

Revised: July 20, 2010



# MEMORANDUM OF AGREEMENT

FOR

[INSERT BRIEF DESCRIPTION]

STATE PROJECT NUMBER: [STATE PROJECT NUMBER]  
FEDERAL PROJECT NUMBER: [FED. PROJECT NUMBER]

ROUTE NUMBER: [ROUTE NUMBER]  
[CITY/COUNTY]



# **LETTER OF AGREEMENT**

1. **CONTRACTING PARTIES:** This Agreement is between the Commonwealth of Virginia, Virginia Department of Transportation, hereinafter referred to as “the Department,” or “VDOT” and

[NAME OF CONSULTANT]  
[ADDRESS]  
[CITY, STATE, ZIP]  
Fed. ID #: [FED. ID #]

hereinafter referred to as “the Consultant.”

[INCLUDE THE FOLLOWING LANGUAGE IF THE VOUCHER PAYMENT IS TO BE SENT TO AN ADDRESS DIFFERENT FROM THE ABOVE ADDRESS.]

Payment remittance shall be sent to the following address:

[NAME OF CONSULTANT]  
[ADDRESS]  
[CITY, STATE, ZIP]  
Fed. ID #: [FED. ID #]

2. **DESCRIPTION AND LIMITS OF PROJECT:** This Agreement is for:

[BRIEF DESCRIPTION OF SERVICES TO BE PROVIDED].

The following items of work shall be subcontracted to:

[NAME OF SUBCONSULTANT]  
[ADDRESS OF SUBCONSULTANT]  
[ITEMS OF WORK]

\*Disadvantaged Business Enterprise

3. **INCLUDED DOCUMENTS:** This Agreement shall consist of the following documents:

- a. This signed Letter of Agreement;
- b. Certifications of the Consultant and the Department;
- c. The following Attachments:
  - Attachment A – General Terms and Conditions
  - Attachment B – Special Terms and Conditions
  - Attachment C -- Payment
  - Attachment D – Scope of Work and Fee Proposal
  - [Attachment E – Year 2000 Compliance]

In the event of any conflict between a provision in Attachment A and a provision in Attachment B, the conflicting provision in Attachment B shall govern this Agreement.

4. **CONSIDERATION:** This is a [Lump Sum/Cost Plus Net Fee/Fixed Billable Rate] contract.

The Consultant will be paid a maximum compensation of \$[LUMP SUM FEE] for services authorized by this Agreement. [USE THIS WORDING ON LUMP SUM AGREEMENTS]

The maximum total compensation payable to the Consultant for services authorized by this Agreement will not exceed \$[MAXIMUM COMPENSATION PAYABLE]. [USE THIS WORDING ON COST PLUS NET FEE/FIXED BILLABLE RATE AGREEMENTS]

[The maximum compensation payable for each [SHOW PHASE/STAGE AS REQUIRED] is as follows:]

[COST PLUS-SHOW NET FEE AND MAXIMUM COMPENSATION]

5. TIME TO COMPLETE WORK: [Plans/Reports/etc.] shall be completed and delivered to the Department within the periods specified in the progress schedule included in Attachment D. [INCLUDE THE FOLLOWING LANGUAGE IF A TERM CONTRACT: Any work underway at the expiration of this Agreement shall be completed by the Consultant under the terms of the Agreement. Services to be performed by the Consultant under this Agreement shall be for project assignments made during a period of the earlier of one (1) calendar year, commencing on the date of this Agreement, or when the cumulative total of fees for project assignments issued reaches the maximum total compensation. The Agreement may be renewable for two (2) additional one (1) year terms at the option of the Commonwealth Transportation Commissioner.]

6. INTENT: It is the intent of this Agreement that the Consultant, employing qualified, competent and experienced personnel, shall perform the stated services equal to the practice prevalent among consultants within the subject area of work and commensurate with the magnitude and intricacy of the work under consideration. These services shall be so complete that it will not be necessary for the Department to supplement any of the operation by its own personnel, except as noted.

[INCLUDE THE FOLLOWING LANGUAGE IF A MULTI-PHASE CONTRACT: The services under this Agreement will be performed as a multi-phase professional services contract. Upon satisfactory completion of Phase I and the determination of the scope of the additional services to be performed in subsequent phases, fair and reasonable compensation will be negotiated for a Supplemental Agreement to perform the services. In the event that the Department and the Consultant cannot agree on fair and reasonable compensation for the additional phases, the Department reserves the right to terminate this Agreement in accordance with the relevant provisions in Attachment A.]

7. SIGNATURES: The parties hereto agree to abide by all the provisions of this Agreement.

IN WITNESS WHEREOF, the parties sign and cause this Agreement to be executed on this the \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_\_.

_____	_____	_____	_____
[NAME]	Date	[NAME]	Date
Commonwealth Transportation Commissioner		[TITLE]	
Commonwealth of Virginia		[NAME OF CONSULTANT'S FIRM]	
Department of Transportation			

_____	_____	_____	_____
Signature of Witness	Date	Signature of Witness	Date

**VDOT REVIEW**

EXTERNAL & CONSTRUCTION AUDIT \_\_\_\_\_ Date: \_\_\_\_\_





# **ATTACHMENT A**

## **GENERAL TERMS AND CONDITIONS**



## **ATTACHMENT A – GENERAL TERMS AND CONDITIONS**

1. **COMPLIANCE WITH LAWS AND REGULATIONS:** The Consultant shall keep fully informed of all federal, state, and local laws, ordinances, and regulations, and all orders and decrees of bodies or tribunals having any jurisdiction or authority, which in any manner affect those engaged or employed on this Agreement, or which in any way affect the conduct of the services provided by the Consultant. It shall at all times observe and comply with, and shall cause its agents, subcontractors and employees to observe and comply with, all such laws, ordinances, regulations, orders, and decrees; and shall protect and indemnify the Commonwealth of Virginia, the Department and its employees and appointees against any claim or liability arising from or based on the violation of any such law, ordinance, regulation, order, or decree, whether by itself or its agents, subcontractors or employees. If any discrepancy or inconsistency is discovered between this Agreement and any such law, ordinance, regulation, order, or decree, the Consultant shall immediately report the same to the Department in writing.

2. **VIRGINIA PROHIBITED EMPLOYMENT DISCRIMINATION:** The Consultant, its agents, employees, assigns or successors, and any person, firm, or agency of whatever nature with whom it may contract or make an agreement, shall comply with the provisions of the Section 2.2-4311 of the Code of Virginia (1950), as amended. During the performance of this Agreement, the Consultant agrees as follows:

- a. The Consultant will not discriminate against any employee or applicant for employment because of race, religion, color, sex, national origin, age, disability, or other basis prohibited by state law relating to discrimination in employment, except where there is a bona fide occupational qualification reasonably necessary to the normal operation of the Consultant. The Consultant agrees to post in conspicuous places, available to employees and applicants for employment, notices setting forth the provisions of this nondiscrimination clause.
- b. The Consultant, in all solicitations or advertisements for employees placed by or on behalf of the Consultant, will state that the Consultant is an equal opportunity employer.
- c. Notices, advertisements and solicitations placed in accordance with federal law, rule or regulation shall be deemed sufficient for the purpose of meeting the requirements of this section.

The Consultant will include the provisions of the foregoing paragraphs “a”, “b” and “c” in every subcontract or purchase order of over ten thousand dollars, so that such provisions will be binding upon each subcontractor or vendor.

3. **NON-DISCRIMINATION PROVISION:** The Consultant agrees to abide by the provisions of Title VI and Title VII of the Civil Rights Act of 1964 (42 USC 2000e), which prohibits discrimination against any employee or applicant for employment, or any applicant or recipient of services, on the basis of race, religion, color, sex or national origin; and further agrees to abide by Executive Order No. 11246 entitled “Equal Employment Opportunity,” as amended by Executive Order No. 11375 and as supplemented in the Department of Labor Regulations (41 CFR Part 60), which prohibit discrimination on the basis of age. Section 49 CFR 21 is incorporated by reference in all contracts and subcontracts funded in whole or in part with federal funds. The Consultant shall comply with the Americans with Disabilities Act (ADA), and with the provisions of the Virginians with Disabilities Act, Sections 51.5-40 through 51.5-46 of the Code of Virginia (1950), as amended, the terms of which are incorporated herein by reference.

In the event of the Consultant’s noncompliance with the nondiscrimination provisions of this Agreement, the Department shall impose such contract sanctions as it or the Federal Highway Administration may determine to be appropriate, including but not limited to:

- a. withholding of payments to the Consultant under this Agreement until the Consultant complies; and/or
- b. cancellation, termination or suspension of this Agreement, in whole or in part.

