actual cost of the Services will not warrant an increase or adjustment in the amount of the fixed fee.
 - h. Reimbursement for costs incurred is subject to the cost criteria set forth in 48 CFR, Federal Acquisition Regulations, Part 31.
- 21. The parties will consider the Services to be complete when accepted by MDOT. Such acceptance by MDOT is not intended to nor does it relieve the Consultant of any of its obligations and responsibilities herein.
 - 22. Any change in the scope, character, or term of the Contract or in the maximum amount of the Contract will only be by award of a prior written amendment to the Contract by the parties. The maximum dollar amount of the Contract will not be increased without an accompanying and comparable increase in the Scope of Services.
 - 23. The Consultant's signature on the Contract constitutes the Consultant's specific agreement that all provisions of the Contract, including these Terms and Conditions, unless otherwise amended, are continued through any time period for which the Contract is extended by way of a time extension amendment. Any such extension will not operate as a waiver by MDOT of any of its rights herein set forth.
 - 24. When unreasonable delays are caused by circumstances or conditions that are not the fault of and are beyond the control of the Consultant and are significant, as determined by MDOT, the Consultant may submit a written request for an extension of time and/or an update to its labor rates to reflect the rates currently in effect for the firm when such changes to those rates are material. MDOT will provide written responses to such requests within thirty (30) days.
 - a. In the event MDOT determines that an extension of time or an update in rates is warranted by the circumstances or conditions that are not the fault of and are beyond the control of the Consultant, MDOT will respond in writing by issuing an amendment to the Contract, as provided for in Section 22. Such extension of time or granting of revised rates will not operate as a waiver by MDOT of any of its rights herein set forth.
 - b. In the event MDOT determines that an extension of time or an update in rates is not warranted by the circumstances or conditions, MDOT will advise the

Consultant in writing of its determination. Such determination by MDOT will be considered final and binding and not subject to further review or consideration.

- c. Failure on the part of the Consultant to submit a written request for an extension of time or an update to its labor rates will constitute a waiver of the request for extra compensation for any such delay or rate change. The filing of such notice by the Consultant will not be construed to establish the validity of the request.
25. MDOT and the Consultant will agree on the Key People to be assigned to the Project Team prior to any work being performed. The Consultant will not replace any Key People assigned to the Project Team without prior written approval from MDOT. MDOT has the right to disapprove proposed replacements, and the Consultant is required to find alternative replacements that are acceptable to MDOT. The replacement of Key People from the Project Team without MDOT's prior written approval will be considered a breach of the Contract, and MDOT may terminate the Contract under the provisions of Section 26(b). If a member of the Project Team who is one of the Key People leaves the Project Team, the Consultant will replace that person with a person who is acceptable to MDOT in accordance with the MDOT "Consultant Loss of Key Staff Notification Process," dated February 9, 2015. Failure by the Consultant to find an acceptable replacement to the Project Team will be considered a breach of the Contract, and MDOT may terminate the Contract under the provisions of Section 26(b). "Key People" are defined as those people whose qualifications and experience are essential to providing quality Services. "Project Team" means the personnel assigned by the Consultant and the subconsultant(s) who are responsible for the completion of the Services.
26. MDOT may terminate the Contract for convenience or cause, as set forth below, before the Services are completed. Written notice of termination will be sent to the Consultant. The Consultant will be reimbursed in accordance with the following:

a. Termination for Convenience:

For Costs to Be Reimbursed on an Actual Cost Plus Fixed Fee Basis:

The Consultant will be reimbursed for all costs incurred up to the termination date set forth in the notice of termination. Such reimbursement will be as set forth in Sections 17 and 20. The Consultant will be reimbursed a proportionate share of the fixed fee based on the portion of the project that is completed, as determined by MDOT. MDOT will receive the work product produced by the Consultant under the Contract up to the time of termination, prior to the Consultant being reimbursed. In no case will the compensation paid to the Consultant for partial completion of the Services exceed the amount the Consultant would have received had the Services been completed.

For Costs to Be Reimbursed on a Lump Sum Basis:

The Consultant will be reimbursed for all costs incurred up to the termination date set forth in the notice of termination. MDOT will pay a proportionate share for a partially completed work product. The value of such partially completed work product will be determined by MDOT based on actual costs incurred. Such reimbursement will be as set forth in Section 17. MDOT will receive the work product produced by the Consultant under the Contract up to the time of termination, prior to the Consultant being reimbursed. In no case will the compensation paid to the Consultant for partial completion of the Services exceed the amount the Consultant would have received had the Services been completed.

For Costs to Be Reimbursed on a Milestone Basis:

MDOT will pay the Consultant for all milestones achieved for which MDOT receives the completed work product. MDOT will pay a proportionate share for the partially completed work product of any partially completed milestone. The value of such partially completed work product will be determined by MDOT based on actual costs incurred. Such reimbursement will be as set forth in Section 17. In no case will the compensation paid to the Consultant for partial completion of the Services exceed the amount the Consultant would have received had the Services been completed.

For Costs to Be Reimbursed on a Loaded Hourly Rate Basis:

The Consultant will be reimbursed for all costs incurred up to the termination date set forth in the notice of termination. Such reimbursement will be as set forth in Section 17. MDOT will receive the work product produced by the Consultant under the Contract up to the time of termination, prior to the Consultant being reimbursed. In no case will the compensation paid to the Consultant for partial completion of Services exceed the amount the Consultant would have received had the Services been completed.

For Costs to Be Reimbursed on a Unit Price per Unit of Work Basis:

The Consultant will be reimbursed for all units of work performed for which MDOT receives the completed work product. MDOT will pay a proportionate share for the partially completed work product of any partially completed unit of work. The value of such partially completed unit of work will be determined by MDOT based on actual costs incurred. In no case will the compensation paid to the Consultant for partial completion of the Services exceed the amount the Consultant would have received had the Services been completed.

b. Termination for Cause:

In the event the Consultant fails to complete any of the Services in a manner satisfactory to MDOT, and/or discloses MDOT's confidential information, in violation of the provisions of Section 14, and/or replaces any Key People without

prior written approval from MDOT, as set forth in Section 25, and/or fails to find an acceptable replacement to the Project Team, as set forth in Section 25, and/or makes any public relations communications and/or products that are intended for an external audience without prior written approval from MDOT, as set forth in Section 47, MDOT may terminate the Contract for cause. Written notice of termination will be sent to the Consultant. The Consultant will be reimbursed as follows:

For Costs to Be Reimbursed on an Actual Cost Plus Fixed Fee Basis:

The Consultant will be reimbursed for the Services completed up to receipt of the notice of termination. MDOT may pay a proportionate share for a partially completed work product produced by the Consultant. The value of such partially completed work product will be determined by MDOT based on actual costs incurred up to the estimated value of the work product received by MDOT, as determined by MDOT. Such actual costs will be as set forth in Section 20. The Consultant will be reimbursed a proportionate share of the fixed fee based on the portion of the project that is completed, as determined by MDOT. MDOT will receive the work product produced by the Consultant under the Contract up to the time of termination, prior to the Consultant being reimbursed. In no case will the compensation paid to the Consultant for partial completion of the Services exceed the amount the Consultant would have received had the Services been completed.

For Costs to Be Reimbursed on a Lump Sum Basis:

The Consultant will be reimbursed for the Services completed up to receipt of the notice of termination. MDOT may pay a proportionate share for a partially completed work product. The value of such partially completed work product will be determined by MDOT based on actual costs incurred up to the estimated value of the work product received by MDOT. Such reimbursement will be as set forth in Section 17. MDOT will receive the work product produced by the Consultant under the Contract up to the time of termination, prior to the Consultant being reimbursed. In no case will the compensation paid to the Consultant for partial completion of the Services exceed the amount the Consultant would have received had the Services been completed.

For Costs to Be Reimbursed on a Milestone Basis:

The Consultant will be reimbursed for all milestones achieved for which MDOT receives the completed work product. MDOT will not reimburse the Consultant for any partially completed milestones.

For Costs to Be Reimbursed on a Loaded Hourly Rate Basis:

The Consultant will be reimbursed for the Services completed up to receipt of the notice of termination. MDOT may pay a proportionate share for a partially

completed work product. The value of such partially completed work product will be determined by MDOT based on actual costs incurred up to the estimated value of the work product received by MDOT, as determined by MDOT. Such reimbursement will be as set forth in Section 17. MDOT will receive the work product produced by the Consultant under the Contract up to the time of termination, prior to the Consultant being reimbursed. In no case will the compensation paid to the Consultant for partial completion of Services exceed the amount the Consultant would have received had the Services been completed.

For Costs to Be Reimbursed on a Unit Price per Unit of Work Basis:

The Consultant will be reimbursed for all units of work performed for which MDOT receives the completed work product. MDOT may pay a proportionate share for the work product of any partially completed unit of work. The value of such partially completed work product will be determined by MDOT based on actual costs incurred up to the estimated value of the work product received by MDOT as determined by MDOT. In no case will the compensation paid to the Consultant for partial completion of the Services exceed the amount the Consultant would have received had the Services been completed.

In the event that termination by MDOT is necessitated by any wrongful breach, failure, default, or omission by the Consultant, MDOT will be entitled to pursue whatever remedy is available to it, including, but not limited to, withholding funds or off-setting against funds owed to the Consultant under the Contract, as well as any other existing or future contracts between the Consultant and MDOT, for any and all damages and costs incurred or sustained by MDOT as a result of its termination of the Contract due to the wrongful breach, failure, default, or omission by the Consultant. In the event of termination of the Contract, MDOT may procure the professional Services from other sources and hold the Consultant responsible for any damages or excess costs occasioned thereby.

In the event the Consultant disagrees with MDOT regarding a determination of the completeness or value of Services completed or the amount of reimbursement for which the Consultant is eligible under the provisions of this section, the Consultant may invoke the DRP described in Section 32.

27. In the event that an audit performed by or on behalf of MDOT indicates an adjustment to the costs reported under the Contract or questions the allowability of an item of expense, MDOT will promptly submit to the Consultant a Notice of Audit Results and a copy of the audit report, which may supplement or modify any tentative findings verbally communicated to the Consultant at the completion of an audit.

Within sixty (60) days after the date of the Notice of Audit Results, the Consultant will (a) respond in writing to the responsible Bureau of MDOT indicating whether or not it concurs with the audit report, (b) clearly explain the nature and basis for any disagreement as to a disallowed item of expense, and (c) submit to MDOT a written

explanation as to any questioned or no opinion expressed item of expense (Response). The Response will be clearly stated and will provide any supporting documentation necessary to resolve any disagreement or questioned or no opinion expressed item of expense. Where the documentation is voluminous, the Consultant may supply appropriate excerpts and make alternate arrangements to conveniently and reasonably make that documentation available for review by MDOT. The Response will refer to and apply the language of the Contract. The Consultant agrees that failure to submit a Response within the sixty (60) day period constitutes agreement with any disallowance of an item of expense and authorizes MDOT to finally disallow any items of questioned or no opinion expressed cost.

MDOT will make its decision with regard to any Notice of Audit Results and Response within one hundred twenty (120) days after the date of the Notice of Audit Results. If MDOT determines that an overpayment has been made to the Consultant, the Consultant will repay that amount to MDOT or reach agreement with MDOT on a repayment schedule within thirty (30) days after the date of an invoice from MDOT. If the Consultant fails to repay the overpayment or reach agreement with MDOT on a repayment schedule within the thirty (30) day period, the Consultant agrees that MDOT will deduct all or a portion of the overpayment from any funds then or thereafter payable by MDOT to the Consultant under the Contract or any other agreement or payable to the Consultant under the terms of 1951 PA 51, as applicable. Interest will be assessed on any partial payments or repayment schedules based on the unpaid balance at the end of each month until the balance is paid in full. The assessment of interest will begin thirty (30) days from the date of the invoice. The rate of interest will be based on the Michigan Department of Treasury common cash funds interest earnings. The rate of interest will be reviewed annually by MDOT and adjusted as necessary based on the Michigan Department of Treasury common cash funds interest earnings. The Consultant expressly consents to this withholding or offsetting of funds under those circumstances, reserving the right to file a lawsuit in the Court of Claims to contest MDOT's decision only as to any item of expense the disallowance of which was disputed by the Consultant in a timely filed Response.

28. All documents prepared by the Consultant under the Contract, including tracings, drawings, estimates, specifications, field notes, investigative studies, and other relevant documents, are the property of MDOT.
29. The Contract is personal to the parties and cannot be assigned. The Consultant will not sublet any portion of the Services without MDOT's approval of the Consultant's Intent to Subcontract form, and subconsultant work may not begin until the subcontract is signed or, in specific situations, a Limited Notice to Proceed form is signed. The Consultant will not sublet more than sixty percent (60%) of the Services under the Contract by dollar amount.

Such approval of any Intent to Subcontract form or Limited Notice to Proceed form is given solely for the purposes of MDOT. Approval does not constitute an assumption of liability, a waiver, or an estoppel to enforce any of the requirements of the Contract, nor

will any such approval by MDOT be construed as a warranty of the third party's qualifications, professional standing, ability to perform the work being subcontracted, or financial integrity. Neither the Intent to Subcontract form nor the Limited Notice to Proceed form replaces the traditional subcontract or subcontract amendment between the Consultant and its subconsultant. MDOT or its representative may inspect, copy, scan, or audit the traditional subcontract records at any reasonable time after giving reasonable notice.

Any subconsultant will not sublet more than fifty percent (50%) of its subcontracted Services by dollar amount. This provision will be included in all subcontracts relating to the Contract.

30. The Consultant agrees to pay each subcontractor for the satisfactory completion of work associated with the subcontract no later than ten (10) calendar days from the receipt of each payment the Consultant receives from MDOT. This requirement is also applicable to all sub-tier subcontractors and will be made a part of all subcontract agreements.

This prompt payment provision is a requirement of 49 CFR Part 26, as amended, and does not confer third-party beneficiary right or other direct right to a subcontractor against MDOT. This provision applies to both Disadvantaged Business Enterprise (DBE) and non-DBE subcontractors.

The Consultant further agrees that it will comply with 49 CFR Part 26, as amended, and will report any and all DBE subcontractor payments to MDOT with each invoice in the format set forth in Appendix G, dated September 2015, attached hereto and made a part hereof, or any other format acceptable to MDOT.

31. All questions that may arise as to the quality and acceptability of work, the manner of performance and rate of progress of the work, the interpretation of designs and specifications, and the satisfactory and acceptable fulfillment of the terms of the Contract will be decided by MDOT, except as provided for in the dispute resolution process, as set forth in Section 32 below.
32. In the event that problems occur with the Services performed by the Consultant, MDOT and the Consultant agree to follow a DRP. The Consultant and MDOT specifically agree that, in the event problems arise with the performance of the Services that may be the result of errors and/or omissions by the Consultant or a failure of the Consultant to otherwise perform in accordance with the Contract, the Consultant and MDOT will follow and abide by a decision reached by the DRP, as described in the attached Exhibit C, dated April 21, 2022. It is further agreed that the Consultant reserves the right to file a lawsuit in a Michigan court of competent jurisdiction to contest the decisions or rulings of the DRP only at the completion of the DRP and then only if the DRP decision was timely rejected by the Consultant in accordance with the requirements of the DRP.

33. With regard to nondiscrimination and DBE requirements:
- a. In connection with the performance of Services under the Contract, the Consultant (hereinafter in Appendix A referred to as the “contractor”) agrees to comply with the State of Michigan provisions for “Prohibition of Discrimination in State Contracts,” as set forth in Appendix A, dated June 2011, attached hereto and made a part hereof. This provision will be included in all subcontracts relating to the Contract.
 - b. During the performance of the Contract, the Consultant, for itself, its assignees, and its successors in interest (hereinafter in Appendix B referred to as the “contractor”), agrees to comply with the Civil Rights Act of 1964, being PL 88-352, 78 Stat. 241, as amended, being Title 42 USC Sections 1971, 1975a-1975d, and 2000a-2000h-6, and the Regulations of the Department of Transportation (49 CFR Part 21) issued pursuant to said Act, including Appendix B, dated June 2011, attached hereto and made a part hereof. This provision will be included in all subcontracts relating to the Contract.
 - c. The Consultant will carry out the applicable requirements of MDOT’s DBE program and 49 CFR Part 26, including, but not limited to, those requirements set forth in Appendix C, dated October 2, 2014, attached hereto and made a part hereof.
34. Public Act 533 of 2004 requires that payments under the Contract be processed by electronic funds transfer (EFT). The Consultant is required to register to receive payments by EFT at the SIGMA Vendor Self Service (VSS) website (www.michigan.gov/SIGMAVSS).
35. The Consultant specifically agrees that in the performance of the Services, by itself, by an approved subcontractor, or by anyone acting on its behalf, it will comply with any and all state, federal, and local statutes, ordinances, and regulations and will obtain all permits that are applicable to the entry into and performance of the Contract.
36. In addition to the protection afforded by any policy of insurance, the Consultant agrees to indemnify and save harmless the State of Michigan, the Michigan State Transportation Commission, MDOT, the FHWA, and all officers, agents, and employees thereof:
- a. From any and all claims by persons, firms, or corporations for labor, materials, supplies, or services provided to the Consultant in connection with the Consultant’s performance of the Services; and
 - b. From any and all costs or claims for additional compensation or damages, or injuries to or death of any and all persons, for loss of or damage to property, for environmental damage, degradation, response and cleanup cost, including attorney fees and related costs, caused by errors and/or omissions attributable to the Consultant’s performance of the Services under the Contract unless the