4. TITLE VI OF THE CIVIL RIGHTS ACT OF 1964: During the performance of this Agreement, the Consultant, for itself, its assignees and successors in interest (herein referred to as “the Consultant”), agrees as follows:

- a. Compliance with Regulations: The Consultant will comply with the Regulations of the U.S. Department of Transportation relative to nondiscrimination in Federally-assisted programs of the U.S. Department of Transportation (Title 49), Code of Federal Regulations, Part 21, (hereinafter referred to as the Regulations), which are herein incorporated by reference and made a part of this Agreement.
- b. Nondiscrimination: The Consultant, with regard to the services provided by it after award and prior to completion of this Agreement, will not discriminate on the grounds of race, religion, color, sex, national origin, age or handicap in the selection and retention of subconsultants, including procurements of materials and leases of equipment. The Consultant will not participate either directly or indirectly in the discrimination prohibited by Section 21.5 of the Regulations, including employment practices when the services cover a program set forth in Appendix B of the Regulations.
- c. Solicitations for Subconsultants: In all solicitations, either by competitive bidding or negotiation made by the Consultant for work to be performed under a subcontract, including procurements of materials or equipment, each potential subcontractor or supplier shall be notified by the Consultant of the Consultant’s obligations under this Agreement.
- d. Information and Reports: The Consultant will provide all information and reports required by the Regulations, or orders and instructions issued pursuant thereto, and will permit access to its books, records, accounts, other sources of information, and its facilities as may be determined by the Department or the Federal Highway Administration to be pertinent to ascertain compliance with such Regulations, orders and instructions. Where any information required of the Consultant is in the exclusive possession of another who fails or refuses to furnish this information, the Consultant shall so certify to the Department, or the Federal Highway Administration as appropriate, and shall set forth what efforts it has made to obtain the information. Consultants and subconsultants with fifteen (15) or more employees will submit an updated Title VI Evaluation Report (EEO-D2) annually as long as the consultant or subconsultant is performing in accordance with this Agreement.
- e. Sanctions for Noncompliance: In the event of the Consultant’s noncompliance with the nondiscrimination provisions of this Agreement, the Department shall impose such contract sanctions as it or the Federal Highway Administration may determine to be appropriate, including but not limited to:
  - 1) withholding of payments to the Consultant under this Agreement until the Consultant complies, and/or
  - 2) cancellation, termination or suspension of this Agreement, in whole or in part.
- f. Incorporation of Provisions: The Consultant will include the provisions of paragraphs “a” through “f” in every subcontract of \$10,000 or more, including procurements of materials and leases of equipment, unless exempt by the Regulations, order or instructions issued pursuant thereto. The Consultant will take such action with respect to any subcontractor or procurement as the Department or the Federal Highway Administration may direct as a means of enforcing such provisions including sanctions for noncompliance: Provided, however, in the event the Consultant becomes involved in, or is threatened with, litigation with a subcontractor or supplier as a result of such direction, the Consultant may request the Department to enter into such litigation to protect the interests of the Department and, in addition, the Consultant may request the United States to enter into such litigation to protect the interests of the United States.

5. **CERTIFICATION REGARDING NON-SEGREGATED FACILITIES:** By the execution of this Agreement, the Consultant certifies that it does not maintain or provide for its employees any segregated facilities at any of its establishments, and that it does not permit its employees to perform their services at any location, under its control, where segregated facilities are maintained. It certifies further that it will not maintain or provide for its employees any segregated facilities at any of its establishments, and that it will not permit its employees to perform their services at any location under its control, where segregated facilities are maintained. The Consultant further certifies that no employee will be denied access to adequate facilities on the basis of sex or disability. As used in this certification, the term “segregated facilities” means any waiting rooms, work areas, restrooms and washrooms, restaurants and other eating areas, time clocks, locker rooms and other storage or dressing areas, parking lots, drinking fountains, recreation or entertainment areas, transportation, and housing facilities provided for employees which are segregated by explicit directive or are in fact segregated on the basis of race, creed, color, national origin, age or handicap, because of habit, local custom or otherwise. It agrees that, except where it has obtained identical certification from proposed subcontractors and material suppliers for specific time periods, it will obtain identical certification from proposed subcontractors or material suppliers prior to the award of subcontracts or the consummation of material supply agreements exceeding ten thousand dollars, and that it will retain such certifications in its files.

6. **DISADVANTAGED BUSINESS ENTERPRISES/SMALL, WOMAN AND MINORITY BUSINESS:** The Consultant, its agents, employees, assigns, or successors, and any person, firm or agency of whatever nature with whom it may contract or make an agreement, shall comply with the provisions of 49 CFR Part 26, as amended, which is hereby made part of this Agreement by reference. The Consultant shall take all necessary and reasonable steps in accordance with 49 CFR Part 26, as amended, to ensure that DBE firms have the maximum opportunity to compete for and perform contracts and subcontracts under this Agreement. Subpart A of 49 CFR 26, Section 26.13 requires each contract signed with a contractor (and each subcontract the prime contractor signs with a subcontractor) must include the following assurance:

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

Further, the Consultant agrees to provide the Department with the dollar amount contracted and name of each subcontractor which identifies itself as a DBE. [Include the following wording on contract with DBE Goals: The DBE goal for this Contract is \_\_\_\_%.]

In accordance with the Governor’s Executive Order No. 33, the Department also requires the utilization of Small, Women and Minority (SWaM) Businesses to participate in the performance of consultant contracts. The Consultant shall take all necessary and reasonable steps in accordance with Executive Order No. 33, to ensure that SWaM firms have the maximum opportunity to compete for and perform contracts and subcontracts under this Agreement. Further, the Consultant agrees to provide the Department with the dollar amount contracted and name of each subcontractor which identifies itself as a SWaM. [Include the following wording on contract with SWaM Goals: The Swam goal for this Contract is \_\_\_\_%.]

The Department is also required to capture DBE and SWaM payment information on all professional services contracts. Therefore, the prime consultant will be required to complete the DBE and SWaM Payment Compliance Report, C-63 form on a quarterly basis.

In the event of the Consultant’s noncompliance with the DBE/SWaM participation for the services indicated in Expression of Interest in response to the RFP, Attachment D, Scope of Work and

Fee Proposal of this Agreement, the Department shall impose such contract sanctions as it or the Federal Highway Administration may determine to be appropriate, including but not limited to:

- a. Withholding of payments to the Consultant under this Agreement until the Consultant complies, and/or
- b. Cancellation, termination or suspension of this Agreement, in whole or in part.

7. TDD/TTY EQUIPMENT FOR THE DEAF: When seeking public participation through the maintenance of a toll free hot line number and/or publishing project-related materials, the Consultant agrees to ensure that all citizens have equally effective communication. The Consultant agrees to provide or identify a telecommunications device for the deaf/teletypewriter (TDD/TTY) or acceptable means of telephone access for individuals with impaired speech or hearing. The Consultant will provide notice of a TDD/TTY number whenever a standard telephone number is provided.

8. IMMIGRATION REFORM AND CONTROL ACT OF 1986: By signing this Agreement, the Consultant certifies that it does not and will not during the performance of this Agreement violate the provisions of the Federal Immigration Reform and Control Act of 1986, which prohibits employment of illegal aliens.

9. OCCUPATIONAL SAFETY AND HEALTH STANDARDS: The Consultant shall not require any individual employed in the performance of this Agreement to work in surroundings or under working conditions which are unsanitary, hazardous, or dangerous to health or safety as determined under the Occupational Safety and Health Standards promulgated by the United States Secretary of Labor. This provision shall be made a condition of any subcontract entered into pursuant to this Agreement.

In addition, the Consultant shall abide by the Virginia Occupational Safety and Health Standards adopted under Section 40.1-22 of the Code of Virginia (1950), as amended, and will fulfill the duties imposed under Section 40.1-51.1 of the Code of Virginia. Any violation of the aforementioned requirements or duties which is brought to the attention of the Consultant by any person shall be immediately abated.

10. CERTIFICATION REGARDING DEBARMENT: By the execution of this Agreement, the Consultant 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 from covered transactions 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; and have not been convicted of any violations 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 (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.

11. LEGAL JURISDICTION: This Agreement shall be construed and shall be governed in accordance with the Constitution and the laws of the Commonwealth of Virginia.

12. SEVERABILITY: The declaration by any court, or other binding legal source, that any provision of this Agreement is illegal and void shall not affect the legality and enforceability of any other provision of this Agreement, unless said provisions are mutually dependent.

13. FINAL ACCEPTANCE AND FINAL PAYMENT: All services performed under this Agreement shall be performed in accordance with the current standards, policies, and procedures of the Department, and in the case of projects using federal funds, the Federal Highway Administration (FHWA). All services shall be subject to the approval of the Department through its designated representatives.

Upon receipt of a written notice from the Consultant of completion of the services, the Department will make a review to determine if all services specified in the Agreement have been satisfactorily completed. If all services have been satisfactorily completed, the Department will make final acceptance. The Consultant will be notified of final acceptance in writing.