Consultant proves that notwithstanding the error or omission, the Consultant met generally accepted standards of care. In addition to excusing consultants from liability for errors or omissions that the Consultant proves occurred despite its compliance with generally accepted standards of care, the Consultant will only be responsible for the percentage of the damages and costs that corresponds to the proportion of the total damages and costs caused by the errors and/or omissions attributable to the Consultant for which the Consultant is otherwise liable under this subparagraph.

MDOT will not be subject to any obligations or liabilities by contractors of the Consultant or their subcontractors or any other person not a party to the Contract without its specific consent and notwithstanding its concurrence in or approval of the award of any contract or subcontract or the solicitation thereof.

It is expressly understood and agreed that the Consultant will take no action or conduct that arises either directly or indirectly out of its obligations, responsibilities, and duties under the Contract that results in claims being asserted against or judgments being imposed against the State of Michigan, the Michigan State Transportation Commission, MDOT, and/or the FHWA, as applicable.

In the event the same occurs, it will be considered as a breach of the Contract, thereby giving the State of Michigan, the Michigan State Transportation Commission, MDOT, and/or the FHWA, as applicable, a right to seek and obtain any necessary relief or remedy, including, but not limited to, a judgment for money damages.

37. The Consultant's signature on the Contract constitutes the Consultant's certification of "status" under penalty of perjury under the laws of the United States with respect to 49 CFR Part 29, as amended and as relocated to 2 CFR Part 1200, pursuant to Executive Order 12549.

The certification that is outlined as a part of these Terms and Conditions as Attachment A is Appendix A of 49 CFR Part 29 and applies to the Consultant (referred to in Appendix A as "the prospective primary participant").

The Consultant is responsible for obtaining the same certification from all subcontractors under the Contract by inserting the following paragraph in all subcontracts:

"The subcontractor's signature on the Contract constitutes the subcontractor's certification of 'status' under penalty of perjury under the laws of the United States with respect to 49 CFR Part 29, as amended and as relocated to 2 CFR Part 1200, pursuant to Executive Order 12549. The certification included as a part of this Contract as Attachment B is Appendix B of 49 CFR Part 29."

This certification is required of all subcontractors, testing laboratories, and other lower tier participants with which the Consultant enters into a written arrangement for the procurement of goods or services provided for in the Contract.

38. For contracts in excess of One Hundred Thousand Dollars (\$100,000.00):
- a. The Consultant's signature on the Contract constitutes the Consultant's certification that to the best of his or her knowledge and belief no federal appropriated funds have been paid or will be paid by or on behalf of the undersigned to any person for influencing or attempting to influence an officer or employee of any 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, or the extension, continuation, renewal, amendment, or modification of any federal contract, grant, loan, or cooperative agreement.
 - b. If any funds other than federal appropriated funds have been paid or will be paid to any person for influencing or attempting to influence an officer or employee of any 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 will complete and submit Standard Form LLL, "Disclosure Form to Report Lobbying," pursuant to Section 1352, Title 31 USC, in accordance with its instructions.
 - c. The Consultant will require that the language of this certification be included in the award documents for all third-party agreements (including subcontracts, subgrants, and contracts under grants, loans, and cooperative agreements) and that all subrecipients will certify and disclose accordingly.
 - d. This certification is a material representation of fact upon which reliance was placed when this transaction was made or entered into. Submission of this certification is a prerequisite for making or entering into this transaction imposed by Section 1352, Title 31 USC. Any person who fails to file the required certification will be subject to a civil penalty of not less than Ten Thousand Dollars (\$10,000.00) and not more than One Hundred Thousand Dollars (\$100,000.00) for each such failure.
39. In accordance with 1980 PA 278, MCL 423.321 et seq., the Consultant, in the performance of the Contract, will not enter into a contract with a subcontractor, manufacturer, or supplier listed in the register maintained by the United States Department of Labor of employers who have been found in contempt of court by a federal court of appeals on not less than three (3) occasions involving different violations during the preceding seven (7) years for failure to correct an unfair labor practice, as prohibited by Section 8 of Chapter 372 of the National Labor Relations Act, 29 USC 158. MDOT may void the Contract if the name of the Consultant or the name of a

subcontractor, manufacturer, or supplier utilized by the Consultant in the performance of the Contract subsequently appears in the register during the performance of the Contract.

40. For contracts in excess of One Hundred Fifty Thousand Dollars (\$150,000.00):
- a. The Consultant stipulates that any facility to be utilized in the performance of the Contract, unless such Contract is exempt under the Clean Air Act, as amended (42 USC 7401 *et seq.*, as amended, including Pub. L. 101-549), and under the Clean Water Act, as amended (33 USC 1251 *et seq.*, as amended, including Pub. L. 100-4), and/or under Executive Order 11738 and regulations in implementation thereof (40 CFR Part 15), is not listed on the date of Contract award on the U.S. Environmental Protection Agency (EPA) List of Violating Facilities pursuant to 40 CFR Part 15.20.
 - b. The Consultant agrees to comply with all the requirements of the Clean Air Act and the Clean Water Act and all regulations and guidelines listed thereunder related to the Consultant and the Services under the Contract.
 - c. The Consultant will promptly notify MDOT and the U.S. EPA, Assistant Administrator for Enforcement, of the receipt of any communication from the Director, Office of Federal Activities, EPA, indicating that a facility to be utilized for the Contract is under consideration to be listed on the EPA List of Violating Facilities.
 - d. The Consultant agrees to include or cause to be included the requirements of the preceding three (3) paragraphs, (a), (b), and (c), in every nonexempt subcontract.
41. The Consultant agrees that no otherwise qualified individuals with disabilities in the United States, as defined in the Americans with Disabilities Act, 42 USC 12101 *et seq.*, as amended, and regulations in implementation thereof (29 CFR Part 1630), will, solely by reason of their disabilities, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving benefits under the Contract.
42. The Consultant agrees that it will not volunteer, offer, or sell its services to any litigant against MDOT with respect to any Services it has agreed to perform for MDOT under the Contract, provided that this provision will not apply either when the Consultant is issued a valid subpoena to testify in a judicial or administrative proceeding or when the enforcement of this provision would cause the Consultant to be in violation of any Michigan or federal law.
43. Any approvals, reviews, and/or inspections of any nature by MDOT will not be construed as warranties or assumptions of liability on the part of MDOT. It is expressly understood and agreed that any such approvals are for the sole and exclusive purposes of MDOT, which is acting in a governmental capacity under the Contract, and that such approvals are a governmental function incidental to the Services under the Contract.

Any approvals, reviews, and/or inspections by MDOT will not relieve the Consultant of its obligations hereunder, nor are such approvals, reviews, and/or inspections by MDOT to be construed as warranties as to the propriety of the Consultant's performance but are undertaken for the sole use and information of MDOT.

44. With regard to claims based on goods or services that were used to meet the Consultant's obligation to MDOT under the Contract, the Consultant hereby irrevocably assigns its right to pursue any claims for relief or causes of action for damages sustained by the State of Michigan or MDOT due to any violation of 15 USC, Sections 1 - 15, and/or 1984 PA 274, MCL 445.771 - 445.788, excluding Section 4a, to the State of Michigan or MDOT.

The Consultant will require any subcontractors to irrevocably assign their rights to pursue any claims for relief or causes of action for damages sustained by the State of Michigan or MDOT with regard to claims based on goods or services that were used to meet the Consultant's obligation to MDOT under the Contract due to any violation of 15 USC, Sections 1 - 15, and/or 1984 PA 274, MCL 445.771 - 445.788, excluding Section 4a, to the State of Michigan or MDOT as a third-party beneficiary.

The Consultant will notify MDOT if it becomes aware that an antitrust violation with regard to claims based on goods or services that were used to meet the Consultant's obligation to MDOT under the Contract may have occurred or is threatened to occur. The Consultant will also notify MDOT if it becomes aware of any person's intent to commence, or of commencement of, an antitrust action with regard to claims based on goods or services that were used to meet the Consultant's obligation to MDOT under the Contract.

45. The Consultant agrees not to provide any services to a construction contractor for a project for which the Consultant has provided services to MDOT.

The Consultant and its Affiliates agree not to have any public or private interest, and will not acquire directly or indirectly any such interest in connection with the project, that would conflict or appear to conflict in any manner with the performance of the Services under the Contract. "Affiliate" means a corporate entity linked to the Consultant through common ownership. The Consultant and its Affiliates agree not to provide any services to a construction contractor or any entity that may have an adversarial interest in a project for which it has provided services to MDOT. The Consultant and its Affiliates agree to disclose to MDOT all other interests that the prime or sub consultants have or contemplate having during each phase of the project. The phases of the project include, but are not limited to, planning, scoping, early preliminary engineering, design, and construction. In all situations, MDOT will decide if a conflict of interest exists. If MDOT concludes that a conflict of interest exists, it will inform the Consultant and its Affiliates. If the Consultant and its Affiliates choose to retain the interest constituting the conflict, MDOT may terminate the Contract for cause in accordance with the provisions of these Terms and Conditions.

46. The Consultant warrants that it has not employed or retained any company or person other than bona fide employees working solely for the Consultant to solicit or secure the Contract and that it has not paid or agreed to pay any company or person other than bona fide employees working solely for the Consultant any fee, commission, percentage, brokerage fee, gift, or other consideration contingent upon or resulting from the award or making of the Contract. For breach or violation of this warranty, MDOT will have the right to terminate the Contract without liability or, at its discretion, to deduct from the Contract price or consideration or otherwise recover the full amount of such fee, commission, percentage, brokerage fee, gift, or contingent fee.
47. Any public relations communications and/or products pertaining to the Contract or the Services thereunder that are intended for an external audience will not be made without prior written approval from MDOT, and then only in accordance with explicit instructions from MDOT. Examples of public relations communications and/or products may include the following:
- a. Use of the MDOT logo;
 - b. Brochures, flyers, invitations, programs, or any other printed materials intended for an external audience;
 - c. Postings on social media sites or websites;
 - d. New or updated video, digital versatile disk (DVD), or video sharing productions;
 - e. Exhibits or presentations.
- A violation of this provision constitutes a breach of the Contract, and MDOT may terminate the Contract under the provisions of Section 26(b).
48. Any document referenced in these Terms and Conditions is made part of these Terms and Conditions.
49. In case of any discrepancy between the body of the Contract and any exhibit thereto, the body of the Contract will govern. In case of any discrepancy between the Contract and these Terms and Conditions, the Contract will govern.

EXHIBIT C

DISPUTE RESOLUTION PROCESS – CONSULTANTS

DEFINITIONS

1. **Chief Structure Design Engineer** – The MDOT Engineer responsible for oversight of plan development activities for the MDOT trunkline bridge program, including distribution and assignment of work, and oversight of design units that manage bridge Design Consultants.
2. **Construction Documents** – Contract documents as prepared by the Consultant for the Department and defined in the services contract or authorization, or as prepared by the Department. This includes but is not limited to plans, specifications, calculations, survey notes, special provisions, bid quantities, etc.
3. **Consultant** – The corporation, partnership or individual that has a prime contract with the Department. Note that the Prime Consultant may have subconsultants also involved in the project; however, the Prime Consultant is responsible for the entire team.

The Consultant is responsible for preparing the construction plans and other contract documents used for the construction of a project. This includes consultants who provide survey information, as well as services from other engineering and/or architectural disciplines included as part of the construction plans and contract documents. This includes the Engineer of Record.

The Consultant is responsible for oversight and documentation of construction contractor activities to assure compliance with state and federal regulations and that projects are constructed according to the construction plans and specifications. This includes consultants providing construction staking, inspection or other construction engineering services.

4. **Department** – Michigan Department of Transportation (MDOT).
5. **Design or Construction Engineering Issue** – A potential error and/or omission will be considered a Design or Construction Engineering Issue until such time that the cause, effect, and responsibility have been determined.
6. **Discovery** – The identification of a design or construction engineering issue.
7. **Engineer of Construction Field Services** – The MDOT Engineer responsible for oversight of such things as the development and distribution of construction specifications, quality control/quality assurance programs, field consultation standards, and training in support of the regions' delivery of the annual program.
8. **Engineer of Design** – The MDOT Engineer responsible for oversight of such things as the development process and the preparation of the contract documents, milestone review process, design standards, special details and special provisions, and training in support of the development of the annual program.
9. **Errors and/or Omissions** – deficiencies as a result of, but not limited to, missing information, miscalculations, incorrect details, incorrect documentation, or inadequate inspection/quality assurance activities,
10. **FHWA** - Federal Highway Administration.
11. **MDOT Design Project Manager (DPM)** – The Manager of the Design Phase of a project who oversees the Design Phase of a project and is responsible for managing the Design Consultant.

12. **MDOT Construction Project Manager (CPM)** – The Manager of the Construction Phase of a project who oversees the Contractor as they construct the project. This is usually the Transportation Service Center (TSC) Construction Engineer.
13. **MDOT Contracts Services Division (CSD)** – CSD administers MDOT's contracting processes, including bid lettings, contract awards, consultant and contractor payments, prequalification contract monitoring, and purchasing.
14. **MDOT Construction Field Services Division (CFS)** – CFS is responsible for the development and distribution of construction specifications, quality control/quality assurance programs, field consultation standards, and training in support of the regions' delivery of the annual program.
15. **MDOT Financial Operations Division (FOD)** – FOD delivers both financial and operational services throughout MDOT, including the recording of fiscal transactions, budget reporting, and project accounting.
16. **MDOT TSC Manager** - MDOT's TSC Managers are trained to direct and oversee the transportation activities and programs of their respective areas, including handling transportation-related design, construction, maintenance, and operational programs within each TSC's geographic boundaries.
17. **MDOT Region Engineer** – MDOT's seven regional offices are managed by professional engineers who are trained to direct and oversee the transportation activities and programs of their respective regions, including handling transportation-related design, construction, maintenance, and operational programs within each region's geographic boundaries.
18. **Premium Costs of a Material Nature (referred hereafter as Premium Cost)** – The additional cost of a contract change, for non-value-added-work (work that would not have been necessary), as a result of an error and/or omission. Additional costs are due to, but not limited to, delays, inefficiencies, rework, extra work, or improper test or inspection, other than those caused by the contractor and/or his subcontractors or suppliers.
19. **Projects involving direct Federal oversight:** Category of projects identified by FHWA for oversight based on risk.
20. **ProjectWise (PW)** – MDOT's documentation filing system used to manage engineering and construction data on projects. For purposes of this document, it is the current information system of the Department at the time when this process is invoked on a project.

BACKGROUND

The Department employs professional consulting engineering firms to provide design engineering and construction engineering and inspection services. It is the policy of the Department that projects will be built as designed and let. In the event the project includes errors and/or omissions resulting in Premium Costs, then the steps of this procedure will govern.

Design work shall conform to current MDOT, FHWA, and AASHTO practices, guidelines, policies, and standards (i.e., Road Design Manual, Standard Plans, Published MDOT Design Advisories, Drainage Manual, Special Details, Special Provisions (both standard and unique), Roadside Design Guide, A Policy on Geometric Design of Highways and Streets, Michigan Manual of Uniform Traffic Control Devices, etc.).

The administration of construction work shall be in compliance with the standard construction practices of the Department; the project construction contract, proposal, and plans; the Standard Specifications for Construction and all applicable publications referenced within; the MDOT Construction Manual; the Documentation Guide; the Work Zone Safety and Mobility Manual; and all other references, guidelines,

and procedures manuals necessary to carry out the work described herein in an appropriate and acceptable manner.