If the review discloses that any services, in whole or in part, are incomplete or unacceptable, the Consultant shall immediately correct the deficiency. Upon completion or correction of the services, another review will be made that will constitute the final review. In such event, providing the services are complete and acceptable, the Department will make the final acceptance and the Consultant will be notified of final acceptance in writing.

When final acceptance has been duly made by the Department, the Consultant shall submit a final estimate voucher. Except as provided for in Section 17, any disputes or claims between the Consultant and the Department or between the Consultant and any subconsultant shall have been resolved prior to the final estimate being submitted. Upon review and approval of the final estimate voucher by the Department, the Consultant will be paid the entire sum due after previous payments are deducted and other amounts are retained or deducted under the provisions of the Agreement. Final payment will become due and the final estimate paid within sixty (60) calendar days after approval of the final estimate voucher. The Department will notify the Consultant in writing when the final payment is made. Payments shall be subject to correction at the time of the final audit.

14. CLAIMS FOR ADDITIONAL TIME OR COMPENSATION: Claims for services not clearly authorized by this Agreement, or not ordered by the Department by prior written authorization, shall not be paid, nor shall any additional time be granted to complete the services. The Consultant shall notify the Department in writing, and wait for written approval, before it begins providing services not previously authorized. If such notification and approval is not given or the claim is not properly documented, the Consultant shall not be paid the extra compensation, nor be granted any additional time. Proper documentation alone shall not prove the validity of the claim. If the claim is found to be valid, it shall be allowed and paid for in accordance with the terms of a supplemental agreement.

15. AGREEMENT MODIFICATION The Department may, at any time, by written order, make any changes in this Agreement which either increase or decrease the services hereunder. If such change causes an increase or decrease in the cost of or the time required for performance of this Agreement, an equitable increase or decrease in consideration may be made and this Agreement shall be modified in writing by a Supplemental Agreement between the Department and the Consultant. The Supplemental Agreement shall set forth the proposed changes in services, extension of time for completion and adjustment of the compensation, including net fee, to be paid the Consultant, if any. If the parties fail to agree upon the adjustment to be made, the dispute shall be determined as provided in this Agreement, but nothing in this section shall excuse the Consultant from promptly and diligently proceeding with the prosecution of the services so changed.

16. DELAYS: If the services provided for under this Agreement should be delayed due to factors or conditions beyond the control of the Consultant and through no fault or negligence on its part, the Consultant may apply in writing for an extension of time and/or an adjustment in compensation. This

request shall be accompanied by substantiating data to justify any extension of time and/or adjustment in compensation. If, in the opinion of the Commonwealth Transportation Commissioner or his duly authorized representative, a delay due to factors and conditions beyond the Consultant's control is justified, the Consultant may be granted an extension of time and/or adjustment in compensation.

17. **DISPUTES:** Any contractual claim in connection with the services provided, whether for money or other relief, not disposed of by mutual agreement shall be submitted in writing no later than sixty (60) days after final payment; however, written notice of the Consultant's intention to file such a claim shall have been given at the time of the occurrence or beginning of the services upon which the claim is based. Submission of a notice of claim as specified shall be mandatory. Failure to submit such a notice shall be a conclusive waiver of such claim by the Consultant. An oral notice or statement will not be sufficient nor will a notice or statement after the event.

At the time of occurrence or prior to providing the services, the Consultant shall furnish the Department an itemized fee proposal for which additional compensation will be claimed. The Consultant shall keep a separate record of actual cost for the services. Failure on the part of the Consultant to afford the Department proper records of actual costs will constitute a waiver of a claim for such extra compensation except to the extent that it is substantiated by the Department's records. The filing of such notice by the Consultant and the keeping of cost records by the Consultant shall in no way establish the validity of a claim. The data furnished by the Consultant shall be subject to a complete audit by the Department or its authorized representative if they are to be used as a basis for claim settlement.

Upon completion of the Agreement, the Consultant may, within sixty (60) days from the date of final payment, submit to the Department a written claim for the amount he deems he is entitled to under the Agreement. The final payment date shall be that date set forth in a letter from the Department to the Consultant at the time the final estimate is submitted to the Fiscal Division for vouchering. The claim shall set forth the facts upon which the claim is based. The Consultant shall include all pertinent data and correspondence that may substantiate the claim. Within ninety (90) days from receipt of the claim, the Department will make an investigation and notify the Consultant of its decision.

If the consultant is dissatisfied with the decision, he shall notify the Commissioner in writing within thirty (30) days from receipt of the Department's decision that he desires to appear before him, whether in person or through counsel, and present additional facts and arguments in support of his claim. The Commissioner will schedule and meet with the Consultant within thirty (30) days after receiving the request. Within forty-five (45) days from the date of the meeting, the Commissioner will investigate the claim, including the additional facts presented, and notify the Consultant in writing of his decision. If the Commissioner deems that all or any portion of a claim is valid, he shall have the authority to negotiate a settlement with the Consultant subject to the provisions of Section 2.2-514 of the Code of Virginia 1950 as amended. If dissatisfied with the decision, the Consultant shall be entitled to institute judicial review if such action is brought within six months of receipt of the Commissioner's written decision. Any civil action by the Consultant shall be subject to the provisions of Section 2.2-4363 (D) of the Code of Virginia (1950), as amended.

Upon completion of the final audit, the Consultant may, within sixty (60) days from the date of receipt of the final audit letter from the Department, submit to the Department a written claim for the amounts he disputes in the final audit. The dispute resolution process will be the same as outlined above for claims.

Any monies that become payable as the result of claim settlement after payment of the final estimate or final audit dispute resolution will not be subject to payment of interest unless such payment is specified as a condition of the claim settlement.

18. **CONFLICTS OF INTEREST:** No member of or delegate to the Congress of the United States shall be entitled to any share or part of this Agreement or to any benefit arising therefrom. The Consultant shall not engage the services of any person employed by the Department on any services covered by this

Agreement without written permission of the Department. Written permission will not be granted for any employee having official responsibility, as that term is defined in Section 2.2-4368 of the Code of Virginia, who dealt in an official capacity with the Consultant concerning procurement during his employment or for a period of one year from cessation of employment by the Department unless the employee or former employee provides written notification to the Department and receives written permission prior to commencement of employment by the Consultant. Any violation of these provisions by the Consultant shall be a basis for immediate termination of this agreement for cause.

19. COVENANT AGAINST CONTINGENCY FEES: The Consultant warrants that it has not employed or retained any company or person to solicit or secure this Agreement and that it has not paid or agreed to pay any company or person, other than subconsultants identified in this Letter of Agreement or a bona fide employee working solely for the Consultant, any fee, commission, percentage, brokerage fee, gifts or any other consideration contingent upon or resulting from the award or making of this Agreement.

For breach or violation of this warranty, the Department shall have the right to void this Agreement without liability or, at its discretion, to deduct from the Agreement price or consideration, or otherwise recover, the full amount of such fee, commission, brokerage fee, gift, or contingent fee.

20. INSURANCE: The Consultant shall furnish the Department a certificate evidencing comprehensive commercial general liability insurance in an amount acceptable to the Department prior to beginning any work on the project, and agrees to maintain this amount throughout the life of this Agreement.

The Consultant shall provide the Department with a certificate evidencing professional liability insurance in an amount acceptable to the Department and agrees to maintain this amount through the life of this Agreement.

The Consultant shall provide the Department with a certificate evidencing worker's compensation insurance as required by law by an insurer authorized to transact the business of worker's compensation insurance in this Commonwealth or in compliance with Section 65.2-801 of the Code of Virginia (1950), as amended, and agrees to maintain this amount through the life of this Agreement.

In the event of a non-renewal or cancellation of such required insurance coverage, thirty (30) days written notice must be given to the Department prior to such non-renewal or cancellation. Certificates evidencing insurance shall be submitted annually to the Department.

21. PROGRESS SCHEDULE AND REPORTS: The Consultant shall furnish the Department a schedule of progress which it proposes to follow throughout the term of this Agreement. No services shall commence until such schedule has been approved in writing by the Department. The schedule shall indicate starting and completion times of each significant task for each major element of this Agreement, and shall have the capability of indicating the proposed percentage of completion at any point for each element, if so required by the Department.

The Consultant shall submit a monthly progress report in a format acceptable to the Department.

22. PLANS AND REPORTS: Plans and reports shall be completed and delivered to the Department according to the progress schedule or as otherwise directed, in a format acceptable to the Department.

23. CORRECTION OF ERRORS: The Consultant shall check for accuracy any reports, and the design, drafting and details of final plans prior to submission. The Consultant will be required, without additional compensation, to correct any errors, including but not limited to omissions, discrepancies and ambiguities, in any services performed in fulfillment of the obligations of this Agreement, and shall also reimburse the Department for any costs incurred. Acceptance of the plans or reports by the Department shall not relieve the Consultant of the responsibility of subsequent correction of errors.

Costs incurred by the Consultant in correcting errors in the plans or reports and reimbursing the Department for costs incurred by the Department as a result of such error shall be maintained in a separate

account. Such account shall be clearly coded and identified, and shall be subject to audit by the Department. Such costs shall not be billed to the Department as a direct charge or an overhead item.

24. **LIABILITY, INDEMNIFICATION, STANDARD OF PERFORMANCE:** The Consultant shall be responsible for all damage and expense to person or property caused by its negligent activities including, without limitation, those which it chooses to deliver through its subcontractors, agents or employees, in connection with the services required under this Agreement. Further, it is expressly understood that the Consultant shall indemnify, defend and hold harmless the Commonwealth of Virginia, the Department, its officers, agents and employees from and against any and all damages, claims, suits, judgments, expenses, actions and costs of every name and description caused by any negligent act or omission in the performance by the Consultant, including, without limitation, those which it chooses to deliver through its subcontractors, agents or employees, of the services under this Agreement.

The Consultant shall also be liable for all damages, costs and additional expense incurred by the Department, including but not limited to damages, costs and expenses resulting from claims brought against the Department by the construction contractor(s), caused by the failure of the Consultant to perform the services with the same degree and standard of care and skill normally expected of and provided by consultants in the performance of the same or similar services.

Acceptance of the services by the Department shall not waive any of the rights of the Department contained in this section nor release or absolve the Consultant from any liability, responsibility or duty contained herein.

25. **TERMINATION:** This Agreement may be terminated as follows:

- a. By mutual agreement of the parties, in writing and signed by the parties.
- b. By the Department without cause, in whole or in part, at any time, with fifteen (15) days advance notice in writing, by the end of which period the Consultant shall have discontinued all services and shall have delivered to the Department all reports, records, drawings, field notes, plans and other data completed or partially completed, which shall become and remain the sole property of the Department. The Department reserves the right to terminate this Agreement without the fifteen (15) days advance notice in the event the Consultant avails itself of the Federal or State Bankruptcy Laws or merges with or spins off from an entity. The Department's decision is not subject to review.
- c. By the Department without advance written notice, due to the failure of the Consultant to perform the services or fulfill its obligation(s) under this Agreement, in which case the Department may take over the services and prosecute the same to completion by further agreement or otherwise, and the Consultant shall be liable to the Department for any excess cost occasioned to the Department thereby.
- d. By failure of the General Assembly to appropriate, or the Commonwealth Transportation Board to allocate, sufficient funds to continue the services, in which event the Agreement will terminate upon depletion of the then currently appropriated or allocated funds.

26. **ASSIGNMENT AND SUBCONTRACTING:** This Agreement, being intended to secure the personal services of the individuals constituting the firm which is a party to this Agreement and referred to collectively as "the Consultant," shall not be assigned, subcontracted or transferred without consent of the Department in writing. This Agreement shall inure to the benefit of and shall be binding upon the personal representatives and legal successors of the respective parties hereto. Nothing contained in this Agreement is intended or shall be construed to inure to the benefit of any person or entity other than the parties hereto and their legal successors.

The Consultant shall not subcontract or assign all or any part of the services provided under this Agreement, except as expressly stated in this Agreement, without the prior written approval of the

Department. Such consent to subcontract, assign or otherwise dispose of any portion of this Agreement shall not be construed to relieve the Consultant of any responsibility for the fulfillment of this Agreement. The Consultant is fully responsible for the satisfactory completion of all subcontracted services. Subcontracts shall include all provisions of this Agreement, except that retainage need not be withheld on subcontracts, and the Consultant shall be responsible for seeing that these provisions are complied with. No subcontracting by a subcontractor is allowed without prior written approval of the Department.

27. **PAYMENT TO SUBCONTRACTORS:** In accordance with Article 4 of the Virginia Public Procurement Act (Sections 2.2-4347 through 2.2-4356 of the Code of Virginia (1950), as amended), the Consultant shall make payment to all subcontractors within seven (7) days after receipt of payment from the Department, or shall notify the Department and subcontractor in writing of the intention to withhold all or a part of the amount due along with the reason for nonpayment.

In the event payment is not made as noted, the Consultant shall pay interest at the rate of one percent per month to the subcontractor, unless otherwise provided in this Agreement, on all amounts that remain unpaid after seven (7) days except for the amounts withheld according to this Agreement.

The Department does not require retainage to be withheld by the Consultant on any subcontracts. If the Consultant elects to withhold retainage on subcontracts, prompt payment of the retainage shall be made to the subcontractors within the later of 60 days after the final billing is received by the Consultant from the subcontractor or the satisfactory acceptance of the services by the Department. The Department will notify the Consultant and the subcontractor in writing when the services have been satisfactorily accepted. If the retainage is not promptly paid, the Consultant shall notify the Department and the subcontractor in writing as to the reasons for not making payment.

These same requirements shall be included in each subcontractor agreement and shall be applicable to each lower-tier subcontractor.

28. **CONSULTANT RELATIONSHIPS TO CONTRACTORS:** The Consultant shall serve only in a consulting and professional capacity and is not by this Agreement authorized to be, or represent itself to be the agent or servant of the Department. The function, duties and responsibilities of the Consultant with respect to any contractor employed by the Department in connection with a project shall be consistent with the preceding sentence, and in no case shall the Consultant assume any of the obligations of the Department to any contractor. The Consultant shall refer any questions from a contractor to the Department.

29. **COMPLIANCE WITH LOBBYING RESTRICTIONS** (This section only applies to agreements using federal funds.): By signing this Agreement, the Consultant certifies that:

- a. Since promulgation of the federal requirements implementing Section 1352 of Title 31, U.S.C. (PL 101-121, Section 319) entitled "Limitation on use of appropriated funds to influence certain Federal contracting and financial transactions.", no federal appropriated funds have been paid and none will be paid, by or on behalf of the Consultant, to any person for influencing or attempting to influence an officer or employee of any federal agency, a Member of Congress, an officer or employee of Congress, or an employee of a Member of Congress in connection with the awarding of a federal contract, the making of any Federal grant, the making of any federal loan, the entering into of any cooperative agreement, and the extension, continuation, renewal, amendment, or modification of any federal contract, grant, loan, or cooperative agreement;
- b. If any funds other than federal appropriated funds have been paid or will be paid to any person for influencing or attempting to influence an officer or employee of any federal agency, a Member of Congress, an officer or employee of Congress, or an employee of a Member of Congress in connection with this federal contract, grant, loan, or cooperative agreement, the

Consultant shall complete and submit Standard Form-LLL, "Disclosure Form to Report Lobbying," in accordance with its instructions; and

- c. The Consultant shall require that the language of this certification be included in all subcontracts at all tiers, and that all subcontractors shall certify and disclose accordingly.

30. RECORDS: The Consultant and subcontractors shall retain all books, documents, papers, accounting records and other evidence supporting the costs incurred, for three (3) years after payment of the final estimate or final audit, whichever is later. Such evidence shall be made available at the Consultant's offices at all reasonable times and will be subject to audit and inspection by the Department or any authorized representatives of the Federal Government.

Evidence of costs incurred by a subcontractor shall be made available at its office at all reasonable times during the contract period between the Consultant and the subcontractor and for three years after written acceptance by the Consultant, for audit and inspection by the Department or any authorized representatives of the Federal Government. It shall be the Consultant's responsibility to notify the Department, in writing, of the completion of that subcontractor's portion of the services so that the records of the subcontractor can be audited within the three-year retention period. Failure to do so may result in the Consultant's liability for any costs not supported by the proper documentation for the subcontractor's phase of the services. Final payment for the subcontractor's phase of the services will be made after total costs are determined by the final audit of the subcontractor.

31. INTELLECTUAL PROPERTY RIGHTS: All rights in intellectual property developed or created pursuant to this Agreement shall be the sole property of the Department. "Intellectual property" includes all inventions subject to the U.S. Patent System (including but not limited to new processes, materials, compounds and chemicals), and all creations subject to the U.S. Copyright Act of 1976 (including but not limited to printed material, software, drawings, blueprints, and compilations such as electronic databases).

All copyrightable material created pursuant to this Agreement shall be considered work made for hire and shall belong exclusively to the Department. Neither party intends any copyrightable material created pursuant to this Agreement, together with any other copyrightable material with which it may be combined or used, to be a "joint work" under the copyright laws. If the whole or any part of any such copyrightable material cannot be deemed work made for hire or is deemed a joint work, the Consultant agrees to assign, and does hereby irrevocably assign, its entire copyright interest therein to the Department and shall execute and deliver such further documents as the Department may reasonably request for the purpose of acknowledging or implementing such assignment.

The Consultant warrants that no individual, other than regular employees of the Consultant or the Department working within the scope of their employment, shall participate in the creation of any intellectual property pursuant to this Agreement unless such individual and his or her employer, if any, have signed an intellectual property agreement satisfactory to the Department.