Additionally, work performed as the Project Engineer for the Project will be consistent with the Department's practice and in accordance with the Specifications, Plans, Proposal, the MDOT Construction Manual, and any and all other applicable references, guidelines, and/or procedures manuals.

This document establishes procedures to identify, investigate, and document errors, omissions, and contractual breaches in consultant-prepared construction plans and contract documents, or in the performance of consultant construction engineering and inspection services. This document also describes how to determine and document the extent of consultant responsibility for the cost of plan revisions and certain added construction costs or issues resulting from errors, omissions, and contractual breaches; and how to establish the requirement for a recommendation to pursue recovery of non-value-added project costs while minimizing the impact to construction during that resolution.

DISPUTE RESOLUTION PROCESS

It is the intent that all parties involved in this process work together, through the development and delivery of the project, to resolve disputes.

Should issues arise during the construction of a project, the Consultant and the Department agree to promptly address and resolve these issues according to the guidelines set forth in this document and in the spirit of the MDOT/ACEC (American Council of Engineering Companies) Partnering Charter. Time is normally of the essence in resolving issues.

If changes are due to errors and/or omissions in the Construction Documents or resulting from Construction Engineering Services, these errors and/or omissions can cause premium costs or reduction in quality. An assessment must be made by MDOT to determine the extent of the Design and/or Construction Engineering Consultant's responsibility for the errors and/or omissions, including the Consultant's share of the Premium Costs.

The determination of the degree of responsibility for the error or omission may include, but is not limited to:

- a review of the Consultant's scope of work,
- the contract documents in effect when the work was done,
- necessity for assumptions when detailed design is not applicable,
- changes in site conditions after the design was completed,
- decisions in the field to re-design, move, extend, or change something because of field conditions that could not have been anticipated,
- the Contractor not following the plans,
- actions taken by others without the input from the Consultant, and
- directions provided by the Department.

It is important to understand the cost of correcting an error and/or omission relative to the estimated first-time cost that would have been incurred had the services or contract documents been correct. For example, the omission of a pay item that must be added during construction will cause an increase in the construction cost, but the cost would have been higher had the pay item been included from the beginning. In this case, the cost of the omission depends on how much more it costs to include the item during construction than it would have cost had the item been included when the project was bid.

1. DISCOVERY

- A. **Design Issues Discovered Prior to the Award of the Construction Contract** – When a potential Design Issue is discovered prior to award of a specific construction contract, the following will occur:
- 1) If the CPM or DPM anticipates the potential Design Issue could result in cost recovery of Premium Costs the DPM coordinates with the MDOT TSC Manager. TSC Manager will notify the MDOT Region Engineer and Engineer of Design of the potential Design Issue.
 - 2) If MDOT Region Engineer and Engineer of Design concur that there is a potential Design Issue, the Department will notify the Consultant in writing that a potential Design Issue has been discovered.
 - 3) The CPM or DPM shall track premium costs related to the potential Design Issue.
 - 4) The CPM or DPM shall set up a folder in PW to track correspondence and any applicable project costs.
 - 5) The DPM, CPM and the Consultant will endeavor to resolve the Design Issue as quickly as possible, with the best interest of the project functionality and keeping costs and schedule in mind.
- B. **Design issues discovered after the award of the construction contract** – When a potential Design Issue is discovered after the award of a specific construction contract, the following will occur:
- 1) The CPM will notify the DPM of a potential Design Issue. If the CPM and/or DPM anticipate the potential Design Issue could result in cost recovery of Premium Costs the DPM and/or CPM coordinates with the MDOT TSC Manager. The TSC Manager will notify the MDOT Region Engineer and Engineer of Design of the potential Design Issue.
 - 2) If MDOT Region Engineer and Engineer of Design concur that there is a potential Design Issue, the Department will notify the Consultant in writing that a potential Design Issue has been discovered.
 - 3) The CPM shall set up a folder in PW to track correspondence and any applicable project costs. Any Premium Costs will be determined later.
 - 4) The DPM, CPM and the Consultant will endeavor to resolve the Design Issue as quickly as possible, with the best interest of the project functionality and keeping costs and schedule in mind.
 - 5) Consultant advises the Department of a recommended remedy to the Design Issue, for MDOT's consideration.

The issue will be referred to as a Design Issue until it is resolved. Avoid the use of design error or omission until it is determined by MDOT that there is an error or omission.

- C. **Construction Engineering Issues Discovered** – Discovery of potential Construction Engineering Issues typically occurs during reviews of the construction engineering work product, supplemental agreements, time extensions, staffing, equipment, and project records. When a Construction Engineering Issue is discovered, the following will occur:

- 1) If the CPM anticipates the potential Construction Engineering Issue could result in cost recovery of Premium Costs, the CPM coordinates with the TSC Manager. The TSC Manager will notify MDOT Region Engineer and MDOT Engineer of Construction Field Services of the potential Construction Engineering Issue.
- 2) If MDOT Region Engineer and Engineer of Construction Field Services concur that there is a potential Construction Engineering Issue, the Department will notify the Consultant in writing.
- 3) The CPM shall set up a folder in PW to track correspondence and project costs. Any premium costs will be determined later.
- 4) The CPM and the Consultant will endeavor to resolve the Construction Engineering Issue as quickly as possible, with the best interest of the project and cost in mind.

The issue will be referred to as a Construction Engineering Issue until it is resolved. Avoid the use of Construction Engineering error or omission until it is determined by MDOT that there is an error or omission.

In all cases, when a project involves Federal funding, the CPM or DPM will provide notification to FHWA.

2. RESOLUTION OF ISSUE AND CORRECTION

After discovery of a Design or Construction Engineering Issue, the first focus will be resolving the issue in order to minimize the impact on construction or other potential Premium Costs. The DPM and/or CPM and the Consultant will attempt to jointly determine a solution. If the Design or Construction Engineering Issue involves an active construction project, MDOT might request the construction contractor to also work with the DPM and/or CPM and the Consultant on the solution. If an agreement cannot be reached on the solution, MDOT alone will decide on the appropriate action. This may include correcting the issue with Department personnel or by hiring another firm.

The DPM and/or CPM should establish a “design assistance during construction” contract, if one has not been already established by the Department, to allow reimbursement of the Consultant efforts during resolution of the issue. *If the Consultant is found, by the Department, to be responsible for the error and or omissions, these fees would be reimbursed to the Department based on the percentage of fault of the Consultant as determined by the Department.*

The final resolution must be documented by the DPM and/or CPM for use during the cost recovery portion of the process. This information must be saved in the PW issue folder.

3. COST RECOVERY, PREMIUM COST DETERMINATION, AND RESOLUTION STEPS

STATEMENT OF THE FACTS, POTENTIAL PREMIUM COSTS, AND NOTICE TO CONSULTANT OF DESIGN OR CONSTRUCTION ENGINEERING ISSUE

The following steps are taken to focus on determining potential responsibility and financial implications.

- A. The DPM and/or CPM, working with MDOT TSC Manager and MDOT Region Engineer, will develop a “Statement of Facts” that outlines the Department’s current understanding of responsibilities associated with the discovered design or construction issue. If the “Statement of Facts” includes correlating construction costs, these costs will be estimated and provided by the DPM and/or CPM and supported by documentation in PW. The “Statement of Facts” will be electronically transmitted to the Consultant by the DPM or CPM.

- B. The initial calculation of Premium Costs will be developed by the CPM and reviewed by the TSC Manager.
- C. If during this review, it is determined that there are either insufficient facts to support pursuing cost recovery or Premium Costs, the CPM will issue a letter to that effect to the Consultant with copies to the MDOT Region Engineer, Engineer of Design, Engineer of Construction Field Services and if needed the Chief Structure Design Engineer.
- D. If there are sufficient facts to support pursuing cost recovery and Premium Costs have been determined, the DPM for Design Issues or CPM for Construction Engineering Issues will prepare and submit a letter of notification to the Consultant with the Department's position and determination of premium costs. This letter will be sent by certified mail to the Consultant.
- E. Upon receipt of the letter from the Department, the Consultant has 30-days to notify the Department, in writing, of its choice to elect one of the following options:
 - 1. Accept the decision in whole.
 - 2. Accept the decision on errors or omissions but appeal amount of premium cost, if applicable.
 - 3. Ask for additional time or information as necessary to determine their level of responsibility. Upon receipt of the additional information, the 30-day time period begins again.
 - 4. Appeal both decision on errors or omissions and the amount or a portion of the premium cost, if applicable.