The Department shall have all rights, title and interest in or to any invention reduced to practice pursuant to this Agreement. The Consultant shall not patent any invention conceived in the course of performing this Agreement.

The Consultant hereby agrees that, notwithstanding anything else in this Agreement, in the event of any breach of this Agreement by the Department, the remedies of the Consultant shall not include any right to rescind or otherwise revoke or invalidate the provisions of this section. Similarly, no termination of this Agreement by the Department shall have the effect of rescinding the provisions of this section.

32. OWNERSHIP OF DOCUMENTS: All documents, in electronic and/or hard copy format, which for purposes of this Agreement is defined to include but not be limited to, reports, plans, subject data ("subject data" is defined as all information, whether or not copyrighted, that is compiled or delivered or specified to be compiled or delivered under this Agreement), drawings, studies, specifications, memoranda, estimates and computations secured by and for the Consultant in the prosecution of this

Agreement, shall become and remain the property of the Department upon termination or completion of the work. The Department shall have the right to use such documents for any public purpose without compensation to the Consultant, other than as hereinafter provided. If the Department uses the documents for a purpose other than for which this Agreement has been executed, such use shall be at the risk of the Department.

Except for its own internal use, the Consultant shall not publish or reproduce documents, in whole or in part, in any manner or form, nor shall the Consultant authorize others to do so without the written consent of the Department.

The Department reserves the right to publish initially all documents. The Consultant shall not release or publish any documents without the prior written approval of the Department. Neither the Consultant, nor any subcontractor or any agents, employees or subcontractors thereof, shall publish, participate in the publication of, or make oral presentations regarding any documents, information or material relating to this project, either during or after the term of this Agreement, without specific prior written approval of the Department. Any releases to the news media must be approved by and released through the Department.

The terms of this section shall be expressly included in any third-party agreement entered into by the Consultant or by any subcontractor, agents, employees or subcontractors thereof.

33. PUBLICATION PROVISIONS: No documents produced as part of this Agreement, and in whole or part with public funds, shall be copyrighted by the Consultant. When the project uses federal funds, any final report shall contain the following:

- a. An acknowledgment, "Prepared in cooperation with the U.S Department of Transportation, Federal Highway Administration and the Virginia Department of Transportation";
- b. A disclaimer, "The contents of this report reflect the view of the Consultant who is responsible for the facts and the accuracy of the data presented herein. The contents do not necessarily reflect the official views or policies of the Federal Highway Administration or the Virginia Department of Transportation. This report does not constitute a standard, specification or regulation.";
- c. A statement, if published by either the Department or the Consultant, giving credit to all participating agencies.

In the event the Department does not subscribe to the conclusions of the report, the following statement shall be added: "The opinions, findings, and conclusions expressed in this publication are those of the authors and do not necessarily represent those of the Virginia Department of Transportation."

The terms of this section, shall be expressly included in any third-party agreement entered into by the Consultant or by any subcontractor, agents, employees or subcontractors thereof.

34. STAFFING BY CONSULTANT: The control and supervision of all phases of the services provided by the Consultant shall be under the direction of a project manager who has had not less than five (5) years experience in managing the type of services herein described and who shall be assigned to manage the services provided under this Agreement until all services have been completed or until the Department agrees in writing that the project manager may be replaced or removed.

Furthermore, other individuals identified as Key Personnel in the Expression of Interest (EOI) shall remain on the Consultant's Team for the duration of the contract. If extraordinary circumstances require a proposed change, it must be submitted in writing to the Department's Project Manager, who, at his/her sole discretion, will determine whether to authorize a change. Unauthorized changes to the Consultant's Team at any time during the contract may result in termination of services.

If the services covered by this Agreement include the practice of architecture, professional engineering, land surveying or certified landscape architecture, the Consultant or subcontractor shall have in responsible charge at each place of business a full-time resident Virginia licensed architect, professional engineer, land surveyor or certified landscape architect exercising supervision and control of the services of each profession being practiced.

A competent staff, adequate in number and experience to perform the described services in the prescribed time, shall be assigned at all times. The name, title and experience record of each key staff member subsequently assigned shall be reported as such assignments are made.

If the services covered by this Agreement includes the application of guardrails and guardrail terminal treatments, a staff member that has satisfactorily completed training approved by the Department in the application of these devices, shall be assigned to perform the described services. Approved training course shall be completed prior to the initiation of the described services with the training being renewed every three (3) years. Approved training courses include, but are not limited to: Guardrail Installer Training (GRIT) for Designers offered by the Department; AASHTO Roadside Design Guide conducted by the Federal Highway Administration; or Design, Construction and Maintenance of Highway Safety Appurtenances and Features conducted by the Federal Highway Administration.

35. **CONFERENCES:** The Department shall hold an initial conference at a place and time selected by the Department, for the purpose of reviewing the Consultant's schedules, procedures, methods and the clarification of any ambiguities that may then exist. A principal of the Consultant and the Consultant's project manager shall attend the conference.

Progress conferences will be held periodically. The Consultant will prepare and present written information and studies to the Department so it may evaluate the features and progress of the services being provided. Either party may request a conference be held at the office of the requesting party or at a place designated by the Department. Conferences may also be held to inspect the Consultant's services to date at the request of the Department.

36. **LIAISON WITH CONSULTANT:** The Department may assign and maintain one or more representatives on this Agreement at no cost to the Consultant. These representatives shall work in close cooperation with the Consultant to ensure a thorough understanding of all methods and procedures employed by the Consultant. The Consultant shall make such records, procedures and methods related to this Agreement available to these representatives as may be requested.

The Department reserves the right to make such reviews from time to time as it may deem necessary or desirable and to maintain proper liaison.

37. **COORDINATION:** The Consultant shall coordinate all plan development with the Department to ensure compatibility with programmed and planned road improvement projects in the Agreement area.

38. **TESTIMONY:** In the event that the testimony of the Consultant is required in any legal proceeding in connection with claims brought against or prosecuted by the Department, the Consultant agrees to appear as a witness on behalf of the Department. Payment for appearance will be based on the approved current hourly salary rate and daily per diem rate for each eight-hour day's preparation for, or attendance in, court and one-fourth of this sum for each two hours or fraction thereof.

39. **NOTICE TO PROCEED:** Work to be performed by the Consultant under this Agreement shall begin within five (5) days after receipt of official notice from the Department to proceed. Written notice to proceed will be given by the Department prior to any work being done on any element of this Agreement. The Department will not be responsible for payment for services performed in advance of such notice.

40. CONTINGENCY: On Agreements containing a contingency, the contingency shall not be used without written permission of the Department. The additional services provided under the contingency shall not begin until an agreement has been reached with the Department on the man-hours and costs required to perform the services. If services are provided under the contingency prior to an agreement being reached with the Department regarding man-hours and costs, only those man-hours and costs determined to be necessary and reasonable by the Department will be reimbursed.

41. DRUG-FREE WORKPLACE: During the performance of this contract, the Consultant agrees to:

- a. Provide a drug-free workplace for the consultant's employees;
- b. Post in conspicuous places, available to employees and applicants for employment, a statement notifying employees that the unlawful manufacture, sale, distribution, dispensation, possession, or use of a controlled substance or marijuana is prohibited in the consultant's workplace and specifying the actions that will be taken against employees for violations of such prohibition;
- c. State in all solicitations or advertisements for employees placed by or on behalf of the consultant that the consultant maintains a drug-free workplace; and
- d. Include the provisions of the foregoing clauses in every subcontract or purchase order of over \$10,000, so that the provisions will be binding upon each subcontractor or vendor.

For the purpose of this section, "drug-free workplace" means a site for the performance of work done in connection with a specific contract awarded to a consultant, the employees of whom are prohibited from engaging in the unlawful manufacture, sale, distribution, dispensation, possession or use of any controlled substance or marijuana during the performance of the contract.

42. eVA ELECTRONIC PROCUREMENT: By accepting and performing this contract, the consultant agrees that it is subject to an eVA registration and transaction fee established by the Department of General Services (DGS) which will be invoiced to your company by DGS following the submittal of the first Consultant Estimate Voucher for payment. For further information on eVA registration and transaction fees refer to the following website; <http://www.eva.state.va.us>.

43. CRITICAL INFRASTRUCTURE INFORMATION/SENSITIVE SECURITY INFORMATION (CII/SSI):

Contract documents or project material containing CII/SSI in whole or in part are subject to the terms of this Section and comply with the requirements of CII/SSI Guide. This guide can be located at; <http://www.virginiadot.org/business/const/CII-CriticalStructureInformation.asp>.

Consultants shall be responsible for safeguarding Critical Infrastructure/Sensitive Security Information (CII/SSI) (as defined in the VDOT CII/SSI Policy) in their custody or under their control. Individuals are responsible for safeguarding CII/SSI entrusted to them. The extent of protection afforded CII/SSI shall be sufficient to reasonably foreclose the possibility of its loss or compromise.

Consultants shall ensure that all employees using this information are aware of the prohibition against disclosing CII/SSI in any manner (written, verbal, graphic, electronic, etc.) that permits interception by unauthorized persons.

Consultants shall protect CII/SSI at all times, either by appropriate storage or having it under the personal observation and control of a person authorized to receive it. Each person who works with protected CII/SSI is personally responsible for taking proper precautions to ensure that unauthorized persons do not gain access to it.

The use and storage of CII/SSI shall conform to the following guidelines: During working hours, reasonable steps shall be taken to minimize the risks of access to CII/SSI by unauthorized personnel. After working hours, CII/SSI shall be secured in a secure container, such as a locked desk, file cabinet or facility where contract security is provided.

The reproduction of CII/SSI documents or material containing CII/SSI shall be kept to the minimum extent necessary consistent with the need to carry out official duties. The reproduced CII/SSI material shall be marked and protected in the same manner as the original material.

Material containing CII/SSI shall be disposed of by any method that prevents unauthorized retrieval. (e.g. shredding, burning, returning to original source, etc.)

CII/SSI shall be transmitted only by US first class, express (US Postal, FedEx, UPS, etc.), certified or registered mail, or through secure electronic means.

The portions of the documents that are marked as CII/SSI are not subject to disclosure under Code of Virginia §2.2-3705.2, and may not be released except with written permission from VDOT. Unauthorized release or reproduction of these documents may result in civil penalty or other legal action.

By copying, downloading, or receiving a copy of any documentation containing CII/SSI, or any part thereof, the consultant or any other recipient acknowledges and agrees to the terms of this Section and will advise any individual using these documents, or any part thereof, that they too shall be responsible for safeguarding the CII/SSI in their custody or under their control. All costs associated with performing these CII/SSI requirements are the responsibility of the prime consultant.

In the event of loss, suspected loss or compromise of any VDOT CII/SSI material, the Consultants having possession of the said CII/SSI material will immediately upon having knowledge of the loss, suspected loss or compromise of any VDOT CII/SSI material, notify the VDOT project manager. If the loss is a result of a theft or suspected theft, of either the actual CII/SSI material or any device containing or storing CII/SSI material, the Contractor/Consultant will immediately file a report with a law enforcement agency having jurisdiction and forward a copy of the report to the VDOT project manager.)

Consultants shall include the terms of this Section and comply with the CII/SSI Guide, in any further dissemination of any contract documents or project materials containing CII/SSI in whole or in part, and in all subcontracts awarded under this contract.

#### 44. SECURITY REQUIREMENTS and CRIMINAL HISTORY RECORD CHECK:

A Criminal History Record Check (CHRC), through VDOT Personnel Security Section (PSS) and when required through the Virginia Capitol Police, shall be required of all employees of the prime consultant and all subconsultants for work conducted at all other VDOT locations, where VDOT is directly responsible for the day-to-day management of staff, or the individual has unrestricted access to Critical Infrastructure (CI), Critical Infrastructure Information (CII), Sensitive Security Information (SSI), or Personally Identifiable Information (PII).

All individuals undergoing the CHRC shall be required to complete and sign any VDOT required forms necessary to release personal information or to agree to non-disclosure of VDOT critical, sensitive or personal information and pass a fingerprint-based CHRC.

All costs associated with the fingerprint-based CHRC are the responsibility of the prime consultant.

A VDOT issued photo-identification badge is required for each employee of the prime consultant or any sub-consultant who will be performing work at all other VDOT locations, where VDOT is directly responsible for the day-to-day management of staff, or the individual has unrestricted access to Critical Infrastructure (CI), Critical Infrastructure Information (CII), Sensitive Security Information (SSI), or Personally Identifiable Information (PII).

Based upon the results of the fingerprint-based CHRC, VDOT reserves the right to deny access to CII/SSI material and issuance of a VDOT security clearance and a VDOT issued photo-identification badge. Upon denial, there are no available appeals.

Consultants shall return all VDOT access identification badges on the day any employee is no longer assigned to VDOT's premises/work and upon contract expiration. The consultant shall notify VDOT Project Manager within eight business hours upon discovery of any lost, stolen or damaged access identification badge. Failure to return access identification badges or notify the Project Manager that access identification badge has been lost, stolen or damaged may be cause for debarment. See: Commonwealth of Virginia, Vendor's Manual Section 7.20.

Consultants shall be responsible for notifying the PSS whenever an employee or subcontractor employee is charged with any criminal violation. Notification shall be made no later than the next regular business day of finding.

Consultants shall include the terms of this Section, in any further dissemination of any contract documents in whole or in part, and in all subcontracts awarded under this contract.

# **ATTACHMENT B**

**SPECIAL TERMS AND CONDITIONS**



## **ATTACHMENT B – SPECIAL TERMS AND CONDITIONS**

**\*\*\*\*[The VDOT division drafting this Agreement should insert any project or division-specific Special Terms and Conditions here and delete this instructional sentence. All division sections shall be formatted the same.]**

# ATTACHMENT C

PAYMENT



## **ATTACHMENT C - PAYMENT**

**\*\*\*\*[The VDOT division drafting this Agreement should select one of the three following Payment sections (Lump Sum, Cost Plus Net Fee, or Fixed Billable Rate), and delete the two non-applicable Payment sections and this instructional sentence.]**

### **LUMP SUM PAYMENT**

A. FEE: For services provided in accordance with the provisions of this Agreement, the Department shall pay to the Consultant the Lump Sum Fee stated in the Letter of Agreement.

The fee shall include compensation for all services and costs specified in this Agreement, or as may be required for the completion of the services contained herein.

B. MONTHLY PARTIAL PAYMENTS: Monthly partial billings for services provided will be submitted, except when the net receivable amount is less than \$500.00. In such case, no partial payment will be made and the value of such work shall be carried over to the next monthly billing. Monthly partial payments will be made for the services outlined herein based on a percentage of the Lump Sum Fee equal to the percentage completion reported. Billings shall be submitted no more frequently than once every 30 calendar days.

C. TERMINATION WITHOUT CAUSE: In the event this Agreement is terminated without cause, payment of the Fee shall be made on the basis of the percentage of completion at the time of the effective date of termination, as determined by the Department.

### **COST PLUS NET FEE PAYMENT**

A. NET FEE: For services performed in accordance with the provisions of this Agreement, the Department agrees to pay the Consultant its Actual Cost, as defined below, plus the Net Fee stated in the Letter of Agreement.

The Net Fee remains fixed regardless of differences between the estimated and actual costs to the Consultant except as otherwise stipulated in this Agreement, or as may be modified by a supplemental agreement.

B. ACTUAL COST: Actual costs shall include all direct salaries, payroll burden, indirect costs or overhead, computer costs, and non-salary direct costs, as defined herein. The actual costs shall be determined by final audit.

C. DIRECT SALARIES: Direct salaries are defined as cost of salaries of professionals, draftsmen and other personnel, including partners or principals actually performing work or a service, for the time directly chargeable to the project. Cost of time of partners or principals, to the extent that they perform technical or advisory services directly applicable to the project, shall be included in the direct salary costs at the rates stipulated in the proposal, Attachment D. The time of partners or principals as stated above shall be documented by the use of time sheets as the cost is incurred.

A list of employee classifications and hourly pay rates are shown in Attachment D. The hourly rates shall be the current rates at the time of submitting the proposal and shall not reflect any anticipated raises or escalation. Anticipated raises or escalation shall be shown as a separate item. Employees, other than those already on an hourly rate, shall have their salaries converted to an hourly rate based upon the number of compensable hours in the Consultant's normal week.

The use of overtime must be authorized in advance, in writing, by the Department. Premium overtime payments, when authorized by the Department, shall be included in direct salary costs. Payroll burden and overhead cost shall be added to the straight time salaries for overtime payment, but shall not be added to premium payments.

D. **PAYROLL BURDEN:** Payroll burden is defined as sick leave, vacation and holiday pay of professionals, draftsmen, and other technical personnel, plus payroll excise and unemployment taxes, contributions for Social Security, unemployment compensation insurance, retirement plan, and life and medical insurance benefits. Costs of company contributions to life insurance, medical insurance, and retirement plans for employees shall be normal and reasonable. Payroll burden is expressed as a percentage of direct salaries.

E. **PAYROLL COSTS:** Payroll costs are defined as direct salaries plus the payroll burden.

F. **IN-HOUSE COMPUTER COSTS:** Computer/CADD costs for all technical computations or databases for the project, performed on the Consultant's in-house electronic computer, shall be charged as a separate item at an hourly rate established by a Federal Acquisition Regulations audit and representative of actual costs, not to exceed \$6.00 per hour, or shall be included in the Federal Acquisition Regulations audited overhead rates.