NOTE: A Consultant's failure to provide the Department written notice of its election within 30-days of receipt of the decision will constitute the Consultants acceptance of the Department's decision and an end to due process. If accepted in whole or no response was received, and as directed by the CPM or DPM, CSD will:

- 1. Develop a settlement agreement for signature by MDOT and the Consultant.
- 2. Work with FOD to prepare and submit an invoice to the Consultant for the premium costs and any other applicable costs.
- 3. Will work with FOD to ensure that federal aid reimbursement, if applicable, are appropriately reimbursed.

CONSULTANT'S FIRST LEVEL OF APPEAL

If the Consultant does not accept the Department's decision, in whole or in part:

- A. Within 30-days of receipt of the decision, the Consultant must submit a written appeal as directed by the letter.
- B. The written appeal must include the Consultant's reasons for disagreement and supporting documentation in countering the Department's decision. If there are subconsultants involved with the issue(s), each subconsultant must provide their own reasons and supporting documentation along with the prime consultant's information.
- C. The consultant's appeal will be submitted to the TSC Manager, Engineer of Design, Chief Structure Design Engineer (if needed), and/or Engineer of Construction Field Services for review.
- D. If MDOT determines additional information is necessary to better understand the Consultant's position, additional information will be requested in writing within 30-days.

- E. Once all the additional requested information is received by the Department will provide a response to the Consultant within 30-days of its final position with a letter sent by certified mail.

Upon receipt of the Department's position, the Consultant has 30-days to notify the Department, in writing, of its choice to elect to initiate one of the following options:

- Accept the Department's decision in whole.
- Accept the Department's decision on the errors and omissions but appeal the amount of the premium cost to the MDOT Region Engineer, or their designee.
- Appeal the Department's decision in whole to the MDOT Region Engineer, or their designee.

NOTE: A Consultant's failure to provide the Department written notice of its election within 30-days of receipt of the decision will constitute the Consultants acceptance of the Department's decision and an end to due process. If accepted in whole or no response was received and as directed by the CPM or DPM, the CSD will:

1. Develop a settlement agreement for signature by MDOT and the Consultant.
2. Work with the FOD to prepare and submit an invoice to the Consultant for the premium costs.
3. Will work with the FOD to ensure that federal aid credits, if applicable, are appropriately reimbursed.

CONSULTANT'S SECOND LEVEL APPEAL

If the Consultant does not accept the Department's decision, in whole or in part:

- A. Within 30-days of receipt of the first level appeal decision, the Consultant must submit a written appeal as directed by the letter.
- B. The written appeal must include the Consultant's reasons for disagreement and supporting documentation in countering the Department's decision. If there are subconsultants involved with the issue(s), each subconsultant must provide their own reasons and supporting documentation along with the prime consultant's information.
- C. The Consultant's appeal will be sent to the MDOT Region Engineer and MDOT Bureau Directors of Development, Construction Field Services and Bridges and Structures for review.
- D. If MDOT determines additional information is necessary to better understand the Consultant's position, additional information will be requested in writing within 30-days.
- E. Once all additional requested information is received by the Department will provide a response to the Consultant within 30-days of its final position with a letter sent by certified mail.

Upon receipt of the Department's position, the Consultant has 30-days to notify the Department, in writing, of its choice to elect one of the following options:

- Accept the Department's decision in whole.
- Accept the Department's decision on the errors and omissions but appeal the amount of the Premium cost to MDOT's Bureau Directors of Development, Field Services and Bridges and Structures.
- Reject the Department's decision in whole to MDOT's Bureau Directors of Development, Field Services, and Bridges and Structures.

NOTE: A Consultant's failure to provide the Department written notice of its election within 30-days of receipt of the decision will constitute the Consultants acceptance of the Department's decision and an end to due process. If accepted in whole or no response was received and as directed by the CPM or DPM, CSD will:

1. Develop a settlement agreement for signature by MDOT and the Consultant.
2. Work with FOD to prepare and submit an invoice to the Consultant for the premium costs.
3. Will work with FOD to ensure that federal aid credits, if applicable, are appropriately reimbursed.

MEDIATION

If no agreement is reached, the parties agree to conduct **non-binding** facilitated mediation. A written Notice of Mediation shall be served upon all parties within 15 days after the appeals process is exhausted. Within thirty days of the service of the Notice of Mediation, unless the Parties agree in writing to extend such time, the Parties shall conduct at least one mediation session facilitated by an independent third party, such as AAA [Mediation.org](https://www.mediation.org) (a division of the American Arbitration Association). Principals of each party with authority to resolve the dispute shall attend the mediation and may be represented or assisted by legal counsel. Each party will pay its own fees, costs, and expenses, but the costs, fees, and expenses charged by the third-party mediator shall be borne equally by the parties. If third Parties participate in the facilitated mediation, the costs shall be borne equally on a per capita basis. Within seven days (7) after the service of the Notice for Mediation, the Parties shall confer to select an independent mediator. If the Parties cannot agree on a mediator, then a mediator will be selected by the AAA Mediation.

If an agreement is reached through the mediation process, then the parties will memorialize their agreement in writing and execute the documents necessary to resolve the dispute.

The contents of the mediation, including all statements, communications, or offers made therein, and any documents prepared specifically for the mediation, should not be disclosed outside the mediation process except to comply with the Michigan Freedom of Information Act, MCL 15.231 et seq., or other applicable law or court order.

If an agreement cannot be reached in the mediation process, then the parties may commence litigation.

APPENDIX A
PROHIBITION OF DISCRIMINATION IN STATE CONTRACTS

In connection with the performance of work under this contract; the contractor agrees as follows:

1. In accordance with Public Act 453 of 1976 (Elliott-Larsen Civil Rights Act), the contractor shall not discriminate against an employee or applicant for employment with respect to hire, tenure, treatment, terms, conditions, or privileges of employment or a matter directly or indirectly related to employment because of race, color, religion, national origin, age, sex, height, weight, or marital status. A breach of this covenant will be regarded as a material breach of this contract. Further, in accordance with Public Act 220 of 1976 (Persons with Disabilities Civil Rights Act), as amended by Public Act 478 of 1980, the contractor shall not discriminate against any employee or applicant for employment with respect to hire, tenure, terms, conditions, or privileges of employment or a matter directly or indirectly related to employment because of a disability that is unrelated to the individual's ability to perform the duties of a particular job or position. A breach of the above covenants will be regarded as a material breach of this contract.
2. The contractor hereby agrees that any and all subcontracts to this contract, whereby a portion of the work set forth in this contract is to be performed, shall contain a covenant the same as hereinabove set forth in Section 1 of this Appendix.
3. The contractor will take affirmative action to ensure that applicants for employment and employees are treated without regard to their race, color, religion, national origin, age, sex, height, weight, marital status, or any disability that is unrelated to the individual's ability to perform the duties of a particular job or position. Such action shall include, but not be limited to, the following: employment; treatment; upgrading; demotion or transfer; recruitment; advertising; layoff or termination; rates of pay or other forms of compensation; and selection for training, including apprenticeship.
4. The contractor shall, in all solicitations or advertisements for employees placed by or on behalf of the contractor, state that all qualified applicants will receive consideration for employment without regard to race, color, religion, national origin, age, sex, height, weight, marital status, or disability that is unrelated to the individual's ability to perform the duties of a particular job or position.
5. The contractor or its collective bargaining representative shall send to each labor union or representative of workers with which the contractor has a collective bargaining agreement or other contract or understanding a notice advising such labor union or workers' representative of the contractor's commitments under this Appendix.
6. The contractor shall comply with all relevant published rules, regulations, directives, and orders of the Michigan Civil Rights Commission that may be in effect prior to the taking of bids for any individual state project.