G. **OVERHEAD COSTS:** Overhead costs are defined as those general administrative and clerical costs at the Consultant's home office which are necessary to the proper performance of the services, but cannot be effectively and economically allocated to the project. Cost of time of partners or principals performing administrative duties shall be included in the Overhead Costs. Overhead costs are expressed as a percentage of direct salaries or other acceptable base.

H. **PAYROLL BURDEN AND OVERHEAD RATE:** The Consultant's most recent payroll burden and overhead rate, audited by an independent certified public accountant or cognizant government agency, established annually in accordance with the Federal Acquisition Regulations, will be applied for the purpose of computing monthly partial payments. Non-allowable costs are those identified in the Federal Acquisition Regulations.

The Consultant and its subconsultants are required to submit Federal Acquisition Regulations (FAR) audits on an annual basis within six months of the end of the Consultant's fiscal year. The Department will approve a provisional payroll overhead (payroll burden and overhead) billing rate for the fiscal year submitted. Subsequent estimate vouchers must adjust overhead to the provisional overhead billing rate approved for the fiscal year that has been reviewed, and for billing periods in the next fiscal year until an approved provisional overhead billing rate is established for that year. Increases in the provisional overhead billing rate or actual applied overhead based on audit are not a basis for an increase in the fixed fee or in the maximum compensation payable. The provisional overhead billing rate is subject to post audit prior to final payment. Overhead adjustments for work previously billed will not be allowed until time of final audit.

I. **NON-SALARY DIRECT COSTS:**

1. Non-salary direct costs shall include purchase and rental of all materials, supplies and equipment necessary for the performance of the services on this project and cost of outside professional consulting or contracting services, all at invoiced cost to the Consultant, plus the cost of communications and reproductions directly chargeable to the project, plus necessary travel and per diem expenses. The purchase cost of all materials, supplies and equipment, which are not for the exclusive use in providing the services included in this Agreement, are not allowed as non-salary direct costs and shall be included in the Consultant's overhead. These items include, but are

not limited to, fax machines, copiers, computers, software, refrigerators, coffee makers, microwave ovens, cellular telephones, pagers, helmets, tape measures, fire extinguishers, and professional books and references.

2. The cost of motor vehicle rentals and the cost of common carriers shall be the actual cost incurred. The cost of motor vehicle leases shall be [the actual cost incurred, subject to audit] [at the rates shown in Attachment D]. Leases must be supported by bona fide documentation from the leasing company and will only be allowed from established companies in the business of leasing vehicles.
3. For use of personal or company owned vehicles, the reimbursable rate per mile stipulated in the cost proposal (Attachment D) shall be allowed to cover costs.
4. For personnel in travel status, reimbursement of actual expenses up to the maximum amount per day (as shown in Attachment D) will be allowed for meals. Reimbursement will not be allowed for meals unless an overnight stay is required. Actual expenses up to the maximum amount per day (as shown in Attachment D) will be allowed for lodging of personnel in travel status.
5. Total non-salary direct costs shall not exceed those shown in Attachment D, except by prior approval of the Department.
6. Costs of time applied and charged directly to the project for the services of special outside consultants, contractors or drafting services shall be included in non-salary direct costs at rates stipulated in the proposal or received by competitive bidding.
7. Invoiced cost to the Consultant of all technical computations for the project performed by outside commercial electronic computation services shall be included in non-salary direct costs.

J. ESTIMATED COSTS: A detailed itemized breakdown of allowable costs and computation of all costs and fees have been submitted by the Consultant with the fee proposal in the general form as furnished by the Department, and they are hereby incorporated as part of this Agreement in Attachment D.

K. TOTAL COMPENSATION: Except as may be changed according to the Agreement Modification provision of this Agreement, the maximum total compensation payable under this Agreement will not exceed the amount shown in the Letter of Agreement. Contingencies shown in the cost proposal may not be utilized except by written prior approval of the Department.

L. MONTHLY PARTIAL PAYMENTS: Monthly partial billings will be submitted as established in Attachment D. When the net receivable amount is less than \$500.00, no partial payment will be made and the value of such work shall be carried over to the next monthly billing. Monthly partial payments will be made for the services outlined herein based on the sum of the Consultant's statement of actual costs incurred, plus a percentage of the net fee equal to the percentage completion reported. Billings shall be submitted no more frequently than once every 30 calendar days.

1.

M. TERMINATION WITHOUT CAUSE: In the event this Agreement is terminated without cause, payment shall be made on the basis of the Actual Cost incurred up to the effective date of termination, subject to audit, plus a percentage of the Net Fee equal to the percentage completion of the services contracted for under this Agreement at the time of effective date of termination.

**\*\*\*\*[This section should be used when services are being provided at fixed billable rates. This could either be for a single project or for multiple assignments to be made during the term of this contract. Select the proper wording and delete these instructions.]**

**FIXED BILLABLE RATE PAYMENT (ACTUAL COST BASIS) - [MULTIPLE ASSIGNMENTS]**

A. PAYMENTS: Payments shall be made for [this project/each assignment] upon receipt by the Department of proper billing, in accordance with the schedule shown in the proposal for [this project/each assignment]. Billing shall be based on the hours agreed upon for performing the services multiplied by the fixed billable hourly rate as stipulated in Attachment D plus non-salary direct costs. In the event the hourly rates in Attachment D are misrepresented by the Consultant, the Department reserves the right to adjust the compensation paid to the Consultant to reflect the difference.

B. IN-HOUSE COMPUTER COSTS: Computer/CADD costs for all technical computations for [this project/each assignment], performed on the Consultant's in-house electronic computer, shall be charged as a separate item at an hourly rate established by a Federal Acquisition Regulations audit and representative of actual costs, not to exceed \$6.00 per hour, or shall be included in the Federal Acquisition Regulations audited overhead rates.

C. NON-SALARY DIRECT COSTS:

1. Non-salary direct costs shall include purchase and rental of all materials, supplies and equipment necessary for the performance of the services on [this project/each assignment] and cost of outside professional consulting or contracting services, all at invoiced cost to the Consultant, plus the cost of communications and reproductions directly chargeable to the project, plus necessary travel and per diem expenses. The purchase cost of all materials, supplies and equipment, which are not for the exclusive use in providing the services included in this Agreement, are not allowed as non-salary direct costs and shall be included in the Consultant's overhead. These items include, but are not limited to, fax machines, copiers, computers, software, refrigerators, coffee makers, microwave ovens, cellular telephones, pagers, helmets, tape measures, fire extinguishers, and professional books and references.
2. The cost of motor vehicle rentals and the cost of common carriers shall be the actual cost incurred. The cost of motor vehicle leases shall be [the actual cost incurred, subject to audit] [at the rates shown in Attachment D]. Leases must be supported by bona fide documentation from the leasing company and will only be allowed from established companies in the business of leasing vehicles.
3. For use of personal or company owned vehicles, the reimbursable rate per mile stipulated in the cost proposal (Attachment D) shall be allowed to cover costs.
4. For personnel in travel status, reimbursement of actual expenses up to the maximum amount per day (as shown in Attachment D) will be allowed for meals. Reimbursement will not be allowed for meals unless an overnight stay is required. Actual expenses up to the maximum amount per day (as shown in Attachment D) will be allowed for lodging of personnel in travel status.
5. Total non-salary direct costs shall not exceed those shown in [Attachment D/each assignment's proposal], except by prior approval of the Department.
6. Costs of time applied and charged directly to [the project/each assignment] for the services of special outside consultants, contractors or drafting services shall be included in non-salary direct costs at rates stipulated in the proposal or received by competitive bidding.
7. Invoiced cost to the Consultant of all technical computations for [the project/each assignment] performed by outside commercial electronic computation services shall be included in non-salary direct costs.

D. ESTIMATED COSTS: A detailed itemized breakdown of allowable costs and computation of all costs and fees has been submitted by the Consultant with the fee proposal in the general form as furnished

by the Department, and is hereby incorporated as part of this Agreement in [Attachment D/as an attachment to the Agreement for each assignment].

E. **CONTRACT TERM:** Under this Agreement, assignments may be issued during the 12-month period following the date of execution of this Agreement or when the cumulative total of fees for project assignments reaches the maximum total compensation, whichever occurs first. This period shall be referred to as the “Contract Term”.

F. **TOTAL COMPENSATION:** Except as may be changed according to the Agreement Modification provision of this Agreement, the maximum total compensation payable under this Agreement will not exceed the amount stated in the Letter of Agreement. If during the Contract Term, the cumulative total of all issued project assignments reaches the maximum total compensation limit, no further assignments may be issued during the Contract Term.

G. **MONTHLY PARTIAL PAYMENTS:** Monthly partial billings will be submitted as established in Attachment D. When the net receivable amount is less than \$500.00, no partial payment will be made and the value of such work shall be carried over to the next monthly billing. Monthly partial payments will be made for the services outlined [herein/in each assignment’s proposal] based on the sum of the Consultant’s statement of actual costs incurred. Billings shall be submitted no more frequently than once every 30 calendar days.