7. The contractor shall furnish and file compliance reports within such time and upon such forms as provided by the Michigan Civil Rights Commission; said forms may also elicit information as to the practices, policies, program, and employment statistics of each subcontractor, as well as the contractor itself, and said contractor shall permit access to the contractor's books, records, and accounts by the Michigan Civil Rights Commission and/or its agent for the purposes of investigation to ascertain compliance under this contract and relevant rules, regulations, and orders of the Michigan Civil Rights Commission.
8. In the event that the Michigan Civil Rights Commission finds, after a hearing held pursuant to its rules, that a contractor has not complied with the contractual obligations under this contract, the Michigan Civil Rights Commission may, as a part of its order based upon such findings, certify said findings to the State Administrative Board of the State of Michigan, which State Administrative Board may order the cancellation of the contract found to have been violated and/or declare the contractor ineligible for future contracts with the state and its political and civil subdivisions, departments, and officers, including the governing boards of institutions of higher education, until the contractor complies with said order of the Michigan Civil Rights Commission. Notice of said declaration of future ineligibility may be given to any or all of the persons with whom the contractor is declared ineligible to contract as a contracting party in future contracts. In any case before the Michigan Civil Rights Commission in which cancellation of an existing contract is a possibility, the contracting agency shall be notified of such possible remedy and shall be given the option by the Michigan Civil Rights Commission to participate in such proceedings.
9. The contractor shall include or incorporate by reference, the provisions of the foregoing paragraphs (1) through (8) in every subcontract or purchase order unless exempted by rules, regulations, or orders of the Michigan Civil Rights Commission; all subcontracts and purchase orders will also state that said provisions will be binding upon each subcontractor or supplier.

Revised June 2011

APPENDIX B
TITLE VI ASSURANCE

During the performance of this contract, the contractor, for itself, its assignees, and its successors in interest (hereinafter referred to as the “contractor”), agrees as follows:

1. **Compliance with Regulations:** For all federally assisted programs, the contractor shall comply with the nondiscrimination regulations set forth in 49 CFR Part 21, as may be amended from time to time (hereinafter referred to as the Regulations). Such Regulations are incorporated herein by reference and made a part of this contract.
2. **Nondiscrimination:** The contractor, with regard to the work performed under the contract, shall not discriminate on the grounds of race, color, sex, or national origin in the selection, retention, and treatment of subcontractors, including procurements of materials and leases of equipment. The contractor shall not participate either directly or indirectly in the discrimination prohibited by Section 21.5 of the Regulations, including employment practices, when the contractor covers a program set forth in Appendix B of the Regulations.
3. **Solicitation for Subcontracts, Including Procurements of Materials and Equipment:** All solicitations made by the contractor, either by competitive bidding or by negotiation for subcontract work, including procurement of materials or leases of equipment, must include a notification to each potential subcontractor or supplier of the contractor’s obligations under the contract and the Regulations relative to nondiscrimination on the grounds of race, color, or national origin.
4. **Information and Reports:** The contractor 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 facilities as may be determined to be pertinent by the Department or the United States Department of Transportation (USDOT) in order to ascertain compliance with such Regulations or directives. If required information concerning the contractor is in the exclusive possession of another who fails or refuses to furnish the required information, the contractor shall certify to the Department or the USDOT, as appropriate, and shall set forth the efforts that it made to obtain the information.
5. **Sanctions for Noncompliance:** In the event of the contractor’s noncompliance with the nondiscrimination provisions of this contract, the Department shall impose such contract sanctions as it or the USDOT may determine to be appropriate, including, but not limited to, the following:
 - a. Withholding payments to the contractor until the contractor complies; and/or
 - b. Canceling, terminating, or suspending the contract, in whole or in part.

6. **Incorporation of Provisions:** The contractor shall include the provisions of Sections (1) through (6) in every subcontract, including procurement of material and leases of equipment, unless exempt by the Regulations or directives issued pursuant thereto. The contractor shall take such action with respect to any subcontract or procurement as the Department or the USDOT may direct as a means of enforcing such provisions, including sanctions for non-compliance, provided, however, that in the event a contractor becomes involved in or is threatened with litigation from a subcontractor or supplier as a result of such direction, the contractor may request the Department to enter into such litigation to protect the interests of the state. In addition, the contractor may request the United States to enter into such litigation to protect the interests of the United States.

Revised June 2011

APPENDIX C
Assurances that Recipients and Contractors Must Make
(Excerpts from US DOT Regulation 49 CFR § 26.13)

- A. Each financial assistance agreement signed with a DOT operating administration (or a primary recipient) must include the following assurance:

The recipient shall not discriminate on the basis of race, color, national origin, or sex in the award and performance of any US DOT-assisted contract or in the administration of its DBE program or the requirements of 49 CFR Part 26. The recipient shall take all necessary and reasonable steps under 49 CFR Part 26 to ensure nondiscrimination in the award and administration of US DOT-assisted contracts. The recipient's DBE program, as required by 49 CFR Part 26 and as approved by US DOT, is incorporated by reference in this agreement. Implementation of this program is a legal obligation and failure to carry out its terms shall be treated as a violation of this agreement. Upon notification to the recipient of its failure to carry out its approved program, the department may impose sanctions as provided for under Part 26 and may, in appropriate cases, refer the matter for enforcement under 18 U.S.C. 1001 and/or the Program Fraud Civil Remedies Act of 1986 (31 U.S.C. 3801 et seq.).

- B. Each contract MDOT signs with a contractor (and each subcontract the prime contractor signs with a subcontractor) must include the following assurance:

The contractor, subrecipient or subcontractor shall not discriminate on the basis of race, color, national origin, or sex in the performance of this contract. The contractor shall carry out applicable requirements of 49 CFR Part 26 in the award and administration of US DOT-assisted contracts. Failure by the contractor to carry out these requirements is a material breach of this contract, which may result in the termination of this contract or such other remedy as the recipient deems appropriate, which may include, but is not limited to:

- (1) Withholding monthly progress payments;
- (2) Assessing sanction;
- (3) Liquidated damages; and/or
- (4) Disqualifying the contractor from future bidding as non-responsible.

APPENDIX G PRIME CONSULTANT STATEMENT OF DBE SUBCONSULTANT PAYMENTS

Information required in accordance with 49 CFR Section 26.37 to monitor progress of the prime consultant in meeting contractual obligations to DBEs

PRIME CONSULTANT NAME	DBE % REQUIRED	CONTRACT / AUTH NO.	BILLING PERIOD TO	INVOICE NUMBER	SUBMITTAL DATE
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IS THIS PRIME FIRM MDOT-DBE CERTIFIED? <input type="checkbox"/> YES <input type="checkbox"/> NO	IS THIS THE FINAL INVOICE? <input type="checkbox"/> YES <input type="checkbox"/> NO
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CERTIFIED DBE SUBCONSULTANT	SERVICES / WORK PERFORMED	TOTAL SUBCONTRACT AMOUNT	TOTAL INVOICED TO DATE	DEDUCTIONS	ACTUAL AMOUNT PAID TO DATE	DBE AUTHORIZED SIGNATURE (FINAL PAYMENT REPORT ONLY)	DATE
		\$	\$				
		\$	\$				
		\$	\$				
		\$	\$				
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		\$	\$				

IF THE DBE % PROPOSED WAS NOT ATTAINED, PLEASE INCLUDE THE REASON

AS THE AUTHORIZED REPRESENTATIVE OF THE ABOVE PRIME CONSULTANT, I STATE THAT, TO THE BEST OF MY KNOWLEDGE, THIS INFORMATION IS TRUE AND ACCURATE

PRIME CONSULTANT NAME	TITLE	SIGNATURE	DATE
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COMMENTS

PRIME CONSULTANT OR AUTHORIZED REPRESENTATIVE:

This statement reports the actual dollar amounts of the project cost earned by and paid to DBE subconsultants. Complete and submit to the Payment Analyst with each billing and within 20 days of receipt of final payment. Some forms may be blank if no payment was made since the previous billing.

For "Contract No., Authorization No.," and "Job No." as appropriate, use the numbers assigned by MOOT.

For "Period Covered," report the calendar days covered by the billing.

For "Services Work Performed" report the main service performed by the subconsultant during the reporting period.

For "Total Contract Amount" report the total amount of the contract between the prime consultant and the subconsultant.

For "Cumulative Dollar Value of Services Completed" report the total amount the subconsultant has earned since beginning this project.

For "Deductions," report deductions made by the prime consultant to the subconsultant's "Cumulative Dollar Value of Services Completed" for retainage, bond or other fees, materials, services or equipment provided to the subconsultant according to mutual, prior agreement (documentation of such agreement may be required by MDOT).

For "Actual Amount Paid to Date," report cumulative actual payments made to the subconsultant for services completed.