H. **TERMINATION WITHOUT CAUSE:** In the event this Agreement is terminated without cause, payment shall be made on the basis of the Actual Cost incurred up to the effective date of termination, subject to audit.

I. **AGREEMENT RENEWAL:** The Department, at its sole discretion, may renew this Agreement for a maximum of two additional one-year Contract Terms, provided the option to renew was indicated in the Request for Proposal. If the Department exercises its option to renew, the next Contract Term shall begin 12-months from the date of execution of this Agreement or any subsequent renewals of the Contract Term or when the cumulative total of fees for project assignments issued in any Contract Term reaches the maximum total compensation, whichever occurs first. The sum of all projects in one Contract Term shall not exceed the amount specified in the original contract. Any unused or uncommitted amounts from a previous term are forfeited and shall not carry forward to the next Contract Term. Upon the Department’s decision to renew the Agreement, the Commissioner written approval must be obtained in accordance with the renewal process established in the procurement and management of the professional services. A renewal letter shall be sent to the Consultant authorizing the Consultant to extend the Agreement by one additional Contract Term. Failure to obtain the Commissioner written approval to renew the contract prior to expiration date or when the cumulative total of project fees reaches the maximum total compensation for the Contract Term will result in an expired contract.

J. **EXPIRATION OF AGREEMENT:** This Agreement will expire, on the earlier of one year from the date of this Agreement or when the cumulative total of fees for project assignments issued reaches the maximum total compensation unless the option to renew the Agreement is exercised in writing by the Department as described in Item I above. If the Department elects not to renew this agreement for an additional Contract term, as permitted by the Agreement, no new letter of agreements may be made under this Agreement after this date. Assignments for which letter of agreements have been executed prior to this date will be completed and monthly partial payments processed.

[INCLUDE THE FOLLOWING WHEN THE MAXIMUM TOTAL COMPENSATION IS LESS THAN \$5,000,000: Supplemental Agreements may be executed as authorized by §2.2-4309 of the Code of

Virginia for changes in the scope of work to allow completion of ongoing assignments. Supplemental agreements for the final Contract Term may not extend the maximum total compensation beyond \$5,000,000.]

**\*\*\*\*[This section should be used when multiple assignments are being made under separate lump sum letters of agreement based on the fixed billable rates given in Attachment D. Delete this text.]**

### **FIXED BILLABLE RATE PAYMENT (LUMP SUM BASIS) - MULTIPLE ASSIGNMENTS**

A. FEE: For services provided in accordance with the provisions of this Agreement, the Department shall pay to the Consultant the Lump Sum Fees stated in the letter of agreements for each assignment. The Lump Sum Fee for each assignment shall be based on the hours agreed upon for performing the services multiplied by the fixed billable hourly rates as stipulated in Attachment D plus non-salary direct costs.

The fee shall include compensation for all services and costs specified for each assignment, or as may be required for the completion of the services contained therein.

B. CONTRACT TERM: Under this Agreement, assignments may be issued during the one-year period following the date of execution of this Agreement, or when the cumulative total of fees for project assignments reaches the maximum total compensation, whichever occurs first. This period shall be referred to as the "Contract Term". .

C. TOTAL COMPENSATION: Except as may be changed according to the Agreement Modification provision of this Agreement, the maximum total compensation payable under this Agreement will not exceed the amount stated in the Letter of Agreement. If during the Contract Term, the cumulative total of all issued project assignments reaches the maximum total compensation limit, no further assignments may be issued during the Contract Term.

D. MONTHLY PARTIAL PAYMENTS: Monthly partial billings for services provided will be submitted, except when the net receivable amount is less than \$500.00. In such case, no partial payment will be made and the value of such work shall be carried over to the next monthly billing. Monthly partial payments will be made for the services outlined herein based on a percentage of the Lump Sum Fee equal to the percentage completion reported. Billings shall be submitted no more frequently than once every 30 calendar days.

E. TERMINATION WITHOUT CAUSE: In the event this Agreement is terminated without cause, payment of the Fee shall be made on the basis of the percentage of completion at the time of the effective date of termination, as determined by the Department.

F. AGREEMENT RENEWAL: The Department, at its sole discretion, may renew this Agreement for a maximum of two additional one-year Contract Terms, provided the option to renew was indicated in the Request for Proposal. If the Department exercises its option to renew, the next Contract Term shall begin 12-months from the date of execution of this Agreement or any subsequent renewals of the Contract Term or when the cumulative total of fees for project assignments issued in any Contract Term reaches the maximum total compensation, whichever occurs first. The sum of all projects in one Contract Term shall not exceed the amount specified in the original contract. Any unused or uncommitted amounts from a previous term are forfeited and shall not carry forward to the next Contract Term. Upon the Department's decision to renew the Agreement, a renewal letter shall be sent to the Consultant authorizing the Consultant to extend the Agreement by one additional Contract Term.

G. EXPIRATION OF AGREEMENT: This Agreement will expire on the earlier of one-year from the date of this Agreement or when the cumulative total of fees for project assignments issued reaches the maximum total compensation unless the option to renew the Agreement is exercised in writing by the Department as described in Item F above. If the Department elects not to renew this agreement for an additional Contract term, as permitted by the Agreement, no new letter of agreements may be made under this Agreement after this date. Assignments for which letter of agreements have been executed prior to this date will be completed and monthly partial payments processed.

[INCLUDE THE FOLLOWING WHEN THE MAXIMUM TOTAL COMPENSATION IS LESS THAN \$5,000,000: Supplemental Agreements may be executed as authorized by §2.2-4309 of the Code of Virginia for changes in the scope of work to allow completion of ongoing assignments. Supplemental agreements may not extend the maximum total compensation for the final Contract Term beyond \$5,000,000.]

# **ATTACHMENT D**

## **SCOPE OF WORK AND FEE PROPOSAL**



## **ATTACHMENT D - SCOPE OF WORK AND FEE PROPOSAL**

**\*\*\*\*[The VDOT division drafting this Agreement should attach the scope of work and fee proposal here and delete this page. The attached material should contain the above title and the sheets consecutively numbered starting with page D-2. Any proposed progress schedules should be included in this attachment.]**

# **ATTACHMENT E**

YEAR 2000 COMPLIANCE



## **ATTACHMENT E - YEAR 2000 COMPLIANCE**

A. The Consultant represents and warrants that all computer controlled facility components, as herein defined, supplied by the Consultant or otherwise incorporated into the services (whether as new construction or as modifications, repairs or upgrades to/of existing CCF components) are 4-digit Year 2000 compliant, as herein defined, on the date the Consultant submits its proposal or bid. The Consultant must verify compliance by either physical testing and/or written confirmation from the component and/or systems manufacturer and providing copies of the tests or confirmations to the Department.

B. "Computer controlled facility component" or "CCF component" shall mean all systems components, products, or modules which utilize software driven technology or embedded microchip technology. This shall include, but not be limited to, programmable thermostats, HVAC controllers, auxiliary elevator controllers, utility monitoring and control systems, fire detection and suppression systems, alarms, security systems, traffic controller systems, movable bridge controller systems, and any other facilities control systems utilizing microcomputer, minicomputer or programmable logic controllers.

C. "Year 2000 compliant" or "4-digit Year 2000 compliant" shall mean that each CCF component both individually and when working with other parts of a system, must at a minimum meet the following requirements when used before, on or after January 1, 2000: (1) accurately interpret, recognize, calculate, compare, sequence, store, retrieve, display, transmit and otherwise accurately process and act on all date information; (2) experience no crash, interruption, degradation of performance or requirement for human intervention as a result of processing or acting on date information; (3) correctly recognize and handle all leap years and calendar logic; (4) structure and store date data in a format to accommodate the 4-digit range; (5) provide all necessary interfaces or other appropriate means for assuring that non-compliant date data are automatically corrected before entering or leaving the system.

D. If the Department discovers that any CCF component is not Year 2000 compliant, then at that time, or at any later time, the Department may require the Consultant to provide all labor, materials and equipment necessary to bring any non-compliant CCF component into Year 2000 compliance, at no cost to the Department, within sixty (60) days of notice of the noncompliance. The Consultant's warranty regarding Year 2000 compliance for any and all CCF components supplied by the Consultant, or for which the Department is not specifically responsible under the terms of this Agreement, shall survive termination of this Agreement and shall remain in full force and effect during the useful life of that portion of the Work containing or affected by such CCF components.

E. The Consultant shall be liable to the Department for any and all direct or consequential damages incurred as a result of any breach of this warranty. The remedies provided in this section shall be available to the Department notwithstanding any contrary provision in any other part of this Agreement. No limitation shall apply to this section unless the limitation or change is made directly to this section. The remedies provided in this section are in addition to all other remedies provided by law or elsewhere in this Agreement.