For "Actual Amount Paid During this Report Period" report actual payments made to the subcontractor for services during this reporting period.

"Provide "DBE Authorized Signature" for final payment only.

Be sure to sign, title and date this statement.

MDOT PAYMENT ANALYST:

Complete "Comments" if necessary, sign date and forward to the Office of Business Development within seven (7) days of receipt.

MDOT Office of Business Development
P.O. Box 30050
Lansing, Michigan 48909
Questions about this form? Call Toll-free, 1-866-DBE-1264

ATTACHMENT A

(This is a reproduction of Appendix A of 49 CFR Part 29)
**Certification Regarding Debarment, Suspension, and Other
Responsibility Matters -- Primary Covered Transactions**

Instructions for Certification

1. By signing and submitting this proposal, the prospective primary participant is providing the certification set out below.
2. The inability of a person to provide the certification required below will not necessarily result in denial of participation in this covered transaction. The prospective participant shall submit an explanation of why it cannot provide the certification set out below. The certification or explanation will be considered in connection with the department or agency's determination whether to enter into this transaction. However, failure of the prospective primary participant to furnish a certification or an explanation shall disqualify such person from participation in this transaction.
3. The certification in this clause is a material representation of fact upon which reliance was placed when the department or agency determined to enter into this transaction. If it is later determined that the prospective primary participant knowingly rendered an erroneous certification, in addition to other remedies available to the Federal Government, the department or agency may terminate this transaction for cause or default.
4. The prospective primary participant shall provide immediate written notice to the department or agency to which this proposal is submitted if at any time the prospective primary participant learns that its certification was erroneous when submitted or has become erroneous by reason of changed circumstances.
5. The terms covered transaction, debarred, suspended, ineligible, lower tier covered transaction, participant, person, primary covered transaction, principal, proposal, and voluntarily excluded, as used in this clause, have the meanings set out in the Definitions and Coverage sections of the rules implementing Executive Order 12549. You may contact the department or agency to which this proposal is being submitted for assistance in obtaining a copy of those regulations.
6. The prospective primary participant agrees by submitting this proposal that, should the proposed covered transaction be entered into, it shall not knowingly enter into any lower tier covered transaction with a person who is proposed for debarment under 48 CFR part 9, subpart 9.4, debarred, suspended, declared ineligible, or voluntarily excluded from participation in this covered transaction, unless authorized by the department or agency entering into this transaction.
7. The prospective primary participant further agrees by submitting this proposal that it will include the clause titled "Certification Regarding Debarment, Suspension, Ineligibility and Voluntary Exclusion Lower Tier Covered Transaction," provided by the department or agency entering into this covered transaction, without modification, in all lower tier covered transactions and in all solicitations for lower tier covered transactions.
8. A participant in a covered transaction may rely upon a certification of a prospective participant in a lower tier covered transaction that it is not proposed for debarment under 48

CFR part 9, subpart 9.4, debarred, suspended, ineligible, or voluntarily excluded from the covered transaction, unless it knows that the certification is erroneous. A participant may decide the method and frequency by which it determines the eligibility of its principals. Each participant may, but is not required to, check the List of Parties Excluded from Federal Procurement and Nonprocurement Programs.

9. Nothing contained in the foregoing shall be construed to require establishment of a system of records in order to render in good faith the certification required by this clause. The knowledge and information of a participant is not required to exceed that which is normally possessed by a prudent person in the ordinary course of business dealings.
10. Except for transactions authorized under paragraph 6 of these instructions, if a participant in a covered transaction knowingly enters into a lower tier covered transaction with a person who is proposed for debarment under 48 CFR part 9, subpart 9.4, suspended, debarred, ineligible, or voluntarily excluded from participation in this transaction, in addition to other remedies available to the Federal Government, the department or agency may terminate this transaction for cause or default.

Certification Regarding Debarment, Suspension, and Other Responsibility Matters -- Primary Covered Transactions

1. The prospective primary participant certifies to the best of its knowledge and belief, that it and its principals:
 - a. Are not presently debarred, suspended, proposed for debarment, declared ineligible, or voluntarily excluded by any Federal department or agency;
 - b. Have not within a three-year period preceding this proposal been convicted of or had a civil judgment rendered against them for commission of fraud or a criminal offense in connection with obtaining, attempting to obtain, or performing a public (Federal, State or local) transaction or contract under a public transaction; violation of Federal or State antitrust statutes or commission of embezzlement, theft, forgery, bribery, falsification or destruction of records, making false statements, or receiving stolen property;
 - c. Are not presently indicted for or otherwise criminally or civilly charged by a governmental entity (Federal, State or local) with commission of any of the offenses enumerated in paragraph (1)(b) of this certification; and
 - d. Have not within a three year period preceding this application/proposal had one or more public transactions (Federal, State or local) terminated for cause or default.
2. Where the prospective primary participant is unable to certify to any of the statements in this certification, such prospective participant shall attach an explanation to this proposal.

[60 FR 33042, 33064, June 26, 1995]

ATTACHMENT B

[This is a reproduction of Appendix B of 49 CFR Part 29]
CERTIFICATION REGARDING DEBARMENT, SUSPENSION, INELIGIBILITY,
AND VOLUNTARY EXCLUSION--LOWER TIER COVERED TRANSACTIONS

Instructions for Certification

1. By signing and submitting this proposal, the prospective lower tier participant is providing the certification set out below.
2. The certification in this clause is a material representation of fact upon which reliance was placed when this transaction was entered into. If it is later determined that the prospective lower tier participant knowingly rendered an erroneous certification, in addition to other remedies available to the Federal Government, the department or agency with which this transaction originated may pursue available remedies, including suspension and/or debarment.
3. The prospective lower tier participant shall provide immediate written notice to the person to which this proposal is submitted if at any time the prospective lower tier participant learns that its certification was erroneous when submitted or has become erroneous by reason of changed circumstances.
4. The terms “covered transaction”, “debarred”, “suspended”, “ineligible”, “lower tier covered transaction”, “participant”, “person”, “primary covered transaction”, “principal”, “proposal”, and “voluntarily excluded”, as used in this clause, have the meanings set out in the Definitions and Coverage sections of rules implementing Executive Order 12549. You may contact the person to which this proposal is submitted for assistance in obtaining a copy of those regulations.
5. The prospective lower tier participant agrees by submitting this proposal that, should the proposed covered transaction be entered into, it shall not knowingly enter into any lower tier covered transaction with a person who is debarred, suspended, declared ineligible, or voluntarily excluded from participation in this covered transaction, unless authorized by the department or agency with which this transaction originated.
6. The prospective lower tier participant further agrees by submitting this proposal that it will include this clause titled “Certification Regarding Debarment, Suspension, Ineligibility, and Voluntary Exclusion--Lower Tier Covered Transaction”, without modification, in all lower tier covered transactions and in all solicitations for lower tier covered transactions.
7. A participant in a covered transaction may rely upon a certification of a prospective participant in a lower tier covered transaction that it is not debarred, suspended, ineligible, or voluntarily excluded from the covered transaction, unless it knows that the certification is erroneous. A participant may decide the method and frequency by which it determines the eligibility of its principals. Each participant may, but is not required to, check the Nonprocurement List (Telephone No. (517) 335-2513 or (517) 335-2514).

8. Nothing contained in the foregoing shall be construed to require establishment of a system of records in order to render in good faith the certification required by this clause. The knowledge and information of a participant is not required to exceed that which is normally possessed by a prudent person in the ordinary course of business dealings.
9. Except for transactions authorized under paragraph 5 of these instructions, if a participant in a covered transaction knowingly enters into a lower tier covered transaction with a person who is suspended, debarred, ineligible, or voluntarily excluded from participation in this transaction, in addition to other remedies available to the Federal Government, the department, or agency with which this transaction originated may pursue available remedies, including suspension and/or debarment.

Certification Regarding Debarment, Suspension, Ineligibility, and Voluntary Exclusion--Lower Tier Covered Transactions

1. The prospective lower tier participant certifies, by submission of this proposal, that neither it nor its principals is presently debarred, suspended, proposed for debarment, declared ineligible, or voluntarily excluded from participation in this transaction by any Federal department or agency.
2. Where the prospective lower tier participant is unable to certify to any of the statements in this certification, such prospective participant shall attach an explanation to this proposal.

[Federal Register Doc. 88-11561 Filed 5-25-88; 8:45 a.m.]

March 9, 1989